Submission to Parliamentary Joint Committee on Human Rights

Religious Discrimination Bill 2021 and related bills

AND

Submission to Legal and Constitutional Affairs Legislation Committee

Religious Discrimination Bill 2021; Religious Discrimination (Consequential Amendments) Bill 2021 and Human Rights Legislation Amendment Bill 2021 [Provisions]

8th December 2021

Dr Renae Barker, BEc LLB *Murd*, PhD *W.Aust*

1. Preliminary

I am a Senior Lecturer in the Law School at the University of Western Australia and an Honorary Research Fellow at the Centre for Muslim States and Societies. I have published extensively on matters relating to the intersection between law and religion and have made written and/or oral submissions to numerous government inquiries into issues related to freedom of religion and religious discrimination.

My publications most relevant to this inquiry include:

- 'The Freedom of Religion Debate: Where are we and how did we get here?' (2020) 47(4) *Brief* 27 – 32
- 'Hold the Front Page; gay rights in Australian Schools' (2019, October 24) *The Tablet*
- Renae Barker and Robyn Carrol, 'How might an apology feature in the new religious freedom bill?' (2019, September 19) *The Conversation*
- 'Religions should be required to be transparent in in their use of exemptions in anti-discrimination laws' (2018) 44(3) *Alternative Law Journal* 191 – 196
- 'The Religious discrimination bill isn't (just) about Christians' (2019, September 2) *ABC Religion and Ethics*
- 'The Ruddock Freedom of Religion Review is about much more than discrimination' (2018, December 18) *ABC Religion and Ethics*
- 'Transparency is the way forward for religious exemptions to anti-discrimination laws' (2018, October 15) *ABC Religion and Ethics*
- 'Why Australia needs a religious Discrimination Act' (2018, October 25) *The Conversation*

I have previously made submissions to the following relevant inquires and calls for submissions:

- Renae Barker, *Submission to Attorney Generals Department: Religious discrimination Bill – Exposure* Draft (29 January 2020)
- Renae Barker, *Submission to Attorney Generals Department: Religious discrimination Bill – Second Exposure* Draft (25 September 2019)
- Renae Barker, *Submission No 11435* to *Religious Freedom Review* (14 February 2018).
- Renae Barker, *Submission to Senate Standing Committee on Legal and Constitutional Affairs on the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* (February 2019)
- Renae Barker *Submission to Senate Standing Committee on Legal and Constitutional Affairs on Legislative Exemptions that Allow Faith-Based Educational Institutions to Discriminate Against Students, Teachers and Staff* (November 2018)

A full list of my publications and submissions can be accessed on the University of Western Australia's Research Repository. Other publications will be referred to throughout the submission where relevant.

2. The Role of a Religious Discrimination Bill

Before turning to specific provisions of the Bill I will outline some preliminary matters regarding the role of a religious discrimination law. The proposed Religious Discrimination Bill will play a vital role in protecting and promoting freedom of religion in Australia as well as in setting the course of the Australian state-religion relationship.

2.1 Freedom of Religion

Australia, infamously, is the only western democracy without a national bill or charter of rights.[1] As a result freedom of religion, and other human rights, are protected by a patchwork of laws, public policy and social conventions. Professor Paul Babie has referred to this as an Australian ethos of rights.[2] One of the effects of this absence of a comprehensive human rights framework contained in a national bill or charter of rights is that anti-discrimination laws, at both the state and federal level, have assumed an inflated prominence as a key protection for freedom of religion. Another consequence is that human rights issues, including freedom of religion, are often addressed legally using alternative mechanism such as administrative law, statutory and constitutional interpretation rather than by directly addressing the human rights issue in question.[3]

It is important to remember, however, that freedom of religion and religious discrimination while linked are not the same thing. As member of the Expert Panel on Religious Freedom Professor Nicholas Aroney has explained:

> The exact relationship between the two is complicated and needs to be understood carefully. The right to religious freedom means that everyone has the liberty to act on the basis of their own religion. This may *require* discrimination … However, the exercise of religious freedom by an organisation may also involve *interference* with someone's freedom of religion. … On the other hand, a law which prohibits religious discrimination involves the imposition of a duty not to treat someone less favourably because of their religion. This may necessarily *protect* that someone's religious freedom … But a prohibition on religious discrimination may also *contravene* religious freedom.[4] [emphasis in original]

The distinction between religious discrimination and freedom of religion is also recognised in international law. For example discrimination on the basis of a person's religion is prohibited, *inter alia*, in articles 2(1), 4, 24 and 26 of the International Covenant on Civil and Political Rights (ICCPR) while freedom of religion and belief is covered in article 18.

---

[1] Louise Chappell, John Chesterman and Lisa Hill, *The Politics of Human Rights in Australia* (Cambridge University Press, 2009) 27-29.

[2] Paul T Babie, 'The Ethos of Protection for Freedom of Religion or Belief in Australian Law' (2020) 47(1) *University of Western Australia Law Review* 64 – 91.

[3] Renae Barker, 'Freedom of religion without a bill of rights: Australia's peculiar approach to tackling freedom of religion and other human rights issues' in Paul Babie, Neville Rochow and Brett Scarffs (eds) *Freedom of Religion or Belief: Creating Constitutional Space for Fundamental Freedoms* (Edward Elgar 2020) 109 – 130; Renae Barker, *State and Religion: The Australian Story* (Routledge, 2019) 105 – 129.

[4] Nicholas Aroney, Religious Discrimination and Religious Freedom: An Evaluation of the Exposure Draft of the Australian Religious Discrimination ((2019) *Brill* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455089

An important distinction between the prohibition on religious discrimination in the ICCPR and freedom of religion is that while freedom of religion can be derogated from where doing so is 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others' (see art 18(3)) the prohibition on religious discrimination cannot. For example while article 4 permits states to derogate from their obligations under the ICCPR '[i]n times of public emergency which threatens the life of the nation' such derogation is not permitted if it 'involves discrimination solely on the ground of … religion….'

The necessity to place legal limits around the manifestation of freedom of religion has been highlighted during the COVID19 pandemic. In Australia we have seen the closure of places of worship as well as restrictions on religious practices such as prohibitions on singing during religious services. These restrictions have impinged upon the manifestation of religious belief in a very public way impacting upon believers from a wide range of faiths. They have also been necessary to protect public health. In the case of the Religious Discrimination Bill and other aspects of Australia's anti-discrimination laws it may be necessary to limit the manifestation of religious belief in order to protect, *inter alia*, the rights and freedoms of others. In particular it may be necessary to do so in order to protect the rights of others not to be discriminated against on the basis of, *inter alia*, 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' (see art 2(1) & 26 ICCPR).

It is therefore important that the distinction between freedom of religion and religious discrimination is kept in mind when considering specific clauses of the Bill and their potential effect. Just because a particular provision advances freedom of religion does not mean it belongs in a law about religious discrimination. In fact, arguably, provisions solely about freedom of religion do not.

2.2 State-Religion Relationship

The nature of Australian secularism and the state-religion relationship is complex. As Chief Justice Latham observed in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*[5] 'almost any matter may become an element in religious belief or religious conduct.' Similarly almost any law or public policy may contribute to the state-religion relationship if it touches in some way upon the diverse lived experience of religion. Some laws such as section 116 of the *Australian Constitution*, state and territory anti-discrimination law and charity law are obvious contributors. Others are less obvious as they may impact only upon those of minority faiths or only become obvious when conflict arises. This was demonstrated very graphically following the leaking of the Religious Freedom Review recommendations in late 2018. As the Senate Legal and Constitutional Affairs Committee noted:

> The leak of the recommendations of the Religious Freedom Review caused great concern in much of the community, not least because it appears many Australians were unaware of the broader exemptions to discrimination laws provided to faith-based educational institutions.[6]

Other laws and public policies which impact on the Australian state-religion relationship but arguably go un-noticed by the vast majority of Australians include parliamentary procedure, police powers, criminal law and local planning laws. By contrast, if passed the federal Religious Discrimination Bill will be a very conspicuous addition to this tapestry of laws, public policy and social conventions that make up the Australian state-religion relationship.

---

[5] http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1943/12.html

[6] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Schooldiscrimination/Report

Australia's State-religion relationship has been variously described as liberal separation, pragmatic pluralism and non-establishment pluralism.[7] I argue that it is the last of these, non-establishment pluralism, that best accounts for all of the unique features of the relationship. As I have outlined elsewhere:

> "Non-establishment pluralism" captures the tension inherent in the state religion relationship. It acknowledges the reality of the Australian state-religion relationship by recognising the role of both section 116 of the Australian Constitution and the reality of the high level of cooperation between the state and religion.
>
> In calling the Australian state-religion relationship non-establishment pluralism, I am using "non-establishment" in two senses. First, the Australian Constitution prohibits the federal government from establishing a state church. This is a fundamental foundational aspect of the state-religion relationship and must be taken into account in any description of that relationship. Second, pluralism itself is not and cannot be established as per the Australian Constitution.
> …
>
> Second, just as the federal government cannot establish a state church it also cannot establish pluralism. Any attempt to establish a religion (as in the United Kingdom), multiple religions (as in the 1830s in Australia), or religion generally (as in Belgium) would fall foul of section 116. Pluralism in Australia is therefore a product of ordinary law, political will, and policy. As a result, pluralism is precarious. Rather than being built on a sure foundation of constitutional law, it is built upon a foundation of sand. The legislation, public policy, and political will which form the basis of Australian pluralism can be changed and washed away. By contrast, the non-establishment of a state church is enshrined in the Australian Constitution, which is notoriously difficult to amend.[8] (internal citation omitted)

Australia is also a secular country.[9] This is largely based on section 116 of the *Australian Constitution* which, inter alia, prohibits the federal government from establishing a state church or religion.

The Religious Discrimination Bill, if passed, will play a significant role in shaping the Australian state-religion relationship into the future as well as defining the nature of Australian secularism.

2.3 The Nature of Religious belief

In *The Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* ('*The Scientology Case*')[10] the Australian High Court offered three definitions of religion.[11] Ultimately, the conclusion that Scientology was a religion for the purposes of *Pay-roll Tax Act 1971* (Vic) did not hinge on which definition was legally correct. The definitions from the case have been applied multiple times both in Australia and overseas in a number of different contexts.[12] While all three definitions have their

---

[7] Renae Barker, 'Pluralism vs Separation: Tension in the Australian Church-State Relationship' (2021) 16(1) *Religion and Human Rights* 1-40.
[8] *Ibid*, 34 – 35.
[9] Renae Barker, 'Is Australia a Secular Country? It Depends on what Mean' (2015, May 14) *The Conversation* https://theconversation.com/is-australia-a-secular-country-it-depends-what-you-mean-38222
[10] *The Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120 ('*The Scientology Case*').
[11] Renae Barker, '*Church of the New Faith v Commissioner of Pay-roll Tax*: Defining Religion for the World?' in Renae Barker, Paul Babie and Neil Foster (eds) Law and Religion in the Commonwealth: The Evolution of Case Law (Hart, 2022) forthcoming; note the Attorney General has previously been supplied a pre-print copy of this chapter.
[12] Ibid

merits it is that offered by Mason ACJ and Brennan J in their joint judgment which has been most pervasive:

> for the purpose of the law, the criteria of religion are twofold, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, although 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.[13]

The definition from the joint judgment of Wilson and Deane JJ has also been relied upon on a number of occasions.

More recently Lord Toulson of the United Kingdom Supreme Court has offered a more modern formulation of Mason ACJ and Brenna J's definition:

> a spiritual or non-secular belief system held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system.[14]

Although, it was the definition from Wilson and Dean JJ which Lord Toulson singled out for particular praise. He however, rejected the use of the term 'supernatural' 'because it is a loaded word which can carry a variety of connotations.'[15]

These however, are legal definitions. While any definitions of religion used when applying the provisions of the Religious Discrimination Bill must be a legal one it is not necessarily what ordinary people will have in mind when they think about the application of the Bill. As the debate on the Bill has already demonstrated when people think about religion they think about the things people do and say in the name of their religion. In other words they focus on the manifestation of religion or the practice of religion rather than the belief. However as Latham CJ observed in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*:[16]

> almost any matter may become an element in religious belief or religious conduct. The wearing of particular clothes, the eating or the non-eating of meat or other foods, the observance of ceremonies, not only in religious worship, but in the everyday life of the individual - all of these may become part of religion. [17]

The effect of this in the context of the Religious Discrimination Bill is that, theoretically, almost anything may be covered by the Bill. This is not to say the Bill is unlimited. The actions covered by the Bill must be a religious activity. However this will be much more than going to mosque, temple, church or synagogue on the relevant holy day. Religion touches upon almost all aspects of a person's life. It may influence what they eat and drink, what they wear, who they associate with, how they raise their children, when they wake up and when they go to sleep, which day they work and which they rest.[18] It can even influence how they interact with in civil society and, in a democracy, who they vote for. In some cases these religious practice3s will be out of step with general societal

---

[13] *The Scientology Case*, 136 (Mason ACJ and Brennan J).
[14] *R (Hodkin and another) v Registrar General of Births, Deaths and Marriages* [2014] 1 All ER 737, 752.
[15] Ibid.
[16] *Adelaide Company of Jehovah's Witnesses Inc V Commonwealth* (1943) 67 CLR 116
[17] Ibid 124 (Latham CJ).
[18] *Adelaide Co. of Jehovah's Witnesses Inc. v. Commonwealth* (1943) 67 CLR 116, 124.

expectations. For example religious practice can include a male child refusing to shake the hand of a female teacher.[19]

The breadth of the beliefs and actions which may be covered by the provision of the Bill are particularly relevant in relation to those clauses dealing with 'Statements of Belief.' While debate has thus far focused on statements of belief about gender, sexuality and sexual activity religious belief is about much more. As I will discuss in more detail bellow the breadth of the 'Statement of Belief' clause are the most problematic in the Bill.

One argument to ameliorate the breadth of the Bill is that is only coveres those beliefs and activities based on 'genuine' religion. However, this argument should be resisted. The legal definitions of religion outlined above are broad. They are wide enough to encompass both well known, minority and emerging religious beliefs and practices.

Further, the Bill needs to avoid the error of only protecting religious orthodoxy. Religious belief and practice, even within the one faith or denomination can vary considerably. For example Pope Francis has urged Roman Catholics to get vaccinated against COVID 19. This is despite the fact that some of the vaccines on offer were developed using a cell line from an aborted foetus.[20] Despite the clear statements from both the Pope and the Vatican some Roman Catholics remain reluctant to be vaccinated against COVID-19. Conversely research repeatedly show many Roman Catholics support Same Sex-marriage despite the clear position of the church that it does not support same-sex marriage.[21]

It is also tempting for the law to support the religious beliefs or practices which accord with general community expectations. However, as the examples above demonstrate this will produce results which are perverse. If the law only protects religious beliefs the community accepts the outcome in the case of vaccines will likely accord with that of the Pope and in the case of same-sex marriage with that of the individual Roman Catholics who support same-sex marriage.

The message here is the law cannot pick and choose. The Religious Discrimination Bill must prohibit religious discrimination against all religious beliefs and practices. This includes those that accord with religious orthodoxy and those that do not. It includes those that accord with general community expectations and those that do not. It must include those the community understands well and has come to accept as well as those the general community knows little about.

3. Consideration of Specific Issues

3.1 Statements of Belief

As alluded to above the clauses relating to "Statements of Belief" are the most controversial and arguably most problematic in the Bill.

While I acknowledge that a genuine attempt has been made in the relevant clauses to exclude statements that are 'not made in good faith, or are 'malicious' or which 'a reasonable person would consider would threaten, intimidate, harass or vilify.' I do not believe this is enough to ameliorate all

---

[19] See Gabriel Samuels, 'Muslim Schoolboys who refused to shake hands with female teachers lose appeal' (2016, September 21) *Independent https://www.independent.co.uk/news/world/europe/muslim-schoolboys-handshake-female-teacher-refuse-appeal-lose-a7319986.html*

[20] See Bess Levin, 'Pope Francis Tells Vaccine Sceptics to Stop Being Idiots and Get Their Shots' (2021, September 15) *Vanity Fair https://www.vanityfair.com/news/2021/09/pope-francis-vaccine-skeptics*; Davin Watkins, 'Pope Francis Urges People to Get Vaccinated Against Cocid-19' (2021, August 18) *Vatican News* https://www.vaticannews.va/en/pope/news/2021-08/pope-francis-appeal-covid-19-vaccines-act-of-love.html

[21] See https://www.pewforum.org/religious-landscape-study/religious-tradition/catholic/views-about-same-sex-marriage/

the inherent problems with the relevant clause. While I am sceptical of all clauses relating to Statements of Belief it is clause 12 which I believe to be the most problematic.

Clause 12 purports to override state and territory law as well as clarify the application of the Bill by excluding 'Statements of Belief' from the definition of discrimination.

Statements of Belief are inherently a form of speech. These may take the typical forms of verbal communication or written communication. Religious speech may also take the form of non-verbal communication, images or symbols. However, Australia does not have a constitutionally enshrined freedom of speech. Nor is freedom of speech protected by a national bill or charter of rights. Instead the High Court has found an implied freedom of political communication in the *Australian Constitution*.[22] In *Attorney-General (SA) v Corporation of the City of Adelaide*[23] French CJ confirmed that 'some "religious" speech may also be characterised as "political" communication for the purposes of the freedom [of political communication].'[24] However, the Court missed the opportunity to clarify the character of religious political speech versus 'ordinary' religious speech.[25] At any event religious speech which is political is protected by the more general implied freedom of political communication. As such clause 12 is not needed to protect such speech.

Religious speech which is not also 'political communication' is not covered by the implied freedom of political communication. However nor is any other kind of speech.

Two arguments can be mounted in favour of clause 12. The first is that its inclusion supports the role of religion in the public sphere. Australia has traditionally taken the approach allowing religion a conspicuous place in the public sphere while maintaining the institutional separation between church and state. Australia has embraced a form of secularism where, as described by Charles Taylor, religious belief is just one option for both the state and its people. Religion is not removed from the public sphere; rather it is just once voice among many, include those with no religion. [26] However, clause 12 takes the role of religious speech in the public sphere a step further. Rather than simply being one voice amongst many entitled to an equal place in the public sphere religious speech is being elevated above other forms of speech – receiving a level of protection not currently available to other forms of speech. Leaving clause 12 out will not prohibit religious speech. Only that speech which constitutes direct or indirect religious discrimination will be prohibited as is already the case. This is more consistent with Australian secularism. Religion is welcome in the public sphere but so too are other views and ideas.

The second argument that can be mounted in support of clause 12 is that it supports freedom of religious belief. Freedom of religion and belief in international law has two components – freedom of belief and freedom to manifest those beliefs. As outlined above freedom to manifest religious beliefs can be abrogated where it is necessary to do so in order to protect the rights and freedoms of others. By contrast freedom of belief, often referred to as the *forum internum*, cannot be abrogated. The question, in relation to clause 12, is whether religious speech, or more specifically statements of belief, constitute religious belief or a manifestation of religious belief. The quintessential example of

---

[22] *Lange v Australian Broadcasting Corporation*(1997) 189 CLR 520.

[23] (2013) 249 CLR 1; for a summary of the case see Adrienne Stone, '*Freedom to Preach in Rundle Mall: Attorney-General (SA) v Corporation of the City of Adelaide ('Corneloup's Case')*' (14 October 2013) Opinions on High <http://blogs.unimelb.edu.au/opinionsonhigh/2013/10/14/stone-corneloup>.

[24] *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 44 (French CJ).

[25] Mitchell Landrigan, 'Can the Implied Freedom of Political Discourse Apply to Speech by Or about Religious Leaders (2014) 34 *Adelaide Law Review* 427. See also Renae Barker, 'Freedom of religion without a bill of rights: Australia's peculiar approach to tackling freedom of religion and other human rights issues' in Paul Babie, Neville Rochow and Brett Scarffs (eds) *Freedom of Religion or Belief: Creating Constitutional Space for Fundamental Freedoms* (Edward Elgar 2020) 109 – 130.

[26] https://theconversation.com/is-australia-a-secular-country-it-depends-what-you-mean-38222

laws which impermissibly restrict religious belief (as opposed to the manifestation of that belief) are those that impose a requirement to to take a religious oath. Other examples include legal requirements to disclose a person's religious belief on identity documents or other official documentation and mandatory patriotic observances (saluting the flag, stating an oath of allegiance etc.).[27] It has also been suggested that making the religion question on the Australian census compulsory would infringe upon protection of religious belief.

However, given the breadth of conduct that could be covered by statements of belief, it is my view that clause 12 goes beyond pure religious belief and protection of the *forum internum*. Clause 12 also covers manifestations of religious belief in the form of statements of belief. In other words it covers not just what a person believes but also where they manifest that belief by making statements about their religious beliefs in the public sphere. As I have previously argued:

> … , religious speech can also be a component of religious activity. Proselytising, for example, involves statements of religious belief. The aim of these statements is to convert. Engaging in Proselytising, however, is more than merely an exercise of the *forum internum*. It is a religious activity and therefore potentially subject to limitations.
>
> Statements of belief can have many different purposes. A religious organisation may make a statement of belief in their founding documents such as their constitutions, article of association or membership rules. Here the purpose is to clearly delineate the shared beliefs of the group and the belief requirements of membership. A religious individual may make a statement of belief as part of their religious duties. For example the first pillar of Islam and first obligation of all Muslims is to state: "Ashhadu Alla Ilaha Illa Allah Wa Ashhadu Anna Muhammad Rasulu Allah" (translation: "There is no God but Allah, and Muhammad is his messenger."). The purpose here is to fulfil the religious requirements of Islam. A person may make a statement of belief to clarify the position of a particular religion on current social or political issues. The purpose here is to inform the members of that faith along with the public of the religion's official position. Statements of faith can also be made for less noble purposes such as to condemn, isolate, humiliate or attack. The Religious Discrimination Bill makes no attempt to distinguish between the different purposes for which a statement of faith may be made.
>
> Statements of faith can also take many different forms. A statement of belief may be in the form of a quote from religious texts or a traditional form of words, such as the Islamic statement of faith. Statements of faith can also be an explanation of or interpretation of religious texts of doctrines. These interpretations may well be contested with in a given faith or between religions sharing religious texts or histories. Section 5 defines statement of faith to require that the belief 'may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion.' There is a risk that this wording may draw secular courts into internal religious disputes and require courts to make pronouncements on issues of religious belief. In the explanatory notes, the government has already taken steps down this dangerous path.
>
> The explanatory notes state at para 407:
>
> > For example, a statement made in good faith by a Christian of their religious belief that unrepentant sinners will go to hell may constitute a statement of belief. However, a statement made in good faith by that same person that all people of a particular race will go to hell may not constitute a statement of belief as it may not be reasonably be

[27] W.C. Durham and B.G Scharffs, *Law and Religion: National, International and comparative Perspectives* (Walter Kluwer, 2019 2nd) 178 – 179.

> regarded as being in accordance with the doctrines, tenets, beliefs or teachings of Christianity.
>
> While I am confident the vast majority of Christians would agree with this statement, Christianity is not a monolithic religion with all adherents believing the same thing. Who constitutes an 'unrepentant sinner' is likely to vary significantly between different denominations and sects and even within denominations. Further in this statement the government has made an assumption that it could never be reasonable for a Christin to state all people of a particular race will go to hell. As abhorrent as a statement of that nature would be such an assumption or interpretation of faith is not one a secular government or court can or should make. It is not the role of a secular government or court to tell a religious person that their beliefs are 'unreasonable.'
>
> While I welcome the protection of the *forum internum*, and therefore the absolute right to hold a particular religious belief, I am concerned that the provision as written goes too far. Religious speech which also constitutes religious activity should be subject to the normal law and normal restrictions placed upon speech. Freedom of speech is not absolute in Australia for good reason. While I welcome increased protection for freedom of speech, protecting just one kind of speech disparities and inconsistencies will be created in the law.[28]

I note that the definition of statement of belief in the current Bill has been updated and no longer refers to the belief needing to 'reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion.' However, this relatively minor change is not enough to overcome the inherent problems with clause 12.

Leaving the clause out will not prevent religious people from holding certain beliefs. Nor does it require them to do anything which may reveal their religious beliefs (in the way an oath or the census question do). At most it may require them to6 remain silent about certain religious beliefs while operating in the public sphere. While its exclusion may cause some frustration to those who hold strong religious beliefs the need to protect other vulnerable groups, such as members of the LGBTI+ community, must be weighed against that frustration. I believe that the balance in this case is in favour of allowing anti-discrimination law to limit the manifestation of these beliefs in the form of Statements of Belief which are discriminatory.

Finally it is important that in the vast majority of cases statements of belief do not and will not constitute either direct or indirect discrimination. Religious speech which is discriminatory is currently prohibited under existing anti-dissemination law and we have not seen a flood of cases of people being found to have discriminated in contravention of those laws. I note in particular that high profile cases involving Israel Folau and Archbishop Porteous both ended without a final resolution that their particular statements of belief constituted discrimination.

3.2 Conduct Requirements and Qualifying Bodies

Clause 15 of the Bill has also attracted significant criticism. For example national president of the Australian Lawyers Alliance, Graham Droppert SC, has expressed concern that clause 15 will limit the ability of the legal profession to discipline members of the profession who make statements which may bring the profession or the legal system into disrepute.[29]

---

[28] Renae Barker, *Submission to Attorney Generals Department: Religious discrimination Bill – Second Exposure* Draft (25 September 2019) 9 – 10.

[29] Naomi Neilson, 'Religious discrimination Bill could bring legal profession into disrepute' (2021, December 07) *Lawyers Weekly* https://www.lawyersweekly.com.au/biglaw/33218-religious-discrimination-bill-could-bring-

Clause 15 suffers from the same problems as clause 12 in that it elevates religious speech above that of other forms of speech. I note however that it is a much more modest proposal than earlier draft Bills which also included a similar provision in relation to employers more generally. As I have previously submitted such clauses were not necessary in the context of employment as the Bill already prohibits indirect religious discrimination:

> Where an 'employer conduct rule' prohibits an employee from engaging in religious activity both at work and outside of work they could bring a claim against their employer on the basis of indirect discrimination.[30]

A similar argument applies in relation to qualifying bodies. If a conduct rule imposed by a qualifying body discriminates against a person on the basis of their religious belief or practice this is already covered by the Bill.

However, I acknowledge that the current Bill is the product of significant negotiation and compromise. The removal of clauses relating to 'employer conduct rules' is a significant improvement. Should clause 12 be removed then, despite its shortcomings, clause 15 could be retained in the interests of compromise.

3.2 Religious Schools and Amendment of the *Sex Discrimination Act*

The third controversial aspect of this Bill is its application to religious schools and its failure to address discrimination against students in particular.

In the wake of the leaking of the recommendations from the Religious Freedom Review it was those relating to discrimination in schools that garnered particular public attention. Despite inaccurate media reporting the recommendations sought to narrow the exemptions for religious schools under existing anti-discrimination laws.[31] Given these recommendations have still not been acted upon despite strong public support and assertions from religious schools that they do not use the exemptions relating to students it is unsurprising that many in the community are distressed that this issue still has not been addressed.

In my submission to the Religious Freedom Review I noted that:

> While those of no particular faith and those who embrace atheism or agnosticism may not see the need for those fulfilling an ostensibly secular role to comply with the beliefs of the religious organisation employing them this only highlights an important difference between those of faith and those who are not. Taking the example of a gardener a person who has no religion is likely to see the role as being the care and maintenance of the religious organisations grounds and gardens. However the care of the natural environment can also be seen as a profound act of worship or spiritual fulfilment in honouring God's creation. Similarly the role of receptionist is likely to be seen by those with no religion as an administrative role involving answering the telephone, greeting people and attending to general administrative tasks. For a religious organisation and individuals the role could be seen as the first contact between those seeking spiritual guidance and

---

legal-profession-into-disrepute?utm_source=LawyersWeekly&utm_campaign=08_12_21&utm_medium=email&utm_content=1&utm_emailID=abc9fc2b01290c7f5324df71a8538dda99b7ebf498a1f79786fb2f57a1efb923

[30] Renae Barker, *Submission to Attorney Generals Department: Religious discrimination Bill – Second Exposure* Draft (25 September 2019) 6.

[31] Renae Barker, 'It is Not Inevitable: The Future Funding of Faith-Based Schools after Ruddock' (2020) 97(2) *Australasian Catholic Record* 144 – 155.

> the religion involved. The difficulty faced by those of faith in understanding the religious nature of ostensibly secular roles is summed up in the quote from Thomas Aquinas:
>
> > To one who has faith, no explanation is necessary. To one without faith, no explanation is possible.

And in my submission to the *Senate Standing Committees on Legal and Constitutional Affairs enquiry into Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* I added:

> This applies equally to schools. The maths teacher at a religious school is often used as an example of a secular role where the person fulfilling that role does not necessarily need to comply with the religious ethos of the school in order to fulfil the requirements of their job. However as with the administrative assistant or gardener discussed above the role of maths teacher may be seen by religious people very differently to those from a secular background. As with others teachers the maths teacher is likely to be approached by students for guidance on a range of issues, not just trigonometry or algebra. They may also be required to participate in religious activities of the school. A teacher whose belief and values conflict with the religious ethos of the school is unlikely to be able to do either of these things both in line with the school's religious ethos nor authentically.

Religious schools have a specific character which is informed by the religious beliefs and practices which underpin the school. Parents may choose to send their children to those schools for a range of reasons. While this may include secular reasons, such as the academic performance of the school or the commute time between their home and the relevant school, many also choose to send their children to these schools due to the unique culture within each school. That culture may or may not be explicitly religious, but it is enabled by the fact that, unlike state run government schools, the school does not need to be secular. That is not to say that secular schools cannot have ethics and values underpinning a unique culture, but those ethics and values cannot be based on specific religious beliefs and practices and must fit within the State Government's education policies and practices.

If religious schools are to be able to maintain their unique character they must be able to make decisions about the running of their school in ways that sets them apart from secular schools. This may include taking into account religious beliefs and practices in hiring and admission policies. This, however cannot be unlimited. Like other manifestations of religious beliefs the manifestation of religious belief by schools on behalf of the individuals who make up that school community can be limited where necessary to, *inter alia,* protect the rights and freedoms of others. The question is what limits will be necessary.

In relation to the Religious Discrimination Bill specifically clause 11 over-rides state and territory law to permit religious bodies that are an educational institution to 'gives preference, in good faith, to persons who hold or engage in a particular religious belief or activity.' I welcome to use of positive language and the concept of giving preference to co-religionists rather than discriminating against those of other faiths.

I also welcome the inclusion of transparency requirements. I have previously argued for the use of transparency requirements more broadly as a way of ameliorating some of the negative impacts of so called exemption or balancing provisions where they impact upon the rights and freedoms of others.[32]

---

[32] Renae Barker, 'Religions should be required to be transparent in in their use of exemptions in anti-discrimination laws' (2018) 44(3) *Alternative Law Journal* 191 – 196; Renae Barker, 'Transparency is the way forward for religious exemptions to anti-discrimination laws' (2018, October 15) *ABC Religion and Ethics*

I would encourage the inclusion of similar transparency requirements in other anti-discrimination laws.

Recent media reports have flagged a possible amendment to the *Sex Discrimination Act 1984* (Cth). While not currently addressed in the Bills which are the subject of this inquiry I will make a brief comment on this proposed amendment.

Section 38(3) of the *Sex Discrimination Act 1984* (Cth) permits religious schools to discriminate 'in the provision of education and training' on the basis of a person's 'sexual orientation, gender identity, marital or relationship status or pregnancy.' The Religious Freedom Review recommended that this clause (along with section 38(1) and (2))[33] be narrowed:

> Recommendation 7
>
> The Commonwealth should amend the Sex Discrimination Act to provide that religious schools may discriminate in relation to students on the basis of sexual orientation, gender identity or relationship status provided that:
> (a) the discrimination is founded in the precepts of the religion
> (b) the school has a publicly available policy outlining its position in relation to the matter
> (c) the school provides a copy of the policy in writing to prospective students and their parents at the time of enrolment and to existing students and their parents at any time the policy is updated, and
> (d) the school has regard to the best interests of the child as the primary consideration in its conduct.

Several high profile public figures have spoken out against the continued inclusion of section 38(3) in the *Sex Discrimination Act 1984* (Cth). For example Fr Frank Brennan has recently commented:

> Given that both sides of our Parliament accept without reservation that such discrimination has no place in any school, religious or not, it is outrageous that our Parliament has not clarified this matter three years on, and that we will have to await yet another federal election before the matter is legislated obliging educators not to discriminate against a child on the basis of sexuality or gender identity.[34]

There is therefore some debate as to whether the clause needs to be removed entirely or whether arrowing its scope is sufficient. I note that the Australian Law Reform Commission has been tasked with considering this and other possible amendments anti-discrimination arising out of the Religious Freedom Review and subsequent parliamentary inquires. My preference would be for this matter to be determined after a very careful consideration of all the possible consequences and ramifications by the Australian Law Reform Commission rather than made in a rushed way as a political compromise. However I am also conscious that LGBTI+ families in particular have been waiting to see reform in this area for over two and half years and that the prospect of waiting on the outcome of yet another inquiry in unpalatable.

While it is my preference to see section 38(3) removed entirely from the *Sex Discrimination Act 1984* (Cth) I am also attracted to a, at least short term, compromise proposed by Associated Professor Neil

[33] See recommendation 5.
[34] https://www.eurekastreet.com.au/article/where-to-now-with-religious-discrimination

Foster.[35] Foster has proposed that in the vent that section 38(3) is repealed that it be replaced with a new section 38A:

> **Section 38A**
>
> Nothing in s 21 renders it unlawful for an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, in connection with the provision of education or training, to set and enforce standards of dress, appearance and behaviour for students, so long as this is done in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Another alternative would be to retain section 38(3) while the Australian Law Reform Commission does its important work while at the same time implementing the Religious Freedom Review's recommendation that 'the school has a publicly available policy outlining its position in relation to the matter.' This could be adapted from the provisions of the Religious Discrimination Bill dealing with the hiring of teachers. One of the challenges in this area is knowing how wide spread the use of section 38(3) is. Requiring, as a transitional measure, schools to identify their intention to rely on section 38(3) would provide some of the answers to the very important question in this debate: do we even need this section if no one is using it?

4. The Need to Act

In previous submissions on earlier exposure drafts of the Religious Discrimination Bill I commented on the need to protect the vulnerable and that in all the wrangling between lobby groups we may lose sight of those the Bill should be designed to protect.

As I argued in my submission on the second exposure draft:

> If we fail to pass a religious Discrimination Act it is the most vulnerable in our community who will suffer. Those from religious minorities whose religious beliefs and practices are poorly understood by the majority of Australians.[36]

And as I have previously argued elsewhere:

> While Australia is far from perfect, the average Australian does not need to fear arrest, assault or persecution because of their religious beliefs and practices. This is no excuse to exclude those of faith from the protection of religious discrimination laws. It is now, while we do not have rampant religious discrimination, that we must protect the most vulnerable. It is too late when we are already vilifying them. In passing a *Religious Discrimination Act*, the federal government can send a powerful message both to Australia's minority faith communities and persecuted religious groups around the world: your human rights matter; in Australia, discrimination on the basis of religious belief and activity will not be tolerated.[37]

---

[35] https://lawandreligionaustralia.blog/2018/10/14/ruddock-report-part-2-changing-the-law-on-religious-schools-and-gay-students/?fbclid=IwAR3BfnMEr9H_qXCLtLxnJYlA0XlWzY31id86bTBshlDyTVqh0HADP_Jxdt8 ; https://lawandreligionaustralia.blog/2021/12/02/expelling-students-from-religious-schools-based-on-sexual-orientation/

[36] Renae Barker, *Submission to Attorney Generals Department: Religious discrimination Bill – Exposure* Draft (29 January 2020) 4.

[37] 'The Religious discrimination bill isn't (just) about Christians' (2019, September 2) *ABC Religion and Ethics* *https://www.abc.net.au/religion/the-religious-discrimination-debate-is-not-about-christians/11472040*

I ended my submission on the first exposure draft with these words:

> At the end of the day the measure of the success of these laws much be twofold: are vulnerable minorities protected and is there less discrimination than before the passage of these laws. If the answer to either of these questions is no – then we have failed in the task.[38]

And echoed them in my submission on the second exposure draft.[39] My view today remains the same. This Bill is essential to protect the most vulnerable in our community – but it is not without significant flaws. These flaws are much less than in previous exposure drafts – and the Attorney General is to be commended on her efforts – however these flaws need to be addressed if we are to achieve the core aim of anti-discrimination law: less discrimination.

[38] Renae Barker, *Submission to Attorney Generals Department: Religious discrimination Bill – Second Exposure* Draft (25 September 2019) 12.
[39] Renae Barker, *Submission to Attorney Generals Department: Religious discrimination Bill – Exposure* Draft (29 January 2020) 4.

Opinion Nothing less than the character of Australian secularism is at stake in the religious discrimination debate

Renae Barker

Posted Tue 30 Nov 2021, 5:19pm
Updated Tue 30 Nov 2021, 5:19pm

If passed the federal Religious Discrimination Bill will be a conspicuous addition to this tapestry of laws, public policy, and social conventions that make up the Australian state-religion relationship. (Eskay Lim / EyeEm / Getty Images)

The last few years have seen an unprecedented level of public interest in and disagreement over religion and its place in Australian society. Much of the recent debate has focussed on the long anticipated *Religious Discrimination Bill*. On 25 November, Prime Minister Scott Morrison finally introduced the bill to the federal parliament. This is its third iteration, with the first exposure draft having been released, by then Attorney General Christin Porter, back in mid-2019; a second exposure draft was released in late 2020.

There has been intense public debate surrounding the some of the bill's more controversial sections. Opponents of the bill argue that it opens the door to further discrimination against the LGBTQIA+ community, while others claim that it does not go far enough in protecting freedom of religion. While these two issues are undoubtedly important, the bill and surrounding debate are also a litmus test for the future of the Australian state-religion relationship.

State and religion in Australia

State-religion relationships around the world vary considerably. They exist on a spectrum from **theocracy** where religion and state are fused, through to **abolitionist regimes** where the state actively seeks to destroy religious belief. The Australian state-religion relationship sits somewhere in the middle of these two extremes. The relationship has been variously described as liberal separation, pragmatic pluralism, and non-establishment pluralism — all of which involve separation between the institutions of state and religion, while at the same time allowing religion and religious people to exist in the public square.

What differs between these views of the Australian state-religion relationship is the role of religion in the public sphere. One is not necessarily more correct than the other. They are simply different ways the relationship between the Australian state and religion can play out. Each have their proponents and detractors, and each have their benefits and detriments. The institutional separation of state and religion means Australia is also usually described as a secular country. This is largely based on section 116 of the Australian Constitution which, among other things, prohibits the federal government from establishing a state church or religion.

The nature of Australian secularism and the state-religion relationship is complex. As Chief Justice Latham observed in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*, "almost any matter may become an element in religious belief or religious conduct." Similarly, almost any law or public policy may contribute to the state-religion relationship if it touches in some way upon the diverse lived experience of religion. Some laws — such as section 116 of the Australian Constitution, state and territory anti-discrimination laws, and charity law — are obvious contributors. Others are less obvious in that they may only affect those of minority faiths or only become obvious when conflict arises. This was demonstrated graphically following the leak of the Religious Freedom Review recommendations in late 2018. As the Senate Legal and Constitutional Affairs Committee noted:

> The leak of the recommendations of the Religious Freedom Review caused great concern in much of the community, not least because it appears many Australians were unaware of the broader exemptions to discrimination laws provided to faith-based educational institutions.

Other laws and public policies which have implications for the Australian state-religion relationship, but arguably go unnoticed by the vast majority of Australians, include parliamentary procedure, police powers, criminal law, and local planning laws.

By contrast, if passed the federal *Religious Discrimination Bill* will be a conspicuous addition to this tapestry of laws, public policy, and social conventions that make up the Australian state-religion relationship. It is therefore important, not only because it will prohibit religious discrimination, but also because it will play a significant role in shaping the Australian state-religion relationship into the future.

Social hostility and the protection of minority religions

The primary purpose of the *Religious Discrimination Bill* is to prohibit religious discrimination. In terms of the State-religion relationship this is essential in determining the place of religion, and in particular minority religions, in the public square. In his speech introducing the Bill the Prime Minister alluded to this, commenting that:

> This bill brings clarity and it provides confidence that Australians of faith can have confidence they will be protected from discrimination. A Sikh should not be discriminated against because of the turban they wear. Nor a Maronite because of the cross around their neck. Nor a Muslim employee who keeps that prayer mat in the bottom drawer at their desk at work. Nor a Hindu couple who are seeking to rent a property. Nor a Jewish school seeking to employ someone of their faith — if that faith is their preference — and the publicly stated policy of their school.

Australia is at a pivotal point in determining how minority religions will be treated. Social hostility towards religion in Australia is increasing. In 2019, the most recent year for which data is available, the Pew Research Center report on freedom of religion ranked Australia as having a moderate level of social hostility towards religion. This places Australia along-side countries such as Saudi Arabia and Morocco. In its report on religious freedom in 2016, the Pew Research Center noted the presence of "nationalist groups and local residents opposed [to] the building of [mosques]" and "police … arrests in Melbourne after violence broke out between religious freedom advocates and opponents of Islam at competing protests" as key factors contributing to the increasing level of social hostility towards religion.

The Australian Islamophobia Register receives and reports on verified experiences of Islamophobia, which the report defines as "the perpetration of verbal and physical anti-Muslim abuse together with denigration of Muslim identity." In the two years covered by their latest report, they verified 349 incidents of Islamophobia. Women were the victim in 72 per cent of verified cases. Given the prevalence of under-reporting, this is likely to be just the tip of the iceberg.

If the trend of increased social hostility towards religion — and minority faiths specifically — continues, it will push the Australian state-religion relationship away from liberal separation, pragmatic pluralism, and non-establishment pluralism and towards antagonism. Prohibiting discrimination on the basis of a person's religion at the federal level will not only provide individuals who experience this hostility with a legal remedy, it will also send a powerful signal that this kind of behaviour is not acceptable and will not be tolerated. It will also help preserve Australian secularism.

The role and limits of religious exemptions

But the *Religious Discrimination Bill* does more than prohibit discrimination. It also provides a number of exemptions from the general operation of the bill. The inclusion of exemptions or balancing clauses for religious organisation and religious schools are a common feature of anti-discrimination law.

For example, the federal *Sex Discrimination Act 1984* contains exemptions for bodies and educational institutions established for religious purposes. Without these exemptions the law would, for example, require the Catholic Church to hire women as priests. This would involve the law and the state interfering with a deeply held and longstanding matter of religious doctrine. Interference by the state in the selection of religious leaders is inconsistent with Australian secularism due to the high level of entanglement with religion this would involve. If the exemption relating to selection and hiring of religious leaders were removed, this would shift the state-religion relationship towards one of hostility towards or control of religion by the state. The exemptions in the *Religious Discrimination Bill* permit religious bodies to

discriminate on the basis of religion. As with the exemptions is the *Sex Discrimination Act*, these exemptions are essential to ensure that state does not cross the line from secularism towards interference with and hostility towards religion.

However, the exemptions in the *Sex Discrimination Act* also permit, more controversially, schools to discriminate in the hiring of staff and selection of students on the basis of their LGBTQIA+ status. It has been claimed that the exemptions in the *Religious Discrimination Bill* will have a similar effect. This is where things get tricky. If, for example, exemptions permitting religious schools to discriminate in the selection of teachers were removed from the *Religious Discrimination Bill*, and from other anti-discrimination laws, this would involve the state telling a religious organisation who it can and cannot have as part of their community. There is an inevitable entanglement and interference by the state in what many religions would consider their internal operations — and, in the case of schools in particular, what Father Frank Brennan has described as the ability of schools to "uphold the tenets of their faith and the ethos that makes their school a community."

Giving religious organisations the ability to discriminate on *any* basis in *any* situation is also inconsistent with Australian secularism. Doing so would amount to the state deferring to religious organisations, thereby pushing the state-religion relationship towards deference, endorsement, and establishment of religion. Providing legal limits to the ability of religious organisations to discriminate is consistent with the Australian approach to anti-discrimination laws and Australian secularism. For example, neither the *Racial Discrimination Act 1975* nor the *Disability Discrimination Act 1992* provide exemptions for religious organisations or bodies. The question is where these limits should be.

The Religious Freedom Review recommended that exemptions in federal, state and territory anti-discriminate laws be narrowed by removing any exemptions relating to race, disability, pregnancy or intersex status, or on the basis that existing employees had entered into a marriage. The expert panel also recommended that schools be required to have a publicly available policy outlining their approach to remaining exemptions. Given representatives of several large religious schools have been adamant that they do not and do not intend to use exemptions relating to students in the *Sex Discrimination Act*, their removal would also seem to be a sensible approach.

However, all of these matters are beyond the scope of the current *Religious Discrimination Bill*. The bill only exempts religious organisations and schools from the general prohibition against religious discrimination. Exemptions from prohibitions on the basis of other attributes — such as gender, sexuality, and so on — are dealt with in other laws which need to be amended.

Religious speech and expression

One of the most controversial aspects of the *Religious Discrimination Bill* is the statement of belief clause. Section 12 of the bill overrides state and territory anti-discrimination law by providing that the making of a statement of belief does not constitute discrimination unless is it malicious, or where a reasonable person would consider the statement of belief to threaten, harass or vilify a person or group.

As with other aspects of the bill, the eventual inclusion or exclusion of this clause will affect the Australian state-religion relationship. On the one hand, its inclusion supports the role of religion in the public sphere, while removing it would mean that some statements of belief would be excluded. Whether or not people can speak about and otherwise express their belief in public is an important component of the state-religion relationship. In France, for example, some aspects of religion have been excluded from the public sphere. Public officials are not permitted to wear conspicuous items of religious clothing while carrying out their public function — including teachers. This is a direct manifestation of France's separationist approach to religion. Australia has traditionally taken a different approach, allowing religion a more conspicuous place in the public sphere while maintaining the institutional separation between church and state. However, the inclusion of this clause arguably not only preserves the role of religion in the public sphere but also shifts the state religion relationship towards a deferential approach to religion.

Australia is infamous for not having a right to freedom of speech. Our equivalent in the constitutionally implied right to freedom of political communication. While this covers religious political speech, not all religious speech is permitted. Religious speech which constitutes direct or indirect discrimination under Australian federal, state or territory anti-discrimination laws are currently prohibited. If the *Religious Discrimination Bill* passes unamended, this will change. Religious speech will be elevated above other forms of speech — receiving a level of protection not currently available to other forms of speech.

Leaving clause 12 out will not prohibit religious speech — only that speech which constitutes direct or indirect religious discrimination will be prohibited, as is already the case. This is more consistent with Australian secularism. Religion is welcome in the public sphere, but so too are other views and ideas.

Getting the balance right

There are of course many other aspects to the *Religious Discrimination Bill* — such as the creation of the Religious Discrimination Commissioner and prohibition on qualifying bodies imposing a requirement which would prohibit statements of belief. All have some bearing on the Australian state-religion relationship.

In the coming months, as the debate on the bill progresses both within parliament and outside its walls, much will be said about religious discrimination and freedom of religion. Claims and counter claims will be made about the consequences the bill will have on individuals and religious communities. While these consequences are important and need to be clearly understood and articulated, we must also not lose sight of the broader effect of the bill on the Australian state-religion relationship. Australia is about to make a decision on an important aspect of the delicate tapestry which constitutes that relationship — it is important we get it right.

Dr Renae Barker is a Senior Lecturer at the University of Western Australia Law School.

Topics

- Community and Society
- Religion and Beliefs
- Religious Schools
- Discrimination
- Law, Crime and Justice
- Government and Politics
- Parliament
- Federal Parliament
- Ethics

Religion & Ethics

- *link* Read
- *link* Watch
- *link* Listen
- *collection* News
- *collection* Opinion
- *link* About
- *link* Contact

Connect with Religion & Ethics

- Facebook
- Twitter

Newsletter Subscribe

- Email address
- Subscribe

Your information is being handled in accordance with the ABC Privacy Collection Statement.

Podcast

Subscribe to Compass podcast

Subscribe to Religion & Ethics RSS feed

Subscribe to Compass RSS feed

Opinion The Religious Discrimination Bill isn't (just) about Christians

Renae Barker

Posted Mon 2 Sep 2019, 5:54pm
Updated Mon 2 Sep 2019, 5:54pm

In the religious discrimination debate, the focus on cases like Israel Folau (R) and Archbishop Porteous places too much attention on the powerful. (Aneeta Bhole / ABC News / Mark Metcalfe / Getty Images)

It is no accident that Attorney General Christian Porter launched the exposure drafts of the *Religious Discrimination Bill* in the Great Synagogue in Sydney. Jews make up less than one percent of the Australian population, with only 91,025 people self-identifying as Jewish at the 2016 census.

The launch of the exposure draft in the place of worship of a minority faith is an important reminder that these laws are needed to protect those least able to protect themselves. As Chief Justice Latham explained in *Adelaide Company of Jehovah's Witnesses v Commonwealth*, "[t]he religion of the majority of the people can look after itself." Whereas laws such as those proposed in the *Religious Discrimination Bill* exposure draft are, as I've written previously, "required to protect the religion (or absence of religion) of minorities, and, in particular, unpopular minorities."

In its report, the Ruddock Religious Freedom Review recommended the federal government amend the existing *Racial Discrimination Act 1975* (Cth) or enact a new *Religious Discrimination Act* "to render it unlawful to discriminate on the basis of a person's 'religious beliefs or activity'." The government has decided to take the second of these two options. The new law will add to the suite of existing federal anti-discrimination legislation including the *Age Discrimination Act 2014* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act 1975* (Cth), *Fair Work Act 2009* (Cth) and Australian *Human Rights Commission Act 1986* (Cth). Religion's exclusion from this list of Federal anti-discrimination protections is an omission the remedy of which is long overdue.

It is unfortunate, however, that the *Religious Discrimination Bill* has been written in the wake of specific high-profile incidents that *may* be examples of religious discrimination. The risk is that in focusing on these specific incidents, we will not see the wood for the trees. Already commentary on the Bill has begun to focus on whether or not Israel Folau would have been permitted to put out his controversial Instagram

post or whether the Catholic Archbishop of Hobart, Julian Porteous, would have been reported to the Tasmanian Anti-Discrimination Commission. Section 41 of the Bill is already being referred to as the "Porteous provision," while clause 8(3) is clearly aimed at the Folau incident.

Section 41 of the *Religious Discrimination Bill* exposure draft provides that a "statement of belief" does not constitute discrimination. It goes so far as to specifically override section 17(1) of the *Tasmanian Anti-discrimination Act 1998* (Tas), which prohibits people from offending, humiliating, intimidating, insulting or ridiculing others on the basis of attributes such as disability, sex, sexual orientation and gender identity. This was the provision under which the complaint was made against Archbishop Porteous after he issued a pastoral letter setting out the Roman Catholic position on marriage.

Section 8(3) of the Bill refers specifically to "employer conduct rules." It provides that for employers with a revenue of $50 million per year or more, such rules are indirect religious discrimination unless the employer can demonstrate the rule is "necessary to avoid unjustifiable financial hardship to the employer." This is clearly aimed at conduct rules such as those imposed by Rugby Australia on its players.

While the focus thus far has been on specific clauses designed to "fix" specific problems, if the debate about the *Religious Discrimination Bill* exposure draft is to progress it must shift to the real issue — religious discrimination itself.

Religious discrimination and persecution are lived realities for people around the world. On 22 August 2019 the United Nations marked, for the first time, the international day to commemorate the victims of acts of violence based on religion or belief. The plight of religious groups such as the Yazidis in Syria and Turkey, the Rohingya in Myanmar and the Uyghurs in China stand as a stark reminder of what can happen if religious discrimination is allowed to run unchecked. Religious persecution does not begin with genocide — it begins with discrimination and vilification.

While Australia is far from perfect, the average Australian does not need to fear arrest, assault or persecution because of their religious beliefs and practices. This is no excuse to exclude those of faith from the protection of religious discrimination laws. It is now, while we do not have rampant religious discrimination, that we must protect the most vulnerable. It is too late when we are already vilifying them. In passing a *Religious Discrimination Act*, the federal government can send a powerful message both to Australia's minority faith communities and persecuted religious groups around the world: your human rights matter; in Australia, discrimination on the basis of religious belief and activity will not be tolerated.

The focus on cases such as Israel Folau and Archbishop Porteous places too much attention on the powerful. The focus instead should be on the vulnerable. Australia's hands are far from clean in this regard.

In 2014, federal Parliament banned those wearing facial coverings from sitting in the public viewing areas. While the ban was short lived, it was a clear example of discrimination against Muslim women on the basis of their religious activity. With no federal *Religious Discrimination Act*, Muslim women who wear the niqab or burqa for spiritual reasons had no avenue to challenge the ban. Muslims make up just 2.6 percent of the Australian population. Muslim women who wear a facial covering are a tiny fraction of that number. They are a small, vulnerable minority — the very definition of the "unpopular minorities" identified by Chief Justice Latham.

In *Arora v Melton Christian College*, the Victoria Civil and Administrative Tribunal (VCAT) found in favour of a Sikh school boy who had been refused enrolment at Melton Christian College. The School's uniform policy required that boys must have short hair and prohibited the wearing of a head covering. As a Sikh, the child at the centre of this case wanted to wear a patka, a small piece of cloth tied around the head to keep the wearer's long hair neat and tidy. Sikhs believe that their hair should remain uncut as one of the "five requisites of the faith." The discriminatory nature of the school's policy is clear from its wording, which specifically prohibited the wearing of "head coverings related to a non-Christian faith." While the VCAT found in favour of the student in this case, the very fact that the school felt it appropriate to discriminate in this way demonstrates just how far we have to go.

The *Religious Discrimination Bill* exposure draft is not perfect. There is much in it that should be improved, from both a religious and LGBTIQ+ perspective. But I would urge these two groups to stop trying to find ways to use discrimination laws as a sword to attack each other and instead find ways to collectively hold religious discrimination laws up as a shield to protect vulnerable minority religions. Disagreement over specific clauses, aimed at fixing discrete examples, which may or may not be religious discrimination, must not be allowed to derail the *Religious Discrimination Bill*. I am sorry Christian and LGBTIQ+ groups, this isn't (just) about you. This is bigger than you.

Renae Barker is Senior Lecture at the University of Western Australia School of Law, Honorary Research Fellow at the Centre for Muslim States and Societies and Writing Fellow at Brigham Young University International Centre for Law and Religion Studies. She is the author of State and Religion: The Australian Story.

Topics

- Community and Society
- Religion and Beliefs
- Law, Crime and Justice
- Laws
- Discrimination

Religion & Ethics

- *link* Read
- *link* Watch
- *link* Listen
- *collection* News
- *collection* Opinion
- *link* About
- *link* Contact

Connect with Religion & Ethics

- Facebook
- Twitter

Newsletter Subscribe

- Email address
- Subscribe

Your information is being handled in accordance with the ABC Privacy Collection Statement.

Podcast

Subscribe to Compass podcast

Subscribe to Religion & Ethics RSS feed

Subscribe to Compass RSS feed

Opinion Transparency is the way forward for religious exemptions to anti-discrimination laws

Renae Barker

Posted Mon 15 Oct 2018, 6:54pm
Updated Tue 16 Oct 2018, 1:42pm

Greater transparency would allow those who oppose the use of exemptions to the Sex Discrimination Act to identify schools who make use of those exemptions.
Image:

Godong/Getty Images

Of the twenty recommendations made by the Expert Panel on Religious Freedom, chaired by Philip Ruddock, published by Fairfax last week, it is those relating to schools which have so far been the most controversial. Six of the twenty recommendations are directly related to schools. But it is recommendations five and seven that have garnered the most attention. These deal with the already existing exemptions in the federal *Sex Discrimination Act* which permit schools to discriminate against staff, contractors and students on the basis of their "sexual orientation, gender identity or relationship status." Far from expanding these existing rights, recommendations five and seven advise constraining and narrowing them. In particular, both recommended the introduction of measures to increase transparency in the way these exemptions are used.

With greater transparency comes greater scrutiny. Under the proposed changes to the law, religious schools who wish to take advantage of the exemptions in the *Sex Discrimination Act* will be required to have a "publicly available policy outlining its position in relation to the matter." Such a requirement would be particularly useful to those who oppose what some have labelled "tax payer funded discrimination."

A common argument against exemptions for religious schools in anti-discrimination laws is that these schools also receive federal funding. Just last month Prime Minister Scott Morrison announced the government's new funding arrangements for non-government schools. At present, a call to remove federal funding from schools who make use of these exemptions amounts to either a call to remove all federal funding or to remove all exemptions — as there is no way of knowing which schools are actually using the existing exemptions.

Just because the law permits schools to discriminate does not mean they do. Archbishop Mark Coleridge, on behalf of Catholic schools, has stated: "we have not sought concessions to discriminate against students or teachers based on their sexuality, gender identity or relationship status." Transparency would allow those who oppose the use of exemptions in the *Sex Discrimination Act* to identify those schools who make use of the exemptions. Equally, it would allow those schools who choose *not* to use the exemptions and instead accept all staff, contractors and students regardless of their "sexual orientation, gender identity or relationship status" to be identified. Prospective staff, contracts, parents and members of the public could then make an informed decision about how they choose to interact with their local religious school. If the prevailing mood in Australia does not support the continued existence of these exemptions, then schools who actively use them may find themselves with fewer students, staff and public support.

In response to the public outcry against the existing recommendations, Prime Minister Scott Morrison has announced that the government will introduce legislation to remove the exemptions relating to students. The exemptions relating to staff and contractors look like they will remain at this stage. The federal government should therefore introduce the transparency requirements recommended by the Religious Freedom Review for staff and contractors at the same time as it repeals the existing exemptions relating to students. They could even go a step further and introduce transparency requirements for religious bodies as well as schools.

Religious schools are not the only organisations to be granted exemptions from the federal *Sex Discrimination Act*. Religious bodies are also given exemptions under section 37. Most of the exemptions relate to the hiring and training of religious leaders and people involved in religious observance or practice. However, the exemptions also permit bodies established for a religious purpose to discriminate in relation to any act or practice "being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion." Where this act or practice may involve non-adherents, such as employment by means of public advertisement, they should be required to have a "publicly available policy outlining its position in relation to the matter."

Religious organisations employ people in a range of ostensibly secular roles. Those of no particular faith and those who embrace atheism or agnosticism may not see the need for those fulfilling an ostensibly secular role to comply with the beliefs of the religious organisation employing them. However, those of faith see these roles very differently. Taking the example of a gardener. A person who has no religion is likely to see the role as being the care and maintenance of the religious organisation's grounds and gardens. But the care of the natural environment can also be seen as a profound act of worship or spiritual fulfilment in honouring (God's) creation. Similarly, the role of receptionist is likely to be seen by those with no religion as an administrative role involving answering the telephone, greeting people and attending to general administrative tasks. For a religious organisation and individuals, the role could be seen as the first contact between those seeking spiritual guidance and the religion involved. The difficulty faced by those of faith in understanding the religious nature of ostensibly secular roles is summed up by Thomas Aquinas:

> To one who has faith, no explanation is necessary. To one without faith, no explanation is possible.

As with religious schools, the requirement for religious bodies to be transparent in the use of exemptions would also expose their use to greater public scrutiny. At present no such requirement for transparency exists. As a result, while religious organisations *may* be making use of an exemption, they also may *not* be. It is only when a dispute arises, where an individual believes that the exemption applied by the religious organisation was done so unlawfully, that public debate and therefor scrutiny can occur. Equally,

where a religious organisation chooses not to make use of an exemption, this too would be a matter of public record. Those who interact with these religious organisations would then have the necessary knowledge to make informed decisions about their continued interactions.

It is important that the existing exemptions are understood, not as a right to discriminate but as an exercise of freedom of religion. A significant driver behind the Ruddock Religious Freedom Review was the ongoing debate in Australia about the extent to which freedom of religion could be abrogated in the interests of protecting other important human rights, including the right not to be discriminated against. The line is shifting. The removal and narrowing of exemptions granted to religious organisations is evidence of that.

As with many issues involving human rights, any change to the law is going to be a balancing act and compromise. The ability of religious schools and other religious bodies to maintain their intrinsic religious character and for their adherents to exerciser their freedom of religion must be balanced against the rights of staff and students not to be discriminated against on the basis of their "sexual orientation, gender identity or relationship status." In order to enshrine the rights of one, a compromise will be needed on behalf of the other. Greater transparency will enhance our ability to get the balance right and compromises needed.

Renae Barker is Lecturer in the University of Western Australia School of Law, and an Honorary Research Fellow in the Centre for Muslim States and Societies. She is the author of State and Religion: The Australian Story.

Topics

- Religion and Beliefs
- Rights
- Discrimination
- Schools

Religion & Ethics

- *link* Read
- *link* Watch
- *link* Listen
- *collection* News
- *collection* Opinion
- *link* About
- *link* Contact

Connect with Religion & Ethics

- Facebook
- Twitter

Newsletter Subscribe

- Email address
- Subscribe

Your information is being handled in accordance with the ABC Privacy Collection Statement.

Podcast

Subscribe to Compass podcast

Subscribe to Religion & Ethics RSS feed

Subscribe to Compass RSS feed

THE CONVERSATION
Academic rigour, journalistic flair

A federal Religious Discrimination Act would introduce important protections for Australia's religiously diverse population. Shutterstock

Why Australia needs a Religious Discrimination Act

October 25, 2018 6.05am AEDT •Updated October 25, 2018 3.26pm AEDT

Renae Barker
Lecturer in Law, The University of Western Australia

The Ruddock review on Religious Freedom has recommended the creation of a Religious Discrimination Act as part of its 20 recommendations.

Some have argued there is no pressing need for a Religious Discrimination Act. All states and territories, except South Australia and New South Wales, currently prohibit discrimination on the basis of a person's religion. Religious discrimination is also prevented at the workplace under the federal Fair Work Act.

However, a Religious Discrimination Act is necessary to introduce other important protections for Australia's religiously diverse population. Besides Christians, who make up about half the population, Australia is home to other religious minorities, including Muslims (2.6% of the population), Hindus 1.9% and Sikhs 0.5%. A Religious Discrimination Act would also protect the growing number of Australians who identify as having no religion (30%).

As Chief Justice John Latham explained in the Jehovah's Witnesses case of 1943:

> *...it should not be forgotten that such a provision as s. 116 [of the Constitution] is not required for the protection of the religion of a majority. The religion of the majority of people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities, and, in particular, of unpopular minorities.*

Read more: Why Australia does not need a Religious Discrimination Act

Religious discrimination is not a new issue

Religious discrimination is not a new discussion in Australia. Twenty years ago, the Human Rights and Equal Opportunity Commission noted that:

> *Despite the legal protections that apply in different jurisdictions, many Australians suffer discrimination on the basis of religious belief or non-belief, including members of both mainstream and non-mainstream religions and those of no religious persuasion.*

Submissions received by the commission detailed the areas in which people experienced religious discrimination. For example, Pagan groups found it difficult to hire facilities to conduct events, while Muslim, Buddhist and Sikh communities reported having problems with planning authorities. Some people said they kept their religions a secret at work for fear of being fired or denied promotions.

The commission recommended the introduction of a federal Religious Freedom Act, which included provisions prohibiting discrimination on the basis of a person's religion.

What's the state of religious discrimination in Australia?

Australians already enjoy a relatively high level of religious freedom. However, this does not mean that people are never discriminated against on the basis of their religion.

In 2014, for instance, the parliament banned people wearing face coverings from entering the open public viewing gallery in Parliament House. Instead, they were relegated to the glass viewing area usually reserved for school children. The effect of the ban was to discriminate against Muslim women who wear burqas or niqabs as part of their religious devotion.

During the same-sex marriage postal survey, there were reports of people claiming they were discriminated against because they supported the "No" campaign. An entertainer who worked as a contractor for a children's party business was fired after changing her Facebook profile frame to one that included the words "it's OK to vote no". She claimed she was discriminated against due to her Christian beliefs.

Read more: The 'gay wedding cake' dilemma: when religious freedom and LGBTI rights intersect

Under the International Covenant on Civil and Political Rights, Australia is also obligated to enact laws prohibiting both religious discrimination and vilification.

Religious vilification is behaviour that incites hatred, serious contempt for, or revulsion or severe ridicule of a person or group of people because of their religion. Only three states – Victoria, Queensland and Tasmania – currently prohibit religious vilification.

In response to concerns about the tone of the same-sex marriage debate, the federal government passed a temporary Marriage Law Survey (Additional Safeguards) Act 2017 (Cth). The act prohibited vilification on the basis of a person's "view in relation to the marriage law survey question" or a person's "religious conviction, sexual orientation, gender identity or intersex status." It automatically lapsed on November 15 2017, the day the survey results were released.

Without the full details of the Ruddock review, it is unclear whether the proposed Religious Discrimination Act would include provisions prohibiting religious vilification.

What would a Religious Discrimination Act do?

Introducing a Religious Discrimination Act would also fix an anomaly in the existing Racial Discrimination Act. Section 9 of this act prohibits discrimination on the basis of a person's "race, colour, descent or national or ethnic origin".

Ethnic origin has been interpreted by the courts to cover both Sikhs and Jews. By contrast, Muslims and Christians are not covered by the Racial Discrimination Act, as they do not constitute a single ethnic group.

But as the Federal Court of Australia explained in Jones v Scully, ethnic origin covers more than a person's racial identity. It includes groups who have shared customs, beliefs, traditions and characteristics derived from their histories.

Those claiming discrimination on the basis of their lack of religious beliefs are also not covered under the Racial Discrimination Act. This creates a discrepancy in the treatment of different religious groups under the law.

Read more: Ruddock report constrains, not expands, federal religious exemptions

As Australia continues to debate the best way to protect freedom of religion, while also guaranteeing the rights of other groups, such as the LGBTI community, balance and compromise will be necessary.

As part of that balancing act, the government has already announced it will remove some religious exemptions from the Sex Discrimination Act, making clear, for instance, that students cannot be expelled from religious schools on the basis of their sexuality.

Other restrictions, such as requiring religious organisations to be transparent in their use of exemptions in anti-discrimination legislation such as the Sex Discrimination Act, may also be needed.

A Religious Discrimination Act should also be part of the compromise and balance. Religious discrimination may not be an everyday occurrence for many Australians. However, this does not mean the law should ignore those who have been discriminated against because of their faith or lack of it.