The Dangers of Elevating Social Ethos to Religious Orthodoxy

Submission to the Parliamentary Joint Committee on Human Rights on the Religious Discrimination Bill 2021 and Related Bills

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Foreword

We are grateful for the opportunity to make a submission to this inquiry. We support protection from discrimination based on a person's religious beliefs. We are concerned, however, that this legislative package will have the perverse effect of increasing discrimination experienced by people of faith.

The proposed legislation risks elevating social ethos to the status of religious orthodoxy. It would have the perverse effect of increasing discrimination within religious traditions against people of faith who, in good conscience, hold differing views about social ethics.

We make this submission in our personal capacity as historians of religion, persecution, and social cohesion. This submission sets out our concerns, supporting them with historical examples. Our views do not necessarily represent the views of the Australian Catholic University or La Trobe University.

About the Authors

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1. Elevating Social Ethos to Religious Orthodoxy

The Religious Discrimination Bill 2021 legislative package dangerously elides social ethos and religious belief. In doing so it mistakenly elevates particular (sub)cultural characteristics to protected status. Social character or ethos is not equivalent to creed or confession of faith and should not be afforded the same protections under the law.

This submission focusses on clauses 9 and 11. These clauses outline the areas in which the conduct of religious health and education providers does not constitute religious discrimination under the bill. The stated purpose of these clauses is to enable educational and health providers to maintain their religious ethos by providing that it is not discrimination to make faith-based decisions in employment and partnerships. For such conduct to be exempt from the proposed law, it must be in accordance with a publicly available policy issued by the religious body.

We are concerned that the legislative package thus authorises discrimination in employment and partnerships. It is concerning that discriminatory conduct would be authorised merely on the status of a publicly available policy, designed to maintain a particular ethos.

Historically, the social ethics and ethos of religious traditions and individual religious communities have changed over time, have been contested, and have rarely been consistent at any given time. For example, over the course of the last century, as the civil rights of women and LGBTQ+ people have been afforded greater public recognition, religious traditions have grappled with how best to reconcile their social policies with these new developments. Most religious traditions now contain a diversity of views and understandings of gender and sexuality. People who sincerely hold to the creedal statements that define membership of a religious community may also thus sincerely hold to divergent social ethics, particularly related to sexuality and gender.

Research suggests that Australian women and LGBTQ+ people are as actively involved in religious communities as the population as a whole.[1] Sadly, gender and sexuality are the areas in which religious leaders are least confident in providing pastoral counselling and advice.[2] This has led to the provision of pastoral care that has been damaging to sexual and gender minority populations.[3] The Religious Discrimination Bill 2021 legislative package's authorisation of discrimination to protect a religious ethos will likely lead to increased discrimination against women and LGBTQ+ people within religious communities. The legislation will reify particular, and contested, social ethics to the status of protected religious beliefs in the service of discrimination.

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[1] A.O. Hill, A. Bourne, R. McNair, M. Carman & A. Lyons. *Private Lives 3: The health and wellbeing of LGBTIQ people in Australia*. ARCSHS Monograph Series No. 122. (Melbourne: Australian Research Centre in Sex, Health and Society, La Trobe University, 2020), 26.

[2] Australian Institute of Family Counselling. *Get Equipped: Responding to the growing mental health needs in our churches and communities*. (Canberra: Australian Institute of Family Counselling, 2017).

[3] T.W. Jones, T.M. Jones, J. Power, N. Despott, & M. Pallotta-Chiarolli. *Healing Spiritual Harms: Supporting Recovery from LGBTQA+ Change and Suppression Practices.* ARCSHS Monograph Series No. 129 (Melbourne: Australian Research Centre in Sex, Health and Society, La Trobe University, 2021).

Historically there are many examples of this process, and none should be viewed as positive for social cohesion or for equity outcomes. In those examples, figures in charge of organised institutions within a given religion have used such publicly available policies to marginalise and exclude others, often members of vulnerable groups. These policies have functioned as 'purity tests' and have most often been applied unevenly, being deployed for political ends. Moreover, their targets can be viewed as arbitrary scapegoats: historically, many other members of the community would also have failed purity tests but were not singled out.

This legislative package would elevate particular, contested social policies to the status of protected religious belief. Further, it would authorise discrimination against women and LGBTQ+ people of faith on the basis of social policy that is contested within their religious traditions. In doing so, the Religious Discrimination Bill 2021 would become an engine of religious persecution and so should not be enacted in its current form.

2. Religious Communities' Social Ethos Changes over Time

The history of Christian attitudes towards clerical celibacy and understandings of sodomy clearly illustrates that sexual ethics (or ethos) within religious traditions are not constant and trans-historical, but change over time.

In the eleventh century, the religious elite of Western Europe reinvented itself in a process sometimes called the 'Gregorian Reform'. Around the same time, Western European society became a persecuting society. Social institutions, especially those that were religiously led, increasingly sought to identify, marginalise, and remove minority groups, such as dissident Christian denominations (called 'heretics'), sexual 'minorities' (men who had sex with men and women), Jews, and Muslims. The reinvention and the persecution are related, as the historian R. I. Moore has argued.[4]

Clerical celibacy was not always a legal requirement of the Catholic Church. Its history is one example of how religious policy on sexual matters is not a timeless and inherent part of a religion but rather changes over time. The celibacy of Catholic clergy effectively arose as part of the reinvention of the eleventh century. Before this time, most priests were in long-term sexual relationships. In the eleventh century, a vocal minority took control of the institution of the Church and sought to transform it. Through a lengthy process of violence and persecution, this minority enforced its sexual ideals on the Church. Calling themselves 'reformers', members of the minority objected to what they regarded as the ritual impurity conferred on priests by any sexual activity and to the loss of Church properties inherited by churchmen's children. These concerns led to a long campaign against clerical marriage and clerical sexual relationships that lasted for centuries and encountered great resistance, not least because the enforcement of universal clerical celibacy was novel.

The campaign for clerical celibacy resulted in a series of new laws. Pope Nicholas II declared for the first time in 1059 that priests could not be married and that all long-term partners of his priests were to be rebranded as 'concubines'. The priests' wives, now shamed as 'concubines' and 'whores', were forcibly expelled from their homes. Their children were declared 'bastards', ineligible for employment in Church institutions. The First Lateran Council, in 1123, reiterated that priests could not marry, and also that they could not legally have sexual relationships (canons 7 and 21). The Second Lateran Council in 1139 repeated these rules, commanding priests to separate from their partners or lose their jobs (canons 6–7). In 1179, the Third Lateran Council reiterated these orders once more (canon 11). The Fourth Lateran Council in 1215 demanded the same things too (canons 7 and 31) and increased the number of Church employees expected to be celibate, extending celibacy to 'minor orders' (canon 14).

The enforcement of celibacy relied on governmental coercion and popular violence. For example, in the mid-eleventh century, advocates of clerical celibacy inspired armed mobs to attack the official clergy of Milan, forcing them out of the city. Similar situations repeated themselves across Europe in what the historian James Brundage has called 'a reign of terror

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[4] R.I. Moore, *The Formation of a Persecuting Society: Authority and Deviance in Western Europe, 950-1250*, 2nd edition (London: Wiley-Blackwell, 2006).

among clerics and their families'.[5] Men employed by the Church now had to agree to an ethos statement for their faith that they had not drafted, choosing between their livelihoods and their families. The enforcement of celibacy, of course, relied on secular rulers, like the King of France, who enforced novel requirements of celibacy as law with the coercive force of the state.

The campaign to make clerical celibacy normal and to enforce it also inspired the systematic persecution of men who had homosexual sex. Advocates of celibacy, like the eleventh-century Italian cardinal Peter Damian, regarded homosexual sex as the epitome of lust. To historians of religion and theology, like Harvard's Mark D. Jordan, Damian's understanding of homosexual sex as a 'pure essence of the erotic' represented the invention of our modern notion of 'sodomy' as a sexual crime committed mostly between men.[6] For medieval authors, this notion of sodomy expressed in a concentrated form what was wrong with all sexual pleasure. For writers like Damian, homosexual sex became a scapegoat for larger frustrations arising from religious policy on sexual matters.

Harsh legislation against homosexual sex accompanied legislation enforcing clerical celibacy. For example, the Third Lateran Council ordered churchmen who had sex with other men to be expelled from the clergy and imprisoned. For laypeople who did the same, it commanded that they be excommunicated and shunned from the rest of society (canon 11). Men excommunicated by the Church for this crime could be executed by the state.

As the historian John Boswell argued in the 1980s, early Christian theologians did not agree that the Biblical cities of Sodom and Gomorrah were destroyed for the sin of sex between men. That notion only developed slowly over centuries.[7] There never was a timeless and consistent policy derived from the destruction of Sodom and Gomorrah, because explanations of why these cities were destroyed have varied. Likewise, the meaning of the term 'sodomy' has varied. For most of its existence in Christian history, it has referred to any sexual act undertaken for the express purpose of pleasure that cannot lead to pregnancy. By this definition, the vast majority of the citizens of a modern nation, such as Australia, are 'sodomites'.

The history of the institutionalisation of clerical celibacy and the invention of the modern concept of 'sodomy' highlights how religious policy on sexual matters has changed over time.

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[5] James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago: University of Chicago Press, 1987), 216.

[6] Mark D. Jordan, *The Invention of Sodomy in Christian Theology* (Chicago: University of Chicago Press, 1997), 176.

[7] John Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century* (Chicago: University of Chicago Press, 1980), 92–99.

3. Religious Communities Can Accommodate Internal Differences in Contested Social Ethics

Religious communities have long histories of navigating sincerely held differences in matters of conscience around social ethics. The history of Catholic doctrine and pastoral practice relating to differences in views about reproductive health provides a model for promoting social cohesion, rather than enhancing religious discrimination, when dealing with ethical differences.

Reproductive health (particularly contraception and abortion) has proved one of the most contentious areas of religious ethics and doctrine in the late twentieth and early twenty-first century, for the Catholic Church as in many other religious denominations. The modern Catholic Church's position on birth control remains, broadly, that set out by Pius XI's encyclical on Christian marriage Casti connubii (1930), and Paul VI's encyclical Humanae vitae (1968). Casti connubii prohibits contraception and condemns civil divorce, extramarital sex, eugenic sterilization, voluntary sterilization, and abortion on grounds that any act that deprives sexual intercourse of 'its natural power to generate life' is 'an offence against the law of God and of nature' and a 'a grave sin'. Humanae vitae reasserts Casti connubii's general position. However, these documents constitute just one moment in the Catholic Church's long history of responses to the ethical questions surrounding birth control rather than a settled and unchanging view. The Church has developed pastoral mechanisms that enable the recognition of sincerely held differences in understanding of doctrine, promoting social cohesion rather than religious discrimination within it.

For most of the Catholic Church's history, abortion was not synonymous with murder, because a foetus was not understood to be a complete person in its initial phases of development.[8] Medieval theologians, for example, developed their ideas regarding the ethics of abortion based on theories of the moment at which a foetus becomes a proper human being with a soul. Their thinking on this subject was informed by Aristotle, who held that a process of 'animation' of the foetus begins at conception but is not complete until some later moment before birth. This view allowed medieval theologians to distinguish between abortion of 'pre-animated' and 'animated' foetuses, with abortions of the latter generally attracting much more severe censure. Sixtus V's bull Effraenatam (1588) was the first Church document to define all abortion unequivocally as homicide.[9] However, Effraenatam condemned not abortion as understood today but a broader range of pharmacological methods of birth control, including taking drugs for contraceptive purposes, which it defined as 'magical' and associated, specifically, with witchcraft (maleficium). Gregory XIV (r. 1590-91), the next pope, immediately revoked Effraenatam, reasserting the traditional opinion that the abortion of a pre-animate foetus could not be true homicide because a foetus could not be considered a human being in actuality before ensoulment.

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[8] Stefania Tutino, *Uncertainty in Post-Reformation Catholicism: A History of Probabilism* (Oxford: Oxford University Press, 2018), 326–50.

[9] John Christopolous, *Abortion in Early Modern Italy* (Cambridge, MA: Harvard University Press, 2021), 127–40.

Catholic teaching on the moment of conception and the legitimacy of abortion continued to change throughout the nineteenth and twentieth centuries. It took until 1869 for Pius IX (r. 1846-78) to return to Sixtus V's position on abortion and homicide in the bull Apostolicae sedis moderationi. Opinions on contraception continued to change in the nineteenth century as well. Only in 1880 did the Congregation of the Sacred Penitentiary issue a ruling that appeared to endorse 'calendar methods' (a.k.a. the 'rhythm method') of contraception. In 1934 the American priest John O'Brien, after the publication of Casti connubii, promoted such methods as Catholic method for regulating births[10], and in 1951 it received formal approval from Pope Pius XII.[11] Pius' endorsement of calendar/rhythm method, and a more recent (but currently controversial) endorsement of coitus interruptus by the current Archbishop of Paris[12], are examples of the constant change and development of religious policy on sexual matters.

Many Catholics have, in good faith, held views about reproductive ethics that diverge from the policies endorsed by the Church. In 1974 the Australian Catholic bishops developed a pastoral mechanism for the application of Humanae Vitae that provided for the recognition and inclusion of contrary views on sexual ethics related to reproductive health. As Kevin McGovern recently explained, the bishops' 'Pastoral Letter on the Application of Humanae Vitae' stated that:

> an individual may fully accept the teaching authority of the Pope in general, may be aware of his teaching in this matter, and yet reach a position after honest study and prayer that is at variance with the papal teaching.[13]

The bishops asked priests to accept parishioners who found themselves sincerely at odds with the Church's teaching, not to subject them to religious penalty, and to admit 'such a person to the sacraments'. Pope Francis has extended this pastoral advice to the context of Catholics who have been divorced and remarried in civil ceremonies. McGovern has suggested that a similar policy could coherently and consistently be applied to 'a Catholic who honestly does not accept some element of the Church's teaching about matters related to LGBTIQA+ people'.

The history of the Catholic Church's pastoral dealings with its teachings about reproductive health thus demonstrates that sincere differences within a faith tradition about social ethics can be dealt with in ways that promote social cohesion, rather than increasing religious discrimination.

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[10] Lucia Pozzi, Vaticano e controllo delle nascite: l'evoluzione della famiglia negli Stati Uniti degli anni Trenta. *Storia e Futuro. Rivista di storia e storiografia on line* 2011.

[11] Acta Apostolicae Sedis, 43, 1951, 835–854.

[12] Cameron Doody, 'No longer sin? Archbishop of Paris backs withdrawal method over pill, condoms', *Novena* 29 January 2020; https://novenanews.com/archbishop-of-paris-withdrawal-pill-condoms/

[13] Kevin McGovern, 'LGBTIQA+ Catholics — will the Plenary Council ignore them, or treat them with respect, sensitivity, and compassion?' *ABC Religion and Ethics*, 7 October 2021; https://www.abc.net.au/religion/lgbtiqa+-catholics-and-the-plenary-council/13574386

4. Formalising Social Ethos into Policy Will Become a Mechanism for Religious Persecution

The legislative package provides for the creation of 'publicly available policy' for institutions that would then be employed to inform what we have termed 'doctrinal purity tests'. These tests would then be used to justify and enable persecution of arbitrarily chosen minority groups. In short, the bill is an engine of persecution against religious people with diverse beliefs.

The proposed bill will enable discrimination against co-religionists who identify as members of the same confession but who hold opinions on some issues that diverge from those prioritised in an institution's articulation of its religious ethos. One area of particular concern lies in an institution's framing of its religious ethos regarding sexual matters. The bill would create a situation in which a field of divergent and changing opinions would become codified and presented as a 'timeless' part of a particular statement of belief.

Solidifying individual institutions' interpretations of a confession's religious ethics in this way would unnecessarily divide faith communities. It would also entrench discrimination in areas of religious ethics where discriminatory attitudes are actually diminishing because of changing interpretations of a confessions' religious ethics. Each institution will be able to enforce its interpretation of confessional orthodoxy on prospective employees through what are effectively doctrinal purity tests. Doctrinal purity tests in hiring would lead to processes of exclusion, and indeed persecution, as those who do not ascribe to what are effectively new confessional statements of belief are eliminated from specific institutions.

The medieval and early modern example of inquisitions illustrates the dangers of solidifying what were originally minority interpretations of a confession's diverse religious ethos. Solidifying specific interpretations of a diverse faith in this way leads to the weeding out of those who do not meet novel standards. Furthermore, the enforcement of such standards is always arbitrary, depending more on the enforcer than on the individuals evaluated by them.

Inquisitors were educated men empowered by both religious institutions and by the state to subject people to doctrinal purity tests. Passing such tests determined people's ability to maintain employment and indeed participation in society. Inquisitors asked about an individual's religious beliefs and ethics on a vast range of matters, from theological concepts, such as the Trinity, to sexual behaviours, like cheating on one's spouse. Their overriding goal was deciding whether an individual was a 'true member' of the Church. If they were not, they could be excluded from society, punished, coerced into changing their minds, and maybe even killed.

Among the first targets of medieval inquisitors were 'heretics'. What inquisitors called heretics, we would today mostly call Christians who were not Catholics. However, the religious ethics of the Middle Ages rendered other Christian denominations immoral, and the laws of the time soon declared them illegal. Many of the inquisitors' questions reflected what were, until recently, novel ideas of religious belief and ethics. In other words, they

enforced new beliefs and ethics on the majority of Christians in Western Europe. For example, people were asked if they believed priests could be married or have sexual relationships, reflecting relatively recent norms of clerical celibacy.

Sexual activity could also make a person into a heretic or, at least, reveal them to be one, and inquisitors soon incorporated inquiries about the sex people had with their partners part of their tests. In other words, the type of sex a person had became a criterion of membership in the medieval Latin Church. In one example, the modern term 'to bugger' referring to homosexual sex, arises from the medieval association of gay sex with religious heresy, supposedly originating in 'Bulgaria'. Inquisitors frequently believed that heretics embraced sex for pure pleasure, imagining that they engaged in nocturnal orgies and rituals. They frequently assumed that sexual deviants were part of a vast conspiracy against the Church and against society. The delusional belief that people who had different types of sex represented a threat to Christian civilisation, a threat that had to be contained, developed over time into the concept of the 'witches' sabbath'.

Senior clergy within the Church were not immune from persecution and exclusion via the activities of inquisitors in this sphere. The foundation of the new Roman Inquisition (also known as the Holy Office) in 1542 led to an unprecedented situation in which inquisitor-cardinals presented dossiers against other cardinals in the 1549-50 conclave which they claimed to contain evidence of their heretical opinions.[14] This unprecedented attempt to get the majority to rule some of their colleagues ineligible for election to the papacy on grounds of doctrinal purity was followed by an inquisitorial 'reign of terror' in Italy in the period 1555-59 when the inquisitor-pope Paul IV Carafa imprisoned large numbers of Italian clergy on suspicion of heresy without due process.[15]

Still more notorious than the Holy Office in Italy were the Iberian Inquisitions in Spain and Portugal. These inquisitions were expressly instructed to investigate the sincerity with which recent converts from Judaism and Islam held to the Catholic faith. In practice, this meant they established apparatuses for the anonymous denunciation of Christian converts (conversos) by their neighbours, for widespread use of judicial torture, and for capital punishment. Historian Jean-Pierre Dedieu estimates that the Spanish Inquisition was responsible for the deaths of 2,000 individuals in the period 1481-1520, subjecting a further 15,000 to lesser forms of punishment.[16] In the later sixteenth and seventeenth centuries, the Spanish Inquisition also persecuted Christians from other backgrounds, branding them Alumbrados (literally, the 'Illuminati' of Dan Brown fame), although historians doubt that any such sect existed in self-defined form at this time.

The provision for religious bodies to preferably employ people in line with publicly available policies will enable discrimination and even persecution of people of faith from minority communities.

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[14] Miles Pattenden, *Electing the Pope in Early Modern Italy, 1450-1700* (Oxford: Oxford University Press, 2017), 40-41.

[15] Miles Pattenden, *Pius IV and the Fall of the Carafa: Nepotism and Papal Authority in Counter-Reformation Rome* (Oxford: Oxford University Press, 2013), 22–28.

[16] Jean-Pierre Dedieu, 'Les quatre temps de l'Inquisition', in Bartolomé Bennassar (ed.), *L'Inquisition espagnole, XVe-XIXe siècle* (Paris: Hachette, 1979), 15–42.

Conclusion and Recommendation

As historians of religion, persecution, and social cohesion, we support the protection of people from religious discrimination. However, the Religious Discrimination Bill 2021 legislative package will have the perverse outcome of increasing discrimination against people of faith, particularly women and LGBTQ+ people. As such, this legislative package should not be enacted.