

Religious discrimination laws coming to the boil

Frank Brennan 17 November 2021

It's four years since the Australian Parliament amended the *Marriage Act 1961* to provide that marriage means 'the union of two people to the exclusion of all others'. The legislation followed the plebiscite on same sex marriage. To address the concerns of some religious groups, Prime Minister Malcolm Turnbull set up an expert panel chaired by long time Liberal Party minister Philip Ruddock to report on whether Australian law adequately protected the human right to freedom of religion. Having served on that committee, I made some public observations two years ago about our recommendations:

'The Ruddock committee conceded that in theory there is a major lacuna in the array of anti-discrimination legislation. If you legislate to prohibit discrimination on the basis of gender, sexual orientation, age, race, or disability, why not on the basis of religion? ...We recommended both a tweaked tightening of the exemptions for religious bodies in the *Sex Discrimination Act* and the introduction of a *Religious Discrimination Act*. The delay in release of the report and the shambolic handling of its publication highlighted the political problem with our recommendations. The Turnbull wing of the Liberal Party favoured the tweaked tightening of the *Sex Discrimination Act* provisions but not the introduction of a *Religious Discrimination Act*. The Morrison wing of the Liberal Party were troubled by the former but attracted to the latter.'

The issue is now back on the boil both in Canberra and in Melbourne. The tweaking of exemptions for religious bodies is not just a Commonwealth concern. It is also a state issue. This week the Victorian Parliament is considering the *Equal Opportunity (Religious Exceptions) Amendment Bill 2021*. And the Morrison Government is secretly cobbling together a *Religious Discrimination Bill*.

The tweaking exercise relates to the discretion afforded to religious groups when it comes to the employment of staff in religious institutions. During our public consultations, the Ruddock panel 'heard from a number of religious schools that argued that spiritual education is not just

about teaching content in classes, but also the formation of a community or environment that supports the teachings of their faith. A key theme in these discussions was the need for staff to model the religious and moral convictions of the community and to uphold, or at least not to undermine, the religious ethos of the school. The Panel heard repeatedly that faith is “caught not taught”. I vividly recall one administrator from a very evangelical Pentecostal school telling us that the school gardener could be just as important as the religion teacher imparting to students a love of God and creation and contributing to a religious ethos in the school environment.

The tweaking proposed by the Victorian government has upset the Victorian Catholic Bishops and the leaders of several minority faiths who have published an open letter complaining that ‘the Bill erroneously disconnects religious belief from conduct that is consistent with this belief.’ The November 16 letter from the religious leaders has no signatories from the Uniting Church, and only one Anglican bishop. The signatories speak of parents’ expectation that a ‘school’s environment faithfully represents the religious ethos in every respect including the conduct of all teachers and staff’. The Victorian bill would allow ‘reasonable and proportionate’ religious discrimination in the employment of staff when ‘conformity with the doctrines, beliefs or principles of the religion’ is ‘an inherent requirement of the position’. The religious leaders are left wondering what’s reasonable, what’s proportionate, and what’s inherent. Would the Victorian law allow the evangelical school to give preference employing the evangelical gardener?

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The Victorian government, trying to hose down religious concerns and uncertainty, claims that ‘there are similar laws in Tasmania which have existed for over a decade’. The Tasmanian law does not use the language of reasonableness, proportionality and inherency — all of which will require judicial clarification. The Tasmanian law contains a readily comprehensible provision which clearly covers the evangelical gardener. It allows religious discrimination ‘if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with (its) tenets, beliefs, teachings, principles or practices.’ The Victorian law might also permit the employment of the evangelical gardener in preference to the atheist gardener but we won’t know until a series of test cases are run on questions of reasonableness, inherency and proportionality.

The Victorian religious leaders raise the question: 'If it is understood that it is advantageous for political parties and ministerial offices to hire staff who adhere to their beliefs and values, why is not the same standard being applied to religious organisations as well?'

The Victorian government trying to counter this oft-stated comparison has claimed that the proposed law would not create a double standard by allowing political parties to choose whom they hire while prohibiting religious groups from doing likewise. The Victorian law allows a politician to discriminate on the basis of political belief when employing any person in their electorate office no matter how routine or administrative their tasks might be. As we know from the Operation Watts IBAC Inquiry arising from the expose of Minister Adem Somyurek's activities, even those on the lowest rung in an electorate office can be expected to contribute significantly to the political ethos and activity in the office.

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Meanwhile in Canberra, the Morrison government has continued a four year exercise of consultation behind closed doors about a proposed *Religious Discrimination Bill*. Three years ago, the Morrison Government decided not to pursue the Ruddock recommendation of a clean, lean *Religious Discrimination Act*. Rather, in response to those who had long advocated a *Religious Freedom Act*, Attorney General Christian Porter attempted to formulate what we might call a *Religious Discrimination PLUS Bill* which would have included some bells and whistles you would not expect to find in a standard piece of anti-discrimination legislation. Porter formulated specific provisions to deal with the controversies relating to Archbishop Porteous's run-in with the Anti-Discrimination Commissioner in Tasmania and Israel Folau's run in with Rugby Australia. The Australian Human Rights Commission provided sound advice to government, 'As a matter of principle, the Commission considers that legislating for single instances is not good legislative practice. As a matter of substance, it may lead to unintended and undesirable consequences.'

Now the new Attorney General Michaelia Cash is trying her hand at a bill for rushed presentation to Parliament before the next election. There is no way that the Senate will pass a *Religious Discrimination PLUS Bill* before the next election in March-April 2022. So it will be back to the drawing board after the election.

Given that all human rights are to be treated equally, it is not good enough that religious freedom at a national level be treated simply as a catalogue of exceptions or exemptions in the *Sex Discrimination Act*. That leaves the perception that religious folk are always engaged in special pleading wanting to discriminate adversely against others.

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Religious schools should be able to choose leaders for their staff who are animated by and supportive of the school's religious ethos and beliefs. If political parties, women's groups and Aboriginal organisations can be selective in their choice of leaders and staff who 'get it' and who want to 'evangelise their mission', why shouldn't religious groups? Religious schools, spared state intervention, should be able to choose competent staff so as to better enable the educational institution to be conducted in accordance with its religious tenets, beliefs, teachings, principles or practices.

We should not discriminate against our fellow citizens on the basis of religion or belief in the provision of public services or in our activities in the public square. But neither should we discriminate against our fellow citizens on the basis of their sexuality or gender in the provision of public services or in our activities in the public square.

We are entitled to conduct our institutions consistent with Church teaching but not in a manner which discriminates adversely against those of a different sexual orientation. We should treat them in the same manner as those of a heterosexual orientation. If we were to insist that all heterosexual teachers be celibate or living in a sacramental marriage, we would have a case for discriminating against teachers in a same sex relationship. But given that we turn a blind eye (or perhaps even a compassionate and understanding one) to those heterosexual teachers not living in a sacramental marriage, we should surely do the same for those thought to be living in a same sex relationship.

There is no chance of minority parties in the Senate signing off on anything more than a clean, lean religious discrimination law. There is no point in being too exercised with the present agitation about the bells and whistles that might be added to such a piece of legislation. Those bells and whistles will not materialise. They are proposed simply as part of the government's electoral strategy to distinguish itself from Labor and to deliver on promises to its core constituency. Labor and the Greens will oppose any *Religious Discrimination PLUS Bill*. The Coalition would require three of the five votes on the Senate cross bench consisting of One Nation (2), Centre Alliance (1), Rex Patrick and Jacqui Lambie. I can't see Rex Patrick and Jacqui Lambie coming on board. Lambie is on record that she 'sees no case for [the Coalition's religious discrimination bill](#) as Tasmanians already enjoy religious freedom and don't want their

discrimination laws changed'. Senator Patrick has said there is 'a question about whether or not there is a problem or just a perception of a problem'.

After the 2022 election, we will need to move on from the present polarised debate in Australia. During the Ruddock inquiry, key human rights NGOs supportive of the LGBT cause and organisations such as PIAC and the Human Rights Law Centre said they had 'long advocated for legal protection of the right to freedom of thought, conscience, religion or belief within a framework which guarantees robust human rights protections for all Australians'. It's time to get back to finding common ground. Whoever wins the next election, I do hope that our federal politicians will have the good sense to legislate a neat and clean *Religious Discrimination Act*.



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Main image: Attorney General Michaelia Cash. (Sam Mooy/Getty Images News)