

Where to now with Religious Discrimination?

Frank Brennan 29 November 2021

On Thursday, three Bills were introduced to the House of Representatives: the *Religious Discrimination Bill 2021*, the *Religious Discrimination (Consequential Amendments) Bill 2021*, and the *Human Rights Legislation Amendment Bill 2021*. Collectively, these bills constitute the Morrison Government's response to the Ruddock Religious Freedom Review provided to government in May 2018.

None of the bills deals with the enrolment of children in religious schools which blew up as an issue during the 2018 Wentworth by-election. That awaits the tweaking of the *Sex Discrimination Act* which is not due until the Australian Law Reform Commission reports to government sometime in the next year or two. In his second reading speech introducing the *Religious Discrimination Bill 2021*, Prime Minister Scott Morrison told Parliament: 'Nothing in this bill – I stress: nothing – allows for any form of discrimination against a student on the basis of sexuality or gender identity. You won't find anything of that nature in this bill. Such discrimination has no place in our education system.' 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.

Those few religious zealots who would want to retain the power to exclude a child on the basis of sexuality or gender identity from a school in receipt of government funding need to accept that their world view can no longer be justified in Australia as an appropriate exercise of religious freedom. In 1983, the High Court of Australia delivered a definitive judgment on the limits of religious freedom in which Justices Mason and Brennan said: '[T]he area of legal immunity marked out by the concept of religion cannot extend to all conduct in which a person may engage in giving effect to his faith in the supernatural. The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general

laws to preserve and protect society are not defeated by a plea of religious obligation to breach them. Religious conviction is not a solvent of legal obligation.'

The bills introduced last week do deal with the issue of the employment of teachers in religious schools. A religious educational institution will be able to publish and implement an employment policy giving preference, in good faith, to teachers and other staff who hold or engage in the school's particular religious belief or activity. Mr Morrison told Parliament: 'The bill recognises that religious schools must be free to uphold the tenets of their faith and the ethos that makes their school a community. It is recognition of the sacrifices parents make to educate their children in accordance with their values and beliefs and the choices they have made for their children's education. As many schools have said throughout this process, "faith is caught not taught".' It's worth recalling that the UN Declaration of Human Rights states: 'Parents have a prior right to choose the kind of education that shall be given to their children.' The bill protects the fundamental right for religious schools to hire religious staff to maintain their religious ethos in accordance with a publicly available policy. This part of the Morrison government's proposal would allow the Commonwealth to override a state law which does not provide this religious freedom.

A showdown is pending with Victoria which is legislating to allow a very limited freedom to show preference for teachers subscribing to the school's religious ethos only if conformity with the doctrines, beliefs or principles of the school's religion is 'an inherent requirement of the position'. The discrimination must be 'reasonable and proportionate in the circumstances'. The Commonwealth has put Victoria on notice that the Victorian law will be a 'prescribed law' to be overridden by the new Commonwealth law.

When introducing its new law, the Andrews government falsely claimed that 'there are similar laws in Tasmania which have existed for over a decade'. The Tasmanian law is very different. It not only permits discrimination for a 'genuine occupational qualification' but also 'in order to enable, or better enable, the educational institution to be conducted in accordance' with its religious 'tenets, beliefs, teachings, principles or practices'. The Commonwealth has no intention of declaring the Tasmanian law a 'prescribed law'. If the Andrews government were wanting to avoid a showdown with Canberra they could legislate as they promised, along the same lines as the Tasmanian law.

'A showdown is pending with Victoria which is legislating to allow a very limited freedom to show preference for teachers subscribing to the school's religious ethos.'

The Andrews government's fudging of the shortfall in its new law became apparent when government member John Kennedy, a long time Catholic school principal, told the Victorian Parliament after having received extensive briefings on the law:

'I think we just need to understand that the legislation is in one sense bigger than what could be seen by some as a circumscribed "inherent requirement", because — in my view, anyway, and my experience — such an inherent requirement incorporates a variety of commodities, including incidental requirements and a critical mass as applied to selecting, promoting and terminating teaching and non-teaching staff. So, for example, I think it could be true that this does not apply to the gardener or the office staff — but it may very well apply to the office staff. It may be argued that the office staff have quite a connection with the local established church and so on and so forth.

'I believe, in the material I received from the framers and so on of the bill, that it makes clear that in fact the provision allowing a religious individual to discriminate on the grounds of a broad range of protected attributes is still there. I think it is important to recognise that that critical mass can mean that whilst the first and foremost thing should be to have a qualified teacher of physics, it does not follow that there has to be a Catholic physics teacher, for example. But it might mean that there should be a critical mass of teachers, for example, who are adherents of the Catholic faith, and obviously so. So I do not see that the legislation goes against that.'

If the Victorian law is unamended in the upper house, presumably John Kennedy and others in the Andrews government could have no objection to the new Commonwealth law making it abundantly clear that Kennedy's genuine and considered understanding of the religious liberty is accorded to the administrators of religious schools in Victoria.

'We can still accord dignity and equality to all while permitting religious schools to adopt hiring policies different from state schools so as to maintain the distinctive ethos of religious schools.'

Archbishop Peter Comensoli, the Archbishop of Melbourne, has had the carriage of this matter for the Australian Catholic Bishops. Backing the Commonwealth provisions that would protect the ability of religious organisations to hire people who share their faith and values, he has

said: 'We want the freedom to hire people for the sake of our mission, just like other non-faith-based organisations. The value of religious organisations to people of faith and wider society is in their religious mission and their ability to embody and pursue that religious mission. Operating religious organisations, such as religious schools, according to their mission includes recognising their ability to hire staff who want to teach and model the vision of the school.' We can still accord dignity and equality to all while permitting religious schools to adopt hiring policies different from state schools so as to maintain the distinctive ethos of religious schools.

There is no way that the Morrison bills will pass through the Senate until they have first been subjected to detailed scrutiny by a parliamentary committee. I still can't see that happening before the 2022 federal election. The only way it could occur before the election would be if the bills were to enjoy support from the Labor Opposition.

I am left wondering why we need to wait for the law reform commission to report on kids in school. Why not deal with students, teachers, and staff at the same time?

Morrison was right when he told the Parliament on Thursday: '[T]he faith of any religion, as well as no religion, shouldn't override the rights of others in a free society. That means we rightly have a secular democracy and government, but that does not afford secular humanism the status of a state religion.' Getting the balance right, we religious citizens need to recall the High Court's injunction that 'religious conviction is not a solvent of legal obligation.'



Fr Frank Brennan SJ is the Rector of Newman College, Melbourne, the Distinguished Fellow of the P M Glynn Institute, Australian Catholic University, and the former CEO of Catholic Social Services Australia (CSSA). He is a peritus at the Fifth Plenary Council of the Australian Catholic Church.