1 Preliminary
I am a Senior Lecture at the University of Western Australia in the Faculty of Arts, Business, Law and Education, an Honorary Research Fellow at the Centre for Muslim States and Societies and a Writing Fellow at Brigham Young University International Centre for Law and Religion Studies. My research focuses on the relationship between the State and religion in Australia. A full list of my publications can be accessed on the University of Western Australia’s Research Repository.


- the historical relationship between the state and religion in Australia\(^1\);
- the 2017 same-sex marriage debate and postal survey\(^2\);
- the historical and contemporary treatment of minority religions in Australia\(^3\);
- the impact on state-religion relations in Australia of an absence of a Bill or Charter of Rights in relation to freedom of religion\(^4\); and
- the issue of freedom of religion in Australia more broadly.

In February 2018 I made a submission to the Religious Freedom Review.\(^5\) In that submission I recommended that exemptions for religious organisations and schools in anti-discrimination laws be amended to include a transparency requirement. My views in relation to this issue have also been published on the ABC Religion and Ethics webpage in an opinion piece titled

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\(^2\) Ibid 146 – 160.
\(^3\) Ibid 183 – 225.
\(^4\) Ibid 100 – 130.
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Transparency is the way forward for religious exemptions to anti-discrimination laws⁶ and in the Alternative Law Journal in a paper titled ‘Religions should be required to be transparent in their use of exemptions in anti-discrimination laws’⁷

I also made submission to the two Senate inquiries into discrimination by religious schools on the basis of sexuality.⁸

My preliminary views in relation to the Religious Discrimination Bill exposure draft were published by ABC Religion & Ethics in an opinion piece entitled ‘The Religious Discrimination Bill isn’t (just) about Christians’⁹ (see Appendix) and a piece on The Conversation co-authored with Professor Robyn Carol titled ‘How might an apology feature in the new religious freedom bill?’¹⁰

I have also previously advocated for a Religious Discrimination Act in a piece published by The Conversation titled ‘Why Australia needs a Religious Discrimination Act.’¹¹ I continue to believe that a religious Discrimination Act is not only a good idea, but necessary to protect Australians from discrimination and for Australia to fulfil its commitments to non-discrimination under international law.

2 Introduction

Article 26 of the International Convention on Civil and Political Rights states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as

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⁸ See Renae Barker, Submission No 1 to Senate Standing Committees on Legal and Constitutional Affairs, Inquiry into Legislative instruments that allow faith-based educational institutions to discriminate against students, teachers and staff (14 November 2018); Renae Barker, Submission No 681 to Senate Standing Committee on Legal and Constitutional Affairs Inquiry into Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (21 January 2019).
race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

At the Federal level the Australian law already prohibits discrimination on the basis of many of the characteristics listed in Article 26. Discrimination on the basis of race, colour and national origin is prohibited by the Racial Discrimination Act 1975 (Cth), the oldest of Australia’s anti-discrimination laws. Discrimination on the basis of sex is prohibited by the Sex Discrimination Act 1984 (Cth). Discrimination on the basis of ‘other status’ in the form of age and disability and prohibited by the Age Discrimination Act 2014 (Cth) and Disability Discrimination Act 1992 (Cth) respectively. The absence of a federal prohibition on the discrimination on the basis of a person’s religious belief or activity (or lack thereof) is an omission which must be remedied.12

The Religious Freedom Review highlighted the inadequate and patchwork nature of Australia’s protection of freedom of religion.13 While the Panel did not identify an ‘urgent need for … change’ they described the exiting patchwork of laws protecting freedom of religion in Australia as ‘piecemeal, inconsistent and overly static.’14

The current Religious Discrimination Bill has much to commend it; however, there are a number of provisions that need to be amended or removed.

A Religious Discrimination Act is not a Religious Freedom Act nor a Bill or Charter of Rights. It cannot and should not be the sole repository of the protection of the human right of the freedom of religion. The Religious Freedom Review did not recommend the creation of a Religious Freedom Act.15 They were concerned that ‘[s]pecifically protecting freedom of religion would be out of step with the treatment of other rights.’16 Despite being called a Religious Discrimination Bill the current exposure draft appears to be attempting to be both a law prohibiting discrimination and a repository for freedom of religion. While I agree with the Panel that the current protections for freedom of religion are piecemeal and inconsistent, I do not support the creation of a Freedom of Religion Act either specifically or via the incorporation of freedom of religion elements into a Religious Discrimination Act. As professor Nicholas Aroney has recently so aptly pointed ‘[r]eligious freedom and religious discrimination are not exactly the same thing, but they are closely related.’17 The inclusion of specific freedom of religion provisions in the Religious Discrimination Bill is out of step with Australia’s current approach to Human Rights generally and therefore sets religion up as somehow different from other fundamental human rights. If there is a desire to more directly protect human rights in Australia this would be better done through a holistic approach which incorporates protections for all fundamental human rights. The role of the Religious Discrimination Act is

14 Ibid 46.
15 Ibid 46.
16 Ibid; In 1998 the Human Rights and Equal Opportunities Commission recommended the creation of a Freedom of religion Act, see Human Rights and Equal Opportunities Commission, Article 18 Freedom of Religion and Belief (Commonwealth of Australia, 1998).
not to set religion apart as special or different from other human rights. Its role is to bring the protection for religious adherents (and those of no faith) from discrimination up to the same level as that afforded to other characteristics listed in Article 26 of the ICCPR. The aim must be to ‘level the playing field’ not to lift religion up above other characteristics.

The overall aim of any new discrimination law must be the protection of the vulnerable from discrimination. As such, it is an essential plank to the prohibition of discrimination, which has been missing from the Australian anti-discrimination framework. To use a much over used analogy, it should be a shield for the weak not a sword for the strong. The test at the end of the day of its success is that there should be less discrimination in Australia – not more. If in prohibiting discrimination on the basis of religious belief and activity we end up with more discrimination we have failed in the task.

As I have written elsewhere:

“[i]t 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.”

In what follows, I have provided my analysis of the various provisions of the Religious Discrimination Bill. While the focus of this submission must necessarily be on the specific provisions, I urge you not to lose sight of the wood.


3.1 Section 5: Definitions

Section 5 defines ‘Religious belief or activity’ as:

(a) holding a religious belief; or

(b) engaging in lawful religious activity; or

(c) not holding a religious belief; or

(d) not engaging in, or refusing to engage in, lawful religious activity.

Defining religious belief and activity is notoriously difficult. It has become almost standard for Judges to make a statement to this effect when ever they are required to determine whether a particular set of beliefs and practices is religious. As Latham CJ explained in Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth, it would be difficult, if

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19 See for example Jacques v Hilton, 569 F Supp 730, 731 (Sarokin J) (D NJ, 1983); R v Registrar General of Births, Deaths and Marriages [2014] 1 All ER 737, 747; Remmers v Brewer, 361 F Supp 537, 540 (SD Iowa, 1973); Alvarado v City of San Jose, 94 F 3d 1223, 1227 (9th Cir, 1996).
20 (1943) 67 CLR 116.
not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed in the world.\textsuperscript{21}

By not defining religious belief or activity, except by reference to itself, the Religious Discrimination Bill effectively leaves the issue to the common law. As the law currently stands the Australian definition of religion is found in \textit{The Church of the New Faith v Commissioner of Pay-roll Tax (Vic)}.\textsuperscript{22} The three judgments of the High Court, in this case, reached three different conclusions as to the definition of religion. Murphy J defined religion as:

any body which claims to be religious, whose beliefs or practices are a revival of, or resemble earlier cults, is religious. Any body which claims to be religious and to believe in a supernatural Being or Beings, whether physical and visible … or a physical invisible God or spirit, or an abstract God or entity, is religious … Any body which claims to be religious, and offers a way to find meaning and purpose in life, is religious.\textsuperscript{23}

Mason ACJ and Brennan J distilled religion down to two key concepts:

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.\textsuperscript{24}

Wilson and Deane JJ identified five indicia of religion:

1. the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses.

2. the ideas relate to man’s nature and place in the universe and his relation to things supernatural.

3. the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance.

4. however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups.

5. the adherents themselves see the collection of ideas and/or practices as constituting a religion.\textsuperscript{25}

\textsuperscript{21} \textit{Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth} (1943) 67 CLR 116, 123.

\textsuperscript{22} (1983) 154 CLR 120 (‘\textit{The Scientology Case}’).

\textsuperscript{23} \textit{The Scientology Case} (n 22) 151.

\textsuperscript{24} \textit{The Scientology Case} (n 22) 136 (Mason ACJ and Brennan J).

\textsuperscript{25} \textit{The Scientology Case} (n 22) 174.
Since The Church of the New Faith v Commissioner of Pay-roll Tax (Vic) was decided in 1984 overseas courts have refined the definition of religion further. For example the Supreme Court of Canada in Syndicate Northcrest v Anselem, held that:

Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.  

While in the UK case of R v Registrar General of Births, Deaths and Marriages, Lord Toulson determined that religion is:

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.

Given the time since the High Court’s 1984 pronouncement on the definition of religion and international developments since it is likely Australian courts will need to revisit the meaning of ‘religious belief or activity.’ While I am comfortable with the parliament leaving the definition of religion to the courts the potential for uncertainty in the short term must be acknowledged.

3.2 Section 8(3)

The Israel Folau case has highlighted the use of ‘employer conduct rules’ to control the behaviour of employees outside office hours. Such conduct rules are not new and employers may have legitimate interests in imposing conduct requirements on their employees both while at work and in their private lives. The Folau case has however highlighted the impact such conduct rules may have on religious activity. It is, however, unnecessary to include a separate provision in the Bill dealing specifically with conduct rules.

The bill already covers indirect discrimination on the basis of religious belief or activity in section 8(1). 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. Further section 8(2)(d) already contemplates indirect discrimination claims relating to ‘employer conduct rules’ being brought under section 8(1). Section 8(3) is therefore unnecessary and as such should be removed from the Bill.

In addition to being unnecessary section 8(3) has inherent flaws. Most significantly the use of ‘unjustifiable financial hardship’ is a crass way of measuring the needs of an employer to impose an ‘employee conduct rule’ which limits the religious activity of its employees outside of working hours.

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27 R v Registrar General of Births, Deaths and Marriages [2014] 1 All ER 737, 752.
This measure equates the human rights of the employee with money and suggests employers can ‘buy’ the human rights of their employees. As I have outlined above I am of the view that section 8(3) is unnecessary. However in the event that the section is retained it should be amended. Instead, in order to escape the operation of section 8(3) an employer should demonstrate a significant link between the employee’s role and the reputation of the employer and that engaging in the prohibited religious activity is likely to have a significant negative impact on the employer’s brand.

3.5 Section 10(1)
The positive framing of section 10 in terms of the Bills application to religious bodies engaging in conduct in accordance with their religious beliefs is welcome. Previous discrimination law have used the language of exemption to exclude certain conduct from the remit of the relevant act. This is unfortunate s it has created an impression that certain groups, including religious organisations, are ‘getting away with’ discrimination. The reality is that rather than ‘getting away with’ discrimination these groups are not in fact discriminating in the legal sense.

The word discrimination covers a wide range of decisions and behaviours – not all of which have negative connotations. For example, in the employment context, employers discriminate between employees with different levels of skill in hiring and promotion decisions. Skills is a relevant consideration for such decisions. However, the word discrimination is usually used as short hand for ‘discrimination on the basis of an irrelevant characteristic.’ Discrimination on the basis of a relevant characteristic is therefore not normally considered to be discrimination. Determining which characteristics are relevant and irrelevant is the role of law.

Different groups within society take different views of what is or is not a relevant characteristic. For example, some religions consider sex to be a relevant characteristic for the purpose of selecting religious leaders, others take a contrary view. When a religion makes a decision on hiring a leader on the basis of gender they are not ‘discriminating’ according to their understanding of the term as the characteristic is relevant. Similarly religious belief and activity is a relevant characteristic for a religious organisation hiring a religious leader. It would be farcical if the Roman Catholic Church was required by law to hire an atheist as a priest or for a mosque to hire a Buddhist as an Imam.

The wording of section 10(1) recognises that when making decisions based on religious belief or doctrine religious organisations are not discriminating on the basis of an irrelevant characteristic according to their understanding of their faith. They may be discriminating in the technical sense but they are doing so on the basis of, what they consider to be, a relevant characteristic.

Society may of course take a different view to religious organisations as to what constitutes a relevant characteristic. Section 10 does not override other discrimination law on this point. Race is, for example, still an irrelevant characteristic and discriminating on that basis will still be unlawful under the Racial Discrimination Act 1975 (Cth). Given that section 10 only applies to discrimination (of either kind) on the basis of religion it makes sense to leave the issue of when religion is and is not what is and is not a relevant characteristic to religions themselves.
The approach taken by this section could be adopted in other discrimination laws. For example, section 8(2) of the *Racial Discrimination Act 1975* (Cth) could be re-worded as:

A charity does not discriminate against a person under this Act by engaging, in good faith, in conduct in accordance with the governing rules of the charity where the governing rules confers a benefit for charitable purposes or enables such benefit to be conferred on persons of a particular race, colour or national or ethnic origin.

Phrasing ‘exemptions’ as not being discrimination in the legal sense is a helpful approach that could be adopted more widely.

### 3.6 Section 10(2)

Section 10(2) defines ‘religious body’ widely. This is in contrast to some state based anti-discrimination laws. For example, the New South Wales *Anti-Discrimination Act 1977* (NSW) limits the exemptions in that Act to ‘a body established to propagate’ the religion. This is arguably too narrow as that phrase could be interpreted such as to limit its application so the proselytising arm of a given religion. Religious body’s do much more than just propagate their religion. Those which provide charity to Australia’s most vulnerable may well do so without any intention of proselytising to or converting those they serve. However, the definition of ‘religious body’ proposed in the *Religious Discrimination Bill* exposure draft it too wide. It is also inconsistent with the approach taken in other anti-discrimination laws and therefore imports another example of inconsistency across federal and state based anti-discrimination laws.

In my submission to the Religious Freedom Review I recommended the use of the phrase ‘body established for a religious purpose’. I defined it as:

**Body established for a religious purpose** includes a body established to propagate, carry on or otherwise conduct the religious and related activities including but not limited to social outreach and welfare, the holding and management of property, the raising of funds including through commercial operations and the conduct and management of religious worship of any religion, including any sect, denomination or sub-group with in a religion.

I further recommended that the phrase ‘act or practice which is consistent with the doctrines, tenants or beliefs of the religion’ should be a subjective test such that secular judges are not required in embark upon a theological enquiry to ascertain the theological veracity of a particular religious belief or practice. I recommended the following definition:

**Act or practice which is consistent with the doctrines, tenants or beliefs of the religion** are those doctrines, tenants or beliefs which the particular body established for a religious purpose concerned holds.

This definition does not include religious schools. I would recommend retaining a separate definition for religious educational institutions.
3.7 Section 41

The ability to make statements of belief is an important component of freedom of religion. In international law the right to have or hold a religious belief is protected absolutely. This is known as the *forum internum*. States cannot prohibit a person from holding a religious belief. By contrast religious activity based on that belief can be regulated by the state. As outlined above article 18(3) of the International convention on Civil and Political rights provides guidance on the extent to which states can do so.

Statements of belief can be seen as an external exercise of the *forum internum*. As an expression of the *forum internum* they must be protected absolutely. However, 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 regarded as being in accordance with the doctrines, tenets, beliefs or teachings of Christianity.
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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 Christian 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.

I note that section 41(2) attempts to place some limits on the operation of section 41(1) by excluding from the operation of section 41(1) speech that “would or is likely to, harass, vilify or incite hatred or violence against another person or group of persons.” However, words such as ‘vilify’ and ‘harass’ are imprecise and already the subject of much controversy. Their use here does nothing to clarify the operation of section 41(1).

Further section 41 would appear to have been included in the Bill in response to the case of Archbishop Porteous. While a complaint was made to the Tasmanian Equal Opportunity Commission, that complaint was ultimately withdrawn. The statement in the explanatory notes that state that section 17(1) of the Tasmanian Anti-Discrimination Act 1998 (Tas) has had a ‘demonstrated ability to affect freedom of religious expression’ is doubtful. It is not clear that that statements made by Archbishop Porteous in the booklet ‘Don’t Mess with Marriage’ in anyway breached section 7(1). A complaint was made, and that complaint was dropped. Section 41 of the bill will not prevent another complaint being made. At most it may provide an additional defence in the vent of a complaint. However, we do not know what the outcome of the claim against Archbishop Porteous would have been had it proceeded to court.

4. Protecting the Vulnerable

As I outlined above and in my article published on ABC Religion and Ethics it is clear that many of the most difficult clauses in the bill have been motivated by specific incidents involving specific powerful individuals. Much of the early commentary on the Bill has also


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focused on these incidents and the extent to which the Bill ‘fixes’ the perceived problems associated with those incidents. This is unfortunate as it distracts from the important issue of religious discrimination as a lived reality for many people from minority faiths.

As I have 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.30

This, however does not mean we do not need a Religious Discrimination Act. I will not repeat the arguments made in my piece for ABC Religion and Ethics except to state that now, while we do not see mass discrimination, hostility and persecution, is the time to legislate to prohibit it. As I said in my piece on ABC Religion and Ethics:

“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.”

A copy of my article on ABC Religion and Ethics can be found in the appendix to this submission.

5. Timing of the Bills and impact on other anti-Discrimination Acts

In its response to the Religious Freedom Review the government indicated that it would refer recommendations 1, 5, 6, 7 and 8 to the Australian Law Reform Commission (ALRC). These recommendations relate to the Sex Discrimination Act 1984 (Cth) and other anti-discrimination laws. In April 2019 the Attorney-General issued Terms of Reference requesting the ALRC to conduct an inquiry into the Framework of Religious Exemptions in Anti-discrimination Legislation. Following an amendment to the Terms of Reference on 29 August 2019 the ALRC is now not due to report until December 2020.

While the government did not commit, specifically, to refer recommendation 15 of the Religious Freedom Review to the ALRC, the findings of the ALRC in relation to other discrimination laws is likely to be directly relevant to the proposed Religious Discrimination Bill. Much of the concern related to the Bill is its impact on the LGBTI+ community. However, it is not until we see the recommendations of the ALRC and a subsequent draft bill based on those recommendations that we will be able to fully appreciate the effect of the full suite of anti-discrimination laws on the LGBTI+ community as well as people of faith.

While I welcome a religious Discrimination Act I urge the government not to rush and to take time to consult widely. This includes taking into account the recommendations of the ALRC on related laws.

8. Final Comments

I welcome the government’s initiative in drafting a religious Discrimination Bill in response to the Religious Freedom Reviews recommendations. The inclusion of a Religious Discrimination Act in Australia suite of Federal anti-discrimination laws is long overdue. It is also a much needed addition to Australia’ patchwork protection of human rights generally and freedom of religion specifically.

While I welcome the Bill generally I urge the government to reconsider the need for section 8(3). This provision is unnecessary. I also urge the government to reconsider the wording and scope of section 10(2) and section 41.

Finally, in progressing this Bill I urge all parties to not lose sight of the wood for the trees. Not to lose sight of the reason for discrimination laws of all types. Discrimination laws are needed to protect the vulnerable from discrimination on the basis of what we as society have deemed to be irrelevant characteristics. Australia is home to a multitude of religious minorities. It is these vulnerable minorities that must be the focus of our debate and our reason for these laws. While powerful men such as Israel Falou and Archbishop Poreous may or may not be assisted by these laws their ‘protection’ is not the point. At the end of the day the measure of the success of these laws much be two fold: 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.
The Religious Discrimination Bill isn’t (just) about Christians

Renae Barker

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.

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