Consultation regarding Religious Freedom Bills

Introduction

1. I refer to the current public consultation relating to the government’s proposed “Religious Freedom Bills” – in particular, the exposure draft of the Religious Discrimination Bill 2019 – and thank you for the opportunity to make this submission.

2. I am an academic philosopher with a special interest in philosophy and public policy, including issues relating to secular government, freedom of religion, and other traditional civil and political liberties such as freedom of speech. I have published widely on these topics. In particular, my published books include Freedom of Religion and the Secular State (Wiley-Blackwell, 2012). In short, I am an academic expert on the topic of secular government and religious freedom. I am currently Conjoint Senior Lecturer in Philosophy at the University of Newcastle, though I do not, of course, purport to represent the views of the university.

3. Although I have long retired from this area of employment, I was for many years a prominent industrial advocate working in the federal jurisdiction. For over four years, from 1994 to 1998, I held the position of Executive Director of the Australian Higher Education Industrial Association, for which I have an entry in Who’s Who in Australia. I also worked for a period as a workplace relations lawyer with Phillips Fox Lawyers (as it then was) in Melbourne, with the title “consultant”. I keep
abreast of developments in workplace relations and employment law, and in anti-discrimination law, and I retain considerable expertise in these fields.

4. My main reaction to the exposure draft of the Religious Discrimination Bill, and the associated documents, is that this is, in its totality, a very complex legislative package. It reflects a large number of policy and drafting decisions that have had little public airing to date. If enacted, the proposed legislation will interact with existing Commonwealth and State legislation in ways that are not entirely predictable. For this reason, the current timeframe, requiring public responses to the exposure draft by 2 October 2019, is very short for what is required, and I respectfully suggest that it be extended for a significant period to allow for adequate consideration and public discussion.

Religious freedom

5. The proposed legislative package is headed “Religious Freedom Bills”, and it has been said by the government to enhance religious freedom in Australia. However, little of the package relates to religious freedom in the strict sense. That is, the proposed legislation does not (generally) introduce new restrictions on the ability of governments to impose their preferred religious doctrines and practices, or to engage in religious persecutions. To avoid confusion, the term “religious freedom” or “freedom of religion” should be reserved for this area of liberty from the exercise of overweening government power. Australians currently enjoy surprisingly little protection of their religious freedom in this sense, but nor is there any crisis of religious freedom.

6. Although section 116 of the Australian Constitution confers some protection of religious freedom, it is limited and relatively weak when compared to that enjoyed in, for example, the United States of America. In particular, s.116 applies only to actions at the Commonwealth level of government. Furthermore, s.116’s prohibition of legislation “for establishing any religion” has been interpreted narrowly by the High Court (far more narrowly than the similarly-worded Establishment Clause in the US Bill of Rights, as interpreted by the US Supreme Court).

7. I support the idea of an inquiry to identify what might be done to strengthen religious freedom in Australia. However, the proposed package does little to expand or reinforce Australians’ protection from action by governments to impose religious doctrines and practices, or to engage in religious persecutions. One arguable exception is section 41 of the draft Bill, which, among other things, limits the ability of State governments to restrict religious speech or speech that criticises religion. Overall, however, the package consists of a new set of provisions relating to something conceptually different, i.e. discrimination in employment, and in various other specified areas, on the ground of religion. Its centrepiece is an anti-discrimination statute, not a protection against the power of the state.

The legislative package

8. The main effect of the package will be to provide for a set of protections against religious discrimination where equivalent protections do not already exist under State law. To the best of my understanding, no fully equivalent protections currently exist under the laws of New South Wales or South Australia. Taken as a whole, then, the package fills a gap in providing protections that have no full equivalent under the laws of two states. In itself, this seems like a reasonable initiative. However, the draft legislation is complex, and it would, if enacted, interact in complex ways with existing laws at Commonwealth and State levels. It is clearly intended to override some State legislation, relying on section 109 of the Australian Constitution, which is unusual, if not unprecedented, for Commonwealth anti-discrimination statutes. This may be justified, but it merits public discussion.

9. Section 10 of the exposure draft is a core innovation, and it will undoubtedly be controversial. This section confers on non-commercial religious bodies a sweeping immunity from other provisions of the Bill. The immunity conferred by s.10 appears to be considerably broader than the defence against claims of unlawful termination of employment set out in s.772(2)(a) and s.772(2)(b) of the Fair Work Act 2009 (Cth). That being so, public discussion is needed to settle whether a provision along the lines of s.772(2)(a) and s.772(2)(b) might be adequate. Such a provision could extend beyond termination of employment to specify certain other actions by a non-commercial religious body, such as a decision not to recruit or promote an individual.

10. For example, the Roman Catholic Church could undoubtedly establish that being male is an inherent requirement of the job of being a Catholic priest, in keeping with the church’s theological doctrines. In other cases, a non-commercial religious
body could argue that a discriminatory recruitment decision was conducted in good faith to avoid injury to the religious susceptibilities of adherents of the relevant religion. I question whether even this latter defence is needed in addition to the “inherent requirements” defence. For example, it could probably be established that an individual employed specifically to teach Catholic morality to school students must not openly flout Catholic morality in his or her own life. I.e. an appearance of personal conformity to Catholic morality is arguably an inherent requirement of such a job. That said, I acknowledge that the “religious susceptibilities” defence already exists in s.772 of the Fair Work Act. It is not, in itself, an innovation.

11. Finally, in respect of s.10, it is important and commendable that this does not confer any licence to discriminate upon primarily commercial bodies. It is crucial to hold the line that such bodies ought not be permitted, in the name of religious freedom, to discriminate on grounds such as sex or sexuality.

12. Much of the current drafting is overly complex in ways that will produce, rather than reduce, uncertainty of interpretation and complexity of litigation. For example, the current s.8 is lengthy and complex, and its method of dealing with terminations of employment for expressions of religious belief currently seems very indirect and complicated.

13. One worrying provision in s.8 is the reference to “unjustifiable financial hardship”, in s.8(3). An employer should not be able to complicate and prolong litigation by raising an issue of unjustifiable financial hardship arising from an employee’s lawful statement of religious or anti-religious belief, made outside the workplace. This is a recipe for sponsors, organised lobby groups, and others to apply economic coercion to employers to pressure them to fire employees for making unpopular religious, or anti-religious, statements. If anything, the government should be looking for ways of protecting employees from the effects of such kinds of coercion aimed at their employers. This method of targeting individuals’ jobs and careers has become a significant social mischief: it currently extends far beyond economic coercion in reaction to unpopular religious views.

Definitions

14. Many of the terms used in the exposure draft are undefined, or otherwise left unclear or open to criticism. There appears, in particular, to be no definition of the central terms “religion” and “religious”. Here, perhaps, it would help to refer to some of the concepts discussed in Church of the New Faith v. Commissioner of Pay-Roll Tax (Vic) (1983) 154 CLR 120.

15. I am concerned about the definition of statement of belief. First, the definition requires that such a statement be made in good faith, but the courts have shown in other areas of the law that “good faith” is now likely to require something more than subjective sincerity, such as some kind of balance, moderation, or due diligence about a statement’s truth and its possible consequences. All that should be required at this point of the legislation, however, is subjective sincerity (which can be presumed until rebutted). A sincere statement of religious (or anti-religious) belief does not become something else merely because it is immoderate, thoughtless, or reckless.

16. Furthermore, there should be no requirement, as per the proposed definition, that a (religious) statement of belief be such as “may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion”. Although something like this might be a sufficient condition for a statement to count as a statement of religious belief, it should not be a necessary condition. If a statement is inherently religious (as with statements about supernatural beings, past miracles, prophesied supernatural events, and what sorts of conduct are sinful or count against salvation in the afterlife), and if it is expressed sincerely, that should be sufficient for it to count as a (religious) statement of belief. A court should not enter into any further inquiry as to whether such a statement can or cannot be reasonably regarded as falling within a religion’s teachings. That amounts to an inquiry into religious orthodoxy, something that courts in other jurisdictions have rightly avoided.

17. Part (b) of the definition of statement of belief, relating to non-religious statements of belief, is open to numerous doubts about its meaning, and I am not at all clear what statements would or would not fall within this definition. E.g., it is required that the statement be “about religion”. It is not clear whether this would include (as it should) a sincere, even if immoderate, statement that is critical of a specific religion, such as Christianity, or of a specific religious doctrine, such as the Christian doctrine of sacrificial atonement or the Islamic doctrine that Muhammad was Allah’s final and definitive prophet.
18. I am also concerned about the current references – in sections 8 and 41 – to statements of religious belief not receiving various protections if they are “malicious” or if they “harass, vilify, or incite hatred or violence”. On one hand, individuals should not be able to escape disciplinary action by employers, or actions under anti-discrimination law, for defamatory comments, invasions of others’ privacy such as revenge porn, severe or repeated personal abuse, campaigns of dehumanising and possibly genocidal propaganda, sexually harassing conduct, and so on, which the individuals concerned might then seek to excuse as expressions of religious belief. Religion should not provide a free pass for these kinds of high-impact and harmful speech. On the other hand, the relevant terms used for this purpose in the exposure draft, particularly the word “vilify”, are not defined, and this will inevitably create problems for State and federal courts attempting to interpret the legislation.

19. Unfortunately, some religions sincerely regard other religions as not merely false but actually demonic. Some religions see themselves as engaged in a cosmic struggle of good versus evil against other religions and/or against unbelief. Unfortunately again, some religions sincerely regard essentially harmless activities, such as consensual gay or lesbian sex, as sinful and conducive to eternal damnation. While all these doctrines are socially unfortunate, their expression has not traditionally been unlawful – and this toleration of harsh doctrines is favoured by policy considerations. (Briefly, religions with harsh doctrines are more likely to “soften” over time if they are tolerated than if their adherents experience what they interpret as persecution.)

20. Without a definition of the word “vilify”, each of the doctrines mentioned in paragraph 19 above could be described as, in a sense, vilifying some demographic group. Thus, the word “vilify” could be given a broader meaning than appears to be the government’s purpose. More thought is needed as to exactly what statements of belief are protected, and how the limits of the protection can best be expressed and defined. The courts are entitled to the clearest possible guidance when they are called upon to interpret and apply the legislation.

21. One possible approach would be to abandon much of the current wording and focus on public speech that either (a) explicitly calls for violence against a demographic group or (b) could reasonably be understood as preparing the ground for violence against a demographic group by employing seriously dehumanising language (examples would include referring to members of the group as rats, cockroaches, or vermin). This would not deal with the full range of high-impact speech mentioned in paragraph 19, but most examples of objectionable speech in these categories could not plausibly be justified as statements of belief within the meaning of the draft Bill.

22. Given all these complexities and difficulties, definitional and otherwise, I respectfully submit that it is not possible to assess the draft legislation adequately in the short timeframe provided, i.e. by 2 October 2019. I suggest that the period for public consultation be extended significantly. It appears that there is no great urgency about putting such legislation in place at the Commonwealth level. If there is any urgency arising from recent and current events, it is, rather, in clarifying and strengthening certain employment rights contained in the Fair Work Act. I now turn to that statute, and particularly to the litigation that has been commenced under its provisions by the prominent footballer Mr Israel Folau.

The Folau litigation and its implications

23. Mr Folau was dismissed from the employment of Rugby Australia for a social media statement in which he paraphrased certain verses from Christian scriptures. These verses identify individuals who engage in homosexual acts as sinners, and hence as people who will be condemned to damnation in the afterlife, unless they repent and seek God’s forgiveness. In making such a statement, Mr Folau seemingly breached a provision in his employer’s code of conduct that forbids condemning people for their sexuality. Further, Rugby Australia evidently argues (with some plausibility) that its code of conduct was incorporated into Mr Folau’s contract of employment, and thus it was entitled to fire him for serious breach of a contractual term. At the same time, however, the alleged breach undoubtedly took the form of a public statement of certain of Mr Folau’s sincerely held religious beliefs. It is not possible to tease apart the alleged breach of contract and the expression of religious beliefs; they were one and the same action.

24. Section 772 of the Fair Work Act states:

(1) An employer must not terminate an employee’s employment for one or more of the following reasons, or for reasons including one or more of the following reasons:

[...]

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It is likely that termination on the ground of religion includes, as with Mr Folau’s case, termination for an employee’s public expression of his or her religious beliefs. Prima facie, therefore, it follows that Rugby Australia breached s.772 by terminating Mr Folau’s employment for the reason that it did.

25. Rugby Australia may argue that it did not terminate Mr Folau’s employment for his expression of his religious beliefs, but for breaching its disciplinary code. The relevant provision of the disciplinary code, however, had precisely the effect of prohibiting Mr Folau from public expression of certain of his religious beliefs (in this case, beliefs about sin and about what conduct conduces to spiritual damnation). It is likely that an employer cannot rely on its disciplinary code in such circumstances, even if the code was incorporated as a term in the contract of employment. That is, an employer cannot avoid the requirements of s.772 either by unilateral action in imposing a disciplinary code on its employees or by including the code in employment contracts. To put this last point in another way, employers cannot use their bargaining positions to contract out of their statutory obligations under s.772. Nor can employees successfully contract out of their rights under that section.

26. Rugby Australia may also rely on the defence that Mr Folau’s obligation to comply with the relevant provision of the disciplinary code was an inherent requirement of his job. However, this argument should not succeed. While compliance with such a provision might be an inherent requirement of the job of a senior executive, or perhaps a public relations manager, employed by Rugby Australia, it is clearly not an inherent requirement of the job of an individual footballer. The obvious presumption is that individual footballers – much like individual plumbers, individual checkout staff, or individuals in any other corner of the labour market – have widely diverse ideas on matters of sin and damnation, religion in general, and related moral issues, and that when they express these ideas publicly they thereby in no way represent or implicate their employers.

27. It appears, then, that Mr Folau is on strong legal and policy ground in taking action against Rugby Australia under s.772. If he ultimately loses his case, it will likely reveal some technical deficiency in the Fair Work Act as it currently stands, and as interpreted by the courts. If any such deficiency emerges as a result of the legal proceedings, this might, indeed, justify some amendment to the Act. At the moment, however, no such deficiency is apparent. It is more than possible that Mr Folau will win his case and establish a helpful precedent for many other employees who wish to assert their employment rights. That being so, the parliament should await the conclusion of the current Folau litigation, which may eventually go all the way to the High Court, before it considers whether it is necessary to amend the Act in any way.

28. Any deficiencies in, or related to, s.772 of the Fair Work Act might also apply to some other statutory grounds of unlawful termination of employment, in addition to termination on the ground of religion. Most obviously, any such deficiencies are likely to affect the prohibition of termination of employment on the ground of political opinion. Once the Folau litigation has concluded, the parliament might need to review the Act to ensure that it is adequate in protecting employees’ expression of all kinds of religious, political, moral, philosophical, and similar views. In particular, it might become desirable to clarify that employers cannot contract out of an obligation not to fire employees for expression of their views on such matters (unless silence about such matters, or the expression only of very anodyne or cautious opinions about them, is genuinely and objectively an inherent requirement of a particular job). As a general proposition, employers should not be able to fire employees merely for their expression of religious, political, moral, philosophical, and similar opinions, especially if they are expressed outside of the workplace.

29. In this respect, I refer to the termination of employment of Mr. Scott McIntyre by the Special Broadcasting Service in 2015, after he expressed certain controversial views regarding Anzac Day, the original Anzacs, and Australia’s record of involvement in war. Mr McIntyre commenced litigation for an alleged breach of s.772 of the Fair Work Act, on the ground that his employment had been terminated because of his expression of political opinion. Because the case was settled, the courts did not have an opportunity to interpret the Act or consider the effect of any disciplinary code that might have applied to Mr McIntyre’s employment. Nonetheless, the case highlights the possibility of employees being fired for public expressions of political and similar opinions, despite what appear to be clear words in the Act.

30. Once more, it is not yet apparent that the Fair Work Act is deficient in any way. Nonetheless, its operation needs to be kept under review to ensure that employers are not able to avoid their obligations by relying on any deficiencies in drafting
or on judicial interpretations that limit the effect of s.772’s seemingly clear words. In any event, it would be worth considering a modification of s.772 to give the broadest constitutionally legitimate protection, within the employer/employee relationship, of the full range of religious, political, moral, philosophical, and similar speech. To avoid duplication of effort, however, I again suggest that this await the conclusion of the ongoing Folau litigation.

Conclusion

31. I have given earnest consideration to the draft legislative package, but its drafting has raised numerous concerns in my mind. In many cases, I was not clear what concrete results were envisaged or intended. I am open to modifying my views as set out in this submission, or to developing them further. However, this would have to follow from well-informed discussion of the concepts and approaches in the package.

32. Religion is a very complex phenomenon, and it is extraordinarily difficult to take into account the wide variety of religious belief and practice when drafting legislation that seeks to regulate religious discrimination and (in the case of s.41) to provide a partial codification of free religious expression. Such an exercise needs time and thought. Proposals should be considered by people with varied life experience and academic expertise, and they must be tested against a wide range of possible situations that could arise. Once again, significantly more time is needed for public discussion. Hence, I suggest an additional period of at least six months beyond the current deadline of 2 October.

Yours sincerely,

Russell Blackford
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