Religious Liberty And Its Challenges In Australia Today: A Report Into The Federal Government's Religious Discrimination Bill 2019

Publish Date:

November 2019

Religious freedom and its challenges in Australia

The freedom to hold a religious conviction and to live a life according to deeply held religious beliefs is a fundamental aspect of the humanity of every individual. It is the hallmark of a civilised society that individuals are able to tolerate each other's beliefs and live together in harmony.

Even in a free society such as Australia, the acknowledgement that we have diverse views and beliefs and the ability to tolerate these differences has proven difficult to sustain. An aggressive brand of secular progressivism in Australia's media, corporate and other institutions has led to some concern amongst Australians of faith regarding their ability to freely follow and propagate

central tenets of their faith. Rugby Australia's dismissal of star player Israel Folau for dramatic expressions of traditional Christian morality on social media platforms highlighted that some religious Australians may need to choose between their employment and their faith.

The dismissal of Folau was not a popular decision. An initial effort to "crowdfund" on the fundraising platform GoFundMe generated more than $750,000 from thousands of donors before it was closed by the site for a supposed violation of its terms of service, further confirming the concerns of many Australians of faith. A few days after, a new crowdfund by the Australian Christian Lobby generated over $2 million from over 20,000 donors before it was paused.

The question has been put to the federal government about what it should do to address concerns that some Australians of faith have regarding their social and political freedoms to propagate their religious views in public and private. The outcome is a package of bills, released for public exposure in August 2019, primarily designed to make it unlawful to treat a person unfairly on the basis of their religious belief or activity.

In some respects, the federal government's *Religious Discrimination Bill 2019* (the draft bill) is a welcome start. In particular, it recognises the role that state anti-discrimination laws play in restricting freedom of speech for Australians of faith, particularly in Tasmania.

However, the overarching framework is misguided. As a mechanism to secure religious liberty, anti-discrimination laws are unsuitable and often undermine the very freedoms they claim to protect. At a general level, one of the fundamental legal causes of the erosion of religious freedom in Australia are the various Commonwealth and state level anti-discrimination laws currently in force. These laws include provisions which prohibit "vilifying speech" or acts which are directly or incidentally "unfair" to another person because of a protected characteristic, such as sexual orientation. These laws restrict freedom of speech and freedom of association, which are two freedoms essential for the manifestation of religious beliefs. Governments at the Commonwealth and state levels should remove or limit the reach of any laws which restrict freedom of speech or association, including anti-discrimination laws.

Further, the bill as currently drafted may heighten sectarian conflict in Australia through the use of the anti-discrimination provisions as a weapon by one religious group against another, or by a secular group against a religious group. Despite being marketed to religious communities as a mechanism for their protection, the explanatory notes to the draft bill explicitly explain that the definition of a protected 'religious belief or activity' also 'includes not holding a religious belief or not engaging in, or refusing to engage in, a religious activity'. Accordingly, Australians of faith will be liable under the provisions of the draft bill for unlawful discrimination against a person of a different faith system or of no faith at all.

It is worth noting that the prospect of anti-discrimination laws being used as a "weapon" against political opponents, rather than a "shield" against discrimination, is a feature rather than a bug. Other anti-discrimination laws suffer from the same problem, with Section 18C of the *Racial Discrimination Act 1975* serving as an exemplar, and warning, for how anti-discrimination laws can have a chilling effect on freedom of speech and open and free debate in a liberal

democratic society.

Indeed, at the heart of the modern debate about religious liberty is the idea that religious liberty itself can be provided to people by the government in the form of protections against unfair discrimination. This is a mistaken understanding. Religious freedom does not mean a person has the right to use a law to coerce a person to accommodate their religious beliefs or lifestyles.

The inclusion of exemptions from liability under the draft bill could be understood as a means of ameliorating the risk of inter-faith tension. The argument for this is that if a religious body is immune under the bill then the prospect that Australians of different religious beliefs, or of no religious belief, could challenge each other using the court system is removed. However, the exemptions under clauses 10 and 11—which relate to religious bodies and conduct arising from activities to meet a need or reduce disadvantage—are drawn too narrowly. By only applying to certain established faith-based bodies, the draft bill ignores the reality that faiths are more than organisations—a religious affiliation requires individuals from a cross-section of society who are affiliated with the faith system. The exemptions also fail to extend to individuals and faith-based groups who also engage solely or primarily in commercial activities, which are currently excluded.

A related concern which arises from the operation of the exemptions is the need to determine which bodies meet the exemption qualifications. Specifically, there arises the need to define which bodies qualify as religious bodies and what kind of conduct meets the standard of that which ‘may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion’. This effectively means the court is given the inappropriate role of defining religion and determining which religious practices or beliefs are legitimate. This is an inevitable consequence of the secular law intruding into the religious sphere.

There are a number of other practical concerns under the draft bill. Clause 41 appears to be directed at ensuring that what happened to Julian Porteous, the Catholic Archbishop of Hobart in 2015, cannot happen again—either in Tasmania or in any other jurisdiction. In 2015, the Tasmanian anti-discrimination commissioner determined that Archbishop Porteous had a case to answer under Tasmanian anti-discrimination law when he circulated a booklet outlining the Catholic Church’s views on marriage. Clause 41 aims to ensure that ‘statements of faith’ are not unlawful under various anti-discrimination statutes, including Tasmanian anti-discrimination law. However, the protection appears to be mostly illusory. The exclusion from protection of any speech which is ‘likely to harass, vilify or incite hatred’ potentially negates the provision, as state anti-vilification laws by definition and intention capture language which “vilifies”, itself a notoriously vague and subjective word. To ameliorate this limitation, Clause 41 of the draft bill should be retained, but the exclusion of speech which is ‘likely to harass, vilify or incite hatred’ should be deleted.

The Australian Human Rights Commission will also be expanded under the draft bill by the addition of a taxpayer funded political advocate in the form of a new Freedom of Religion Commissioner. Additionally, the Commission will be given the responsibility for receiving and managing complaints of religious discrimination in addition to its existing responsibilities under age, sex, disability, and race anti-discrimination laws. The significance of this should not be

understated: under the provisions of the *Australian Human Rights Commission Act 1986*, the Australian Human Rights Commission has a statutory responsibility to accept and inquire into all discrimination complaints made to the Commission. Even where the Commission decides a complaint should not proceed for being vexatious, the complainant has an automatic right to lodge the complaint in the Federal Circuit Court for judicial determination. There are few procedural roadblocks to a persistent litigant using government agencies and the courts to tie down other Australians under complaints of discrimination.

Fundamentally, promoting religious discrimination laws as the solution to concerns about religious liberty promotes the idea that freedom is in some way a gift provided by the government, rather than a pre-existing, natural right. It expands the legislative framework that has posed a significant danger to freedom of religion in the past. And it is clear that the provisions prohibiting discrimination against religious Australians could also be used against religious Australians and the exemptions are drawn too narrowly. Discrimination laws at the federal level are designed so that as many complaints as possible will be heard. Given the low threshold for making discrimination complaints to the Australian Human Rights Commission and for lodging them in the federal courts, even frivolous complaints will require a response. The reasonable fear of litigation will have a chilling effect on freedom of speech and freedom of association and hence freedom of religion. This is not a description of laws that would ordinarily be attached to a free society.

In other words, not only does the bill fail to confront the true threat to religious freedom, the threat may be enhanced.

There is no doubt that toleration of religious ideas has been an issue for some time. However, this is a cultural question that will not be solved by a direct, top-down policy response based on coercion, victimhood and formalised resentment. This paper argues that the best method to promote religious liberty into the future is for policy makers at the state and federal level to lay the broader foundations for freedom by repealing laws which restrict freedom of association and freedom of speech, including by repealing so-called hate speech laws such as Section 18C, so that religious communities can live out their faith without government interference and punishment.

Recommendations:

1. In recognition that religious freedom is a manifestation of freedom of speech and association, the federal government should not proceed with Parts 2, 3, 5, 6, 7, 8 or 9 of the *Religious Discrimination Bill 2019*.
2. In recognition of the above, Australian governments should remove restrictions on freedom of speech and association embedded in existing anti-discrimination laws, including through the repeal of Section 18C of the *Racial Discrimination Act 1975*.
3. If the bulk of the draft bill is to proceed and anti-discrimination laws are to be retained, freedom of religion and freedom of conscience should be protected by expanding and clarifying the exemptions so that they apply to all Australian individuals and organisations of faith or who are engaged in faith-based initiatives.
4. The role of the courts in defining what a reasonably or legitimate religious activity or belief is should be minimised or eliminated.

5. Clause 41 of the draft bill should be retained, but the exclusion of speech which is ‘likely to harass, vilify or incite hatred’ should be deleted.
6. The role of the Religious Freedom Commissioner in the Australian Human Rights Commission should not be established.
7. The Australian Human Rights Commission should not be provided with a role in handling complaints brought under the draft bill.
8. The Australian Human Rights Commission should be abolished.
9. Provisions in the draft bill which reverse the onus of proof should be removed.

Download the full report here.