

Protecting Freedom of Religion and Belief in Antidiscrimination Law - A First Look at the Religious Discrimination Bill

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Freedom of Religion protections strong in international law and weak in Australian law

- ▶ International law e.g. Article 18 International Covenant on Civil and Political Rights (ICCPR)
- ▶ 18(1) Freedom of thought, conscience and religion and freedom to have/adopt religion or belief
- ▶ 18(2) Freedom to manifest religion or belief individually or in community and in private or public
- ▶ Freedom to manifest religion or belief in Worship, Observance, Practice and Teaching subject to 18(3) subject to restrictions in law which are **necessary** to protect public order, health and fundamental freedoms of others

This is international law, NOT Australian domestic law which does not strongly protect freedom of religion (including s.116 of Constitution)

Statutory Freedom of religion protections are mainly in Antidiscrimination laws

- ▶ Discrimination against individuals (probably not corporations) on the basis of religion is unlawful in Vic, Qld, WA, Tas, NAT and ACT but not in federal laws, NSW or SA.
 - ▶ But even where it is unlawful there are exemptions e.g. anything authorised by statute.
 - ▶ Indirect discrimination against religious people through the application of a general policy can be justified if it is “reasonable” - a tribunal or court decides what is reasonable
- ▶ Anti-Discrimination Law Exemptions for religious bodies and religious education institutions re sexuality, gender identity discrimination e.g. to applying a religious values filter in hiring or student conduct
 - ▶ But these exemptions have hurdles - body formed for a religious purpose, acts in conformity with doctrines or tenets of religion

Recap

- ▶ Same Sex Marriage postal vote campaign raised concerns about freedom to express and act on a traditional view (religious or not) of marriage and family if SSM became law.
- ▶ PM Turnbull and Bill Shorten said trust us on freedoms and vote yes but then only gave minimal protections for religious views of marriage
- ▶ PM Turnbull said get SSM done now and we will have an inquiry into religious freedom (a much broader topic than views of marriage)
- ▶ Coalition backbenchers put various freedoms amendments. Coalition had a conscience vote - majority supported amendments. ALP opposed all amendments without a conscience vote and all were defeated.
- ▶ Ruddock Inquiry from Jan to May 18. Govt sat on report until it was leaked and ALP forced a government response in December 18 in response to Wong/Shorten Bills to abolish all protections under Sex Discrimination Act for religious education in schools, colleges and in religious bodies. Narrowly stymied in Senate by Centre Alliance
- ▶ PM Morrison repeated govts promises on religious freedom in May 19 and won the election partly based on religious/social conservatives support. Notable swings against ALP on social issues by religious voters

Government's Ruddock delivery agenda

- ▶ 1A. Religious Discrimination Bill
- ▶ 1B. HR Leg Amendment Bill - amends Charities Act to re traditional marriage beliefs, shields religious schools facilities for SSM weddings and amends objects clauses of antidiscrimination laws
- ▶ 1C. Protect statements of religious belief from antidiscrimination laws and low bar insult/offend provision in s.17 of Tas AD Act
- ▶ 1D. A Religious Freedom Commissioner added to AHRC (not in Ruddock)
- ▶ 2. Legislation in 2020/21 based on ALRC report on how to remove exemptions in anti-discrimination laws for religious schools and churches, mosques etc re sexuality, gender identity, relationship status if possible while letting them manage their affairs in accordance with their faith. (But Ruddock recommended retaining existing exemptions). ALRC report time pushed out to Dec 2020
- ▶ 3. Giving parents the right to take their children out of classes teaching material opposed to the moral/religious framework on the home. - Model Guidelines only being developed and may be ineffective
- ▶ Missing - a Religious Freedom Act to protect against government interference
- ▶ Missing - a right not to be coerced to speak or act against one's conscience or religious beliefs e.g. Asher's Bakery - can't be made to sell a cake with a message on it like Support Gay Marriage or the Holocaust is Fiction

HRL Amendment (Freedom of Religion) Bill 2019

- ▶ 1. The Ruddock Panel said objects clauses in ADAs should respect the equal status in IHRL of all human rights including religious freedom. The drafting doesn't get there. This Bill amends the objects clauses of various ADAs so that in interpreting ADAs regard is to be had to the indivisibility and universality of human rights. This may make no difference in practice.
- ▶ Ruddock recommended and the government also committed to reference the Siracusa Principles that religious freedom could only be limited where necessary and limitations were to be no more restrictive than is required. This has not been included and should be. Relevant to balancing competing human rights claims e.g. under SDA against a religious body.
- ▶ 2. The Bill permits educational institutions established for a religious purpose (SDA s.38) to refuse to make facilities available for solemnisation of a marriage if the refusal conforms to doctrines tenets beliefs or teaching or the religions or educational institution or is necessary to avoid injury to the religious susceptibilities of adherents of the religion. As promised.
- ▶ 3. English Charities Commission deregistered 19 Catholic adoption charities because their preference for adopting to married hetero couples was held to be contrary to law and public policy and hence a disqualifying purpose. But what about reasonable accommodation?
- ▶ This Bill amends Charities Act 2013 s.11 to provide that engaging in or promoting activities that support a view of marriage as a union of a man and a woman to the exclusion of all others is not of itself a disqualifying purpose. The amendment to s.11 is a good provision but it should be extended to cover other obvious points where traditional religious morality now conflicts with legal rights in some jurisdictions e.g. religious view of gender vs agreeing with and acting on a child's or adult's self-determination of gender without diagnosis of gender dysphoria or treatment to change hormonal and anatomical expression.
- ▶ Changes to s.6 of the Charities Act are also required. s.6 requires that a charity's purposes must be for the public benefit. NZ High Court has held that promoting a traditional view of marriage if achieved would not be a public benefit and therefore not a charitable purpose.

Assessment of the Religious Discrimination Bill

- ▶ Out for consultation to 2 October 2019
- ▶ Can't discriminate on the basis of religious belief or lawful religious activity
- ▶ What is religious activity - does it include stating a religious view of gender in a tearoom? Needs expanding as in SSM Bill amendments
- ▶ Can a State or Territory law or council by-law readily make an activity unlawful thus removing federal discrimination protection for it? E.g. gender conversion therapy is made unlawful and is defined to include any teaching or counselling about sexual orientation. Patten Bill in Victoria to expand the Racial and Religious Tolerance Act would make a wide range of statements (religious or not) re gender, sexual orientation and gender identity unlawful in Victoria. The Vic Act would then lead to forfeiting federal discrimination protection.
- ▶ Why should federal religious freedom protections be hostage to State, Territory and local laws making non-PC statements unlawful?
- ▶ Instead of requiring "lawful" religious activities, remove federal discrimination protection for activities which are criminal offences punishable by imprisonment.

Religious Discrimination Bill Comments

- ▶ Statements of belief are protected in the Folau clause (8(3)) and the Porteous clause (41) from constituting discrimination under any antidiscrimination law or being unlawful under s.17 of the Tas ADA (insult/offend). (Need to add in anti vilification statutes like the Racial and Religious Tolerance Act in Vic.)
- ▶ These are promising provisions but the detail currently undermines them.
- ▶ Note that there is no protection under cl 41 from employer discipline or sacking - just from AD Act complaints and lawsuits. Protection under s.8(3) from employer discipline turns on reasonableness of employers policy.
- ▶ Statements that are malicious, that would harass or vilify or incite hatred or violence against another person or group of persons are not protected. On the surface that is reasonable, but what does harass or vilify mean? X states a belief that Y will go to hell unless Y repents. Is that harassment or vilification? Those terms should be removed or defined as “inciting hatred, serious contempt or revulsion” like State laws do.
- ▶ The definition of statement of belief provides that the statement must be reasonably regarded as being in accordance with the doctrines, tenets, beliefs or teachings of a religion. Who has to reasonably regard the statement that way? A judge or tribunal member. Do they take evidence on meaning of doctrine and weigh that against the person’s interpretation. Does a court say you have got your religion wrong so no protection for you? A test of the genuineness of the belief not its reasonable accord with doctrine would be better.
- ▶ The statement must also be in good faith. What does that mean? If it means genuinely held and not made for an ulterior motive, say that.

Religious Discrimination Bill comments cont

- ▶ Not clear that corporations will be protected from religious discrimination e.g. the incorporated Baptist church or charity or counselling centre or religious bakery or publishing company.
- ▶ There are case law statements that a corporation cannot hold a religious belief so Act needs to expressly provide that corporations can hold a religious view and how that is evidenced e.g. by a statement of beliefs adopted by board. Otherwise there is a hole if the corporation is targeted.
- ▶ Chick Fil A, White Magazine, Hobby Lobby
- ▶ Religious discrimination against a person is permitted in employment partnerships and decisions of qualifying bodies if because of the person's religious belief or activity the person is unable to carry out the *inherent requirements of the employment or partnership or profession, trade or occupation*.
- ▶ No need for a general inherent requirements exception. Genuine inherent requirements for religious belief are very rare - chaplaincy positions. But with this drafting a secular organisation could make it an inherent requirement of a position that the employee acts to affirm various matters that contradict the persons' religious beliefs e.g. a commitment to no proselytising or speaking about religious faith, to promoting the option of euthanasia or abortion or participating in Pride fundraisers? Where is the protection for conscience?
- ▶ Alternative is to provide that an employer can require a job applicant *to be an adherent of a particular religion* only if that is an inherent requirement of the employment or qualification (e.g. Muslim chaplain)

Religious Discrimination Bill comments cont

- ▶ Indirect discrimination through a condition, requirement or practice which has the effect of disadvantaging persons who engage in a religious belief or activity (clause 8) e.g. all staff must work on Sunday or during Friday prayers when rostered, support pro abortion charity, not make any statements which might be considered offensive by gay or trans people.
- ▶ It is only discrimination if the condition, requirement or practice is not reasonable.
- ▶ There is a list of factors to determine reasonableness. Essentially a proportionality test. But how do courts weigh the damage to a religious conviction against the result sought to be achieved by the condition or practice?
- ▶ Art 18(3) provides that the right to religious liberty can only be limited where necessary to ensure 5 values - public safety, order, health, the fundamental rights of others, not whenever the limitation is reasonable.
- ▶ Given prevalence of codes of conduct, the reasonableness criterion for indirect discrimination is too much at large. E.g. apply the Siracusa principles to require:
 - ▶ that the condition must ensure reasonable accommodation of religious belief and activity and
 - ▶ the limitation on religious belief and activity must be no greater than is necessary to ensure the goal of the condition is achieved

Religious Discrimination Bill - cl8(3)

- ▶ If the condition, practice or requirement is an employer conduct rule that relates to standard of dress, appearance or behaviour of employees AND it is imposed by a relevant employer (a non-government entity with revenue of at least \$50 million pre annum) AND it would have the effect of restricting or preventing an employee from making a statement of belief while not working for the employer,
- ▶ THEN the employer conduct rule is not reasonable (and hence could be indirect discrimination)
- ▶ UNLESS compliance by the employee is necessary to avoid unjustifiable financial hardship to the employer.
- ▶ If the conditions aren't met, the employer conduct rule falls to be assessed under the general reasonableness test for indirect discrimination.
- ▶ As noted before the statement of belief must not be malicious, likely to harass or vilify and must be reasonably regarded as in accordance with doctrine.
- ▶ Multiple problems. Why not start with the proposition that an employer cannot restrict an employee's ability to state their genuine religious beliefs in their own time? Exceptions could be beliefs which incite hatred against the employer or the product or co-workers or customers.
- ▶ Why are only companies with over \$50m in revenue affected? Are the religious freedoms of employees of smaller companies and government agencies in their own time of less worth?
- ▶ Any assessment of the financial hardship on the employer must exclude the anticipated and actual responses of third parties like sponsors or suppliers or customers or landlords who threaten to impose hardship unless the employee is disciplined or sacked (as Qantas was alleged to have done to ARU re Folau). Including third party responses just encourages boycotts by sponsors, suppliers, customers etc in order to get a business to discipline one of its workers for religious expression.
- ▶ For a better rule about employer conduct rules - see ICS Policy and Drafting Issues in a Religious Discrimination Bill - i4cs.com.au

Religious Discrimination Bill

- ▶ **Protection of religious bodies**
- ▶ allowing them to prefer co-religionists in employment. Needs amending - see Aroney and Parkinson comments.
- ▶ Includes a registered charity and a body conducted in accordance with the doctrines, tenets, beliefs or teachings of a religion. But if it engages solely or primarily in commercial activities, it loses religious body status. Need a better balance. St Vincent's and Salvos run op shops and job training workshops which sell goods as commercial activities but subsidised for charitable purposes - these should be religious bodies.
- ▶ **Freedom of Religion Commissioner.**
- ▶ Could be very good or very bad depending on who is appointed. Lobby government about including some appointment criteria in the statute - a person who understands religion and the importance of advocating for religious freedom.

Overall Assessment

- ▶ Overall assessment of Bill is 5/10 - a reasonable first draft which has tried to grapple with the issues. But it promises more than it delivers because of some big holes and too many ifs and buts that undermine some good initiatives. If the government is willing to work at improving it, it could be made into a very good law but it is well short of that now.
- ▶ And we await the other 70% of the agenda:
- ▶ parental rights in relation to schooling
- ▶ the rules for allowing schools and religious bodies to manage their affairs in accordance with their faith under the Sex Discrimination Act and other discrimination laws
- ▶ Protection of people from being forced to act or speak contrary to conscience or religious belief
- ▶ Protection from government action (federal State and Territory and local) which limits religious freedom under some form of Religious Freedom Act or even an amped up Religious Discrimination Act which applies to all government services and programs. This should be a limitation on government power rather than a freestanding right.

Protecting persons from being forced to express or endorse a view contrary to their religious belief

Asher's Bakery case – Christian bakers could not be compelled to bake a cake with message Support Gay Marriage. Same for Muslim bakers and a message that God is not Great or Jewish bakers that there are many Gods.

Possible drafting to provide this protection – for discussion

(1) Despite any law, it is unlawful for a person to:

- (a) require another person to engage in relevant conduct in relation to a statement or opinion; or
- (b) treat another person unfavourably because the other person or entity refuses or omits to engage in relevant conduct in relation to a statement or opinion

if the other person or entity holds a religious belief and genuinely believes that the statement or opinion is not consistent with that religious belief.

(2) In sub-section (1) relevant conduct in relation to a statement or opinion means:

- (a) expressing, publishing or disseminating the statement or opinion;
- (b) producing or distributing a thing which expresses or supports or endorses the statement or opinion;
- (c) associating the second person or entity with the statement or opinion; or
- (d) endorsing or supporting the statement or opinion.

- ▶ **Note:** Examples of unlawful conduct under this section include any one or more requirements that a printer, sign writer, artisan, film-maker or media business which holds a relevant religious belief express a statement or opinion or publish or produce a poster, sign, cake, video or media content which expresses or endorses a statement or opinion that they genuinely believe is not consistent with that religious belief.

Questions?

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Pemberton v Church of England

Rev Pemberton entered into a legal same sex marriage. The Bishop refused to give him a licence to officiate. He sued.

Court held:

“I have no difficulty understanding how profoundly upsetting Canon Pemberton must find the Church of England’s official stance on same-sex marriage and its impact on him. But it does not follow that it was reasonable for him to regard his dignity as violated, or an “intimidating, hostile, degrading, humiliating or offensive” environment as having been created for him, by the Church applying its own sincerely-held beliefs in his case.... If you belong to an institution with known, and lawful, rules, it implies no violation of dignity, and is not cause for reasonable offence, that those rules should be applied to you, however wrong you may believe them to be. Not all opposition of interests is hostile or offensive.”