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"Religious Freedom and Religious Schools"

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Thank you for the opportunity to speak about this important issue tonight. As it happens, I was asked to speak, and suggested this topic, some months ago! But it turns out to be very topical, and I am glad to be able to provide some input into the current debates which all of you will be aware of.

I'd like to set the scene by briefly discussing the notion of religious freedom, and how it is currently protected in Australia. I will then provide a brief overview of what we are told are the recommendations of the Ruddock Panel on the question, and aim to explore the current debates over the question of how the religious freedom of religious schools should be protected in NSW. Given that most of the recent debate has concerned issues of "sexual orientation", that will be a major focus; but perhaps it is worth remembering that religious freedom covers a number of issues, and I will aim to mention these as well- such as the clash of one religious view with other religious views, and issues of freedom of speech.

Some of you will know that I run a blog on these issues, and others: https://lawandreligionaustralia.blog . If you are reader of that blog, some of the things I am going to say tonight will be familiar to you! However, hopefully seeing it all presented in a slightly more coherent form will still be helpful.

1. Religious Freedom generally

The notion of religious freedom is an important one which has underpinned Western civilisation for many years. In particular it is a right which is strongly recognised in international law- mentioned in the *International Covenant on Civil and Political Rights* (the ICCPR), s 18.

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> 3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

All of these provisions are important, and I wish we had time to go through them line by line. But let me note a couple of key features of art 18:

- It is not just a right to go to church or the synagogue (though it includes that right, shamefully being denied today in some countries); it includes the right,

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not just to believe, but to "manifest" belief in "worship, observance, practice and teaching".

- This right can be exercised individually, or "in community with others". In other words, religious freedom does not just apply to isolated individuals, but it applies to communities, where religious people join together to practice their faith. One such community, of course, is a religious school.[2]
- The freedom to practice one's religion can be limited, but the allowable limitations under art 18(3) are quite narrow, and not just whatever the government of the day feels like: "prescribed by law" and "necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others".
- Art 18(4) is of particular interest to educationalists, because it says that parents and guardians should be free to "ensure the religious and moral education of their children in conformity with their own convictions". This is really a wide-reaching charter of rights for religious schools, who are providing this service for the sake of the parents who entrust their children to those schools.

2. Religious Freedom protection in Australia[3]

While there are wide protections under international law, then, what does this mean for Australia? International obligations like those imposed under the ICCPR (to which Australia has formally acceded) do not become part of Australian domestic law until internally implemented somehow. So far there is no general implementation of art 18 in the Federal sphere for the whole country.

There are some jurisdictions which have implemented a version of the ICCPR obligations, in the form of a local ***"Charter" of rights***. So far there are local charters recognising religious freedom in the ACT (*Human Rights Act* 2004 (ACT) s 14) and the State of Victoria (*Charter of Human Rights and Responsibilities Act* 2006 (Vic) s 14). Queensland has just seen a *Humans Rights Bill* introduced into its Parliament which seems to be modelled on those in the other jurisdictions.[4] As my focus tonight is NSW law I won't go into these too much. Suffice to say that, while it is promising to see a formal recognition of a right to religious freedom, this right is usually qualified in a much broader way than is true under international law, and so far, the right to religious freedom under State law has not seemed to have a big impact on this area.

Perhaps it is worth mentioning a positive decision in Victoria, however, which rejected a challenge to religious freedom under their provisions. While it did not directly involve the application of s 14 of the Victorian Charter (as it had not commenced at the time of the events in question), the decision in *Aitken v The State of Victoria, Department of Education & Early Childhood Development (Anti-Discrimination)* [2012] VCAT 1547 mentioned the provision in passing. In this case, parents of children at a State school objected to the fact that Scripture classes (special religious instruction) were offered at the school their children attended, but their children were "singled out" because they had withdrawn them from the class. The

[2] For more discussion of "group rights" in this area, see Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010), and an excellent article by Professor Nicholas Aroney "Freedom of Religion as an Associational Right" (2014) 33/1 *University of Queensland Law Journal* 153-186.

[3] For a more detailed coverage of this topic, updated in 2017, see Neil J Foster, "Religious Freedom in Australia overview, 2017 update" at http://works.bepress.com/neil_foster/112/ .

[4] See http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T1767.pdf ; introduced on Oct 31, 2018, the Bill has now been referred to a Parliamentary Committee for further consideration.

Tribunal found that there had been no adverse impact on the children, and hence that there was no breach of the Charter or the legislation on discrimination. There was no "detriment" suffered in learning in a different classroom while other students engaged in SRI. The decision of the trial judge here was upheld on appeal in *Aitken v State of Victoria* [2013] VSCA 28.

There is one other way in which international law may be relevant in Australia- as an ***"interpretive guide"*** to the courts when there is some ambiguity in legislation;[5] but this is a fairly weak claim and rarely successful.

If international law is not directly relevant, what are the other legal mechanisms for protecting religious freedom in Australia? It has to be said that at the moment, these are very patchy.

We do have a ***Constitutional clause***, s 116, which is important as a general statement of principle:

> **Commonwealth not to legislate in respect of religion**
> 116 The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for **prohibiting the free exercise of any religion**, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth. (emphasis added)

But there are a number of limits around this as a general protective clause. The first is that it only binds the Commonwealth Parliament, not the States. (There is some debate around the issue, but I think it also binds the Territory Parliaments, since the Territories only get their law-making powers from an Act of the Commonwealth Parliament.) But this means that it is possible for the Parliament of NSW, at least, to ignore these restrictions.

The other main problem with s 116 as a protection of religious freedom ("free exercise"), is that there is still a lot of doubt as to how this should be interpreted. The High Court of Australia has only considered the free exercise clause on a couple of occasions, and so far, has given it a very narrow reading. There are some statements from the court that suggest that a law would only fall foul of this prohibition if the "sole aim" of the legislation was to restrict religious freedom. I think there is a wider approach taken in the important decision of Latham CJ in the main "free exercise" case, *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, where his Honour at 128 broadly supports the view that s 116 prevents "undue interference" with religious freedom. But there is still a deal of uncertainty in how the clause should be interpreted.[6]

While the existence of a common law right to religious freedom is a matter of some debate, it seems to be the case that religious freedom, like the right to free speech, is one of those fundamental civil rights that the courts will seek to preserve under the doctrine of ***"legality".*** This is a statutory interpretation principle, under which courts will assume that Parliament does not intend to interfere with fundamental rights unless they say so very explicitly.

For example, the High Court in a significant case on the meaning of the term "religion" commented as follows:

> Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint.

[5] See *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

[6] See the more detailed discussion in my 2017, above n 3, at 3-6. For good arguments that the "sole purpose" test should be abandoned, and a wider test used, in "free exercise" cases, see Luke Beck, "The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the Constitution" (2016) 44/3 *Federal Law Review*, 505-529; available at SSRN: https://ssrn.com/abstract=2834486.

> Such a definition affects the scope and operation of s. 116 of the Constitution and **identifies the subject matters which other laws are presumed not to intend to affect**. Religion is thus a concept of fundamental importance to the law. (*Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 57 ALJR 785 at 787, per Mason ACJ and Brennan J) (emphasis added)

An example of the application of this technique of interpretation can also be found in In *Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens* (1995) 64 SASR 551, where Doyle CJ commented:

> I accept that freedom of religion is one of the fundamental freedoms which entitles Australians to call our society a free society. I accept that **statutes are presumed not to intend to affect this freedom**, although in the end the question is one of Parliamentary intention. (at 64 SASR 552, emphasis added)[7] (emphasis added)

But in the absence of wide-ranging protection for religious freedom in Australia, one of the main legal protections has come to be the laws relating to ***discrimination***.

One way that discrimination laws can protect religious freedom is by the law making it unlawful to impose a detriment on someone for their religious belief or practice, where such detriment is irrelevant to the specific context. There are a number of laws around Australia forbidding religious discrimination, but at the moment there is no such general prohibition at the Commonwealth level, or in NSW State law.

For the Commonwealth, there are some protections under the *Fair Work Act* 2009 (Cth) ("FWA"), but again they are fairly patchy. Under s 351 there is a prohibition on religious discrimination by an employer, but this will not apply in NSW because s 351(2)(a) excludes its operation where the relevant "prohibited ground" is not unlawful under the law of the State where the activity occurs. In some cases, the unfair dismissal provisions (ss383-384) may apply, though these are only applicable to employees, not contractors. There is a little-used provision of the FWA which was enacted based on Australia's international law obligations, s 772, in Part 6-4, which "contains provisions to give effect, or further effect, to certain international agreements relating to discrimination and termination of employment" (s 769). Under s 772 it is unlawful for an employer to terminate an employee's job for a range of reasons, including under s 772(1)(f) "religion". But again, this applies to employees, and is not said to extend to contractors.[8]

The other way that discrimination laws provide some protection to religious freedom is that such laws usually provide "exemptions" or "exceptions" from their operation, in certain situations involving religious bodies or person. I and others have argued for some time that finding religious freedom mainly in "exemptions" from other laws is unsatisfactory. There is always a tendency, even if not intentional, to regard an "exemption" as something which covers an interest which is less important than the "main" topic and should be read down as narrowly as possible.

One small improvement might be to recognize that these sorts of provisions are not simply temporary carve-outs from the over-arching goal of "equality". They represent a genuine attempt to balance out significant legal rights- for example, in many cases, the right not to be treated detrimentally on irrelevant grounds, with the rights of religious persons and

[7] See also *Evans v NSW* [2008] FCAFC 130, where laws restricting protests in relation to Catholic World Youth Day were struck down as invalid on a number of grounds, one of which expressed in this way: "another important freedom generally accepted in Australian society is freedom of religious belief and expression" – at [79].

[8] See also, at a more general level, the prohibition of terms in certain awards that discriminate on the basis of religion, in ss 153 and 195 of the FWA.

organizations to live out their faith. I have argued that these provisions are best characterized as "balancing clauses".[9]

The question of appropriate protection for religious freedom, of course, was the main topic of the deliberation of the Expert Panel on Religious Freedom chaired by the Hon Philip Ruddock. The Report itself was delivered to the Government in May 2018 but, as most here will know, has not officially been released. On the question as to how religious freedom is best preserved, can I warmly recommend a close reading of the excellent submission by Freedom for Faith to the Panel?[10] The submission was primarily authored by Professor Patrick Parkinson, who many of you will know was formerly a Professor of Law and the University of Sydney Law School, and is now Dean of the University of Queensland Law School. The submission sets forward a number of good reasons for providing increased religious freedom protection through a broadly framed "Religious Freedom Act", relying on Art 18 of the ICCPR in combination with some other articles.

We know, because of course the headline 20 recommendations of the Ruddock Review have now been leaked, that this suggestion was not adopted by the Panel. As yet we haven't seen their reasons. But they do recommend a Commonwealth law prohibiting religious discrimination, which, with appropriate "balancing clauses" to protect other interests, I think would be a good idea. For those who are interested I have prepared a preliminary response to the 20 Recommendations in a paper I presented to some members of the Sydney Diocesan Synod recently.[11]

Let me turn, then, to the specific issue of protection of religious freedom in religious schools.

3. Religious Freedom and Religious Schools

(a) Background- discrimination laws

Commonwealth law has for some time prohibited discrimination on certain specific grounds, limited because the Commonwealth needs specific "treaty" justification for such laws, which are enacted under the "external affairs" power in s 51 of the Constitution. Currently Commonwealth law forbids discrimination on the grounds of race, disability, age and sex. (State laws are able to deal with a wide range of other "prohibited grounds", as they are not dependent on external treaties to get the power to do so.) The *Sex Discrimination Act* 1984 (Cth) ("SDA") initially dealt with discrimination on the basis of sex (gender), marital status and pregnancy; in 2013 the Act was expanded to outlaw discrimination on the basis of sexual orientation and gender identity.

Even at a stage when only the more traditional "sex" grounds were covered, it was realised that a total ban on differential treatment in all areas on the basis of the matters concerned would have a drastic effect on some religious groups. The Roman Catholic church, for example, has long ordained only men to be priests (as have other religious groups). This would arguably be discriminatory under the SDA. So, from its introduction the Act has contained provisions, balancing clauses, allowing what would otherwise be discriminatory behaviour on behalf of religious organisation, when it was required by their religious views, to not be so regarded. Section 37 of the Act allows religious groups to continue with their traditional practices in the area of ordination of clergy, and in some other areas.

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[9] See N Foster, "Freedom of Religion and Balancing Clauses in Discrimination Legislation" (2016) 5 *Oxford Journal of Law and Religion* 385-430.

[10] The submission can be downloaded from this page: https://freedomforfaith.org.au/library/the-ruddock-review.

[11] See https://lawandreligionaustralia.blog/2018/10/22/ruddock-report-part-4-overview-and-the-big-three-areas/ (Oct 22, 2018).

(b) Religious schools and staffing decisions

Similarly, it was appreciated that religious schools in particular would need similar protections. A Biblically faithful Christian school which taught that marriage was only between a man and a woman, and that all sexual activity should be reserved for marriage, could hardly employ a religious studies teacher who was living in a de facto relationship. One of the reasons for parents sending children to a religious school is that they expect the school to not only teach, but to model, behaviour that supports the religious mission of the school.

So, s 38 of the SDA provides protections for religious schools in areas of employment:

> **Educational institutions established for religious purposes**
>
> 38 (1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

(Sub-section 38(2) is almost identical but applies this protection in the case of contractors rather than employees.) What these provisions make clear is that it is not "unlawful discrimination" for a religious school to require staff and contractors to teach and model the religious values of the school.

We may note that this provision is worded in terms of "discrimination" not being unlawful in certain circumstances. This is an unfortunate feature of the legislation. Where the relevant balancing clauses are engaged, the behaviour concerned is best not described as "discrimination" at all. (Yes, of course, there used to be a sense in which the word "discriminate" could be used in a neutral sense, as referring simply to an act of selection applying certain criteria. But in the current use of language, the word "discriminate" has now become almost always negative, and members of the public are surprised to find that legislation gives "a right to discriminate".)

It would be better to frame such a provision differently- either simply as noting that certain behaviour will "not be unlawful", or perhaps framing it as a positive right to "select" staff in accordance with religious beliefs. Still, that is the way that the current provision is framed.

(c) Current law- discrimination and students

In addition to the provisions of s 38(1) and (2) relating to staff, s 38(3) contains an explicit provision allowing a religious school to require students at the school to also comply with school values in this area of sexual behaviour:

> 38 (3) Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Section 21, from which this provision gives an "exemption", is the provision which forbids discrimination in provision of education. Sub-section 38(3) was present from the very start of the 1984 Act, although at that stage it only allowed "discrimination" on the basis of marital status or pregnancy. (The specific terms of s 21 allowed the running of single sex schools, so that did not need to be included into s 38.) When the Act was expanded under the

Labor Government in 2013 to prohibit discrimination on the other grounds, this exclusion clause was also expanded to cover those grounds.

In the Explanatory Memorandum tabled in Parliament when s 38(3) was given its current form in 2013, the Labor Attorney-General, the Hon Mark Dreyfus QC MP, said:

> The Bill will extend the exemption at section 38 of the SDA, so that otherwise discriminatory conduct on the basis of sexual orientation and gender identity will not be prohibited for educational institutions established for religious purpose. Consequently, the Bill will not alter the **right to freedom of thought, conscience, and religion or belief** in respect of the new grounds of sexual orientation and gender identity. (emphasis added)

It should be stressed that there was no particular "campaign" from religious schools prior to introduction of this law to allow them to exclude, or expel, same sex attracted students. Indeed, so far as I am aware, no religious school has a blanket policy that excludes or penalises gay students. But the provision was seen to be of assistance in circumstances where a student who is gay wants to make that a public matter for discussion and activism in the school. This provision allows a school which wants to maintain the general Biblical standard of sexual morality among the student body, for example, to calmly discuss with the student and his or her parents whether that school is the right place for them, or whether they would be more comfortable at a place which affirms their choice to agitate about this issue.

(d) Current debates

(i) Religious Schools and same-sex attracted students

Recommendation 7 of the Ruddock Report, at least as circulated so far, reads as follows:

> **Recommendation 7**
> The Commonwealth should amend the Sex Discrimination Act to provide that religious schools may discriminate in relation to students on the basis of sexual orientation, gender identity or relationship status provided that:
> - The discrimination is founded in the precepts of the religion.
> - The school has a publicly available policy outlining its position in relation to the matter.
> - The school provides a copy of the policy in writing to prospective students and their parents at the time of enrolment and to existing students and their parents at any time the policy is updated.
> - The school has regard to the best interests of the child as the primary consideration in its conduct.

Given the background mentioned above, the first thing to be said is that this recommendation is unfortunately worded. At first glance, and looked at in isolation, it seems to contain a positive recommendation to "provide that religious schools may discriminate". This sounds like a massive change to the law. But in fact, in the context, it is clearly intended to be a recommendation that *narrows* the scope of the current law, rather than expands it. I think the sense of the recommendation would have been better captured if it had said "may **only** discriminate" under the listed conditions.

(One issue worth briefly noting: each of the States and Territories also have laws dealing with discrimination, and some of them do not currently seem to allow religious schools to apply their beliefs in dealing with same sex attracted students. Some commentators have suggested, then, that this recommendation will actually bring about a major change in those jurisdictions. I do not think this is so. In my view, the effect of s 109 of the Constitution is that where a religious school has been given the privilege of applying its faith commitments to decisions in this area, then State law cannot take away that privilege. I have discussed this

briefly in a blog post here, and in a conference paper available here, at pp 23-26. In other words, religious schools in those jurisdictions *already* enjoy the benefit of s 38, although I concede this has not been directly tested in the courts.

In NSW, somewhat oddly, many prohibitions under the *Anti-Discrimination Act* 1977 (NSW) do not apply at all to "private educational authorities", which will include all religious schools and others not provided by the State which operate on other principles.[12] However, by virtue of s 109 of the Constitution, it seems likely that the prohibitions on discrimination on grounds covered by the SDA will be applicable as Federal law to NSW private schools, if the relevant SDA "balancing clauses" are not engaged.)

The additional conditions which the Ruddock Panel has recommended apply to s 38(3), are that the policy be "founded on the precepts of the religion", be made publicly available to existing and prospective students and parents, and that action only be taken with the "best interests of the child" as the guiding principle.

While the publicity recommendations are very sound (to reduce the chance of parents and students not being aware of this issue), the other two recommendations are not so clearly right, in my view.

The first, that discrimination here is only justified where "founded in the precepts of the religion", sounds fine, but on further thought presents some problems. This proposed condition is different to the current one, which is that the decision "discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed". Without reading the Report itself it is hard to determine precisely what the new criterion means. It would not be a good idea if its effect was to hand over to the secular court or tribunal the task of determining what the precepts of a religion "actually" require. That is not an authority that courts and tribunals actually want, and on many occasions, it has been recognised that a secular court should not usually be making binding decisions on religious doctrine.[13]

On the other hand, the proposal would be fine if it simply meant that the decision must be a good faith attempt to apply the religion as interpreted by the school, and not a "sham" to allow dismissal or discipline for ulterior motives. It may be best to wait until the full report is available to properly evaluate this suggestion.

The final suggested criterion concerning "best interests" of the child also sounds fine, until the same question is asked: *who determines* what is in a child's "best interests"? It is not adequate to say that this is a "neutral" issue that can be determined by child counsellors or psychologists. The Christian school may say: in our view it would not be in the interests of the child to support their preference for homosexual activity, as that is contrary to the Bible's teaching. Often a secular counsellor would strongly disagree. On balance I would oppose including this final criterion- not in *substance* (of course I favour any decision being made in the child's best interests) but because the *process* for determining the answer to the question is so unclear.

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[12] See the exemptions applying to "private educational authorities" in relation to discrimination in provision of education on the grounds of sex (s 31A(3)(a)), transgender grounds (s 38K(3)), marital or domestic status (s 46A(3)), disability (s 49L(3)(a)), homosexuality (s 49ZO(3)), and age (s 49ZYL(3)(b)). In addition, such authorities are also exempt from the prohibition against employment discrimination on the grounds of homosexuality (s 49ZH(3)(c)), transgender grounds (s 38C(3)(c)), sex (s 25(3)(c)), disability (s 49D(3)(c)), and marital or domestic status (s 40(3)(c)).

[13] For a recent comment to this effect, see the Supreme Court of Canada decision in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 at [36]: "courts should not decide matters of religious dogma. As this Court noted in *Syndicat Northcrest v. Amselem*, 2004 SCC 47 (CanLII), [2004] 2 S.C.R. 551, at para. 50, "Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion." The courts have neither legitimacy nor institutional capacity to deal with such issues, and have repeatedly declined to consider them…"

On this **recommendation 7**, then, it seems to me that, while there should be no toleration for animosity towards, or bullying of, same sex attracted students, there are serious issues here which religious schools have to deal with. One of the primary reasons that these schools are established, is so that a religious world-view can be presented to students. Parents send children to a Christian school, for example, assuming that the school will be both teaching and modelling Christian virtues, which include those such as self-control and abstaining from sexual sin.

Christian and other schools do not have a track record in Australia of refusing enrolment to gay students, or harshly expelling them when their sexual orientation becomes apparent. But there are difficult conversations to be had when a student decides to announce their sexuality and to actively support a non-biblical view of sexual behaviour among their peers. Rather than laying down detailed rules on how to resolve this issue, the current provisions of s 38(3) give the school the flexibility to look for solutions. They were sensibly introduced by the Labor government in 2013 to implement Australia's obligations to protect freedom of religion and belief.

While supporting the proposed publicity provisions as a sensible incremental improvement, it seems to me that the other conditions proposed by the Ruddock Panel run the risk of taking the conversation away from those entrusted by parents with guarding the religious ethos of the school, and would not be a good idea.

If s 38(3) is not retained, how should it be amended?

However, probably for reasons relating to the use of the word "discrimination" (as noted above), there seems to be a consensus now that the provisions of s 38(3) as they currently stand are not acceptable.

Press reports following the leaking of the Ruddock recommendations indicated that the Prime Minister is now proposing that the Parliament amend the provisions of s 38(3) so that they no longer allow religious schools to expel students on the basis of "sexual orientation". In fact, as many representatives of schools and religious bodies have said, no student has ever been expelled on account of their sexual orientation alone. But it can't be denied that s 38(3) as currently drafted would, in theory, allow this to happen. Yet there is still a genuine need to protect the legitimate interests of such schools in not seeing the religious ethos of the school undermined. How can this be achieved?

Religious schools want to cultivate and model a religiously based moral framework among students, which will be undermined if a student or students regularly and openly espouse moral values contrary to that religion.

A Christian school committed to the view that sex should only take place between married persons, and that homosexual activity is contrary to God's will, may wish to counsel a student not to celebrate a sexual relationship, and in particular a homosexual relationship, while at school. But such counselling might be impacted by s 21 of the SDA.

Section 21 relevantly provides:

> SDA s 21 (1) It is unlawful for an educational authority to discriminate against a person on the ground of the person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:
> (a) by refusing or failing to accept the person's application for admission as a student; or
> (b) in the terms or conditions on which it is prepared to admit the person as a student.
> (2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:
> (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority;
> (b) by expelling the student; or

(c) by subjecting the student to any other detriment…

Currently s 38(3), as we have seen, contains an exemption from the operation of s 21 applying to religious schools, in its dealings with students.

If s 38(3) were to be simply repealed and not replaced by any other protection, a religious school which counsels a student against open advocacy for homosexuality might find itself accused of subjecting the student to a "detriment" under s 21(2)(c), or otherwise breach s 21. This is a particularly tricky issue, and part of the problem relates to identifying what is encompassed by the word "orientation". Is it simply a "desire"? Or does it always include reference to behaviour?

The "orientation"/ "conduct" distinction

On the one hand, many Christian people would want to maintain that "homosexual orientation", if viewed as "a desire to have sex with people of the same sex", is a different issue to **acting** upon that desire. They would point to classic Christian moral teaching that simply having a temptation to do something is not itself sinful, if that temptation is resisted.[14]

But in the modern world of "sexual orientation discrimination", however, there have been a number of court rulings that it is just not possible to distinguish between "orientation" and "action". Statements have been made that it is an essential part of homosexual orientation to be able to express that in sexual activity with a same sex partner, and hence a rule laid down by an organisation based on sexual activity alone, or on support for homosexual activity, may be held to be discriminatory on the basis of "orientation".

For example, in the UK decision in *Bull & Bull v Hall & Preddy* [2013] UKSC 73 the Christian owners of a boarding house had enforced for some years a rule that they would not let a double-bed room to any couple who were not married. A same sex couple were turned away from the room on this basis and sued for sexual orientation discrimination. The UK Supreme Court upheld the award of damages against the Bulls. In particular, they commented at one point as to whether it made a difference that it was the "status of marriage" which was the criterion for the decision, or not. (At the time same sex couples could not marry each other in the UK.) The majority of the court held that this did not make a difference. In particular, Lady Hale commented in this way on the argument that one could distinguish a decision made on the basis of sexual **behaviour**, from one made on the basis of **orientation**:

> [52] Sexual orientation is a core component of a person's identity which requires fulfilment through relationships with others of the same orientation. As Justice Sachs of the South African Constitutional Court movingly put it in *National Coalition for Gay and Lesbian Equality v Minister of Justice*, 1999 (1) SA 6, para 117:
> "While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined."

This view, that sexual orientation *requires* expression in intercourse, and hence that any distinction based on the behaviour will also be a distinction based on orientation, was also affirmed in an Australian decision, *Christian Youth Camps Limited v Cobaw Community Health Service Limited and Mark Rowe* [2014] VSCA 75.[15] The Court there rejected an argument that in denying a booking to a group that was lobbying for the "normalisation" of homosexuality, the Christian group concerned was not basing its decision on the orientation of the group members, but (impliedly) on their "behaviour" of lobbying for a particular viewpoint.

[14] And the Bible tells us that the Lord Jesus, for example, was "tempted" but without sin- see *Hebrews* 4:15.
[15] For detailed comment on this case see a previous post and linked articles.

Maxwell P supported comments that had been made by the Tribunal below, which were to the effect that sexual orientation is "part of a person's being or identity" and that:

> To distinguish between an aspect of a person's identity, and conduct which accepts that aspect of identity, or encourages people to see that part of identity as normal, or part of the natural and healthy range of human identities, is to deny the right to enjoyment and acceptance of identity. (at [57])

(See also Redlich JA: "sexual orientation [is] inextricably interwoven with a person's identity" (at [442]).)

A similar approach has been taken in the United States. In *Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez*, 561 US 661, 130 S Ct 2971, L Ed 2d 838 (2010) the CLS included a requirement for its leaders to agree with traditional Christian teaching on marriage, that it was between a man and a woman, and a commitment to adhere to that teaching. The University of California removed the group's accreditation as an approved student society, because they said that this policy was discriminatory. The US Supreme Court held that the University was entitled to do this, and it was not a breach of the CLS's free speech rights to do so. In the course of the decision Ginsburg J, for the court, said:

> CLS contends that it does not exclude individuals because of sexual orientation, but rather "on the basis of a conjunction of conduct and the belief that the conduct is not wrong." Brief for Petitioner 35-36 (emphasis deleted). Our decisions have declined to distinguish between status and conduct in this context. See *Lawrence* v. *Texas*, 539 U. S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination." (emphasis added)); *id.*, at 583 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is **closely correlated** with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); cf. *Bray* v. *Alexandria Women's Health Clinic*, 506 U. S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."). See also Brief for Lambda Legal Defense and Education Fund, Inc., et al. as *Amici Curiae* 7-20 (at 561 US, 689). (emphasis added)

In other words, where "conduct" is "closely correlated" with sexual orientation, a decision based on conduct will be held to be a decision based on sexual orientation.[16]

There is one case in Australia that sets out a clear distinction between "behaviour" and "orientation". In *Bunning v Centacare* [2015] FCCA 280 an employee of a Catholic family counselling centre was dismissed because of her involvement in support for "polyamorous" activities. The judge in that case held that there was no "sexual orientation" discrimination, because "polyamorous" (the activity of having more than one active sexual partner at one time) was not an orientation, it was an activity. His Honour concluded:

> [39]…I am led to the inexorable conclusion that "*sexual orientation*", as the term is used in s. 4 of the *Sex Discrimination Act 1984* (Cth), covers only that which it expressly covers, i.e., the state of being. It does not cover behaviours.

[16] This precise passage has been cited in a number of the US cases at State level holding that a provider of wedding cakes cannot decline to provide a cake for a same-sex wedding on the basis that their ground of choice was not "orientation", but the message being sent- see eg the decision of the Oregon Court of Appeals, in *Klein v. Oregon Bureau of Labor and Industries* (CA Or; Dec 28, 2017, — P.3d —-, 2017 WL 6613356; 289 Or App 507 (2017), per Garrett J at 523.) This is a similar point- in effect holding that "wanting a same sex wedding cake" and "being same sex oriented" are "closely associated". Interestingly the recent decision of the UK Supreme Court in *Lee v Ashers Baking Company Ltd* [2018] UKSC 49 (10 Oct 2018) does distinguish between a "message" of support for same sex marriage and "same sex orientation", but it is not clear whether that reasoning will in future be applied to actual wedding cakes (in that case it was a cake to be decorated for a political event rather than for an actual wedding.)

However, it has to be said that this was a very unusual set of circumstances and has not so far as I am aware been followed in later cases.[17]

Given the weight of high-level court decisions which seem to refuse to recognise a distinction between "homosexual orientation" and "messages of support for homosexuality", it seems likely that a school's application of a "code of conduct" requiring, for example, students not to openly advocate for acceptance of a view of homosexuality contrary to that of the Bible, would be held to be discriminatory on the basis of sexual orientation. Hence it seems clear that some form of **other** legislative protection is needed, if s 38(3) is to be amended.

How should s 38(3) be amended?

Of course, the Prime Minister's concerns might be met without such a wholesale change to s 38(3), simply by explicitly clarifying that a student may not be "expelled" on the basis of their sexual orientation. But another option may be to redraft it so that it refers, not to inherent *orientation* as such, but to specific *behaviour and conduct* which might undermine a school's ethos.

While it can be argued that, even as it stands, simply counselling someone about their behaviour does not amount to treating someone detrimentally on the basis of their orientation, it would be better to clarify this (especially in light of the cases noted above). If s 38(3) is as it stands is too broad (as noted previously, no Christian or other religious school is arguing for a right to exclude or expel or discipline students simply on the basis of their "orientation" as such), then it might be replaced with a narrower provision that recognises the need to allow a religious school to maintain its religious basis.

One option, for example, would be to make it clear that schools are entitled to set up "reasonable standards of dress, appearance and behaviour for students". A provision to this effect is already contained in the Victorian *Equal Opportunity Act 2010, s 42*. This provision also requires the views of the local school community to be considered. The equivalent in the context of the SDA would be allowing the school to operate in accordance with its religious ethos.

So, s 38(3) might be replaced by something like this:

> **Possible new SDA 38(3)** Nothing in s 21 renders it unlawful for an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, in connection with the provision of education or training, to set and enforce standards of dress, appearance and behaviour for students, so long as this is done in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

This would allow a religious school to establish policies about student dress, appearance and behaviour that are consistent with its religious ethos, without being accused of contravening s 21. It would not support actions simply based on "orientation" (in the sense of "desire") alone. As already noted, even though it can be argued that in any case actions based on specific behaviour and conduct would not be unlawful even at the moment, in light of the court decisions noted above and "for the avoidance of doubt" and litigation, it may be better to spell this out clearly, in a way which is analogous to that already done in the discrimination area at the State level.

In line with the Ruddock Panel recommendations, it would also be possible to add a requirement that this policy be clearly publicised to existing and prospective students and parents.

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[17] For my analysis of the case, see "Sexual orientation and sexual behaviour: can they be distinguished?" (Feb 21, 2015).

This proposal would itself not deal with any *State* legislation that currently allows religious school actions to be based on sexual orientation and the other criteria mentioned in s 21. That would be a matter that State legislators would need to consider. But it is suggested that this proposal may appropriately define the scope of s 38(3) of the Commonwealth SDA to allow it to deal more closely with the need to allow religious schools to take sensible actions to maintain their religious ethos.

While as of the day on which this paper is being delivered, we have not seen an official version of the Government's proposed amendments to s 38(3), there has been a "leaked" version which looks as though it might be under consideration.[18]

The leaked draft law repeals s 38(3) of the SDA. Then the draft inserts a new para 7B(2)(d), which sits in a provision of the Act spelling out what is "reasonable" for the purposes of an indirect discrimination claim. The change seems to be to clarify that religious schools may do what would otherwise be "indirect" sexual orientation discrimination by setting out a policy on student behaviour, which has to be "in good faith to avoid injury to religious susceptibilities" and "having regard to the best interests of the student".

At first this looks as though it may deal adequately with some of the concerns of religious schools. So, for example, suppose the school has a rule that says, "students shall not establish clubs that advocate for a world-view contrary to that of the Bible". Here it could be claimed, even though this policy does not *itself* target homosexual students, that it might be an act of indirect discrimination under s 5A(2) SDA, as the school "imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same sexual orientation as the aggrieved person".

Such a policy would have a differential impact on homosexual students, as they are more likely to want to set up a gay support club than heterosexual students. But s 5A is subject to s 7B (see s 5A(3)), and the new amendment to s 7B would mean that the school could argue that the "condition, requirement or practice is reasonable in the circumstances"- s 7B(1). One of the factors determining whether it is "reasonable" or not would be the proposed new s 7B(2)(d)(i), under which it could be argued that the condition is imposed in good faith to avoid injury to religious susceptibilities (ie it is the sort of thing parents who send their kids to the school would expect, and is consistent with classical Christian views).

However, I am not entirely sure how s 7B(2)(d)(ii) would be interpreted, which imposes a "best interests" test. The school could argue that they have "had regard" to the "best interests" of the student, since, to be blunt, their rule will in part drive home that the school is opposed to homosexual activity, and this may be part of the process of educating the student that the Bible and Christians regard this is a serious spiritual issue.

However, let's take another example: suppose a school rule that says something like "students may not bring same-sex partners to school socials". While the rule is not explicitly targeted at "sexual orientation", this is probably a rule which amounts to "direct discrimination" under s 5A. Under s 5A(1)(b) one would have to say that "expressing romantic affection for a same sex partner" is "a characteristic that appertains generally to persons who have the same sexual orientation as the aggrieved person", and hence this behaviour is indeed directly discriminatory. Hence s 7B's "reasonableness" analysis is not applicable (as under s 7B(1) it does not apply to a case of **direct** discrimination under s 5A).

So, the leaked proposed draft will arguably still make unlawful any school policy that is explicitly directed to activity that flows directly from being a same sex attracted person. (It would still of course be possible to have a rule, eg, that says "students must not engage in

[18] See "Religious schools could still discriminate against gay students under PM's draft laws" (25 Oct, 2018) https://www.sbs.com.au/news/religious-schools-could-still-discriminate-against-gay-students-under-pm-s-draft-laws .

romantic expressions of affection at school activities", so long as this rule was enforced against heterosexual couples as well as homosexual couples. But that may not meet with general approval.) As a result, in my view, it will not meet the legitimate concerns of religious schools. I would still maintain that my proposed draft amendment to s 38(3) would be better option.

(ii) Religious Schools and same-sex attracted teachers

What about the situation with **teachers**? While committing to change the law relating to same-sex attracted students, the Government so far has not indicated its final views on questions relating to teachers.

The ALP, however, has announced that they want to pursue this issue when amendments relating to students are debated in Parliament. It even seems that some members of the LNP Government are unclear about the issue.

While accepting that "orientation alone" should not be a ground to expel or discipline *students*, removing the provisions that allow schools to make these decisions in relation to *staff* is in my view a bad idea. Religious schools exist because parents want the option to see their children educated in an institution which supports their religious and moral worldview. Unlike fellow students, teachers are an inherent part of the institution. Students do not just learn academic truths from their teachers; in many cases they admire them as people, and model themselves on the values their teachers live out. Hence someone who is committed, by their identification and activity, to opposing the moral framework of the school, is not suitable to be working as part of that school community. A fully committed member of the Greens would not be suitable to work in the office of the Conservatives. The same issues arise in relation to religious schools and same-sex-oriented teachers.[19]

Recommendations 5 and 6 of the Ruddock Report deal with religious schools and teachers:

> **Recommendation 5**
> The Commonwealth should amend the Sex Discrimination Act 1984 to provide that religious schools can discriminate in relation to the employment of staff, and the engagement of contractors, on the basis of sexual orientation, gender identity or relationship status provided that:
> - The discrimination is founded in the precepts of the religion.
> - The school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced.
> - The school provides a copy of the policy in writing to employees and contractors and prospective employees and contractors.
>
> **Recommendation 6**
> Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools in employment on the basis of race, disability, pregnancy or intersex status. Further, jurisdictions should ensure that any exceptions for religious schools do not permit discrimination against an existing employee solely on the basis that the employee has entered into a marriage.

As with recommendation 7, the wording of recommendation 5 is somewhat misleading. Religious schools *already* enjoy the right to make decisions in the employment area which would otherwise be discriminatory; the recommendation is designed to add extra conditions to the existing provisions. As we have seen, in the Federal sphere, this right is set out in s 38(1) and (2) of the *SDA*.

Recommendation 6 deals with both the Commonwealth law, and also State and Territory anti-discrimination laws, which vary in their provisions. The first half recommends

[19] In a previous post "Religious groups and employment of staff", I provided three examples of cases where these issues had been discussed, and some of the points I made there are repeated below.

that these jurisdictions no longer allow religious schools, in their employment decisions, to rely on the four grounds of "race, disability, pregnancy or intersex status". I am going to put these to one side for the purposes of this discussion, which will major on the "sexual orientation" point.

That is raised, however, by what we might call recommendation 6(b), which requires all jurisdictions to not allow "discrimination" on the basis that an employee has "entered into a marriage". In past days this might have applied to cases where an employer decided to sack a female employee when she got married to her boyfriend. Now it will also apply, presumably, where a teacher or other worker at a religious school enters into a same sex marriage. This will again raise significant issues for a school operating on a religious ethos.

Why are these provisions here?

A key point to note is that, while recommending some additional conditions, the Ruddock Report in general (as far as we can judge from the leaked material) **supports** the existence of the provisions allowing selection and management of staff in religious schools to be influenced by sexual orientation.

The current provisions of s 38(1) and (2) are a part of the legislation because it has long recognised that some religious groups hold the view that sex should only take place between a man and a woman, and then only once they are married to each other. The "Abrahamic" religions, Christianity, Islam and Judaism, have taught for many years that homosexual activity is not part of God's design for humanity. A person who identifies as being of homosexual "sexual orientation" is someone who has signalled, by that, that they disagree with this view. In particular, someone who announces that they are going to marry their same sex fiancé is making a very clear public statement that they disagree with this moral stance.

Of course the community at large has now indicated its support for homosexuality in changing the law to allow same sex marriage. But in the course of those debates, it was regularly claimed that allowing same sex couples to marry would *not* have a wider impact on those who disagreed with this change. It was always assumed that there would be a part of the community who did not support the move, and that for many of those people it would be because of their religious convictions. (Indeed, it is always worth remembering that 38% of Australians who indicated a view in the "postal survey" process, voted against the change. That is not an insubstantial portion of the Australian community.)

Let's consider some **objections** which are now being taken to these provisions.

The "public funding" furphy

One mantra that is regularly trotted out in these debates is this: if schools wish to accept "public funds", they can only do so on condition that they accept public morality on homosexuality.

But this really is a furphy. The statement seems to assume that "public funds" arrive from some mysterious source with a label saying "only to be used for secular purposes". "Public funds" come from taxpayers, around 53% of whom in Australia have a belief in some form of religion. There is absolutely no reason why the taxes paid by religious citizens should not be used in a context where there is a general public benefit, supplied by a religious body which operates on the basis of a religious world-view. Australia has a long tradition for many years of religious schools being provided with public funding, at least since the High Court declared in the famous "DOGS" case that this did not amount to the "establishment" of religion contrary to the Constitution.[20]

[20] See *Attorney-General (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, known as the *DOGS case* for the group which sponsored the challenge, "Defence of Government Schools", discussed here. More recently the NSW Court of Appeal reaffirmed in the 2016 *Hoxton Park* decision , *Hoxton Park Residents Action Group Inc*

Public funds are supplied to religious schools because they have been shown to be able to deliver the general public curriculum, as well as providing an option for parents who want their children to be educated in accordance with their religious beliefs. (Indeed, if all religious schools were to close down tomorrow, it is clear that the public-school system would be massively overcrowded.)

"But there's no 'Christian' view of mathematics"

Another common refrain here is to argue that, while a religious studies teacher needs to a fully committed religious believer, surely there is no need to give religious schools an option to dismiss, or not employ, a gay maths teacher?

And it is true that some schools will make that decision. But the fact is that many religious schools offer the experience of being part of a whole religiously motivated community, in which every member lives out that faith. That is one of the defining characteristics of those who are serious about their religion- it is not simply a "Sunday morning" or "Friday afternoon" hobby, it is a deep life commitment which covers every aspect of existence. So, the school will expect, and parents who send children there will expect, that those providing the education will do so, wherever possible, from a position of full support for the religious world view in all parts of life. After all, the idea that a successful organisation is one where the employees "buy in" to the company's corporate vision, is a key insight of modern management theory.[21] Why would it not apply to a school?

"But does it really matter what teachers do on their own time"?

I suggested above that it would be reasonable to remove the provisions of s 38(3), allowing a religious school to discriminate against a student on the grounds of their "orientation" alone, so long as the school was still allowed to implement a religious policy concerning the behaviour and conduct of students. Might not the same be said about teachers? Would it be possible to only allow teachers to be disciplined or dismissed where they had openly and publicly defied the school's values?

It seems to me that such a policy would have many problems. The suggestion ignores the many differences between the positions of students and teachers respectively. Teachers are those who set the tone for the classroom, who are looked up to by their students.

So, for example, how would a teacher's "orientation" become known? Presumably the teacher would make it clear in communicating with colleagues or students. Once this fact has been communicated, the message being conveyed by the teacher's continuing employment at the school is that a preference for same-sex sexual partners is acceptable to the organisation.

It could be argued that, so long as the teacher does not *act* on their self-identification at school, and in particular does not actively seek to persuade students that homosexual activity is acceptable, then they are causing no harm to the school ethos.

But this ignores one of the deep truths about the profession of teaching- that students regularly learn so much, not simply from the facts that are conveyed by their teacher, but from observing and modelling themselves on the teacher's life as a whole person. Popular media is

v Liverpool City Council [2016] NSWCA 157 (5 July 2016), that supplying an Islamic school with public funds did not breach the Constitution.

[21] See eg Chhotray, Sivertsson & Tell "The Roles of Leadership, Vision, and Empowerment in Born Global Companies" (2018) 16 *J Int Entrep* 38–57 at 43: "Several studies discuss how important it is for employees to understand and share the company vision. This is a prerequisite for effective empowerment programs…"

full of such stories, from the classic films such as *Dead Poet's Society* or *Mr Holland's Opus* to the equally classic *Simpsons* episode where Lisa is inspired by her substitute teacher.

For once fiction is close to reality. Teachers do have a significant impact on the lives of their pupils going beyond the mere content they convey in class, and knowing this, it seems reasonable for a religious school to ask its teachers themselves to be examples of godly behaviour which it seeks to model and inculcate in students. This will of course mean that a heterosexual teacher will be disciplined or dismissed if they start living with their partner outside marriage, or a single female teacher might be asked to leave if they become pregnant. But it may also mean that a teacher who identifies as homosexual, may be told that this does not fit with the overall message of the school.

Professor Helen M Alvaré, "The Opposite of Anarchy and the Transmission of Faith…" (2015) puts it this way, when she notes that questions of "sex, marriage and parenting" are precisely the areas where many of society's current values conflict with those taught by the Christian church for thousands of years. In those circumstances it is not surprising that religious groups would seek to pass on community values to children by intentionally setting up learning communities where children learn about the beauty of the Christian world-view. She says:

> It is not clear how religious leaders and families would pass on their faith in this milieu, without consistent and persistent teaching, in word but also in deed…
> It is obviously true that children will be more inclined to believe what their faith teaches, and that it is "doable" in their lives, if they have before them the example of teachers faithfully living out their religious beliefs with peace and integrity. This needs to be acknowledged as a matter of common sense: the person of the teacher importantly influences the student. (at p 9)

Response to the Ruddock Recommendations

So, to sum up, I do not think the abolition of the s 38(1) and (2) provisions is a good idea. In relation to the details of the Ruddock **recommendations 5 and 6**, while happy with the "publicity" changes, I have some serious reservations about the first proposed condition. For reasons noted above, I do not think it is the role of secular courts or tribunals in these sorts of cases to be determining what is "required" by the precepts of a religion. It would in my view be best to maintain the current wording, which refers simply to a decision made "in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed". This would exclude a decision made as a "sham" to cover up some bad motive but would allow the choice as to how the religion should be interpreted, to be left with those who run the school in accordance with those precepts.

As noted in an excellent recent article on these issues by Annette Pereira, Executive Officer of the Australian Association of Christian Schools:

> For a religious community to function, it needs to be able to resolve its moral and ethical decisions within itself, with reference to its sacred teachings and texts. It is not up to the government to make those decisions on its behalf.[22]

A society which is truly "diverse" will allow space for minority views. There is a long history of Australian parents choosing to send their children to religious schools, precisely because the mix of beliefs and practices that characterise the schools are seen to be beneficial to their children. It would deny that free choice to deny these schools the ability to operate in accordance with their fundamental beliefs, by selecting staff who share those beliefs.

[22] "Schools would be pushed into an impossible corner", *Sydney Morning Herald*, 15 Oct 2018, https://www.smh.com.au/national/schools-would-be-pushed-into-an-impossible-corner-20181015-p509od.html .

Another challenge to this view can be seen in legislation introduced by the Greens Party in the Australian Senate,[23] and in proposals to amend the law of the ACT put forward by the ACT government.[24] In my judgment the Greens proposal, being brought forward in the week prior to the recent Wentworth by-election and looking most like an opportunity to embarrass the Government, will probably not receive any further debate. The ACT Bill may progress, but if course will not directly impact the law of NSW. (And in any event my view is that it will not over-ride whatever the Commonwealth law says on the matter.)

4. Other important issues

I have focussed in this paper on issues to with sexual orientation of students and staff, and related matters, because that has been the controversial area in recent days. But it is worth noting briefly that challenges to religious freedom can come up in other areas.

(a) Religious schools and other religions

One obvious issue is whether a religious school is entitled to only enrol students from a specific religious background, or to employ staff who share that religion. In general, the rule adopted across Australia, even in Tasmania where protection of religious freedom is at its weakest, is that schools are entitled to only offer their facilities to students of one religion, and usually to only employ staff from that religion.[25] Some laws, however, require demonstration that the requirement for staff to be of the school's religion is an "genuine occupational requirement", or something similar.[26] While such requirements sound plausible, in the end I think they are unwise, again because they shift the locus of decision-making about the content of religious beliefs from the religious school to a secular tribunal or a court.[27]

In NSW at the moment, this is not an issue, mainly because there is no prohibition on religiously-based discrimination in our State. But of course, it would need to be taken into account if the Commonwealth introduced a Federal *Religious Discrimination Act*.

(b) Free speech and "vilification" issues

Another issue that religious schools may face from time to time is the operation of "vilification" laws, which prohibit certain types of speech which either induce hatred and contempt for people based on a "protected characteristic", or (in a very bad example of such a law) where speech causes "offence". While one might think that in general a school set up to operate on a religious basis would not be challenged, when teaching the doctrines of their religion to children whose parents wanted them to be taught about that religion… sadly one Tasmanian example means that even this obvious proposition may be in doubt. This is the case of Archbishop Julian Porteous, who sent a letter outlining the Roman Catholic doctrine of marriage to the parents of students at Roman Catholic schools in Hobart and was then sued

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[23] See my blog comment "Greens Bill a serious attack on religious freedom" (Oct 18, 2018).
[24] See my preliminary comment based on press reports, "ACT proposal to remove religious freedom provisions for schools" (Oct 25, 2018) and detailed discussion of the Bill as introduced, in "ACT bill removing religious freedom from religious schools introduced" (Nov 1, 2018).
[25] For an overview of "balancing clauses" in discrimination laws around Australia, see Neil J Foster, "Protecting Religious Freedom in Australia Through Legislative Balancing Clauses.pdf" *Occasional papers on Law and Religion* (2017) at: http://works.bepress.com/neil_foster/111/ .
[26] See, eg, s 25 of the *Anti-Discrimination Act* 1991 (Qld): "if the work genuinely and necessarily involves adhering to and communicating the body's religious beliefs".
[27] For more detailed comment on these issues, in the context of some proposed Victorian amendments, see my blog post "Victorian challenge to religious freedom of faith-based organisations" (Sep 8, 2016) https://lawandreligionaustralia.blog/2016/09/08/victorian-challenge-to-religious-freedom-of-faith-based-organisations/ .

under Tasmania's *Anti-Discrimination Act* 1998 s 17, which prohibits "causing offence" on grounds including sexual orientation.[28] (The case was eventually dropped, but without a final decision by the tribunal, so a similar could be brought at any time.)

No other jurisdiction in Australia, thankfully, has such a draconian law as the "anti-offence" provision in Tasmania. (Nor, thanks to a decision of the High Court earlier this year, can an action against a resident of another State be taken in a Tasmanian tribunal.)[29] There is a prohibition on "homosexual vilification" in s 49ZT(1) of the *Anti-Discrimination Act* 1977 (NSW) on "incit[ing] hatred towards, serious contempt for, or severe ridicule of, a person or group of persons" on the grounds of homosexuality. It seems clear that a respectful presentation of the Bible's teaching on this matter should not incite any of those things, but even if it is suggested that it would, there is a defence under s 49ZT(2)(c), for

> (c) a public act, done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

At the moment, then, it seems that religious schools in NSW will probably not run up against the vilification provisions. But any attempt to adopt a "Tasmanian" model for these provisions should be resisted.

5. How should religious freedom be protected?

All of this raises the question as to how religious freedom *ought* to be protected in the future. As this has been a long paper already, let me just sketch out the main options which should receive further discussion.

(a) Current regime- "exemptions" to discrimination laws?

Should we simply continue with current regime of "exemptions" to discrimination laws? No, I don't think this is a good idea. For one thing, as mentioned, the public tolerance for a "right to discriminate" seems almost non-existent these days. The word "discrimination" is now almost completely a negative one. Coupled with reference to religious freedom protections as "exemptions", which seems to signal they should be limited and dispensed with as soon as possible, the current regime is highly unsatisfactory.

However, there is no doubt that whatever option is chosen, there will still be a need to be explicit about the interaction between discrimination laws and laws about religious freedom. I recommend careful consideration be given to introducing a new definition of "discrimination" which takes into account that it is not unlawful to exercise the human right to freedom of religion by selecting staff who agree with the ethos of the religious group. A model for such a provision is found the Freedom for Faith submission at pp 67-69.[30]

(b) A Religious Discrimination Act?

We know that one thing the Ruddock Panel has recommended is a *Religious Discrimination Act* of some sort- see **recommendation 15**. This would enact the general principle that, just as persons should not be subjected to irrelevant detriments on the grounds

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[28] For background and some linked articles, see https://lawandreligionaustralia.blog/2015/11/13/first-they-came-for-the-catholics/ (Nov 13, 2015).
[29] See *Burns v Corbett* [2018] HCA 15 (18 April 2018), discussed in https://lawandreligionaustralia.blog/2018/04/18/high-court-upholds-rejection-of-inter-state-vilification-orders/ (April 18, 2018).
[30] See above, n 10.

of their race, age, disability, sex, or sexual orientation, neither should they be on the grounds of their religious belief.

In the Synod briefing paper I mentioned previously, I set out three important limitations that I think ought to be applied to any such Act, balancing clauses to respect other rights. They are:

(a) To balance the right not to be discriminated against on religious grounds, with **other fundamental rights such as bodily integrity and free movement**. It should not be unlawful to decline to employ someone who has advocated use of violence against unbelievers, even if their advocacy is religiously based.

(b) To balance out the **rights of different religions not to be required to support other religious worldviews**. A church, or a religious school, should be entitled to not employ someone as a pastor or youth worker who comes from a different religious background.

(c) Finally, and importantly, to allow **religious groups to control their own internal affairs**. Under international law, for example, it is well established that a member of a religious group cannot claim to be discriminated against by another member of the same group, because they differ on doctrine or practice. The remedy for someone who does not like the way their own group is being run, is to leave that group.

With those qualifications, I think there would be benefit in such legislation.

(c) A more general "Religious Freedom Act"?

Another option would be to seek to implement something a bit broader than merely a prohibition on discrimination, in the form of a positive right to religious freedom. There are still debates to be had about whether this is a good idea- the Freedom for Faith paper recommends something like as a possibility (see Chapter V, coupling religious freedom with some other closely related ICCPR rights such as freedom of speech).[31] From the leaked Ruddock Recommendations, it looks as if they rejected the suggestion. Once the Report is released, we will be in a better position to evaluate the arguments.

(d) Some form of expanded "Human Rights Act"?

Perhaps the broadest type of change would be a wide-reaching piece of human rights protection at the Federal level. I think there are some dangers here, but since we recently had a lengthy inquiry by Father Frank Brennan recommending just this, and it was rejected by all political parties, it may not be something we need to be concerned about as happening very soon.

Conclusion

Those who are managing religious schools will need to think about these issues more and more, it seems. Each of you will no doubt be thinking about the future, and my suggestions are made as an outsider looking in. But it does seem like it would be a good idea to consider a careful review of current doctrinal statements, for example, to be clear as to where the school stands on supporting a Biblical view on sexual behaviour, marriage and sexual identity. Clarity on these issues is needed if it becomes necessary to rely on a "balancing clause" in legislation which turns on the content of doctrine or beliefs.

Let me conclude on a more personal note. I was incredibly encouraged recently to see the public letter on these issues that had been signed by many Anglican Principals. I think

[31] Above, n 10.

myself that, for those who actually read what it said (!), it struck exactly the right notes, decrying any need to expel or dismiss gay students or staff on the basis of their orientation alone, but affirming the imperative that a teacher support the values, ethos and mission of the school. As we have seen tonight, the current provisions protecting the religious freedom of schools are far from perfect in their drafting, but we cannot abandon them until something better is put in place (and not, of course, on the basis that something better will come "sometime soon"!)

Since that letter was issued, I gather there has been a strong negative response from some alumni and former staff- it may have come from others as well. Friends, let me say very clearly that as I see it, this is a fight worth having. I applaud the courage of the principals who put out the letter, whether or not they realised the public backlash that would follow, while of course appreciating that in these areas clarifying communications may be needed to overcome wrong impressions given by media coverage.

I do not think, as some in the Christian community seem to occasionally suggest, that we should pick up our religious principles and abandon the public square. No; we should be grateful that for reasons of history, and through the hard work of those who have come before, Christians at the moment do have the chance to offer Christian education with some support from public funds (supplied by taxpayers, at least half of whom called themselves religious at the last census!) Rather than retreating in the face of opposition, I think we need to continue to graciously make the case for these institutions to continue to be able to operate in accordance with their beliefs. There is nothing wrong with relying on the provisions of the law of the land to defend our right to continue to teach the Christian message- that is what the apostle Paul did on a number of occasions in the book of Acts, relying on his Roman citizenship and the laws of the Empire to keep preaching as long as he could. Not everyone needs to be out front saying this all the time, but those who make the case need the strong support of others behind the scenes.

Of course, there may come a point when running a school on Biblical principles becomes impossible. In my judgment, however, we are still some way off that point. That doesn't mean, of course, that in carrying on now we may not face some hard, difficult times. The apostle Paul, writing near the end of his life to his protégé Timothy, who had been with him through many of those hard times, referred to his teaching, his conduct, his faith… and his persecutions and sufferings. "Indeed", he says in 2 Tim 3:11, "all who desire to live a godly life in Christ Jesus will be persecuted".

But for those who stay faithful to the Lord and his word, Paul says later in 2 Tim 4:8, "there is laid up… the crown of righteousness, which the Lord, the righteous judge, will award to me on that Day, and not only to me but also to all who have loved his appearing".

Carrying on the teaching of the gospel through religious schools is an important job. Through our religious schools, parents will be able to realise the right given to them under art 18(4) of the ICCPR to ensure the "religious and moral education of their children in conformity with their own convictions". More importantly, as students learn to love the gospel and love the gospel-centred life as they see it lived out in their school staff, the Lord Jesus will be glorified. May he strengthen you all in this ministry.