

Newcastle Lawyers' Christian Fellowship March 2020

“The latest draft of the Religious Discrimination Bill- the good, the bad and implications for lawyers”

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Questions of religious freedom have become quite prominent in Australia in recent times. Part of the impetus for this debate was the recognition of same sex marriage in December 2017,² when the course of Parliamentary debate led to the then-Prime Minister Malcolm Turnbull undertaking to commission further work on how religious freedom was protected, and whether any changes were needed. This took place through a Panel of Experts chaired by Phillip Ruddock, which provided its report to the Government in May 2018 (although the report was not made public until December that year, after the leaking of its recommendations led to some controversy.)³

Going into the May 2019 Federal election, the new Prime Minister, Scott Morrison, promised to implement a number of recommendations of the Ruddock Report. After his (somewhat unexpected) re-election, the promise has been fulfilled in part by the release for comment of two Exposure Drafts of a *Religious Discrimination Bill*.⁴ The Bill has not yet been formally introduced into Parliament, but it seems worthwhile to note the issues it raises, some of the opposition it is now facing, and in this context in particular possible impacts on legal practitioners.

Dealing with possible adverse treatment of people on the basis of their religious beliefs or activities (which is the function of “religious discrimination laws” like this one) is only one part of furthering religious freedom in Australia generally. But it has already caused some controversy. Religious bodies and individuals have generally expressed support for the Bill, although noting some perceived defects in coverage.⁵ Others have expressed concern that the Bill may have an adverse impact on health-care,⁶ and in more recent days have suggested it will unleash all sorts of horrible statements by religious people.⁷ I want to set out these concerns

¹ Newcastle Law School, University of Newcastle, NSW. Views expressed here are of course my own and not necessarily those of my institution.

² See the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth), which commenced operation on 9 December 2017.

³ *Religious Freedom Review: Report of the Expert Panel* (Dec 2018), <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf>

⁴ See <https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx> and <https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills-second-exposure-drafts.aspx>. For my previous comments on the first Bill and its related material, see two blog posts: “New Commonwealth Religious Freedom Laws” (Aug 30, 2019) <https://lawandreligionaustralia.blog/2019/08/30/new-commonwealth-religious-freedom-laws/>; and “Legal Reflections on the Religious Discrimination Bill” (Sep 2, 2019) <https://lawandreligionaustralia.blog/2019/09/02/legal-reflections-on-the-religious-discrimination-bill/>. For my comments on the second draft Bill see “Submission on Second Draft of Religious Discrimination Bill” (Jan 28, 2020) <https://lawandreligionaustralia.blog/2020/01/28/submission-on-second-draft-of-religious-discrimination-bill/>.

⁵ See for example the submission of Christian “think-tank” Freedom for Faith, at <https://freedomforfaith.org.au/library/fff-submission-to-the-religious-freedom-bill-2019>.

⁶ A Remeikas, “Religious discrimination bill would create barriers to women's healthcare, advocates warn” *The Guardian*, 10 Oct 2019, at <https://www.theguardian.com/australia-news/2019/oct/10/religious-discrimination-bill-would-create-barriers-to-womens-healthcare-advocates-warn>.

⁷ See a series of what seem to have been carefully devised articles, featuring for example Luke Beck, an academic, former High Court Justice Michael Kirby, and celebrity ex-athlete Ian Thorpe: J Ireland “Religious discrimination bill gives Australians 'right to be a bigot” (*Sydney Morning Herald*, Jan 30, 2020)

and what needs to be considered to determine whether they are valid or not.

But first, it is worth setting the scene in relation to religious freedom generally in Australia.

Religious Freedom Protection in Australia

I have written an earlier paper on protection of religious freedom in Australia under current laws,⁸ where I give a couple of important quotes from the courts on the topic:

“Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society...”⁹

“Religious faith is a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity.”¹⁰

Religious freedom has been a key part of our common law tradition. It is protected to some extent under s 116 of the Commonwealth Constitution. In addition, in more recent years, it has been recognised as a vital part of the human rights framework set up by international human rights treaties. For example, the International Covenant on Civil and Political Rights, the ICCPR, which Australia has committed itself to abide by, says this in art 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 beliefs 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.

These are key rights which are sadly very seriously breached in some other parts of the world - for example, in China, where Muslim Uighers are being interned and “re-educated” in Xinjiang province, primarily on the basis of their faith.¹¹ But we have been fortunate to generally have a tradition of religious freedom in Australia for many years.

Nevertheless, there are important issues which are becoming recognised as significant problems for members of Australian society with religious beliefs. The threats do not usually come from official punishment for belief from the government, but there can be other sanctions which are applied to believers in response to their desire to practice their faith and live it out in

<https://www.smh.com.au/politics/federal/religious-discrimination-bill-gives-australians-right-to-be-a-bigot-20200129-p53vq4.html> ; J Ireland “Kirby says religious discrimination laws a 'weapon against non-believers'” (SMH, Feb 26, 2020) <https://www.smh.com.au/politics/federal/kirby-says-religious-discrimination-laws-a-weapon-against-non-believers-20200226-p544ib.html> ; J Ferguson “Ian Thorpe Dives Head First Into The Religious Discrimination Bill Debate” (27 Feb 2020) <https://10daily.com.au/news/politics/a200226qtrdm/ian-thorpe-dives-head-first-the-into-religious-discrimination-bill-debate-20200227> .

⁸ Neil J Foster, "Religious Freedom in Australia overview 2017 update" (2017), available at: http://works.bepress.com/neil_foster/112/ .

⁹ *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 57 ALJR 785 at 787, per Mason ACJ and Brennan J.

¹⁰ *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 at [560] per Redlich JA.

¹¹ See <https://www.theguardian.com/commentisfree/2019/oct/31/china-uighurs-muslims-religious-minorities-marco-rubio> .

their lives. Notice that under art 18 the right to religious freedom includes not only the right to believe and worship in church, or at the mosque or synagogue or temple, but also the right to “manifest... religion or belief in ... observance, practice and teaching.” Of course, a right to manifest belief cannot be absolute- it, like all other human rights, must be balanced with other rights of other persons. No-one can claim a religious right to commit physical violence on other people in the name of religion. We don't want to see sacrificial offering in public squares under the guise of a revival of Aztec religion! And we have a strong consensus these days that even a practice that is sometimes justified as a “religious” custom, such as female genital mutilation, will not be accepted where it does violence to the bodies of girls.¹²

But it has been increasingly recognised in recent years that religious beliefs cannot be simply ignored- and in many situations should be suitably accommodated by employers and others where possible.

Discrimination law and religious freedom

What role does discrimination law, like the latest Bill, play in protecting religious freedom? There are some other ways of protecting this right. We do have a provision in our Federal Constitution, s 116, which forbids the Commonwealth Parliament from making “any law for...prohibiting the free exercise of any religion”- but it has been interpreted quite narrowly, and in any event only applies to the Commonwealth Parliament, leaving the States quite free to limit religious freedom. There are some State or Territory laws which implement a Bill or Charter of human rights; but not in NSW, and the ones elsewhere have not been very effective in protecting religious freedom so far.

As it turns out, one of the key ways of protecting religious freedom in Australia in recent years has been through discrimination laws. This happens in two ways. One is that there are laws which make it unlawful to discriminate against someone on the basis of their religious belief or activity. (That is what this Bill does.) The second way that discrimination laws protect religious freedom is that, in laws that forbid discrimination on *other* grounds, those laws provide exemptions, or what I prefer to call “balancing clauses”, recognising the need to allow believers to express their faith in their actions.¹³ So, to take one obvious example, since the *Sex Discrimination Act 1984* (Cth) (“SDA”) was introduced making it generally unlawful to make employment decisions on the basis of gender, the Roman Catholic Church has continued to ordain only men as priests. Why? Because the SDA contains a “balancing clause” allowing religious groups to make employment decisions, and some other decisions, based on their fundamental religious commitments.¹⁴ (This Bill does not directly impact on the balancing clauses in the SDA and related laws; that is a matter which is being considered by the ALRC, which is due to report at the end of the year.¹⁵)

¹² Recently the High Court of Australia commented on FGM – see *The Queen v A2; The Queen v Magennis; The Queen v Vaziri* [2019] HCA 35 (16 October 2019). They overturned the NSW Court of Appeal’s dismissal of a prosecution and sent the matter back for a new trial. Kiefel CJ and Keane J commented at [4]: “The Crown did not suggest that the procedure has a basis in religion but rather suggested that it is cultural in nature”. (See also Edelman J at [166] quoting a statement in Parliament: “While the practice is often linked to certain religious communities, this view is in fact mistaken. The origins of the practice pre-date most major religions.”) But even if it were accepted that the practitioners were convinced it was a religious obligation, it is clear that it would still be a valid criminal offence.

¹³ See Neil J Foster, "Freedom of Religion and Balancing Clauses in Discrimination Legislation" *Oxford Journal of Law and Religion* Vol. 5 (2016) p. 385 – 430; available at: http://works.bepress.com/neil_foster/108/ .

¹⁴ The relevant provision is s 37 of the SDA. For a more general overview of the interaction between religious freedom and discrimination laws see a paper linked at my blog post, “Religious Freedom and Discrimination Law” (Oct 19, 2019) <https://lawandreligionaustralia.blog/2019/10/19/religious-freedom-and-discrimination-law/>.

¹⁵ See <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/> .

Well, against that background, let me give you an overview of how the draft Bill operates, respond to some objections to it, and suggest how it might impact legal professionals.

The Draft Religious Discrimination Bill (version 2)

As mentioned, the drafts that have been released are designed to function as “Exposure Drafts” for public comment, but so far, no Bill been introduced into Parliament for actual debate. The Government made a number of changes to the first draft in response to comments it received; I understand that they may also now be slightly redrafting the second draft (“RDB2”) and possibly release RDB3 for a brief period of further public comment before it is finally introduced. It seems likely that it will be introduced into the Senate- even though that would be a bit unusual as it is not the House where the Attorney-General sits, the pragmatic reason is that the place where the Bill will be most likely to be amended is the Senate (which of course the Government doesn’t control), and also it is pretty certain that it will be referred to a Senate committee for further consideration so that may as well be done before it reaches the House.¹⁶ So some of the details I mention here may change, though I suspect the overall structure will be very similar.

(a) Religion as a protected characteristic

Like other discrimination laws, the Bill when enacted will make it unlawful for people to discriminate against another person on the grounds of a “protected characteristic”- here, that characteristic is “religious belief or activity”. Discriminate here means in general terms to “treat a person less favourably” than someone else would be treated who does not have the religious belief or engage in the religious activity that the other person does.

The Bill defines “religious belief or activity” in cl 5(1) as follows:

religious belief or activity means:

- (a) holding a religious belief; or
- (b) engaging in lawful religious activity; or
- (c) not holding a religious belief; or
- (d) not engaging in, or refusing to engage in, lawful religious activity.

So, one thing that is clear is that it will protect atheists from being punished for their atheism, as well as protecting religious people.

But one issue that immediately comes up for many people is this: how do we define “religion” in this context? Well, here the Bill doesn’t provide a clear answer. It does not provide a comprehensive definition of what amounts to a “religion”. But it seems clear that it is relying on the definition that was provided by the High Court of Australia in its decision in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (“the *Scientology case*”).¹⁷ While there was a 3-way split in that case around the definition issue, two of the judgments have provided pretty clear guidance and have been used by other courts later.¹⁸

Mason ACJ and Brennan J said (at 136):

We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, belief in a **supernatural Being, Thing or Principle**; and second, the acceptance of **canons of conduct in order**

¹⁶ For those who are interested, there is a selection of the 6000 submissions on the first draft, and a smaller set of the submissions on the second draft, linked on the official website for the Bill- see <https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx>.

¹⁷ [1983] HCA 40; (1983) 154 CLR 120.

¹⁸ See the more recent decision of the UK Supreme Court in *Hodkin & Anor, R (on the application of) v Registrar-General of Births, Deaths and Marriages* [2013] UKSC 77, which effectively adopts many of the features of the Australian *Scientology* decision.

to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. (emphasis added)

Their Honours explicitly noted that this did not mean that a religion had to be “theistic”.

We would hold the test of religious belief to be satisfied by belief in supernatural Things or Principles and not to be limited to belief in God or in a supernatural Being otherwise described. (at 140)

However, they rejected as “religion” a view of “ultimate meaning” which had no elements of a “higher power” at all.

Wilson and Deane JJ were more discursive, though adopting a similar approach (at 174):

One of the more important indicia of "a religion" is that the particular collection of ideas and/or practices involves **belief in the supernatural**, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has "a religion". Another is that the ideas **relate to man's nature and place in the universe and his relation to things supernatural**. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe **particular standards or codes of conduct** or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an **identifiable group or identifiable groups**. A fifth, and perhaps more controversial, indicium (cf. *Malnak v. Yogi* [1979] USCA3 125; (1979) 592 F (2d) 197 is that the adherents **themselves see the collection of ideas and/or practices as constituting a religion**.

As has been said, **no one of the above indicia is necessarily determinative** of the question whether a particular collection of ideas and/or practices should be objectively characterized as "a religion". They are no more than aids in determining that question and the assistance to be derived from them will vary according to the context in which the question arises. All of those indicia are, however, satisfied by most or all leading religions. It is unlikely that a collection of ideas and/or practices would properly be characterized as a religion if it lacked all or most of them or that, if all were plainly satisfied, what was claimed to be a religion could properly be denied that description. Ultimately however, that question will fall to be resolved as a matter of judgment on the basis of what the evidence establishes about the claimed religion. Putting to one side **the case of the parody or sham**, it is important that care be taken, in the exercise of that judgment, to ensure that the question is approached and determined as one of arid characterization not involving any element of assessment of the utility, the intellectual quality, or the essential "Truth" or "worth" of tenets of the claimed religion. (emphasis added)

The comments on “parody or sham” here lead to the comment that the courts are well suited to reject spurious claims of “religious” status. The deference given by courts to the practitioners of a genuine religion to say what their beliefs are, does not mean the courts are blind to possibility of a fraud or sham set up for purely satirical or money-making causes, or designed to avoid the application of the law. Courts all over the world, for example, have had no problem concluding that the so-called “Church of the Flying Spaghetti Monster” is a parody invented for argument, rather than being a true religion¹⁹. In the UK, the Charity Commission has ruled that the “Jedi Order” (based on beliefs from the fictional Star Wars universe) is not a genuine religion.²⁰

However, there is one issue with the definition above of “religious belief or activity” where I think more work is needed. The definition in relation to “activity” is restricted to “**lawful** religious activity”. While the concern not to allow seriously harmful practices to be protected is supported, use of the broad phrase “lawful” seems to run the risk of negating much of the protection provided by the Bill. On its face it would seem to mean that a State or Territory

¹⁹ See eg *Cavanaugh v Bartelt* (12 April 2016; USDC for Nebraska, 4:14-CV-3183).

²⁰ See a note of the decision at <https://www.farrer.co.uk/news-and-insights/charity-commission-decision-the-temple-of-the-jedi-order/> (8 March 2018).

government, or even a local Council, could pass a law banning certain activities which might be regarded as core religious behaviour (preaching in a public park, for example, or hiring a hall to run church services).

The Government did amend RDB1 in this respect in one way in RDB2. The latest draft, in cl 5(2), clarifies that an activity is “not unlawful” merely because prohibited by a local council by-law. This is a good step. But the definition still, to a large extent, leaves prevention of religious discrimination by this Commonwealth law at the mercy of any State or Territory which decides to go its own way by enacting a prohibition on some behaviour to be accompanied by even the slightest penalty. This seems inconsistent with Australia’s clear international obligations under the ICCPR art 18 (concerning protection of religious freedom) and art 26 (prohibition against discrimination on the ground of, *inter alia*, religion to protect “all persons”).

If some limit is to be placed on the type of genuinely religious activity which may be protected, it would seem to be an appropriately high bar to adopt the definition of “serious offence” from current cl 28(2), which removes protection where someone advocates commission of a “serious offence”, defined as “an offence involving harm (within the meaning of the Criminal Code), or financial detriment, that is punishable by imprisonment for 2 years or more under a law of the Commonwealth, a State or a Territory”. I recommended in my submission on RDB2 that cl 5(2) be redrafted along the following lines: “For the purposes of paras (b) and (d) of the definition of *religious belief or activity* in subsection (1), (i) an activity is not unlawful merely because a local by-law prohibits the activity, and (ii) an activity is lawful except where the activity amounts to a serious offence within the definition of that term in subsection 28(2).”

Another option, which I think is conceptually better, is to be more honest and to remove the qualification “unlawful” altogether. Logically the lawfulness or otherwise of a belief is not connected with whether it is “religious”. Instead, we should openly acknowledge in a separate clause that some religiously inspired acts, even if genuinely religious, are not protected, and work on drawing up guidelines for identifying these.

(b) Prohibited discrimination

The core of the Bill is found in the provisions that make discrimination of different kinds unlawful. The Bill then outlines in what areas of life such prohibitions operate, and then provides some exemptions or “balancing clauses” which recognise other rights that need to be balanced in this area.

(i) Direct discrimination

As with most other discrimination laws, the Bill provides for both “direct” and “indirect” discrimination. **Direct discrimination** is dealt with in cl 7. This is where the protected characteristic is openly and clearly the basis of a decision. One example would be a café which had a sign up saying that they did not serve Buddhists (a practice not currently unlawful in NSW!) Most decisions of this sort are not quite so open, however.

(ii) Indirect discrimination

Indirect discrimination is dealt with in cl 8. This provision (also present in most other discrimination laws on other grounds) is designed to deal with the situation where a decision may apparently be made on a lawful ground, but the *impact* of the decision on those with a protected characteristic would be worse than its impact on others. (To some extent this is designed to deal with the problem of “sham” decisions which are in fact based on the relevant characteristic but are covered up by a false claimed motive. But it applies more generally as well.)

An example of this, say, would be a law firm implementing a rule that there is an

essential staff meeting that all personnel must attend on a Friday after sunset. Here an orthodox Jewish believer would be unable to attend as Sabbath would have commenced. It could then be argued that this was indirect discrimination on the basis of religion. Under cl 8 what would need to be shown is this:

- The employer has imposed a “condition, requirement or practice”;
- This has the effect of “disadvantaging persons who have or engage in the same religious belief or activity”;
- The condition etc is not “reasonable”.

Note that in the case of direct discrimination there is no defence of “reasonableness”, but there is in the case of indirect discrimination. How do you determine whether a condition etc is reasonable? Clause 8(2) sets out various factors to be considered- the “nature and extent of the disadvantage”, “the feasibility of overcoming or mitigating the disadvantage”, whether the disadvantage is “proportionate to the result sought” by the employer, and finally, where there is a rule laid down by an employer that “relates to dress, appearance or behaviour”²¹, whether the rule would “limit the ability of an employee... to have or engage in the employee’s religious belief or activity”.

Let me unpack this in the case of the postulated “Friday evening practice meeting” rule.

- The rule would “disadvantage” an orthodox Jewish legal practitioner as it would stop them from observing the Jewish sabbath.
- It would be a serious disadvantage for such a person, as observance of the Sabbath is a key part of orthodox Judaism.
- Is there some way of overcoming or mitigating this? The obvious answer is yes, have the meeting at some other time. Here is where the reasons for scheduling the meeting on Friday evenings will need to be examined. It is just convenience for the partner, or is there some serious legal or other reason why it has to be on a Friday evening?
- Even if there is *some* reason, is it sufficiently crucial to over-ride this fundamental religious obligation? This is the “proportionate” issue.
- If it is a rule about “behaviour” (and that is not entirely clear), then would enforcing this rule limit the employee’s ability to engage in this important religious activity?

The various facts may lead to different answers. But what can be seen is that the law treats this person’s deep religious commitments as important, and as something that needs to be seriously weighed up in decision-making in the workplace.

Let me be clear. It is not enough for an employer of lawyers to say, “when you become a lawyer, you just have to put your religious beliefs aside and comply with what the other members of the firm do”. That is not even the law now, and it will certainly not be the law if the Bill, or something similar, is introduced.

Similar issues have arisen in the context of health professionals. In recent years it has not been uncommon to see arguments put forward that there should be no recognition of a doctor’s conscientious religious beliefs that certain medical procedures are inappropriate. So Julian Savelescu says:

If people are not prepared to offer legally permitted, efficient, and beneficial care to a patient because it conflicts with their values, they should not be doctors.²²

²¹ See the definition of “employer conduct rule” in cl 5(1).

²² [BMJ](#). 2006 Feb 4; 332(7536): 294–297. For similar views expressed by other commentators, see Michael Quinlan, “When the State Requires Doctors to Act Against Their Conscience: The Religious Freedom Implications of the Referral and the Direction Obligations of Health Practitioners in Victoria and New South

On that view, of course, the medical profession will exclude a large number of talented, caring, hard-working and conscientious Roman Catholic, other Christian, Jewish and Muslim professionals, simply because no accommodation can be provided in the small number of cases where there may be religious objections. There will be a similar impact on the legal profession if it refuses to recognise that some lawyers have genuine religious beliefs.

The fact is that our society does **not** say to employees that they must abandon their consciences when they become professionals. Take the example of those medical professionals who were working on Nauru and Manus Island, who wanted to speak out about the shocking health condition of some asylum seekers. The government enacted laws saying that they had to keep silent. When some of them broke silence and spoke out, were they met with a barrage of commentators saying, “if you can’t abide by your employment conditions, you shouldn’t be a doctor”? Not really. Many people admired and approved of their behaviour, even though it was not in accordance with their contractual obligations, because it was seen that in some contexts there is a higher principle than obeying your contract.

Suppose a lawyer in a firm told that he has to act in a matter which is in fundamental conflict with his religious beliefs. Or let’s suppose that the firm demands that all members sign up to a policy of support for same sex marriage, where the lawyer is convinced this is wrong.

How would the Bill operate in circumstances where a legal practitioner was threatened with disciplinary action or dismissal for declining to sign up to such support, or to be involved in a case which they felt would be contrary to their beliefs?

First, we should note that dismissing someone on the grounds of their religious belief or activity would be *prima facie* contrary to cl 14(2)(c) of RDB2. Part 3 of the Bill sets out the areas of life in which discrimination is unlawful, and they include a range of activities to do with work in Division 2: employment (cl 14), forming and dissolving partnerships (cl 15), rules applied by “qualifying bodies”, which would include bodies that certify legal practitioners (cl 16), membership of trade unions (cl 17), and employment agencies (cl 18).

In general terms, there would be a plausible argument that dismissing someone who objects to supporting same sex marriage might amount to indirect discrimination under cl 8 of the Bill. To dismiss someone who had this objection would probably not amount to “direct” discrimination (as the ground would not itself relate to religion) but would seem to qualify as “indirect” discrimination. That is because a “condition, requirement or practice” that someone express such support will clearly have the effect of “disadvantaging” persons who hold a religious objection to same sex marriages.

The question that would then be asked would be whether this condition etc. was “reasonable” (and the onus of proving this is borne by the employer- see cl 8(7).) Consideration can then be given to the matters we noted above in relation to the “Friday night meeting” condition. How serious a “disadvantage” is this? Is it feasible to overcome it (that is, what goal is being achieved by the “sign up”)? Is the disadvantage to the believer “proportionate” to the goal being achieved?

(c) Areas of application of the Bill

I’ve already mentioned that the Bill forbids religious discrimination in areas related to paid work, under Division 2 of Part 3. In Division 3 it sets out others areas of activity where such discrimination is unlawful: education (cl 19), access to premises (cl 20), provisions of goods, services and facilities (cl 21), provision of accommodation (cl 22), disposal of land (cl 23), sport (cl 24), membership of clubs (cl 25), provision of Commonwealth benefits (cl 27).

Wales” (December 1, 2016). *Brigham Young University Law Review*, No. 4, 2016; at p 1258. Available at SSRN: <https://ssrn.com/abstract=2946620> .

It is also made unlawful to request information from someone if the purpose of the question is to facilitate discrimination against them (cl 26).

However, there are a number of exceptions to the application of these provisions, and in particular there is one major clause which operates as a “balancing clause” for religious organisations.

(d) Where discrimination is lawful

The balancing clause noted is **clause 11**. While the legislation aims to make it unlawful to treat someone detrimentally on account of their religion where this religion is irrelevant to the activity (the example I mentioned before of refusing service at a café to someone who is Buddhist), there are some areas of life where a person's religious belief or activity, or lack of religion, may actually be *relevant*. The most obvious example is where employment in a religious group is being considered. We would expect, for example, a political party to employ someone who shared its views. Similarly, the legislation in broad terms allows a church or a religious body to maintain its “message” by only employing people who share their religious ethos.

That is the effect of clause 11- or should I say, that should be the effect of clause 11 if it operated sensibly! The core of the provision is cl 11(1):

- (1) A religious body does not *discriminate* against a person under this Act by engaging, in good faith, in conduct that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.

Clause 11 is a good feature of the legislation, recognising the important general principle that religious bodies should normally be free to act in accordance with their faith commitments. Such bodies only come into existence because religious persons join together to further their shared faith. Just as a political party should be free to employ or preference those who share their political opinions, and a “not for profit” advocacy group should be free to employ or preference those who share their policy commitments, so religious groups should be free to employ or preference those who will further the shared religious aims of the group.

Unfortunately, the present form of clause 11 in RDB2 is unduly complex and does not properly meet these goals for a large range of religious bodies. The definition of “religious body” excludes bodies who engage “solely or primarily in commercial activities,” which will potentially rule out a number of not-for-profit organisations that need to charge some amount for their services or goods to enable them to continue to carry out their religious purposes. In response to comments on RDB1, there has been a “back door” inclusion of protection for hospitals, aged care facilities and accommodation providers by specifically excluding them from being regarded as “religious bodies” under cl 11, and then giving them limited protections in relating to employment decisions and the offering of accommodation in clauses 32(8)-(11) and 33(2).

While this complex drafting technique may be understood by those who see the need for the policy outcomes, it may be doubted whether those outcomes justify the web of interlocking definitions needed to understand it. The exclusion of some of Australia's most obviously religious organisations from the definition of that term in cl 11, of itself sends a very bad symbolic message about the value of the services provided by these respected bodies, and may indeed lead to unintended consequences for the future. For example, it would be quite possible that later legislation may simply cross-reference the Religious Discrimination Act to provide a definition of “religious body”, or that administrative guidelines with some other purpose may do so. Unless the later drafters are very careful, these important *actually* religious bodies will be left out of this definition, with unpredictable consequences.

The policy goal, apparently of not extending protections in the area of *service provision* to hospitals and aged-care centres, is also misconceived. Such bodies rarely exclude persons on the basis of their religious beliefs. Where this happens, such as an orthodox Jewish hospital which needs to provide kosher meals and whose limited resources cannot extend to all potential patients, most people would regard this as entirely justified.

I think that the cl 11(5) definition of “religious body” should be amended to reflect the reality of the operation of religious bodies in Australia. It ought to include faith-based schools (current para 11(5)(b)) but also all bodies which have the declared aim of advancing religion, all registered religious charities, and any other “not-for-profit” body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion. Special provisions in cll 32 and 33 noted above would no longer be necessary.

There is still an interesting discussion to be had as to whether the definition of “religious body” should be extended to cover professional practices which want to have a religious ethos. Should the law provide protection for a “Christian legal practice” or a “Jewish law firm”? I think most lawyers would agree that such should be allowed, but at the moment the legislation is not clear on the point. The practical problem is that the Government seems determined that companies like Sanitarium (which are run on Seventh Day Adventist principles, as I understand it) should not be protected, and drafting to distinguish religious professional practices from more obviously “commercial” entities may be hard.

There are a number of other “exception and exemptions” set out in Division 4 of Part 3. I don't have time to go through all of them, but let me mention briefly some of the more important:

- As mentioned previously, under cl 28, nothing in the Bill will make it unlawful to discriminate against someone who has urged others, on the basis of their religion, to commit or condone a “serious offence”, defined as an offence involving harm or financial detriment with a penalty of 2 years imprisonment or more. This is a sound provision excluding, for example, the protection of the Bill from someone known to be a supporter of violent terrorism.
- Clause 32(2) exempts decisions made about work where religion is an “inherent requirement” of a particular position. Religious groups as defined in cl 11 can mostly rely on cl 11, but this clause would cover a “commercial” religious group (if cl 11 continues to exclude such) or a purely secular group where a specific position required religious belief (perhaps a secular hospital which wanted to appoint a “chaplain” from a specific religious tradition.) It may be that it would cover a “Christian law firm” which specified that it was an “inherent requirement” of employment that someone be an active member of a church; but it might then be necessary to spell out why this requirement was imposed in terms of the work to be done.
- Clause 36 allows a “voluntary body” which restricts its membership to persons of a particular belief, to continue to do so. The Lawyer's Christian Fellowship, for example, can still require its members (if we ever had “members” as such) to be professing Christians.
- Those involved in drafting wills may be interested to see that under cl 34 the *prima facie* prohibition in cl 23 on religious discrimination in “refusing or failing to dispose of an estate or interest in land to [an]other person”, is explicitly said not to apply to “a disposal of an estate or interest in land by will or by way of gift”. This seems to mean that it will be unlawful to refuse to lease, or to sell, to someone on the grounds of their religion, but it will not be unlawful to make a will that does so; eg a testator can still say “I leave my house to X so long as he remains a practising Roman Catholic at the time of my death”. (Not that there

are many such wills these days, but there may be some!)

(e) Free religious speech

Another important part of the Bill is one that has been somewhat controversial (to put it mildly!). Under clause 42, which is the only clause in Part 4 of the Bill, it is provided that “statements of belief” do not, without more, constitute discrimination under any Commonwealth, State or Territory discrimination law. In particular, under cl 42(1)(b), a statement of belief is said not to contravene s 17 of the Tasmanian *Anti-Discrimination Act* 1998, which prohibits the causing of “offence” on a number of grounds, including sexual orientation (though not including religious belief).

An important part of the background here is that around the time of the debates on same sex marriage, the Roman Catholic Archbishop of Hobart, Julian Porteous, was sued under s 17 for causing “offence” on the grounds of “sexual orientation”, for his action in distributing to students at Roman Catholic schools, a booklet outlining the Roman Catholic view of marriage.²³ This was regarded at the time by people on both sides of politics as a pretty outrageous interference with free speech, and the action was later withdrawn. But this provision of the Bill aims to prevent similar actions in the future.

However, the clause, cl 42(2)(b), excludes from its protection speech that “would, or is likely to, harass, threaten, seriously intimidate or vilify another person or group of persons”. After number of submissions on RDB1 called for this term “vilify” to be more clearly defined, RDB2 now clearly defines it in cl 5(1) to mean “incite hatred or violence”. This is a great improvement, as it sets a high bar for the sort of speech that will not be protected, well above the level of mere “offence”.

Still, in my view the provision could still be improved. While it exempts “statements of belief” from being classified as “discrimination” under Commonwealth, State and Territory discrimination laws, it seems possible that the word “discrimination” does not extend to what are called “vilification” provisions under some of those laws.

At the moment no other State and Territory laws amount to such a direct attack on religiously motivated free speech as the Tasmanian s 17. But the potential for other “anti-vilification” laws to be interpreted broadly to undermine the ability to discuss religious views remains. In Tasmania, for example, another provision of the ADA 1998, s 19 (which is framed in terms similar to those used by other State and Territory vilification laws) was held in *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48 to make dissemination of views about sexual activity using language taken from the Bible, unlawful.²⁴

In my view, in light of the clear exclusion of various types of seriously bad speech in cl 42(2), there is no need to continue to allow “vilification” laws in the States and Territories, subject to differing wording and possibly idiosyncratic interpretation in different jurisdictions, to interfere with religious freedom. I think that cl 42(1)(a) should provide that statements of belief *per se* do not “constitute discrimination or vilification for the purposes of any anti-discrimination law (within the meaning of the *Fair Work Act* 2009) or any other law relating to vilification.”²⁵

A Tribunal decision in the UK sharply raises these issues.²⁶ Dr David Mackereth was dismissed by an employment agency which was providing his services to a government

²³ For more details, see my blog post, “First they came for the Catholics...” (Nov 13, 2015) <https://lawandreligionaustralia.blog/2015/11/13/first-they-came-for-the-catholics/>.

²⁴ Note that the “defence” provision in s 55 of the Tasmanian legislation, unlike similar legislation elsewhere in Australia, does not contain a defence relating to speech made in a religious context.

²⁵ The additional clause is intended to pick up laws such as the Victorian *Racial and Religious Tolerance Act* 2001, which is a “stand-alone” vilification law.

²⁶ [Mackereth v Department for Work and Pensions](#) (ET: Case Number: 1304602/2018; 26 Sept, 2019).

department as a health assessor, because as part of his training he was told that he had to use the “preferred pronoun” of any transgender patients he was seeing. He claimed that his religious beliefs did not allow him to do so, though he agreed to use whatever personal name the patient preferred. He took an action against the department for indirect discrimination. He lost for a number of reasons.²⁷ Under RDB2 here in Australia, he may have been able to argue that he was being penalised for a “statement of belief” and hence had a defence under cl 42. Whether he would succeed may depend on the meaning the court gives to “harass”.

Does the Bill authorise horrible hate speech?

A number of recent press articles²⁸ have claimed that the new Bill allows terrible hate speech against a range of vulnerable members of society. In my view, with respect to their authors and the commentators quoted, the examples given are “straw men”, false examples devised to be knocked down for the purposes of defeating the legislation.

Let me summarise my response to one of these articles.²⁹

The first paragraph of one article offers some examples of things that the Bill “could make it legal” to say:

a boss [may] tell a gay worker “being gay is a form of brokenness”, or a childcare provider [may] tell a single mother “God will judge you harshly for taking away the child’s right to have a father”.

There is one preliminary problem- neither of the suggested statements are unlawful *at the moment*, except under the idiosyncratic Tasmanian law. So, to say that the Bill will somehow *make* these things legal to say is wrong- they are already legal. To suggest otherwise (as the article does, not limiting its critique to the Bill’s impact on Tasmanian law) is misleading.

Let me hasten to add that the fact that something is legal to say, does not mean it morally should be said! I would not support saying either of the things set out in the article’s first paragraph, in the context suggested. But the reality is that, to allow free speech in a community, we all have to put up with things being said that we don’t approve of. That I don’t approve of these comments, does not mean that they should be illegal.

There are other problems with the article’s critique. These comments *might* be made in theory, but there seems no evidence that they are at all likely. After all, to take the second one, why would a childcare worker who wants to retain customers be so rude to one? The examples seem particularly unlikely. An example offered later in the article: “a receptionist in a medical practice telling a person with a disability “they have been given their disability by God so they can learn important lessons”” suffers the same problems. It is completely unrealistic and unlikely that something like that would be said.

There are other statements in the article that seem incorrect. We are told that

the bill’s wide definition of “statements of belief” [mean] current unlawful acts of discrimination would “likely become lawful if based on religious belief”.

This is not at all what the draft Bill says. Clause 42(1) says that “a statement of belief, in and of itself” does not amount to discrimination. The phrase “in and of itself” (which seems to be intended to translate the more usual legal phrase *per se*) means that the provision operates only on the statement *itself*, considered in isolation from any accompanying actions. So, it is

²⁷ See my discussion of the case: “Fired for using the wrong pronouns” (Oct 6, 2019) <https://lawandreligionaustralia.blog/2019/10/06/fired-for-using-the-wrong-pronouns/> .

²⁸ See above, n 7.

²⁹ For more detail see my blog post, “Straw Men in the Religious Discrimination debate” (Jan 31, 2020) <https://lawandreligionaustralia.blog/2020/01/31/straw-men-in-the-religious-discrimination-debate/> .

just not true to say that any action “based on” a religious belief would be exempted from discrimination laws.

In fact, there are very few examples of situations where a statement alone (“in and of itself”) would amount to sufficiently “detrimental treatment” to amount to discrimination, although there are some broad comments made by courts in the past which might allow this.³⁰ Clause 42(1)(a) is useful, even as it stands, to deal with those rare but possible cases. But the statement that it would of its own force justify religiously motivated *acts* of discrimination is just not correct.

We are also told:

the practical effect of the right to make statements of belief was to establish “the right to be a bigot” ... there was still room for statements that insulted, offended, ridiculed or humiliated others... the proposed bill ruled out only “serious” intimidation.

The controversial phrase “right to be a bigot”, of course, picks up a [comment](#) made by former Attorney-General George Brandis. The Bill here has no such effect; it does *not* establish such a right. The “right” to make bigoted and offensive remarks, is a right which already exists as part of our long tradition of protecting free speech, even speech which we don’t like and which upsets people. That is why we *need* a right to free speech- none of us are tempted to censor speech we agree with!

The Bill does not *create* such a right, then; it operates against the background of these rights. It is true that it over-rides the draconian Tasmanian law which penalises the causing of offence, etc, noted above. But in doing so it operates to remove the “chilling effect” of speech restrictions which impair the right of members of the community to have important discussions about significant issues.

The Attorney-General has written an important response to some of the critiques of this sort which is well worth reading.³¹ As he says:

The fundamental principle of the bill is that ordinary Australians should not be discriminated against because of their religion – or lack thereof – as they go about their everyday lives. That this fundamental principle (which is in many state laws, including in Victoria) has never made its way into Commonwealth discrimination law would surprise many Australians and highlights a significant shortcoming in basic protections for religious Australians...

The religious discrimination bill would, for the first time, protect Australians in each of those scenarios. It is a powerful shield for people of all faiths who would otherwise have no avenue of redress when they were discriminated against on the basis of religion.

The bill also says you don’t break the law by explaining what you believe – making a statement of belief. This should be a completely orthodox position in a country as proudly multicultural as Australia

Impacts on Legal Practitioners

Briefly, the Bill may have in my view a helpful impact on the ability of a religious legal practitioner to live out their faith while working in the legal system.

I mentioned above that it is arguable that the provision relating to “inherent requirements” may allow the operation of a Christian (or Jewish or Muslim etc) law firm. But the general protections against direct discrimination will mean that a secular law firm may not turn away job applicants because they belong to one of these faiths. A firm “appearance policy” will arguably not be able to be used, for example, to refuse to employ a female Muslim

³⁰ See for example *Qantas Airways v Gama* (2008) 157 FCR 537, at [78], though this was not a case of religious discrimination.

³¹ The Hon C Porter, “Religious discrimination bill is a powerful shield for all faiths” (SMH Feb 23, 2020) <https://www.smh.com.au/national/religious-discrimination-bill-is-a-powerful-shield-for-all-faiths-20200221-p5431o.html>.

applicant because she is wearing a discreet headscarf.

The “indirect discrimination” provisions will mean that a firm will have to offer serious, work-related justifications for imposing conditions on employees that disadvantage religious employees. Is that “Friday evening practice meeting” really essential? Or, for a Christian, the Sunday morning meeting?

There are a number of provisions I have not had time to explore in detail, but some which may be of use to Christian lawyers (especially those working for big firms or government bodies) are those which are sometimes called the “Folau clause”. These are clauses 8(3) and (4).

They need to be set in context. The clauses are part of the “indirect discrimination” prohibition in cl 8. If an employer imposes a condition that disadvantages a religious employee, then the employer must show that the condition is “reasonable”.

The operation of cl 8(3) is complex. It operates where an employer imposes a condition of employment which has the “effect of restricting or preventing an employee of the employer from making a statement of belief other than in the course of the employee’s employment”. In other words, as in Israel Folau’s case, where an employee says something religiously motivated on social media outside work.

It only applies to a “relevant employer”. This phrase is defined in cl 5(1) to be limited to employers with annual revenue of \$50 million or above which is not a government body or a body “established for a public purpose” under a law. It is not intended to operate as a “stand alone” principle that discrimination is allowed whenever the conditions of cl 8(3) are met. In fact, cl 8(3), as the Government explains its intention in Explanatory Notes, is designed to make it *harder*, not easier, for large employers to get away with draconian conduct codes imposing limits on employee speech which is motivated by religion. An employee who works for other employers can still rely on the analysis conducted under cl 8(2) in all cases of indirect discrimination to argue that the limits are not “reasonable”.

Still, I agree with other commentators who have expressed concern that this additional obligation is not imposed on large Government bodies as well. While a public authority may be able to demonstrate in many cases that it is “reasonable” for them to impose limits on public service speech, where such speech is directly connected with an employee’s obligations to members of the public, there will be other cases where a “blanket” rule restricting free speech will not be reasonable. Government bodies should be “model employers” in upholding free speech and religious freedom, and it seems fair that they should be held to a higher standard than small businesses.

Conclusion

This has been a quick overview of some of the issues raised by the Bill. No doubt there are other matters that may have an impact on legal practitioners, which I would be happy to attempt to comment on in response to your questions. Perhaps I will just conclude by noting that, whether or not one agrees with the specific terms of this Bill, the introduction of the Bill is in my view a welcome development in recognising the importance of religious belief to many Australian citizens, and the need for serious reasons when those beliefs are to be over-riden for any reason.

Appendix- response to Professor Gaze

Professor Beth Gaze from Melbourne Law School has had an article published in the SMH (1 March 2020) entitled “Exceptions for religious organisations in proposed Bill are too wide”.³² While defending the general concept of a prohibition on religious discrimination (which is good to see), she adopts some of the arguments about “nasty speech” noted above, and add some other critiques of her own.

Her main argument is that the provision in cl 11 allowing preference to be given in employment to co-religionists is “too wide”. She notes:

The conditions for this exception to apply are very wide compared with the existing conditions in Commonwealth law quoted above. The conduct must be “in good faith” and the first condition is that *a person of the same religion as the religious body could reasonably consider [the conduct] to be in accordance with the doctrines, tenets, beliefs or teachings of that religion*. This test would allow one person of that religion to be the judge of whether or not the exception should apply.

At this point, with respect, there is some “sleight of hand”. It has to be conceded that the reference to conduct which a person of the same religion “could reasonably consider” to be in accordance with doctrines, tenets, beliefs or teachings does open up the scope of acceptable behaviour slightly. That is the purpose of the provision, to allow the “internal” view of believers as to appropriate doctrine to be recognised, rather than handing that decision over to a court.³³

But then Professor Gaze, rather than arguing that the test should instead be the one which is already adopted in Commonwealth and State law (such as in s 37 SDA), refers to the much narrower UK law and argues that the RDB should follow that model (where, for example, it has to be shown that it is an “inherent requirement” of a position that a person hold a particular religious view.) The SDA at the moment simply requires, for a religious organisation to do what would otherwise be discriminatory, that such action “conforms to the doctrines, tenets or beliefs of that religion, or is necessary to avoid injury to the religious sensitivities of adherents of that religion.” Neither of those tests is new to Australia, and hence even if one argued against the current draft’s reference to a fellow believer’s views, there is no need to jump to the much more restrictive form of the UK legislation.

Professor Gaze concludes:

The tests proposed in the religious discrimination bill for access to the exceptions for religious organisations are far too wide. The preference to co-religionists in employment would be allowed even where religious commitment or membership is not a genuine requirement of the job. It would apply even where the organisation is largely publicly funded.

What she does not mention is that if the exemption will only operate where religion is a “genuine requirement of the job”, someone will have to make that decision about “genuineness”. To say, for example, that a maths teacher or the school cleaner does not have to share the religious beliefs of a faith-based school, is to make an external, secular decision about “what counts”. But suppose the school sees all its members as equally a part of their comprehensive religious community, designed to model a life of faith to students in all spheres of activity? Why is it right that a court should be asked to rule on this?

Finally, the age-old furphy of “public funding” is raised. We do not live in a totalitarian state where anyone who receives “public money” has to show allegiance to the current values

³² See <https://www.smh.com.au/national/exceptions-for-religious-organisations-in-proposed-bill-are-too-wide-20200227-p5452h.html> .

³³ For comment on these issues see N Foster “Respecting the Dignity of Religious Organisations: When is it Appropriate for Courts to Decide Religious Doctrine?” (2020) 47 University of Western Australia Law Review 175-219.

of the state. For a start, “public money” is always only “money from the public”, and the public includes those who are committed to a religious world-view. Over the years the state has saved large amounts of public expenditure because religious organisations have been willing to take up the slack in caring for the most vulnerable in society. They do this precisely out of their shared religious world-view. If any time that some public money was given to assist them in their care, they were required to renounce their religion, then it is obvious that pretty soon there would be no such groups and public expenditure on these issues would rise dramatically.