The religious freedom debate: What’s at stake for the Australian Jewish community?

The Australian Government is reported to be planning to introduce a Religious Discrimination Bill before the end of the year. The reports suggest that the Bill will prohibit discrimination on the basis of religious belief or affiliation, but with carve-outs exempting faith-based organisations to the extent necessary for them to continue to operate according to their religious precepts. That is, the Bill will say that you are not allowed to discriminate against another person on the basis of that person’s religious beliefs or affiliation, but it will then provide a series of exceptions where faith-based organisations may exclude a person of another faith, or no faith, from membership or employment or other aspects of their operations.

This would be similar to the structure of all previous Federal and State laws which prohibit discrimination (eg on the basis of race, sex, disability or age) but then have exceptions or exemptions for faith-based organisations, among others. The exceptions for faith-based bodies in our current anti-discrimination laws are the principal legal protections for religious freedoms that presently exist in Australia.

Religious freedom as a positive right rather than a narrow exception

In a political and cultural environment in which religious freedoms have not been under serious challenge, this exceptions-based model has until now provided adequate legal protection to religious freedoms in Australia.

However, there is evidence that the political and cultural environment throughout the western world is changing, and the ambit of religious freedoms for faith-based organisations is increasingly being questioned, if not challenged openly. This creates a compelling case for Australian governments to adopt a different approach, one that affirms as a positive right, rather than a negative “exception to the rule”, the proposition that faith-based organisations are free to operate according to their religious principles and ethos.

Such an approach would also be more in keeping with Australia’s international obligations. Article 18 of the Universal Declaration of Human Rights and Article 18.1 of the International Covenant on Civil and Political Rights, (ICCPR) each provide that everyone ‘has the right to freedom of thought, conscience and religion’. According to the ICCPR: “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”.

1
The fundamental character of freedom of thought, conscience and religion is reflected in the fact that the ICCPR says that these freedoms must not be derogated from, even in times of public emergency.

Religious freedom currently receives some constitutional protection in Australia. Section 116 of the Australian Constitution prohibits the making of Commonwealth laws for (i) establishing any religion (ii) imposing any religious observance (iii) prohibiting the free exercise of any religion or (iv) requiring a religious test as a qualification for any office or public trust under the Commonwealth. The High Court has given s.116 a narrow interpretation. Section 116 does not explicitly create a personal or individual right to religious freedom. The government has not indicated that it is proposing to seek a change to this section, nor does any such change appear to be warranted.

Although religious freedom in Australia is not, and has not previously been, under serious threat, the enactment of a Religious Discrimination Act would provide the government with a rare opportunity to entrench religious freedom as a positive right, both to acknowledge its fundamental importance, as recognised by international law, and to protect it against future encroachment.

**Religious practices and anti-discrimination law**

Faith groups generally recognise and respect the right of other faith groups to manifest their religious beliefs, each group according to its own ethos. They do not view legitimate expressions of faith as “discrimination” against specific individuals or groups who do not share that faith, and do not seek to have a “right to discriminate” against each other.

Religious practices which discriminate in favour of members of the same faith community, or in favour of a gender, may not fit the classic form of negative discrimination, which seeks to exclude and disadvantage others out of prejudice. Nevertheless, the objective effect of those practices will be to discriminate against everyone who is not a member of the favoured group, even if it is not directed against any one specific group or specific groups.

For example, in Orthodox Jewish tradition, rabbis, cantors and certain other personnel must be Jewish according to the rules of Halacha (Jewish religious law). Halacha also requires rabbis, cantors and certain other personnel to be (i) religiously observant and (ii) males. The foregoing requirements are in addition to, and indeed preconditions for obtaining, the applicable formal education and training qualifications.

Further, Orthodox Judaism requires that certain other religious functions be performed only by persons who meet these specific requirements. These functions include acting as a judge of a Beth Din (Jewish religious court), the solemnisation of religious marriages, the performance of a religious circumcision, the religious slaughter of animals and the burial of the dead. The Conservative and Progressive streams of Judaism also apply some of these rules, or apply them less stringently.

In Orthodox Jewish religious services, men and women pray separately. All of the ceremonial and religious functions are performed by men, and only men are counted in determining whether a minyan (quorum) is present, a precondition for a full, formal service.
The foregoing is by no means an exhaustive account of orthodox Jewish religious requirements that may be considered ‘discriminatory’.

Indirectly, if not directly, these practices discriminate on the basis of religious belief, gender and sexual orientation. At present, this is allowed by the exceptions contained in anti-discrimination legislation. However, we live in an age that increasingly affirms equality of rights as a moral imperative. Many would see these mere exceptions as a slender thread upon which to hang a fundamental right – in this case the right of Australian Jews who are members of, or otherwise generally attend, a synagogue that follows one of the streams of Orthodox Judaism to practise their faith.

**Faith-based schools**

One aspect of freedom religion which is recognised expressly in article 18.4 of the ICCPR and also in article 5.2 of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) is the freedom of parents to ensure the religious and moral education of their children in conformity with their own convictions. For our community, this includes the freedom to establish Jewish schools and for those schools to discriminate to some extent in their employment and other practices in order to uphold their religious ethos.

Private Jewish schools in Australia generally do not require teachers and other employees to be of the Jewish faith unless the position involves religious instruction or participation in Jewish religious observances or practices. Jewish schools, including those which follow the Orthodox tradition, routinely employ teachers and in some cases principals who are not of the Jewish faith.

If the position involves participation in Jewish religious observances or practices, there may be a religious requirement according to Jewish Orthodox tradition that the employee be personally committed to particular levels of observance, or in some instances, be a male.

Similarly, Jewish schools do not seek to discriminate in employment on the basis of actual or presumed sexual orientation. However, they do require all employees to refrain from acting or speaking, otherwise than in private, in a way that they know or should know is contrary to the school’s religious ethos. It has generally been accepted that this is a reasonable requirement for a religious school, as would be the taking of adverse action against an employee who breaches it, even though this may result in indirect discrimination.

In this respect, religious schools are no different to other employers. If, as a matter of religious belief or for other reasons of conscience you disagree with an organisation’s values, as publicly expressed in its mission statement, codes of practice and other documents, then you should not sign an employment contract with it in the first place, especially if the contract says clearly and explicitly that you will not act or speak publicly in any way that is inconsistent with those values.

The need not to act in a manner that contradicts a school’s religious ethos may also apply to some extent to the engagement of independent contractors by religious schools.

As regards students, the ethos of some Orthodox Jewish schools requires that the school will only enrol students who are Jewish according to Halacha. Alternatively, even if a school has an open enrolment policy which is not restricted to students who are Jewish according to
Halacha, the school might still give preferential treatment to Jewish students. For example, it may restrict the fee relief which is subsidised by philanthropic sources within the Jewish community to students who are Jewish according to Halacha.

In some Orthodox Jewish schools certain leadership positions within the student body may only be available to students who are Jewish according to Halacha, and certain religious observances and rituals and perhaps other aspects of the school’s program will only be available to such students.

In an Orthodox Jewish school, male and female students are treated differently in connection with school activities that relate to some Jewish religious observances or practices. Recently in the UK, government inspectors downgraded the King David High School in Manchester from the top to the bottom rating because the school, for religious reasons, segregates some classes based on gender. The downgrading was criticised because UK law allows single-sex schools, yet a high-achieving school which has always had some separate classes for boys and girls has now been stigmatised for allegedly engaging in unacceptable discrimination.

In Australia, considerable public attention has been directed to how religious schools handle issues concerning a student’s sexual orientation. The ECAJ is not aware of any Jewish school which has refused to enrol a student because of that student’s actual or presumed sexual orientation, or which has expelled or taken other adverse action against a student because of that student’s actual or presumed sexual orientation. When this issue was debated publicly in 2018, no Jewish school advocated retaining the exception in the Sex Discrimination Act that permits such discrimination.

However, it is also critical that faith-based schools continue to have the right to require students to conduct themselves in a manner which is not inconsistent with the school’s ethos, and to enforce that right.

Finally, whilst religious institutions are, and should remain, free to promulgate tenets of their faith, including beliefs about marriage and sexuality, that freedom ought not to extend to vilification of entire groups on the basis of race, colour, sex, sexual orientation or other arbitrary factors. Differences in values and beliefs can be acknowledged and explained without compromising the imperative to respect at all times the dignity and humanity of those with whom such differences are held.

Indeed, the ECAJ’s position has been that education towards respect for people of different faiths and backgrounds in our Australian community should be maintained and strengthened at both religious and secular schools. The role of Special Religious Education (SRE) classes in public schools also needs to be safe-guarded.

**Charitable and philanthropic organisations and voluntary associations**

While some Jewish charitable and philanthropic organisations might also extend their work outside the Jewish community, they could not continue to exist without the capacity to prioritise or give preference to members of the Jewish community, who are their principal source of donated funds.

Similarly, Jewish voluntary associations such as sporting clubs, which are not of themselves religious or cultural, provide the Jewish community with services that make a substantial contribution to the maintenance of social cohesion and our cultural identity. These
organisations thus require the ability to give preference to members of the Jewish community as members and office-holders, and in the services they provide.

**Religious vilification**

Australia is generally a tolerant and peaceful country. Most people understand that migration has been indispensable in bringing growth, prosperity and cultural vibrancy to our nation. Compared to many other parts of the world, Australia remains the land of the fair go and mutual respect.

On the other hand violence and intimidation of people on account of their religious background occur far too frequently, as do serious forms of abuse motivated by religious hatred, which threaten the sense of safety and security of the people at whom it is directed.

To some extent, the criminal law already prohibits such behaviour, but there have also been many reports of cases in which law enforcement authorities have failed to respond adequately or at all. This could be because the relevant laws are not uniform across Australia, are not well understood and are often poorly framed. In addition, police are sometimes not properly trained to identify and act against crimes that are motivated by various forms of hatred. In submissions to official inquiries and more generally, the ECAJ has called, and continues to call, for these deficiencies to be remedied. In 2018, NSW introduced a new offence of inciting or threatening violence against people on account of their religion. The ECAJ supports the introduction of such an offence in the Criminal Code (Commonwealth), which would apply throughout Australia in place of the current sections 80.2A and 80.2B of the Code, which are convoluted and in our view unworkable.

However, some forms of behaviour involve vilification of people on account of their religious beliefs or affiliation, but stop short of inciting or threatening violence against them. It is therefore understandable that some members of religious communities who have been targeted with these forms of behaviour have called for the introduction of a Federal religious vilification law along the lines of Part IIA of the Racial Discrimination Act, which prohibits behaviour that is likely to “offend, insult, humiliate or intimidate” others because of their “race, colour or national or ethnic origin “.

This legislation presently provides some protection to Jewish Australians against discourse that is directed against them as members of an ethnic community, but does not prohibit discourse that is limited to criticism of Jews’ religious beliefs or practices.

Those who favour introducing a Federal religious vilification law similar to Part IIA of the Racial Discrimination Act argue that such a law would be consistent with Article 20(2) of the ICCPR which provides: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

They also point to existing State laws in Victoria, Tasmania, Queensland and the ACT which prohibit acts that incite hatred toward, serious contempt for, or severe ridicule of people on account of their religion. The Victorian and Queensland laws go further and make serious, wilful instances of such behaviour a criminal offence.

Society would undoubtedly be better off without public disparagement of people on the basis of their convictions and practices as members of a recognised faith community. Does that justify making such conduct illegal?
Race and religion differ fundamentally. It is not possible to change one’s ‘race’ or ethnic background, but it is possible to change one’s beliefs, including one's religious beliefs. Whilst many people are born into a religious community and may feel that they cannot easily leave it, in a free country like Australia, belief is ultimately a matter of choice. People may change their religion or disavow religion altogether, as increasing numbers have in fact been doing. According to the ABS:

“The growing percentage of Australia’s population reporting no religion has been a trend for decades, and is accelerating. Those reporting no religion increased noticeably from 19 per cent in 2006 to 30 per cent in 2016. The largest change was between 2011 (22 per cent) and 2016, when an additional 2.2 million people reported having no religion.”

In contrast, “race, colour or national or ethnic origin”, are not open to choice. Disparaging people because of those traits necessarily sends a message that such people, by virtue of who they are, and regardless of how they behave or what they believe, are not members of society in good standing. This cannot but vitiate the sense of belonging of members of the group and their sense of assurance and security as citizens. To disparage a person or group because of their “race, colour or national or ethnic origin” thus necessarily constitutes an assault upon their human dignity.

In contrast, merely confronting people with ideas or opinions which criticise, or are incompatible with, their own belief systems might hurt their sensibilities, but does not in any way impugn their human dignity. In a free society, ideas of any kind - religious, political, ideological or philosophical - are and should be capable of being debated and defended. Robust critiques of ideas of any kind, no matter how passionately adhered to, do not constitute a form of social exclusion of those who adhere to them.

Proponents of laws that prohibit religious vilification have argued that they seek only to outlaw the disparagement of people on account of their religion, not critiques of their religious beliefs. This distinction has a superficial appeal, but in practice is difficult to sustain. How is it possible to criticise, satirise or disparage a religion, or indeed any belief system, without by necessary implication disparaging those who adhere to it?

Any law that might operate to ban or chill discussion of any religion (or ideology, philosophy or other belief system) would not only violate one of the fundamental Enlightenment principles upon which modern free societies are based but would also most probably provoke a reaction that would be antithetical to the religious tolerance which the proponents of such a law hope to encourage. We left behind laws against blasphemy and sacrilege a long time ago, and few Australians would tolerate a return to them, or to anything of similar effect.

**Conclusion**

To date, the religious freedom debate in Australia has generated much heat but little light. The calls for legislative change on a plethora of issues present potential challenges to basic freedoms which have until now largely been taken for granted. This is an area where law reform should proceed cautiously and only following widespread and meaningful community consultations.
There is a strong case for prohibiting religious discrimination and clarifying and updating the law impacting on religious freedom in Australia in the manner we are suggesting, and for introducing more effective criminal laws and enforcement against intimidation, harassment and severe abuse of people on account of their religion. Yet it also has to be acknowledged that there is wide scope for unintended consequences in any substantial changes in the law which might be introduced. It is not only faith communities such as ours which will need to be vigilant. Ultimately, the free and democratic nature of our society, and therefore the interests of all Australians, are affected.

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