

Submission to the Senate Legal and Constitutional Affairs Committee on the Religious Discrimination Bill 2021 and related bills

The PM Glynn Institute is the public policy institute of Australian Catholic University. In 2017 the Institute published ten principles of religious freedom to help foster better understanding of what religious freedom is and why it is important for individuals, organisations and a democratic society.* This submission offers some comments on the Religious Discrimination Bill 2021 based on these principles.

At the foundation of the ten principles of religious freedom is the fact that religious belief is a considered and deeply-held conviction which powerfully informs the way religious believers live, the actions they take, and the shape of communities. It is not just another form of subjective or personal opinion significant only for the individual who holds it. Religious freedom arises from the universal human search for the truth about our nature, the world we live in, and how we should live.

In what follows each of the ten principles is set out as a sub-heading, with a short explanation of the principle in italics immediately following. Some comments are then offered about the extent to which each principle is reflected in the Religious Discrimination Bill.

1. Freedom of religion and belief is a universal human right.

Religious freedom belongs to every person, because most people look for answers to questions of meaning and value in something greater than themselves. Many religious people look to God, but non-religious people also draw on ultimate sources of meaning which are not of their making, such as ideas about human dignity, justice, freedom, equality, and the environment. In one sense, questions of meaning and value are religious questions even when our answers are atheism or agnosticism.

While the Religious Discrimination Bill is not a religious freedom bill, it clearly addresses a significant gap in protection from discrimination provided under Commonwealth law. It recognises religion as a ground for discrimination in addition to the existing protections against discrimination on the grounds of sex, race, age and disability. Consistent with other Commonwealth anti-discrimination legislation, the objects of the bill (c.3(1)(b)) include ensuring that everyone has the same rights to be treated equally before the law – in this case, “regardless of religious belief and activity”. The express recognition of the “indivisibility and universality of human rights and their equal status in international law”, and the equality of every person in dignity and rights in the bill (c.3(2)) is also important. It helps to correct the tendency to treat religious freedom as a problematic or suspect second-order right. It also helps to ensure that religious people are placed on the same footing as others when it comes to considering their rights.

2. Religious freedom is based on respect for individual freedom.

“The act of faith is of its very nature a free act” (Dignitatis humanae §10). Religious freedom is the right to believe or not to believe, to adopt, reject or change beliefs as we decide for ourselves. It protects freedom by protecting people from having the beliefs of others — religious, secular or political — imposed on them. Catholic beliefs too are not to be imposed on anyone, but proposed for people to accept or reject as they decide freely for themselves.

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The bill reflects this principle by incorporating a definition of religious belief or activity which encompasses not holding a religious belief and “not engaging in, or refusing to engage in, religious activity” (c.5(1)). The Explanatory Memorandum to the bill clarifies that this protection is for non-religious beliefs which are inherently related to religion, such as atheism and agnosticism, not for all non-religious belief systems (nn. 41-42). It will also protect people from discrimination because they do not hold certain religious beliefs, either because they do not have a religious faith or because they belong to a different religion (n. 43). The provisions in Part 4 of the bill concerning unlawful discrimination on the grounds of religious belief or activity reflect both this definition and the principle above: people should be free to adopt or reject religious belief without being discriminated against in employment or in other important areas of life.

3. Religious freedom protects human dignity.

Religious freedom upholds the intrinsic dignity of people who think, believe, worship and live differently. It protects them against pressure to hide their beliefs, or from being forced to censor themselves or limit their participation in society to avoid bullying or intimidation. It defends them from discrimination, exclusion or punishment because of their beliefs. Religious freedom is especially important in protecting people whose beliefs or ideas others find strange, ridiculous or even “offensive”, and particularly communities which may be hated and feared because of their beliefs.

This principle is reflected particularly in the provisions of the bill concerning statements of belief. The definition of statements of belief (c.5(1)) encompasses statements made in good faith, both by people who hold and do not hold a religious belief, who genuinely consider their beliefs to be in accord with their religion (if they hold a religious belief) or related to not holding a religious belief (if they do not hold a religious belief). Clause 12(1) provides that a statement of belief in itself does not constitute discrimination under listed Commonwealth and state anti-discrimination laws. Important limitations set out in c.12(2) exclude statements that are malicious, statements that “a reasonable person would consider would threaten, intimidate, harass or vilify a person or a group”, and statements that counsel or promote a serious offence under c.35(1)(b).

As the Explanatory Memorandum sets out at length (nn.151-92), the provisions about statements of belief do not exempt discriminatory conduct (n.152) or any action taken in relation to a statement of belief which may constitute discrimination under federal or state anti-discrimination laws (n.160). They will not exempt statements of belief from federal or state criminal and defamation law (n.179). The provisions are intended to protect people so they can discuss freely their genuinely-held beliefs, without fear of actions under anti-discrimination law being brought against them simply for stating their beliefs in good faith and without malice (nn. 157-59 & 174). They are also intended to protect statements of belief critical of religious beliefs within a faith community (n.167) and atheist or agnostic statements of belief critical of aspects of a religion or religion in general (n.172).

The protection for statements of belief from anti-discrimination legislation, while welcome, is in fact quite limited; even to the extent that while “not constituting discrimination in and of itself”, a statement of belief may serve as evidence in a discrimination claim to explain conduct in another situation resulting in less favourable treatment for someone with a protected attribute (n.174). The limitations on protection for statements of belief ensure that these provisions will not affect existing law protecting people from malicious statements, vilification, defamation and the promotion of criminal activity, or the right to take action for discriminatory conduct under other anti-discrimination laws. They will however provide some protection for people to explain and speak about their religious beliefs in an area where free speech and the free exchange of ideas is often constrained by hostility and the possibility of anti-discrimination complaints.

4. Religious freedom should be exercised in solidarity with other people.

Like many rights, religious freedom is not an absolute. It is limited by respect for both the rights of others and the common good. Because our sense of autonomy is often stronger than our sense of the common good, agreeing on the limits of rights can be fraught. Tensions between rights should be resolved wherever possible in a spirit of mutual respect, not suspicion, and with generosity towards beliefs and ways of life we do not share or even oppose. Restrictions on religious freedom should be made only on the basis of principles which apply to everyone.

An example of how this principle is incorporated in the bill is the provision concerning qualifying bodies and discrimination on the ground of religious belief or activity (c.21). Under this clause, it would be unlawful for a qualifying body to refuse to confer or renew a qualification, or to revoke or vary it, on the grounds of a person's religious belief or activity. This clause will protect (for example) graduates in healthcare disciplines who are opposed to abortion or euthanasia on religious grounds from the future possibility of being denied academic qualifications, professional accreditation or admission because of their religious beliefs. It will also protect healthcare practitioners from the future possibility of having their accreditation to practice revoked because of opposition on religious grounds to these practices.

The conflict between the fundamental right to religious freedom and the legal right to access procedures which are regarded as gravely wrong by many religious (and non-religious) people is an instance where a compromise should be sought which respects the rights and beliefs of those who think differently about important issues of life and death. People who on religious (or indeed non-religious) grounds dissent from a position adopted by a qualifying body on a significant moral question should be accommodated and not discriminated against. They certainly should not be pressured by a threat to their livelihood and career to comply with practices which they hold to be, as a matter of conviction, profoundly wrong.

The protection the bill provides for individuals from religious discrimination by qualifying bodies raises the question of whether similar protection should be extended to religious bodies. The accreditations and authorisations required to operate (as an educational institution, for example), along with eligibility for government funding, should not be withheld, varied or revoked because of a religious body's religious beliefs and lawful religious activities. That this is not a remote or fanciful prospect is recognised by the amendment proposed to the *Charities Act 2013* in the Human Rights Legislation Amendment Bill 2021. This amendment is intended to ensure that a charity's charitable status is not threatened or refused simply because it promotes the view that marriage is a union of a man and woman only. The proposal of an amendment to ensure that this view of marriage is not regarded as being against the public interest and contrary to public policy (and therefore not as a "disqualifying purpose" under the *Charities Act*) suggests that there may be merit in a broader examination of whether protection from religious discrimination by accrediting or authorising authorities should be extended to religious bodies as well.

5. Religious freedom is more than freedom of worship or a right to tolerance.

The persecution of people in different parts of the world because of their religious beliefs shows how important basic protections such as freedom to worship and the right to be tolerated are, but religious freedom does not end there. It is a much larger freedom which makes it possible for individuals and faith communities to witness to their beliefs with integrity and as full members of their society, not only in worship but in professional life, public life and service to the wider community.

This principle is reflected in the bill in clause 7, which provides protection for religious bodies to act in accordance with their faith. It provides that conduct by a religious body undertaken in good faith in accordance with "the doctrines, tenets, beliefs or teachings" of its religion (c.7(2)) or to "avoid injury to the religious susceptibilities" of its co-religionists (c.7(4)) does not

constitute religious discrimination and “is therefore not unlawful . . . in any area of public life” covered by the bill (c.7(1)). In addition to the good faith requirement, there is also an objective reasonableness test for conduct in accordance with a religious community’s beliefs and teachings, based on what a person of the same religious community would reasonably consider to be conduct in accordance with those teachings (c.7(2)). As the Explanatory Memorandum notes, this test avoids courts making determinations about religious doctrines, although they may still have regard to “foundational” or authoritative documents that a religious body submits in evidence to support its conduct (nn. 97-98).

While the bill recognises that religious freedom entails the living out of religious belief in conduct and activity – including in service to the wider community – and the importance of religious bodies being able to maintain their religious ethos and to deliver services in accordance with their beliefs, the protection it provides is limited to take account of other rights and the rights of other people. In providing that a religious body’s conduct in accordance with its beliefs is not discrimination under this bill, it simply establishes that such conduct does not constitute discrimination on the grounds of religious belief or activity. The notes at c.7(2) and c.7(4) state that conduct which is not discrimination under the bill “may still constitute direct or indirect discrimination under other anti-discrimination laws of the Commonwealth”.

The exclusion of religious hospitals, accommodation, aged care and disability services from the provisions in clause 7 is a further limitation (c.8). The only conduct which is not religious discrimination under the bill for these services is conduct in good faith related to employment of staff or partnerships (cc.9(3)&(5)), including “giving preference to persons of the same religion” as the service (cc.9(4)&(6)), so that they can preserve their religious ethos (cc.9(3)(c) & (5)(d)). Entities which engage solely or primarily in commercial activities, even if they are operated by religious people or provide services to religious communities as part of their general business, cannot rely on these provisions at all, although exceptions for employment may be available under clause 39(2) if belonging to a particular religion is an inherent requirement of the position.

While the protection the bill provides for religious bodies to act in accordance with their faith, is limited in some important respects, it is helpful that these provisions clarify that acting in accordance with religious beliefs is not in and of itself a form of discrimination. The assumption that religion is inherently discriminatory (and therefore unjust) undermines a proper respect and appreciation for the importance of religious freedom as a fundamental human right.

6. Religious freedom allows individuals to practise their religion freely and publicly as citizens, and not just in private life.

The claim that religious people should quarantine their beliefs from public debate and even from the way they carry out their profession or occupation is unfair and discriminatory, because it allows everyone except religious people to act on their beliefs. No human being lives in neatly divided public and private worlds. Beliefs about meaning and truth, right and wrong — religious and non-religious alike — are conclusions about what is real and important in life. For everyone, they serve as a basis for their action in the world.

This principle is apparent in various provisions in the bill protecting people from discrimination for speaking about their religious beliefs or for acting on them lawfully and in good faith, including those just discussed in the principles above. It is also reflected in the clause on qualifying body conduct rules restricting people from speaking about their religious beliefs or activities (c.15). This clause provides that a conduct rule imposed by a qualifying body which has “the effect of restricting or preventing [a] person from making a statement of belief” outside their work constitutes discrimination. The legitimate role of qualifying bodies in maintaining appropriate standards of behaviour in certain professions and occupations should not extend

to prohibiting people, as a condition for continuing to practise their profession or occupation, from speaking about their beliefs and convictions as a private citizen outside work.

Again, this protection is limited because it does not affect the capacity of qualifying bodies to restrict or prohibit the making of statements of belief in the course a person carrying out their work. In circumstances where not speaking about one's religious beliefs, even outside work, is an essential requirement of a profession or occupation, a conduct rule imposing this would not be discrimination (c.15(2)). The Explanatory Memorandum outlines the high threshold which would need to be reached for compliance with a conduct rule of this sort to be an essential requirement of a profession or occupation (n.229-30). Clause 15(3) also allows qualifying bodies to prohibit statements of belief made outside work which are malicious, vilify or intimidate others, or which encourage a serious offence. These provisions offer protection against discrimination for people to speak about their beliefs outside work, while also protecting the rights of others.

7. Religious freedom means people are entitled to live out their beliefs in the way they serve the rest of the community.

Coming together around a common purpose and shared beliefs to help those in need is one of the main ways in which religious communities encourage participation in society and work to build up a sense of solidarity. Religious freedom protects not only the right of people to live out their beliefs in co-operation with others who share their faith, but also the right to establish and operate services for the wider community that are faithful to the beliefs which inspired them, and which are reflected in their work.

This principle can be found in the provisions of the bill which protect religious bodies in carrying out their work in accordance with their faith. Subject to the limits discussed above at principle 5, clause 7 provides that conduct by a religious body in accordance with the beliefs and doctrines of the religious community to which it belongs, and conduct "to avoid injury to the religious susceptibilities" of members of its religious community, is not religious discrimination and is not unlawful. Clause 9 restricts the scope of this protection for religious hospitals, aged care, accommodation and disability services to employment only, but the ability to exercise a preference in employment for people who share the faith of these religious bodies is a critical element in ensuring that these works continue to deliver services to the wider community in ways which are faithful to the beliefs which inspired and sustain them. Being able to exercise such a preference in employment, and more generally to act in accordance with one's faith (c.7), without this being regarded as religious discrimination or as unlawful, is a welcome development in anti-discrimination laws as they affect religious communities. This is a much better way of reflecting that religious freedom is a fundamental human right, and not merely something permitted or tolerated by way of an exemption to the general prohibition on discrimination.

8. Religious freedom is not a claim for special treatment.

It is a basic fairness for people to be able to put their beliefs into practice and not to be forced to act against them. Religious freedom protects this basic fairness. It is not a claim for a special privilege or an exemption for religious communities from laws which apply to everyone else, and describing it in these terms is misleading. Religious freedom is a fundamental right which ensures there is a space for religious communities to live out their beliefs, while also respecting the dignity and freedom of other people.

This principle informs the key provisions of the bill and is reflected at its very beginning in the clause setting out the objects of the legislation. The bill recognises "the freedom of all people to have or adopt a religion or belief of their choice, and freedom to manifest this religion or belief either individually or in community with others" (c.3(1)). It seeks to ensure that "everyone has the same rights to equality before the law, regardless of religious belief or activity"

(c.3(1)(b)). It is intended to promote recognition and acceptance “of the principle that people of all religious beliefs, including people with no religious beliefs, have the same fundamental rights in relation to those beliefs” (c.3(1)(c)).

These are clear statements of what the right to freedom of religion entails, of the importance of treating those who are religious equally before the law with other people, and of the equality of fundamental rights that people have in relation to their beliefs, whether they are religious or non-religious. They help to address the misrepresentation that religious freedom is mainly a pretext for discrimination against vulnerable people. They also address the tendency to regard religious communities as suspect or meriting less than equal treatment or respect, particularly when their beliefs may be different or opposed to those of the secular consensus. Ensuring that everyone is treated equally by the law, regardless of their particular attributes, is one of the major purposes of anti-discrimination legislation. The bill will advance this purpose for those who are religious as well.

9. Religious freedom reinforces other fundamental rights.

Religious freedom is part of a larger whole. It does not sit in isolation but is an integrated and essential part of human rights. Because these rights protect the different things we need to make a full life possible, they have to go together and they should not be placed in opposition to each other. Freedom of religion both depends on respect for rights such as freedom of conscience, freedom of thought, freedom of expression, and freedom of assembly, and supports and reinforces them in turn. Placing religious freedom in doubt places these other rights in doubt as well.

The most apparent way in which the bill underscores that religious freedom reinforces other fundamental rights is in its various provisions protecting statements of belief. These provisions serve to protect not only the right to discuss and explain religious beliefs, but freedom of speech more generally. The provisions at clause 21 making it unlawful for qualifying bodies “to discriminate on the ground of a person’s religious belief or activity” in conferring, renewing or refusing a qualification or authorisation help to reinforce freedom of conscience and freedom of thought, as well as freedom of religion and belief. The recognition in the objects of the bill (c.3(1)) of the importance of manifesting religious belief “in community with others”, and the provisions in clauses 7 and 9 concerning employment by religious bodies, including exercising a preference for those from the same religious community, uphold not only manifesting religion in activities and services but different dimensions of freedom of assembly. Various provisions of the bill relating to religious schools support the right of parents and guardians to determine the moral and religious education their children receive. As noted in the discussion of other principles above, none of these protections for religious freedom in the bill are unqualified or without limits to protect the rights of others.

10. Religious freedom makes democratic societies stronger.

Religious freedom protects not only the right of individuals and religious communities to fully participate in the life of a democratic society, but also the contribution they make to building it up. Because religious freedom and related protections such as conscientious objection protect people from being compelled to co-operate with activities which they hold, as a matter of conviction, to be wrong, they also help to encourage people to speak out against injustice and evil when no one else will. Good societies need these voices.

Protecting individuals from discrimination on the grounds of their religious belief and activity is an important measure to ensure that they are able to participate on an equal footing with others in a secular society. Making certain that the law protects the right of religious schools and charities to act in accordance with the doctrines and teachings of their religion, and the right of religious hospitals and aged care and disability services to maintain their religious ethos in the selection of staff, is essential to preserving the contributions these bodies make to building up

society and to helping those in need. Providing protection for people to speak about their religious beliefs helps to prevent public discussion from becoming stifled. Majority support or elite consensus is no guarantee that a law or policy is just, and a good society needs to ensure that space always remains open for people to point out when something is wrong, and to keep insisting that it is wrong, until it is finally addressed. Religious belief is not the only place from which this corrective energy can arise, but it is certainly one of them. By according the rights of religious communities greater protection than they currently enjoy, the bill will help to sustain this.

Conclusion

The Religious Discrimination Bill is not a religious freedom bill and it should be assessed on the basis of what it is. When considered in light of the ten principles of religious freedom, it addresses the considerations underlying each principle in a meaningful way. More could always be done or wished for, but given the complexity of the issue, politically as well as philosophically, the bill strikes a good balance in protecting the rights of religious communities and in balancing these protections with both the rights of others and the requirements of the common good. In important respects it represents a significant advance in the protection of religious freedom as a fundamental human right in Australian law. The bill merits the parliament's support and it would be good to see it passed into law.

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* The ten principles of religious freedom were first published in: Frank Brennan, M. A. Casey & Greg Craven, *Chalice of Liberty: Protecting Religious Freedom in Australia* (Kapunda Press, Redland Bay: 2018), pp.49-53.