

Submission to Senate Standing Committees on Legal and Constitutional Affairs enquiry
into Legislative exemptions that allow faith-based educational institutions to discriminate
against students, teachers and staff

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Preliminary

I am a Lecturer at the University of Western Australia in the Faculty of Arts, Business, Law and Education. My research focuses on the relationship between the State and religion in Australia. A full list of my publications can be accessed on the University of Western Australia's [Research Repository](#).

My book, *State and Religion: The Australian Story* published by Routledge in 2018 covers, inter alia, the relationship between the state and religion in relation to education, the 2017 same-sex marriage debate and postal survey and the issue of freedom of religion in Australia. In February 2018 I made a [submission](#) to the Religious Freedom Review. In that submission I recommended that exemptions for religious organisations and schools in anti-discrimination laws be amended to include a transparency requirement. My views in relation to this issue have also been published on the ABC Religion and Ethics webpage in an opinion piece titled [Transparency is the way forward for religious exemptions to anti-discrimination laws](#).¹

Introduction

The same-sex marriage debate and postal survey highlighted many of the issues facing the LGBTI community, including discrimination. Same-sex marriage may now be a legal reality in Australia but there are many issues still to be resolved.² Many of these issues involve the intersection of the right not to be discriminated against on the basis of your sexuality or gender identity etc and freedom of religion.

Freedom of religion, including in Schools, is only weakly protected in Australia.³ While section 116 of the Australian Constitution ostensibly prohibits the Commonwealth from making any laws for prohibiting the free exercise of religion this provision has been interpreted narrowly by the High court of Australia.⁴ One way in which freedom of religion

¹ Renae Barker, 'Transparency is the way forward for religious exemptions to anti-discrimination laws' (15 October 2018) *ABC Religion and Ethics* <https://www.abc.net.au/religion/transparency-is-the-way-forward-for-religious-exemptions/10379256>.

² See Renae Barker, 'Comment: If 2016 brings marriage equality to Australia, will it end the LGBTI rights debate' (23 December 2015) *SBS Sexuality* <http://www.sbs.com.au/topics/sexuality/article/2015/12/23/comment-if-2016-brings-marriage-equality-australia-will-it-end-lgbti-rights>

³ Renae Barker, *State and Religion The Australian Story* (Routledge, 2019), 105 – 109.

⁴ *Ibid*, 92 – 93.

is protected in Australia's schools is via exemptions to anti-discrimination laws.⁵ These exemptions enable religious schools to operate in accordance with their religious values where those values conflict with more generally held societal norms.

Are Exemptions Still Necessary?

Not all religious schools make use of the exemptions in the *Sex Discrimination Act 1984* (Cth). For example The Anglican Archbishop of Perth, The Most Reverend Kay Goldsworthy AO, recently [published a letter](#) outlining the Anglican School Commission's approach to this issue. In her letter she stated that:

The ASC's current Strategic Plan is very clear on this topic. One of ASC's five core activities is 'inclusion'. The plan states that ASC schools are inclusive schools which proactively outreach to create opportunities and an inclusive supportive environment for students and staff who identify as LGBTI.

Further she '[did] not anticipate any changes in the approach of the Anglican Schools Commission (ARC) schools take in relation to either staff or students.'

In response to the publication of the recommendations of the Religious freedom Review and community concern about the exemptions which allowed religious schools to expel LGBTI students several religious leaders indicated that their schools did not use or want this exemption. For example Archbishop Mark Coleridge, on behalf of Catholic schools, has stated 'we have not sought concessions to discriminate against students or teachers based on their sexuality, gender identity or relationship status.'⁶

However, just because some religious schools do not make use of the exemptions does not mean that others do not. At the moment it is unclear how many schools do in fact make use of the exemptions and how many do not. There is no way, other than via ad hoc comments from religious and school leaders to determine the extent to which religious schools make use of these provisions.

As I outlined in my submission to the Religious Freedom Review:

While those of no particular faith and those who embrace atheism or agnosticism may not see the need for those fulfilling an ostensibly secular role to comply with the beliefs of the religious organisation employing them this only highlights an important difference between those of faith and those who are not. Taking the example of a gardener a person who has no religion is likely to see the role as being the care and maintenance of the religious organisations grounds and gardens. However the care of

⁵ Ibid, 107 – 108.

⁶ Jewel Topsfield and Michael Kozoil, 'Catholic Schools say they don't discriminate on sexuality' (10 October 2018) *The Sydney Morning Herald* (online) <https://www.smh.com.au/politics/federal/catholic-schools-say-they-don-t-discriminate-on-sexuality-20181010-p508vp.html>.

the natural environment can also be seen as a profound act of worship or spiritual fulfilment in honouring God's creation. Similarly the role of receptionist is likely to be seen by those with no religion as an administrative role involving answering the telephone, greeting people and attending to general administrative tasks. For a religious organisation and individuals the role could be seen as the first contact between those seeking spiritual guidance and the religion involved. The difficulty faced by those of faith in understanding the religious nature of ostensibly secular roles is summed up in the quote from Thomas Aquinas:

To one who has faith, no explanation is necessary. To one without faith, no explanation is possible.

This applies equally to schools. The maths teacher at a religious school is often used as an example of a secular role where the person fulfilling that role does not necessarily need to comply with the religious ethos of the school in order to fulfil the requirements of their job. However as with the administrative assistant or gardener discussed above the role of maths teacher may be seen by religious people very differently to those from a secular background. As with others teachers the maths teacher is likely to be approached by students for guidance on a range of issues, not just trigonometry or algebra. They may also be required to participate in religious activities of the school. A teacher whose belief and values conflict with the religious ethos of the school is unlikely to be able to do either of these things both in line with the school's religious ethos nor authentically.

The difficulty with retaining the exemptions, however is that discrimination against individuals on the basis of the characteristics listed in the *Sex Discrimination Act*, including but not limited to their sexuality is out of step with community expectations.

Transparency Allows Rights to be Balanced

As I outlined in my submission to the Religious Freedom Review 'Exemptions which permit a religious organisation to discriminate in relation to staff in ostensibly secular roles impinge upon the rights and freedoms of others.' One solution is to remove the exemptions in the interest of protecting the freedom of others. However doing so will inevitably infringe upon the freedom of religion of parents (and children) who attend religious schools who currently make use of the exemptions in the *Sex Discrimination Act*. Another way forward is to require religious schools to be more transparent in their use of religious exemptions.⁷

Requiring religious schools to be transparent in their use of exemptions has a number of advantages. Transparency opens up the use of exemptions to scrutiny. As I outlined in my submission to the Religious Freedom Review:

⁷ Renae Barker, 'Transparency is the way forward', above n 1.

... while religious organisations may be making use of an exemption they also may not be. It is only when a dispute arises, where an individual believes that the exemption applied by the religious organisation was done so unlawfully, that public debate and therefor scrutiny can occur. Equally where a religious organisation chooses not to make use of an exemption this too would be a matter of public record. Those who interact with these religious organisations would then have the necessary knowledge to make informed decisions about their continued interactions.

At its recent Synod the Anglican Diocese of Sydney passed the *Sydney Anglican Use of Church Property Ordinance 2018* which made explicit that '[a] Diocesan body must only use or allow the use of Church property for acts or practices which conform to the doctrines, tenets and beliefs of the [Sydney] Diocese.' This includes a prohibition on church property being used for, inter alia, same-sex weddings and other events. The Anglican Diocese of Sydney received significant criticism in the press over its decision, including the impact such a policy would have on Anglican schools with in the Diocese. However, such criticism was only possible because the Diocese was transparent and clear about its policy and stance in relation to these matters.

Transparency will also allow those schools which do not make use of the exemptions to distinguish themselves from those that do. Parents could then vote with their feet and enrol their children in schools which conform to their values. If the sentiment of the public really is against the continuation of such exemptions religious schools which continue to use them may well find themselves with less pupils.

Transparency would also allow staff applying to religious schools to know in advance if they may be subject to discrimination on the basis of an attribute otherwise protected in the *Sex Discrimination Act*. As I outlined in my submission to the Religious Freedom Review:

The advantage of such a requirement is that potential employee are alerted to the fact that they may be lawfully discriminated against before they submit an application to the religious organisation. In effect they can choose not to waste their time applying for a position they are unlikely to be selected for.

An additional benefit of transparency is that it would enable the debate about the role, place and funding of religious schools to be carried out with all the relevant facts on the table. As I outlined above we do not currently know how many, if any, religious schools actually make use of the exemptions contained in the *Sex Discrimination Act*. Without this information it is impossible to have a fully informed debate about religious schools. A common argument against the funding of religious schools is that it amounts to 'tax payer funded discrimination.'⁸ This assertion however rests on an assumption that all or most religious

⁸ Clair Moodie, 'Teacher who lost school job after revealing he was in same sex relationship warns of impact of religious views' (12 October 2018) *ABC News* (online) <https://www.abc.net.au/news/2018-10-12/gay-teacher-attacks-push-for-religious-school-discrimination/10365816>.

schools make use of the exemptions. This may or may not be the case. To remove the exemptions on the assumption that they are not being used would be premature. But introducing a transparency requirement so that the public debate about religious schools can be carried out in an informed way would be a step in the right direction.

How Would Transparency Work

There are a number of mechanism open to schools through which they could be required to be transparent in their use of exemptions. The school should be required to make their policy on the use of exemptions publicly available on their web page, in information provided to new and prospective parents of the school and in advertisements of a position of employment. In my submission to the Freedom of Religion Review I recommended that the following provision be inserted in anti-discrimination legislation:

Where a religious organisation intends to rely on [insert relevant section and subsection number] of the Act in relation to employment a statement in the following form must be included in the advertisement of the position of employment.
[name of religious organisation] may make use of the exemptions provided in [insert relevant section and subsection number] of the [insert name of Act].

Another possibility is for those schools registered with the Australian Charities and Not-for-profit Commission to be required to state, as part of their registration, whether or not their school made use of the exemptions. The ACNC has brought much needed transparency to the Not-for-profit and charity sector through its transparency requirements.⁹ As a government organisation to which many religious schools already report this may be another vehicle for transparency in the use of exemptions.

Conclusion

The religious dynamics of Australia are changing.¹⁰ As a result the privileges enjoyed by religious organisations and schools are rightly being challenged. However, just because these rights and privileges are being challenged does not mean they necessarily need to be removed. Instead minor amendments to bring these rights and privileges into line with current societal expectations can be made which preserve freedom of religion alongside other human rights. As I have argued elsewhere:

As those who self-identify as having no religion rightly claim protection in the form of freedom from religion and a voice in public debates on matters of belief, we must be conscious not to trample on freedom of religion at the same time.

...

⁹ Renae Barker, *State and Religion The Australian Story*, above n 3, 311 – 320.

¹⁰ Renae Barker, 'Religion and the Census: Australia's Unique Relationship to Faith and Unbelief' (5 July 2017) *ABC Religion and Ethics* <http://www.abc.net.au/religion/articles/2017/07/05/4696888.htm>

Manning Clarke famously characterized religion in Australia as, and perhaps is increasingly, a "whisper in the mind and a shy hope in the heart." As the balance between the "nones" and those of faith shifts, we must be careful not to drown out this shy voice. In finding our way forward as a nation, the solutions at which we arrive will be a uniquely Australian balancing act - and all the richer for being so.¹¹

Requiring religious schools to be transparent in their use of exemptions contained in the *Sex Discrimination Act* would be a solution that balanced the right to freedom of religion and the right not to be discriminated against on the basis of your sexuality or gender identity. It would also provide the necessary information for an informed and continuing debate on this issue.

¹¹ Ibid.