CURRENT LEGAL ISSUES SERIES

Religious Freedom, Religious Discrimination and the Role of Law

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Commentary: Prof. Patrick Parkinson AM

I Introduction

It is both a pleasure and an honour to be able to comment on Prof. Evans' paper. Prof. Evans has made a distinguished contribution to the field of law and religion. She is highly respected for her work internationally, including by those who might be inclined to disagree with her on particular issues. It hardly needs to be said that she has also made a distinguished contribution to the work of university management, first in her role as the Dean of Melbourne Law School, and then in the higher echelons of university administration, rising to her present position.

For long, law and religion was a neglected field. Indeed, Prof. Evans was, until recently, one of the very few Australian legal scholars to have written in the area outside of the narrow context of commentaries on human rights law or anti-discrimination law.

Now law and religion is a burgeoning field, with many younger scholars doing excellent work in the area. A new *Australian Journal of Law and Religion* was launched just this year.

II The demise of the liberal consensus

The growth in interest in this field is probably because of the mounting challenges to religious freedom that we have seen in recent years. In my view, we are not only rapidly becoming a post-Christian society – that much is obvious. We are also becoming a post-multicultural society. By this I mean that the liberal consensus which has provided the basis for a multicultural and multifaith society is now being gradually discarded.

That liberal consensus rested on a simple principle – that we should live and let live. That meant that in secular workplaces, in secular educational institutions, or for that matter in running a secular AFL club, we should be tolerant of each other's different views and perspectives, working together without discrimination or prejudice, accepting that we may have different beliefs, different cultural practices, different values about sex and family life, and even different ideas about life itself – none of which should matter in the secular workplace. The liberal consensus provides that we have the freedom to be different, and the freedom to speak about those differences. Those freedoms are being eroded now – a point to which I shall return.

III Points of agreement

There is a great deal in this paper with which I can only agree. Prof. Evans's analysis of s.116 of the Constitution indicates how little it really protects religious freedom, or conversely, how little it prohibits the intermingling of Church and State, for example by funding faith-based schools. It seems somewhat extraordinary that a provision, seemingly so closely modelled on the First Amendment to the US Constitution, has departed so markedly from it in terms of judicial interpretation.

I also agree that to date the Human Rights Acts in Victoria, Queensland and the ACT have not shown much promise in terms of protecting religious freedom. I am not convinced, myself, that they will do. This is because these laws do not mirror the international covenants on which they say they are based. While, for example, Article 18(3) of the ICCPR states that the manifestation of religious belief should be subject only to such limitations as are *necessary* to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, s.13 of the *Human Rights Act* in Queensland, like provisions in other jurisdictions, provides to a judge quite a wide discretion to say that a particular human right should not be respected in given circumstances. Inevitably, that discretion will be affected by the values of the judge, or the appellate bench, as the case may be. Very often, these are personal or political value judgments, disguised by the objectivity of legal discourse.

I agree also with the concern that Prof. Evans expressed about minority religions not being treated as favourably as mainstream ones. This is a danger we must work hard to avoid. I have recently had to go into bat for the rights and freedoms of one minority religious organisation. I do not share that organisation's beliefs, and I share the concerns people have about some of its doctrines and practices. However, it seemed plain as daylight to me in these instances that there was discrimination against this group, in one case by a government organisation and in another case by a commission of inquiry, both of which were exceeding their legal powers in so doing. Being concerned with freedom of religion necessitates being concerned for all religions, however small or unpopular they may be.

I also agree that courts should not get involved in determining religious doctrines. Prof. Evans says that:

> Courts should, wherever possible, avoid developing tests that require them to engage in adjudicating the objective religious rules and instead focus on the subjective genuineness with which those beliefs are held.

Courts should not rush in where angels fear to tread.

IV Points of disagreement

So with what do I disagree? Where I disagree with Prof. Evans, it is not so much because I disagree with her answers but because I disagree with her questions.

Let me offer two examples.

(a) The right to select

Prof. Evans raises the thorny issue that faith-based organisations seek to discriminate against applicants for employment, on the basis of their religious beliefs. Can that be justified, she asks, when they are such large employers, when 94% of private schools, 15% of hospitals and over 23% of aged care facilities are religiously affiliated? These institutions, she notes, are huge employers and provide services to hundreds of thousands of people. The way the issue is put, of course, invites the answer.

First, we should be clear that even if 94% of private schools have a religious affiliation, only a small fraction of those have a very active religious identity and ethos. Secondly, faith-based hospitals and welfare services typically seek to provide for everyone in the community who comes for their help. There is no religious test for accessing services that meet the needs of the homeless, the hungry, or those in need of health care.

Beyond this allow me to frame the question differently. The question is whether religious employers should have a right to select staff who support the religious mission of the organisation? Faith leaders across the country have said time and time again that they do not seek the right to discriminate on the basis of religious belief in making employment decisions. What they have asked for is the preservation of the right to select, or the right to prefer, people who adhere to the beliefs and values of the organisation. If I am running a Thai restaurant, and I advertise for Thai staff, it is not because I have any desire to discriminate against Belgians, or any other nationality for that matter. I want to select Thai staff, if I can find them, because I am running a Thai restaurant. And why not? What is the public policy problem in allowing Thai restaurant owners to advertise a preference for Thai staff?

And who could complain if an environmental organisation did not want to select as a member of staff a person who is sceptical about climate change, or uncommitted to policies that reduce the role of fossil fuels?

Large employers like the Catholic schools and hospitals, and indeed the Christian welfare organisations, have a very diverse staff. They do not discriminate, nor ask for the right to do so. However, they do ask for the freedom to select or to prefer to select, staff who will share the faith and values of the organisation and why not? They are, and hold themselves out to be, religious organisations. They seek to retain their religious ethos and character. Why should the Catholic school be indistinguishable, in terms of its staffing complement, from the State school down the road? If you believe in a multicultural society, then you need to accept the right of parents to have some choice in the education of their children. It is a right guaranteed by Article 13(3) of the International Covenant on Economic, Social and Cultural Rights which provides as follows:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational

> standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

That right is not well-respected in Queensland. Section 25(3) of the Anti-Discrimination Act 1991 already imposes severe limitations on the right of faith-based schools to select staff on the basis of religious belief. Now the Queensland Human Rights Commission wants to restrict that right further by providing in legislation that a school cannot insist on a science teacher being an active adherent of the religion.

That assumes that there is no connection between maths or science and religion. I respectfully disagree. Maths is the language of God. I find in many scientific discoveries, particularly in the area of astrophysics, compelling evidence that supports the notion of a Creator who is above, beyond or outside, the matter in this universe.

The right of schools to select or prefer staff whose worldview fits with the mission of the school used to be widely accepted as being an aspect of a successful multicultural society. In Queensland, that right is already very heavily restricted.

It seems extraordinary, if I may say so, that the Qld Human Rights Commission wants to restrict it even further by imposing its beliefs about the relationship between science and faith on those of us who have a different understanding of that relationship. It wants to make the Christian school almost indistinguishable from the state school next door. To that extent, it is undermining Queensland's commitment to a multicultural, and multifaith, society.

So I think this is a significant issue on which I respectfully disagree with Prof. Evans – not so much in her answers, the balances which she has proposed in her public work – but in the way the question itself is framed.

(b) Right to speak freely on religious matters

The second example is in Prof. Evans' criticism of provisions in the federal Religious Discrimination Bill that protected non-vilifying statements of belief. She cites the notorious Israel Folau case as one which raises the question "whether making statements through social media about matters of religious belief around sexual orientation and activity was a religious activity". Framed in that way, we may be tempted to answer no, and particularly so if we ask whether making such statements is required by one's faith or merely motivated by one's faith.

Now I think that Israel Folau was very unwise, and Rugby Australia was even more unwise in the way it handled the situation; but the issue is not whether Folau was engaging in a religious activity that should somehow get special protection. The issue is one about the rights of workers.

The question, in my view, is whether employers should be able to regulate my life, 24/7, including what I post on social media in my personal capacity? Or is there a zone of my life - are there hours of my day or week - which are beyond the scope of my employment? That is a much broader question.

The Folau case was difficult because he was such a public figure, and so there was not such a separation between public and private as there would be for others; but I have seen ordinary people lose their jobs or be threatened with dismissal for expressing moderate and widely held opinions on their private social media with which the employer happens to disagree. That is chilling. In universities, we have considerable freedom of speech, and for good reasons, but should not at least some free speech of others be protected from adverse action by employers?

Today, the argument might be about religious speech; but tomorrow it may be about the expression of a point of view on another issue entirely – including the censorship of a view you hold. Consider a motion passed recently by the National Tertiary Education Union that equated gender critical feminism with transphobia and argued that the expression of gender critical opinions should not be protected by academic freedom. The motion thus condemns those who hold to the view that women's sex-based rights to separate facilities and sports should continue to be respected. Gender critical feminism continues a long tradition of feminist advocacy for women's interests and the protection of women's bodies. It starts from the premise that we are, as homo sapiens, a sexually dimorphic species. That the National Tertiary Education Union should seek now to suppress free speech on feminist issues is yet another sign of the demise of the liberal consensus - the notion that we can agree to differ, that we should never close off subjects of conversation and scientific or social inquiry either within the university or beyond it.

The National Tertiary Education Union is an attack on academic freedom in the workplace. How much more then, if we are concerned about freedom of speech and debate, that we should protect the rights of workers to have a zone of their lives which is not under the control of their employers. Perhaps we need the unions…

V Conclusion

I hope this suffices to illustrate how the way we frame the questions about religious freedom and discrimination law may dictate the answers. I differ from Prof. Evans in some of my answers to the questions that she canvasses in her very fine paper, because I differ from her in terms of some of the questions. I don't think we disagree on the importance of the liberal consensus; but perhaps I see it as more under threat than she does.