

## A Religious Discrimination Act for Australia? Augusto Zimmermann

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Be Careful What You Wish For...

By Augusto Zimmermann

**Social Services Minister Dan Tehan has called for a Religious Discrimination Act to provide greater protections to “people of faith”. Delivering the St Thomas More Lecture in Canberra last month, Mr Tehan contended that the “creeping encroachment from the state on religious belief” was a key issue, given new conflicts in the areas of euthanasia, same-sex marriage and the sanctity of the confessional. “In a liberal democracy, people must have the freedom to air unpopular views, including those informed by their faith, and those views must be open to challenge,” he said.**

Mr Tehan is to be commended in drawing the focus back to the need to protect religious freedom. But be very careful what you wish for, Mr Tehan, as there might be unintended consequences. Senator Fraser Anning is correct to warn that such a push for Religious Discrimination Act could provide a shield to religious extremists and advocates of principles offensive to our liberal democracy, such as sharia law. Although he recognises that minority groups are using “political correctness as a weapon against traditional values”, Senator Anning reminds also that enshrining religious freedom in law could have unintended consequences. “The real danger is that laws intended to protect those who support traditional Christian values will - inadvertently end up providing a shield to Islamic extremists and advocates of sharia law,” he says.

It seems no coincidence therefore that the Australian Federation of Islamic Councils is calling for the introduction of religious anti-discrimination laws after Mr Tehan called for the introduction of such an Act. Federation president Mr Rateb Jneid said “the preferred form of that legislation should be by way of a bill of rights that is based on the Canadian and New Zealand models”. “In the alternative, if a bill of rights is not possible, then we urge the inquiry to accept ... a religious freedom act,” Mr Jneid told *The Australian*.

Of course, I would suggest to the president of the Islamic Councils to start his campaign for a “bill of rights” for religious freedom (other than Islam) in all of the countries in the Middle East except of course for the only democracy in the region, Israel. Besides, it is rather intriguing that he thinks that Australia should follow the Canadian model of “bill of rights” in order to protect religious freedom. Such a mythology of the *Canadian Charter of Rights and Freedoms* protecting religious freedom could not be more departed from the truth. Such an assumption is inaccurate for Canada as for any other common-law jurisdiction.

The enactment of the *Canadian Charter of Rights* in 1982 has become, in the words of law professor M. H. Ogilvie, ‘a sword by which the Canadian state, through the agency of the courts, has intruded into aspects of society which the more self-restrained common law respected as private, including the religious aspect. Neither the internal corporate lives of religious institutions nor the private lives of individual believers can any longer be considered areas into which the state will not go. The public-private divide has largely collapsed.’ Because of such a Charter of Rights, Professor Ogilvie explains, the commitment of the Canadian courts to free speech is ‘doubtful’. He goes on to say how the courts in Canada are ‘erasing religion from public institutions and public events and ghettoising religious freedom expression in order to create a ‘naked public square’. Accordingly, it is increasingly common to hear conservative Christians and Jews in Canada express genuine fear about what the future might hold unless the courts begin to turn back from the course they are on.

Curiously, Mr Tehan quoted from Liberal senator David Fawcett who, in his capacity as chairman of the parliamentary inquiry into the status of the human right to freedom of religion or belief, stated: "While a culture of religious freedom has thrived, and the common law has respected religious freedom to a large extent, the legislative framework to ensure this continues is vulnerable." However, this would be far better guaranteed not by a religious freedom act but by an act guaranteeing free speech and freedom of association that would protect every citizen, religious or not. No need to protect religious people in particular.

A law against the incitement of religious violence would do more good than one against religious discrimination, in my opinion. Religious freedom is not an absolute right and it is necessarily subject to several limitations. As noted by Wilber G. Katz, 'legislation may validly forbid some types of conduct which a particular religion deems obligatory, or may prescribe action forbidden by religious law. Some such limitations are obviously necessary to protect the interests of citizens who do not share the particular faith'. Of course, any act or threat of violence, or incitement to violence, is already a criminal offence. But if it is done as an expression of religious faith, or as an attempt to coerce anyone to change their religious beliefs, then it should be in a special class of aggravated offences with much higher maximum sentences. Above all, religious freedom needs to remain 'subject to powers and restrictions of government essential to the reservation of the community' (Justice Rich) or 'subject to [such] limitations ... as are reasonably necessary for the protection of the community and in the interests of the social order' (Justice Starke).

Nothing excuses undermining the basic rights of some people in order to advance the supposed rights of others. The Turnbull government would go a long way in protecting religious freedom by restoring freedom of speech and freedom of association in this country. For the last twenty years or so anti-discrimination laws no doubt have contributed to a remarkable muzzling of freedom of speech and freedom of association. The tendency in some quarters to portray religious organisations as somehow different in this respect from other social institutions is unfortunate. When recruiting staff or appointing officeholders, a political party could be expected to display discrimination resembling that practiced by religious bodies. It is reasonable, for example, a politician from the Left of the Labor Party might discriminate against individuals with pro-free market views when recruiting staff for their office team. Likewise, environmental advocacy bodies such as Greenpeace or the Australian Conservation Foundation might reasonably be expected to discriminate against climate change sceptics when appointing scientists to their Scientific Advisory Committees. Why is the continued existence of bodies with competing visions inherently less sinister within the political realm than within the religious realm?

In a broader sense, the fundamental right to freedom of association involves a broader discussion on whether there should be adequate legal protection of the ability to reasonably discriminate in particular contexts. In a broader sense, the ability to discriminate on the basis of an organisation's core commitments and values is central to the democratic freedoms of our nation. Accordingly, the ability to discriminate on the basis of an organisation's core values and principles is an important aspect of the fundamental right to freedom of association, religious or not. For example, it is essential to religious bodies that they can select people of similar persuasions during the ordination of clergy; appointment of non-salaried officeholders; recruitment of teachers for their religious schools; securing of part-time theological lecturers for their seminaries; etc. There is therefore scope for a freedom of association act that should be extended to all organisations, including religious ones.

Above all, I certainly do not support the idea of a religious freedom act that seeks to specifically protect the right to freedom of religion. Such an act would do effectively nothing to stamping out unreasonable discrimination, or even reducing anti-religious bigotry. No, such law would simply provide further legal privileges to select constituencies, thus making these privileged groups more valuable than others in the eyes of the law. In my view, a much better approach rather than further undermining equality before the law, is to re-establish free speech and freedom of association in this country. This may involve the enactment of a Freedom of Association Act that re-calibrates the relationship between the conflicting human rights, and it does so by using

language that does not suggest that the freedom of religion (and criticism of religion) is an inferior or secondary right.

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