

---

# Bioethics Outlook

## Plunkett Centre for Ethics

Australian Catholic University,  
St Vincent's Health Australia (Sydney)  
& Calvary Healthcare

Volume 31, No 1

March 2020

---

### MESSAGE OF HIS HOLINESS POPE FRANCIS FOR THE XXVIII WORLD DAY OF THE SICK 2020

**“Come to me, all you who labour and are burdened,  
and I will give you rest” (Mt 11:28)**

*Dear brothers and sisters,*

1. Jesus' words, “Come to me, all you who labour and are burdened, and I will give you rest” (Mt 11:28) point to the mysterious path of grace that is revealed to the simple and gives new strength to those who are weary and tired. These words of Christ express the solidarity of the Son of Man with all those who are hurt and afflicted. How many people suffer in both body and soul! Jesus urges everyone to draw near to him – “Come to me!” – and he promises them comfort and repose. “When Jesus says this, he has before him the people he meets every day on the streets of Galilee: very many simple people, the poor, the sick, sinners, those who are marginalized *by the burden of the law and the oppressive social system...* These people always followed him to hear his word, a word that gave hope! Jesus' words always give hope!” ([Angelus, 6 July 2014](#)).

---

#### In this issue

We record the Pope's message on the recent 'Day of the Sick'.

We also republish the 2020 Barry O'Keefe Lecture, entitled *Do We Need New Laws to Protect Religious Freedom in Australia?* and delivered by Frank Brennan SJ.

---

On this XXVIII World Day of the Sick, Jesus repeats these words to the sick, the oppressed, and the poor. For they realize that they depend entirely on God and, beneath the burden of their trials, stand in need of his healing. Jesus does not make demands of those who endure situations of frailty, suffering and weakness, but offers his mercy and his comforting presence. He looks upon a wounded humanity with eyes that gaze into the heart of each person. That gaze is not one of indifference; rather, it embraces people in their entirety, each person in his or her health condition, discarding no one, but rather inviting everyone to share in his life and to experience his tender love.

2. Why does Jesus have these feelings? Because he himself became frail, endured human suffering and received comfort from his Father. Indeed, only those who personally experience suffering are then able to comfort others. There are so many kinds of grave suffering: incurable and chronic diseases, psychological diseases, situations calling for rehabilitation or palliative care, numerous forms of disability, children's or geriatric diseases... At times human warmth is lacking in our approach to these. What is needed is a personalized approach to the sick, not just of *curing* but also of *caring*, in view of an integral human healing. In experiencing illness, individuals not only feel threatened in their physical integrity, but also in the relational, intellectual, affective and spiritual dimensions of their lives. For this reason, in addition to therapy and support, they expect care and attention. In a word, love. At the side of every sick person, there is also a family, which itself suffers and is in need of support and comfort.

3. Dear brothers and sisters who are ill, your sickness makes you in a particular way one of those "who labour and are burdened", and thus attract the eyes and heart of Jesus. In him, you will find light to brighten your darkest moments and hope to soothe your distress. He urges you: "Come to me". In him, you will find strength to face all the worries and questions that assail you during this "dark night" of body and soul. Christ did not give us prescriptions, but through his passion, death and resurrection he frees us from the grip of evil.

In your experience of illness, you certainly need a place to find rest. The Church desires to become more and more the "inn" of the Good Samaritan who is Christ (cf. *Lk 10:34*), that is, a home where you can encounter his grace, which finds expression in closeness, acceptance and relief. In this home, you can meet people who, healed in their frailty by God's mercy, will help you bear your cross and enable your suffering to give you a new perspective. You will be able to look beyond your illness to a greater horizon of new light and fresh strength for your lives.

A key role in this effort to offer rest and renewal to our sick brothers and sisters is played by healthcare workers: physicians, nurses, medical and administrative professionals, assistants and volunteers. Thanks to their expertise, they can make patients feel the presence of Christ who consoles and cares for the sick, and heals every hurt. Yet they too are men and women with their own frailties and even illnesses. They show how true it is that "once Christ's comfort and rest is received, we are called in turn to become rest and comfort for our brothers and sisters, with a docile and humble attitude in imitation of the Teacher" ([Angelus, 6 July 2014](#)).

---

4. Dear healthcare professionals, let us always remember that diagnostic, preventive and therapeutic treatments, research, care and rehabilitation are always in the service of the sick person; indeed the noun “person” takes priority over the adjective “sick”. In your work, may you always strive to promote the dignity and life of each person, and reject any compromise in the direction of euthanasia, assisted suicide or suppression of life, even in the case of terminal illness.

When confronted with the limitations and even failures of medical science before increasingly problematic clinical cases and bleak diagnoses, you are called to be open to the transcendent dimension of your profession that reveals its ultimate meaning. Let us remember that life is sacred and belongs to God; hence it is inviolable and no one can claim the right to dispose of it freely (cf. [Donum Vitae](#), 5; [Evangelium Vitae](#), 29-53). Life must be welcomed, protected, respected and served from its beginning to its end: both human reason and faith in God, the author of life, require this. In some cases, conscientious objection becomes a necessary decision if you are to be consistent with your “yes” to life and to the human person. Your professionalism, sustained by Christian charity, will be the best service you can offer for the safeguarding of the truest human right, the right to life. When you can no longer provide a cure, you will still be able to provide care and healing, through gestures and procedures that give comfort and relief to the sick.

Tragically, in some contexts of war and violent conflict, healthcare professionals and the facilities that receive and assist the sick are attacked. In some areas, too, political authorities attempt to manipulate medical care for their own advantage, thus restricting the medical profession’s legitimate autonomy. Yet attacking those who devote themselves to the service of the suffering members of society does not serve the interests of anyone.

5. On this XXVIII World Day of the Sick, I think of our many brothers and sisters throughout the world who have no access to medical care because they live in poverty. For this reason, I urge healthcare institutions and government leaders throughout the world not to neglect social justice out of a preoccupation for financial concerns. It is my hope that, by joining the principles of solidarity and subsidiarity, efforts will be made to cooperate in ensuring that everyone has access to suitable treatments for preserving and restoring their health. I offer heartfelt thanks to all those volunteers who serve the sick, often compensating for structural shortcomings, while reflecting the image of Christ, the Good Samaritan, by their acts of tender love and closeness.

To the Blessed Virgin Mary, Health of the Sick, I entrust all those who bear the burden of illness, along with their families and all healthcare workers. With the assurance of a remembrance in my prayers, I cordially impart my Apostolic Blessing.

*From the Vatican, 3 January 2020*

---

# Do we need new laws to protect religious freedom in Australia?

Frank Brennan SJ

The Universal Declaration of Human Rights<sup>1</sup> (UDHR) was proclaimed by the UN General Assembly in 1948 as “a common standard of achievement for all peoples and all nations.” The drafters consulted a broad range of thinkers, including religious and philosophical greats such as Pierre Teilhard de Chardin SJ, Mahatma Gandhi and Aldous Huxley. Teilhard counselled the drafters to focus on “man in society” rather than the human being as an individual. The right to freedom of thought, conscience and religion or belief was recognised in the UDHR, providing:

*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*

When marking the sixtieth anniversary of the UDHR in 2008, Irish poet Seamus Heaney said<sup>2</sup>:

*Since it was framed, the Declaration has succeeded in creating an international moral consensus. It is always there as a means of highlighting abuse if not always as a remedy: it exists instead in the moral imagination as an equivalent of the gold standard in the monetary system. The articulation of its tenets has made them into world currency of a negotiable sort. Even if its Articles are ignored or flouted — in many cases by governments who have signed up to them — it provides a worldwide amplification system for the “still, small voice.”*

A decade ago, the newly elected Rudd government set up a national human rights consultation. I was privileged to chair the consultation which recommended a national Human Rights Act. Neither side of politics was much interested in this suggestion. The more conservative religious leaders were strongly opposed, believing that religious freedom might be better protected by parliament without legislation being subjected to judicial oversight for compliance with human rights generally. Ten years on, they might have cause to think differently. Back in 2009, some of the more conservative religious leaders found a strong ally

---

<sup>1</sup> [un.org/en/universal-declaration-human-rights/](http://un.org/en/universal-declaration-human-rights/)

<sup>2</sup> [irishtimes.com/news/human-rights-poetic-redress-1.903757](http://irishtimes.com/news/human-rights-poetic-redress-1.903757)

---

in Bob Carr, the one-time Labor premier of New South Wales and then later Minister for Foreign Affairs in the Gillard Labor government. Carr delighted in telling the story about the visit he received at his Premier's Office by the Catholic and Anglican Archbishops of Sydney. They were seeking exemptions for religious schools from some provisions of the state's anti-discrimination law, which would then permit the schools to teach their doctrine and enact their practices spared the threat of proceedings in any tribunal investigating whether their employment or enrolment practices were discriminatory. Carr indicated that without a Human Rights Act, this arrangement could be reached on a simple handshake with a meeting of the premier and the two archbishops. He joked that he felt as if he was solving the Reformation.

But a decade on, such an arrangement is far less likely to occur and even less likely to pass muster if publicised. Religious groups, like political parties, may well have an entitlement to employ staff who are willing to get with the program. Religious groups, like any other special interest groups in the community, need to be able to give an account of themselves — especially if the services they are delivering are funded in part by the taxpayer.

The Queensland parliament has now legislated a human rights charter<sup>3</sup> similar to that adopted by the parliaments in Victoria and the ACT. These charters are weak forms of human rights protection by way of judicial review of majoritarian parliamentary intrusions. They do not empower the judges to strike down laws that are incompatible with human rights, but merely to make a declaration of incompatibility and leaving it to Parliament to decide whether to put right the human rights deficit highlighted by the courts.

That's why these legislative instruments are rarely invoked in the courts. Lawyers and their clients are more interested in getting a final, cost-effective result rather than launching academic test cases which result in a learned dialogue and standoff between parliament and the courts. Other Australian jurisdictions, including the Commonwealth, don't have even this mild level of available judicial scrutiny and are out of kilter with other equivalent jurisdictions — such as the UK and New Zealand, which have their own human rights acts.

In the absence of even a modest human rights act, religious freedom tends to be treated by means of *exemptions* for religious bodies or *exceptions* for religious behaviour set down in anti-discrimination acts, such as the Commonwealth's *Sex Discrimination Act*<sup>4</sup>. During the 2017 plebiscite campaign on same-sex marriage, many politicians and advocacy groups agitated or conceded the need for legislation to make up for the lack of legal protection of religious freedom at a national level. Religious folk rightly argued that it was no more logical to legislate religious freedom as an exception or exemption to discrimination laws than to legislate the right to equality and equal treatment as an exception or exemption to a religious freedom law. Over time, a right which is legislated only by way of exception or exemption becomes suspect and liable to further restriction.

---

<sup>3</sup> [legislation.qld.gov.au/view/html/asmade/act-2019-005](http://legislation.qld.gov.au/view/html/asmade/act-2019-005)

<sup>4</sup> [legislation.gov.au/Details/C2014C00002](http://legislation.gov.au/Details/C2014C00002)

---

Australia is a party to the International Covenant on Civil and Political Rights<sup>5</sup> (ICCPR), which further specifies the right to freedom of thought, conscience and religion as first enunciated in the UDHR. Article 18 of the ICCPR is now the main international legal provision protecting freedom of religion or belief. It provides:

1. Everyone shall have the right to freedom of thought, conscience and religion. 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.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

There have been numerous Australian inquiries by parliamentary committees, the Australian Law Reform Commission and the Australian Human Rights Commission which have highlighted the need for some further legislative protection of this right at a Commonwealth level. But the appetite for such reform in the legal academy has been slight, and in the past, almost non-existent among the leadership of the mainstream churches.

Like all competing or conflicting rights, the right to religious freedom is limited in its scope. There is often a need to balance conflicting rights. For example, Article 26 of the ICCPR recognises the right of all persons to equality and to non-discrimination on certain grounds — including religion. Article 26 provides:

*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The most recent report<sup>6</sup> of the Special Rapporteur on freedom of religion and belief to the UN Human Rights Council notes:

*[T]he jurisprudence of the Human Rights Committee and the regional human rights courts uphold that it is not permissible for individuals or groups to invoke “religious liberty” to perpetuate discrimination against groups in vulnerable situations, including lesbian, gay, bisexual, transgender and intersex persons, when it comes to the provision of goods or services in the public sphere.*

---

<sup>5</sup> [ohchr.org/en/professionalinterest/pages/ccpr.aspx](http://ohchr.org/en/professionalinterest/pages/ccpr.aspx)

<sup>6</sup> [pmc.gov.au/sites/default/files/religious-freedom.../10653.pdf](http://pmc.gov.au/sites/default/files/religious-freedom.../10653.pdf)

---

In the wake of the same-sex marriage plebiscite, the Australian challenge has been to strike the right balance between the right to freedom of religion or belief for religious educators and the rights to equality and non-discrimination for teachers and students.

## **The recommendations of the Ruddock Religious Freedom Review**

I served on the Ruddock Religious Freedom Review<sup>7</sup> set up after the same-sex marriage plebiscite. We provided our expert panel report to the Turnbull government in May 2018. The Expert Panel conceded that, in theory, there is a major lacuna in the array of anti-discrimination legislation. If you legislate to prohibit discrimination on the basis of gender, sexual orientation, age, race or disability, why not on the basis of religion? Our report was not released until December 2018 by the Morrison government. We recommended both a tweaked tightening of the exemptions for religious bodies in the Sex Discrimination Act and the introduction of a Religious Discrimination Act.

The delay of the release of the report and the shambolic handling of its publication highlighted the political problem with our recommendations. The Turnbull wing of the Liberal Party favoured the tweaked tightening of the Sex Discrimination Act provisions, but not the introduction of a Religious Discrimination Act. The Morrison wing of the Liberal Party were troubled by the former but attracted to the latter.

I constantly meet well-educated, compassionate human rights advocates who view religion as a hangover from a long past era. While conceding that human rights are universal and inalienable, indivisible, interdependent and interrelated, they basically think that freedom of religion is more trouble than it is worth. They find religious belief and practice marked by notions of tradition, authority, ritual and permanent commitment mystifying and counter-productive. They prize individualism, freedom, personal autonomy and non-discrimination.

They not only welcome increasing manifestations of the secular with a strict separation of church and state, they also relish increased secularisation of society with less reliance and respect being shown to the religious inclination which is quarantined to the sole preserve of the individual's private life — not to be shared in polite company and not to be aired on the public airwaves. Or if aired ever so briefly, to be silently tolerated or publicly declaimed.

Both sides of politics are agreed that it is time to repeal section 38(3) of the *Sex Discrimination Act*<sup>8</sup>, which allows a religious educational institution to discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy provided they discriminate “in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.” I welcome this bipartisan commitment of the parliament, but I despair at our parliament's protracted delay and incapacity to deliver on this commitment.

---

<sup>7</sup> [pmc.gov.au/domestic-policy/religious-freedom-review](https://pmc.gov.au/domestic-policy/religious-freedom-review)

<sup>8</sup> [legislation.gov.au/Details/C2014C00002](https://legislation.gov.au/Details/C2014C00002)



---

Religious schools should *not* be able to discriminate against students on the basis of their sexual orientation or gender identity. But religious schools *should* remain free to teach their doctrine respectfully and reasonably, in season and out of season. And the law should make that perfectly clear. We all need to concede that some religious teachings can be confronting and upsetting. But it is not for the state to rewrite the Bible or the Qur'an.

Let's consider an example that has nothing to do with sexuality. Jesus was fearless in his condemnation of wealth (Matthew 19:23-24): "Truly I tell you, it is hard for someone who is rich to enter the kingdom of heaven. Again, I tell you, it is easier for a camel to go through the eye of a needle than for someone who is rich to enter the kingdom of God." Church schools have to remain free to teach this doctrine even to the wealthiest children privileged to attend private schools with high fees. This doctrine can be taught respectfully and reasonably even though it is in stark contrast to the lifestyle of many of these students and their families.

So, too, the teaching of Jesus about marriage and divorce. Yes, there are a large number of students from blended families who have experienced divorce, and there will be an increasing number of students from families with same-sex married parents. There's no doubt that Jesus's teaching on divorce has been counter-cultural for a long time; so now, his teaching on marriage. A Christian school must be guaranteed the freedom to teach what Jesus taught, respectfully, reasonably and counter-culturally: *respectfully* because the dignity of all persons must be affirmed; *reasonably* because a school has a fundamental educational purpose; and *counter-culturally* because many of the things Jesus taught will never appear in the political manifestos of the Liberal Party or the Labor Party.

As an Expert Panel, the Ruddock Review noted that four of the nine Australian jurisdictions (including the Commonwealth) allowed religious schools to discriminate against students on the basis of their gender identity or sexual orientation; four did not; and then Tasmania allowed discrimination against new applicants but not against existing students at a school. Not being elected politicians, we did not see it as our role to propose major policy changes, but rather to recommend legislative changes which could be expected to win broad rational support across the political spectrum, honouring the principles of federal-state relations.

The Ruddock Review did not want religious schools having the ability to discriminate adversely against kids. But at the same time, we wanted religious schools to be able to teach their doctrine reasonably and respectfully. And we wanted religious schools within reason to be able to constitute their own faith environment just as a political party creates its own political environment — by employing staff and attracting volunteers who get the message and want to proclaim it and enact it. Just as the Greens ought not be required to employ a coal merchant, a Christian school ought not be required to employ an anti-Christian activist. We did not think you should be able to sack a teacher just because they entered into a same-sex marriage.

If religious freedom is to be better protected in future, it is necessary that religious citizens develop a more coherent position on the utility of comprehensive national human rights legislation being enacted and implemented consistent with the complexities in federal-state relations. It is also necessary that religious citizens and their leaders show more regard for



---

the right to equality and equal treatment of others, especially those who have suffered adverse discrimination from religious people and organisations in the past. And it's necessary that the human rights academy accord universality and indivisibility to all human rights including the fundamental right to freedom of religion. Some rights are trumpeted by the mainstream media and the academy; others are not. Freedom of religion might not be fashionable, but that's all the more reason for it to be protected by legislation with judicial teeth. It's time to advocate and demonstrate that all rights — including freedom of religion and the right to equality of treatment — are universal and inalienable, indivisible, interdependent and interrelated.

On the Ruddock Review, we received over 15,000 submissions and held 90 public consultation meetings around the country. We incurred the wrath or displeasure of both ends of the spectrum on the issue of religious freedom because we did not think there were many major issues. To quote our report<sup>9</sup>:

*The Panel heard repeatedly that religious adherence in Australia is at a critical juncture. Changing patterns of religious adherence, a loss of trust in mainstream institutions, and changing social mores are challenging the traditional role that religion has played in Australian society ... The Panel did not accept the argument, put by some, that religious freedom is in imminent peril, it did accept that the protection of difference with respect to belief or faith in a democratic, pluralist country such as Australia requires constant vigilance.*

The right to freedom of thought, conscience and religion set out in Article 18 of the ICCPR is a human right. Like all human rights, it is a right enjoyed by human beings, not a right granted to corporations. We said that the human right to freedom of religion “protects those whose views on faith or belief change over their lifetime. It is not a protection for religions. It is a protection, a human right, for the religious, the non-religious and those who subscribe to other systems of belief.”

Like many previous inquiries, we did accept that there was a shortfall in the federal legal architecture for the protection of religious freedom. Despite our being a signatory to the ICCPR, Australia has not passed the necessary domestic legislation to protect this right.

Most countries similar to ours have legislated some form of national human rights legislation or placed a bill of rights in their Constitution. We have done neither. Having chaired the National Human Rights Consultation for the Rudd government a decade ago, I knew there was no appetite on either side of the legislative aisle for a national human rights act.

Many religious groups and religious leaders who, in the past, have been eloquent opponents of a national human rights act called for a Religious Freedom Act. We opposed that because we thought it risked privileging some rights over others without providing a comprehensive means for resolving any conflict of rights. We spelled out our reasons<sup>10</sup>:

---

<sup>9</sup> [pmc.gov.au/domestic-policy/religious-freedom-review](http://pmc.gov.au/domestic-policy/religious-freedom-review)

<sup>10</sup> [pmc.gov.au/domestic-policy/religious-freedom-review](http://pmc.gov.au/domestic-policy/religious-freedom-review)

---

*[We] did not support enactment of a standalone Commonwealth enactment of this kind at this time. Specifically protecting freedom of religion would be out of step with the treatment of other rights. Moreover, the statutory expression of positive rights would need to be carefully crafted having regard to the need to reconcile them with the full suite of other human rights. As a matter of practicality, this necessitates a framework which provides equal treatment for a wide range of human rights.*

But we did see a place for a federal Religious Discrimination Act. We noted a shortfall in the protection of religious freedom not just at a national level but also in some of the states. There is a shortfall in the NSW and South Australian legislation. Some LGBTI advocates have said they are opposed to any religious discrimination legislation. I find that strange.

Presumably they are not calling for the repeal of section 14 of the Victorian Charter of Rights and Responsibilities<sup>11</sup>, which provides:

(1) Every person has the right to freedom of thought, conscience, religion and belief, including (a) the freedom to have or to adopt a religion or belief of his or her choice; and (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

We thought the Australian Human Rights Commission should be seen to be treating the protection of religious freedom as part of its day job, this being a right every bit as important as the other rights within the purview of the commission. But we did not favour a full-time religious freedom commissioner. We thought that would risk a Balkanisation of the commission in the present climate.

Since the Ruddock Review, many religious groups have continued to agitate for a religious freedom act. We thought something more modest and more consistent with present federal laws would be appropriate. If you have a Sex Discrimination Act, age discrimination legislation, disability discrimination legislation and a Racial Discrimination Act, then why not a religious discrimination act? We recommended *“that steps be taken ... to develop a Commonwealth Religious Discrimination Act directed at the provision of comprehensive protection against discrimination based on religious belief or activity, including the absence of religious belief.”*

Mind you, we saw that even a Religious Discrimination Act would have some added complexity. In a pluralistic democratic society like Australia, there is probably a fair consensus on the exceptions which should be permitted for women or Aborigines to set up exclusive arrangements for themselves, even in the public square with taxpayer assistance. When people want to gather or act exclusively in a group on the basis of some unchangeable, readily

---

<sup>11</sup> [legislation.vic.gov.au/](http://legislation.vic.gov.au/)

---

identifiable characteristic, it is easy enough to set the legal limits on acceptable positive discrimination. When people want to gather or act exclusively in a group on the basis of their religious beliefs, especially when those beliefs motivate them to provide public services and to evangelise, it is a more complex task to set the legal limits on acceptable positive discrimination. While it is unacceptable to have public affirmations that one race or gender is better or preferable to another, it's not quite the same with religion. After all, most religious believers voluntarily follow their particular religion because they believe it is the one true religion or the better or preferable religion. That does not, or should not, cause offence to people of other religious faiths or to unbelievers, provided there is mutual tolerance in the public square of all faiths and none. The common good of a pluralistic society is well served when co-religionists are able to associate together in groups and organisations which enhance their distinctive religious ethos, while contributing to the needs of society through the provision of services delivered in a non-discriminatory way. Ronan McCrea puts it well<sup>12</sup>:

*Religion raises different problems and is the basis of very different claims in different contexts. Sometimes it should be seen as a belief akin to political beliefs, other times it is a right to treat it as something closer to ethnic or racial identity. Designing legal rules for such a shape-shifting phenomenon that is viewed in so different ways by different people in so many different contexts is immensely difficult.*

## **The politics of religious discrimination**

The Morrison government has decided not to pursue the recommendation of the Ruddock Review of a clean, lean Religious Discrimination Act. Rather, in response to those who have long advocated a Religious Freedom Act, the Morrison government is attempting to formulate what we might call a "Religious Discrimination PLUS Bill" which will include some bells and whistles you would not expect to find in a standard piece of anti-discrimination legislation. They have even formulated specific provisions to deal with the controversies relating to Archbishop Porteous's run-in with the Anti-Discrimination Commissioner in Tasmania and Israel Folau's run-in with Rugby Australia.

I agree with the Australian Human Rights Commission<sup>13</sup>: *"As a matter of principle, the Commission considers that legislating for single instances is not good legislative practice. As a matter of substance, it may lead to unintended and undesirable consequences."* They have also inserted provisions overriding State laws such as the Victorian abortion law which prohibits doctors from conscientiously refusing to refer patients for abortions (including late-term abortions) even when a patient has ready access to alternative information and services. I think the Victorian provision pays insufficient regard to a doctor's right to freedom of thought, conscience and religion. But I am not convinced that a *specific* Commonwealth override added to an anti-discrimination bill is the way to go.

In a democracy like ours, there is no requirement that government stick rigidly to the recommendations of an Expert Panel. And there is nothing wrong with those citizens opposed

---

<sup>12</sup> [academic.oup.com/ojlr/article-abstract/5/2/183/1752393](https://academic.oup.com/ojlr/article-abstract/5/2/183/1752393)

<sup>13</sup> [humanrights.gov.au/our-work/legal/submission/religious-freedom-bills-second-exposure-draft](https://humanrights.gov.au/our-work/legal/submission/religious-freedom-bills-second-exposure-draft)

---

to the findings of the Expert Panel agitating for a different legislative outcome. That's why I have kept out of the debate since we submitted our report.

I note that those citizens who are anti-religious tend to view the present legislative exercise as a piece of special-pleading, pandering to a political interest sympathetic to the more conservative groupings in the federal Coalition. Some of the LGBTI groups think this is a rear-guard action by the churches and other religious groups who "lost" the plebiscite — even though the evidence shows, for example, that Catholics who voted in the plebiscite voted "yes" at the same rate (or slightly higher) as the community generally.

I think there is little prospect of any "Religious Discrimination PLUS Bill" passing the Senate. When such a bill is ultimately rejected by the Senate, I do hope that our federal politicians will have the good sense to legislate a neat and clean Religious Discrimination Act, and our politicians in the NSW and South Australian parliaments will have the good sense to bring their legislation up to an appropriate standard honouring our commitments and undertakings under the ICCPR.

### **Beware the tyranny of the majority**

There is undoubtedly increased religious antipathy in the Australian community. For example, I encounter more anti-Catholicism today than I did twenty years ago. Given that all human rights are to be treated equally, I don't think it is good enough that religious freedom at a national level be treated simply as a catalogue of exceptions or exemptions in the *Sex Discrimination Act*. That leaves the perception that religious folk are always engaged in special pleading, wanting to discriminate adversely against others.

Let me state a few propositions which I think should underpin any law or policy in this area. Religious schools should be able to exercise a preference for students and families who support the school's religious ethos and who want to benefit from that ethos. You mightn't want to send your kid to such a school, and you should have a realistic choice. But society is the better when everyone has that choice, and when everyone knows what is involved in making that choice.

Religious schools should be able to choose leaders for their staff who are animated by and supportive of the school's religious ethos and beliefs. If political parties, women's groups and Aboriginal organisations can be selective in their choice of leaders and staff who "get it" and who want to "evangelise their mission," why shouldn't religious groups?

We should not discriminate against our fellow citizens on the basis of religion or belief in the provision of public services or in our activities in the public square. But neither should we discriminate against our fellow citizens on the basis of their sexuality or gender in the provision of public services or in our activities in the public square. Those running Church schools need to work out how best to accommodate all students — including those being brought up by same sex couples and those who identify as LGBTI — and how best to treat all staff — including those who enter into a civil same sex marriage. We are entitled to conduct our institutions consistent with Church teaching but not in a manner which discriminates adversely against those of a different sexual orientation. We should treat them in the same

---

manner as those of a heterosexual orientation. If we were to insist that all heterosexual teachers be celibate or living in a sacramental marriage, we would have a case for discriminating against teachers in a same sex relationship. But given that we turn a blind eye (or perhaps even a compassionate and understanding one) to those heterosexual teachers not living in a sacramental marriage, we should surely do the same for those thought to be living in a same-sex relationship.

In attempting to legislate these propositions, it is essential that government consult widely with the community. The Expert Panel of the Ruddock Religious Freedom Review<sup>14</sup> was of the view “that it is important that the Government consult widely on draft legislation to avoid any unintended consequences.” I continue to think positive religious freedom would be best enhanced by a national Human Rights Act. But I won’t be waiting for that from any Liberal or Labor government in the near future. In Australia, we may have to await the *parousia* on that one.

I note that the two Coalition members who have entered Parliament direct from employment in our two Australian Catholic universities have taken a firm stand *against* the Parliamentary Joint Committee on Human Rights<sup>15</sup> which was created with bipartisan support in response to the recommendations of our National Human Rights Consultation. Last year, Julian Leaser<sup>16</sup> said, “The presence of the Joint Committee on Human Rights, inspired not by an Australian tradition but by international bureaucracies, is a symptom of ‘self-doubt, division and illusion’ and represents a loss of liberty.” He thinks, “The Committee is about bureaucrats judging Parliament, rather than the Parliament judging human rights.” Last week in Parliament, Celia Hammond<sup>17</sup> added her support to Leaser’s campaign to abolish the Committee, telling the House of Representatives: “it may be timely for this parliament to consider the purpose, remit and functioning of this committee to ascertain whether it is in fact contributing in any meaningful way to the protection of the human rights of Australian citizens.” If anything, I think Leaser and Hammond make the case for *strengthening* the joint committee on human rights, not for abolishing it.

Convinced that there is no chance of minority parties in the Senate signing off on anything more than a clean, lean discrimination law, I won’t be too exercised about all the agitation going on presently about the bells and whistles that might be added to such a piece of legislation.

The rethinking by religious conservatives of the need for legislation, including a Human Rights Act, to protect religious freedom, ensuring that equality does not trump religious freedom and conceding that religious freedom ought not trump equality, may simply be a reflection of

---

<sup>14</sup> [pmc.gov.au/domestic-policy/religious-freedom-review](http://pmc.gov.au/domestic-policy/religious-freedom-review)

<sup>15</sup> [aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights\\_inquiries](http://aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries)

<sup>16</sup> [julianleaser.com.au/news/speeches/human-rights-hijacked-2018-bnai-brith-human-rights-address](http://julianleaser.com.au/news/speeches/human-rights-hijacked-2018-bnai-brith-human-rights-address)

<sup>17</sup> [aph.gov.au/Parliamentary\\_Business/Hansard/Hansard\\_Display?bid=chamber/hansardr/be8a2537-4a84-4dc2-b27b-28f392b06329/&sid=0000](http://aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/be8a2537-4a84-4dc2-b27b-28f392b06329/&sid=0000)

---

the political calculation that the elected politicians are now no more likely than the unelected judges to privilege religion over equality. There has also been a hardening of views by some human rights activists who are now opposing any expansion of the patchwork quilt of anti-discrimination laws to include discrimination on the basis of religion. Michael Kirby, a long-time advocate for human rights legislation, has warned<sup>18</sup>:

*Never forget that apartheid in South Africa was ultimately justified by reference to the supposed religious condemnation of miscegeny and that racial intolerance was based on the alleged inferiority of black people traced to contestable Biblical texts ... There is a need for considerable caution in elevating every religious opinion to an enshrined legal right to hurt and harm others.*

There is still hard work to be done to convince both politicians and judges that religious folk are entitled to equal protection of the laws, especially when their religious views are at variance with those of the general public and the intellectual elite of an increasingly secular society and secularist state. That may be because there is not only a change of *attitude* towards religion in Australia, but also a change of *values*. Fewer Australians now value the entitlement of religious folk to maintain the religious ethos of their institutions which are in receipt of taxpayer funds to provide services to the general community regardless of their religious affiliations. They draw the line at religious employers or religious service providers discriminating against individuals on the basis of unchangeable personal attributes in the name of religious freedom. More Australians now value equality and respect for all persons wanting to access services or seek employment regardless of their gender or sexual orientation. If the values are changing, so too will the laws and policies. That would be the case whether or not Australia had a constitutional or legislative bill of rights.

But then again, recourse to community values should not be a foil for majoritarian sentiment wanting to deny the just entitlements of an unpopular misunderstood minority. In the month before the High Court in *Mabo* recognised the rights of Aboriginal Australians to their traditional lands in accord with community values, Justice Gerard Brennan dissented in a case<sup>19</sup> where his fellow judges authorised a non-therapeutic sterilisation of a child with mental disability. He said:

[T]he rule must give priority to the right to physical integrity and the human dignity it protects, even though such a rule imposes burdens on parents, guardians and those having the care of the intellectually disabled child who are entitled to the active support of the State which must bear the ultimate burden.

Such a rule, it may be said, is too idealistic and is out of touch with contemporary community standards. There is much force in that criticism, but this is an area of the law in which it is necessary to guard against the tyranny which majority opinion may impose on a weak and voiceless minority.

---

<sup>18</sup> [sites.thomsonreuters.com.au/journals/2019/11/11/a-letter-from-the-hon-michael-kirby-ac-cmg/](https://www.sites.thomsonreuters.com.au/journals/2019/11/11/a-letter-from-the-hon-michael-kirby-ac-cmg/)

<sup>19</sup> [globalhealthrights.org/wp-content/uploads/2013/02/HC-1992-Marions-Case.pdf](https://globalhealthrights.org/wp-content/uploads/2013/02/HC-1992-Marions-Case.pdf)

---

We must all be eternally vigilant against the tyranny of the majority, especially when populist sentiment has the backing of the elites in society. And we must continue to keep an eye on those who are weak and voiceless whether because of their race, religion or any other attribute which ought to be irrelevant when determining how to respect their dignity and equality living in a pluralist democracy under the rule of law. That vigilance is required whether or not there is a bill of rights.

The gravest danger to human rights is the constraint placed on discourse and debate about the conditions under which people can participate in shaping the kind of society in which they live. That discourse and debate must continue whether or not we have a bill of rights, and most especially in relation to issues which are deemed politically correct. In the absence of a bill of rights, there is a need to enhance public conversation, law and policy-making.

Through respectful dialogue in the public square, in our parliaments and in our courts, we might succeed in rejecting unfairness, insisting on the essential equality of all, respecting the integrity and dignity of those most different from us, while extending mercy to those who most need it, even if they may not be the most deserving. Let's continue seeking justice, truth and compassion for all, whatever their religion, and whatever their sexual orientation.<sup>20</sup>

Fr Frank Brennan SJ AO is Professor at the PM Glynn Institute<sup>21</sup> at the Australian Catholic University and research professor at the Australian Centre for Christianity and Culture<sup>22</sup>. The lecture was first published on the ABC's Religion and Ethics website.

## ***Bioethics Outlook***

A quarterly publication of the Plunkett Centre for Ethics

The Plunkett Centre is a joint centre of Australian Catholic University,  
St Vincent's Health Australia (Sydney) & Calvary Healthcare.

**Subscriptions** Individuals: \$ 55 Institutions: \$99 Pensions and Students: \$27.50

[www.acu.edu/plunkettcentre/](http://www.acu.edu/plunkettcentre/) Telephone (61) 2 8382 2869

---

<sup>20</sup> [abc.net.au/religion/frank-brennan-do-we-need-new-laws-to-protect-religious-freedom/11984926](http://abc.net.au/religion/frank-brennan-do-we-need-new-laws-to-protect-religious-freedom/11984926)

<sup>21</sup> [pmglynn.acu.edu.au/](http://pmglynn.acu.edu.au/)

<sup>22</sup> [about.csu.edu.au/community/accc/home](http://about.csu.edu.au/community/accc/home)



**Save the date!**

# **Annual Plunkett Lecture**

***Is Bioethics Able-ist?***

***Discriminatory ideas  
from  
medicine, ethics and law.***

**Dr William Sullivan, Family Physician**

**Professor of Family and Community Medicine  
University of Toronto, Ontario**

**Director of Family Practice, St Michael's Hospital, Toronto  
Director of the Developmental Disabilities Primary Care Program**

5.30 – 7.30 pm

Thursday 13<sup>th</sup> August 2020

Function Room

Level 4 St Vincent's Clinic

438 Victoria Street

Darlinghurst NSW 2010

**Email: [plunkett@plunkett.acu.edu.au](mailto:plunkett@plunkett.acu.edu.au)**