

## Religious Freedom and Religious Charities

*An address by Lev Lafayette, president of the Victorian Secular Lobby, to the Melbourne Unitarian Peace Memorial Church, Sunday August 24, 2019*

There is much talk at the moment about "religious freedom" in Australia, and there is about to be a great deal more. The Federal Coalition government, pledged a Religious Discrimination Act in the last election, and in recent weeks we have witnessed the Prime Minister, Scott Morrison, declare that he is seeking a bipartisan approach to the Act with discussions with the leader of the opposition, Anthony Albanese. From all accounts the bill can be expected very soon; indeed a month ago a draft was prepared with suggestions that it would be presented to parliament in mid-August. Well, quite clearly that happened yet, and one can suppose that internal conflicts within the Liberal and National Party coalition is not helping the introduction. The Attorney-General Christian Porter has held meetings with various government MPs, which must be quite challenging. On one hand, Porter has made a commitment that the Bill "is not intended to displace state law nor will it import specific provisions of international law", a reference to the fact that state laws in Tasmania, Queensland, and also in the Australian Capital Territory, prohibit vilification on the basis of sexuality and do not provide a specific exemption for religious speech (this differs in New South Wales). On the other hand there is a number of conservative government MPs, such as Barnaby Joyce, who are pushing for broader protections for people of faith, including exempting religious belief from employment contracts. With no sense of the contradiction, these same MPs are also the most strident supporters of exemptions from various discrimination laws by religious organisations. That is, the both want the right to be exempt from discrimination and they want the right to discriminate.

Now quite clearly the history of religious discrimination is one with a long and very bloody history. We know, all too well, how collective punishments were applied to people according to their religious belief. In the past I have spoken quite extensively on the topic; over ten years ago I gave an address at the Melbourne Unitarian Church entitled "Religious Freedom and National Self-Determination", with the following summary:

*One need not delve into many examples of the more extreme attempts of war, torture and genocide to limit religious freedom; most are well known; the Diocletian persecution of Christians by Roman pagans, the Christian Crusades of the Levant, the Mohammedan conquest and rule of Hindu India, the conquest of Mesoamerica and the destruction of their religious life, the Christian versus Christian wars of the Inquisition, the reformation and counter-reformation and into the twentieth century with the public and private Christianity of Hitler against the Jews: "I believe that I am acting in accordance with the will of the Almighty Creator: by defending myself against the Jew, I am fighting for the work of the Lord.."*

In contemporary times, it is particularly the horrific experience of the latter that inspired the liberal and democratic concepts of freedom of religion that are embodied in documents such as the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948. In the relevant section it reads: "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." In terms of the general principles of liberalism, it is recognised that individual freedom is permitted, whether founded on a carefully considered study of the evidence, or an utterly delusional assertion of utter nonsense. Rightly or wrongly, the individual is free, but with a very important restriction - only to the extent that their actions are not harmful to others.

This will be the central issue that will challenge any religious freedom legislation, either here in Australia or elsewhere. To what degree does the free exercise of a particular set of belief-based actions, harm other people? In some cases the answers are very obvious; most of the mortal punishments that were proposed on the Old Testament, for example, are rejected by modern people. In clear contradiction to Exodus 22 we do let witches live. In clear contradiction to Exodus 31, we do put those who work on the Sabbath to death (I am thankful for this, as I was working on this talk yesterday). Rugby player - or maybe former rugby player - Israel Folau should also be thankful for this one as well. Ignoring the allowances in Leviticus 25, we no longer keep slaves. These are rejected because they obviously represent a "freedom" which quite clearly is an act which harms other people. It is an example of liberal principles having priority over and above the "freedom" which some people of a particular religious persuasion may desire because it does not provide the same liberal principles to others. So it is that we do not prohibit the sale of garments made from multiple blends, but we do not have an issue with those who, through religious belief will not wear such garments.

Now these are obvious examples. The contemporary issue of Israel Folau is more difficult. Israel Folau was sacked by Rugby Australia following his social media posts which said hell awaits "drunks, homosexuals, adulterers" and others. Rugby Australia has a code of conduct which is part of the employment contract and a panel, comprising John West QC, Kate Eastman SC and John Boulton AM, determined that Rugby Australia terminate the player's employment for a high-level breach of this code of conduct. Folau is challenging his dismissal in the Fair Work Commission, arguing Rugby Australia violated his religious freedom, and effectively claiming that his religious freedom has a higher standard than the code of conduct. We are reminded that the contract was entered into voluntarily. Last month the Fair Work Commission confirmed that all reasonable attempts to resolve the dispute between Folau and Rugby Australia had been unsuccessful, and this month Folau launched legal action in the Federal Circuit Court of Australia in Melbourne, against Rugby Australia and NSW Rugby for unlawful termination on the basis of religion, breach of contract and restraint of trade.

It is a challenging case as it sits right in the middle of the issue of freedom to express oneself, even in an utterly delusional manner, and the freedom of others to be protected from harm and vilification, and the right of employees to impose standards of conduct both at the workplace and outside of it. As part of his case Folau launched a GoFundMe crowdfunding campaign, which was interesting as he had no shortage of wealth himself and raised well in excess of the legal costs that will be required. When GoFundMe closed down the campaign, the Australian Christian Lobby started an alternative fundraising venture. It was this activity, where we move from the issue of just religious freedom to religious charities.

The Victorian Secular Lobby, of which I am the association's president, initiated a petition and complaints to the Australian Charities and Not-for-profits Commission. We called for the Australian Christian Lobby to be de-registered as a charity as a result of their actions, which we did not consider to adhere to the requirements of being non-profit or for public benefit, thus being in breach of the governance standards for charities. Further, we called upon the Australian Federal government to remove the clause of the Charities Act which allows for "Advancing Religion" as sufficient reason for an organization to receive charitable status. Over the course of several days the petition attracted almost 20,000 signatories.

Now it is this second issue, the statutory definition of charity which warrants further investigation. It is not well-known, and indeed most people consider it to be an unacceptable legal loophole, that "Advancing Religion" is considered sufficient justification in itself for an organisation to be considered a charity. Most people understand and agree with secular principles of charity; we understand it when the act includes "advancing health", or "advancing education", "advancing

social or public welfare", or "advancing culture", or "promoting or protecting human rights" or "preventing or relieving the suffering of animals". These are all charitable activities, and, it must be recognised, many religious organisations engage in these activities as well. The Catholic church is the single biggest non-government employer in the country, with some 250,000 people working in its schools, hospitals, welfare agencies, and universities. The Uniting Church employs 50,000 people in its aged care, disability and youth services. This is not an issue in its own right; what is an issue is that explicit lobby groups, such as the Australian Christian Lobby are classified as a charity where, in the conventional use of the word, they engage in no charitable activity whatsoever.

Now there is a historical justification here. The United Kingdom's Charitable Uses Act of 1601, also known as the Statute of Elizabeth, established what charity was to be used for, which included "the repair ... of churches". Institutions associated with charities would have to be for public benefit and exclusively charitable. Some two hundred years later, in *Morice v Bishop of Durham*, Sir Samuel Romilly put forward a classification of charities under four heads: relief of the indigent, advancement of learning, advancement of religion, and advancement of objects of general public utility. In the UK's Mortmain and Charitable Uses Act 1888 these categories - including "advancement of religion" - were included in the use of charity and, Australia followed suit in common law. It was not until the Charities Act of 2013 that the Commonwealth provided in statutory law what would be considered a charity and that indeed includes "advancing religion".

There is an interesting potential conflict here with section 116 of the Australian Constitution, which is about as close as this country gets to a protected separation between religious and secular authority. The section in question states that "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth". Note that this refers to the Commonwealth; state governments do have these powers, and on two occasions, in 1944 and 1988, attempts have been made to extend the Commonwealth's power to the states, and on both occasions they have failed, meaning that states can make laws concerning the establishment of religion, religious tests, and so forth. In addition to this, the Australian High Court has consistently adopted a narrow interpretation of the clause, limiting itself to define what constitutes a religion (an issue raised in *Church of the New Faith (i.e., Scientology) v Commissioner for Pay-Roll Tax (Vic)*, 1983, the establishing of religion, in the *Attorney-General (Vic) (Ex rel Black) v Commonwealth (the DOGS case)*, 1981, and the free exercise of religion, in *Krygger v Williams*, 1912).

There is however one other aspect to the constitution that is yet to be properly explored - and that is its title - "Commonwealth not to legislate in respect of religion". Imagine if this was actually the principle of behaviour; there would be no need for a special Religious Discrimination Act, because the Commonwealth would not legislate with regard to religion. Religious people would be protected against discrimination to exactly the same degree as non-religious people. There would be no special exemptions by religious organisations from Commonwealth anti-discrimination legislation themselves, as such organisations would be subject to exactly the same requirements as any other organisation, because the Commonwealth would not legislate in respect of religion. Likewise, religious organisations would not be able to claim "advancing religion" as justification in itself for a charitable act. They would, like any other organisation, have to satisfy the requirements of actual secular charitable activity that normal people recognise.

Such a suggestion of course, does require a challenge to the High Court of some existing and proposed legislation. It would also require the High Court to take a broader interpretation of the relevant section of the Constitution, although it is fairly unambiguous as a statement - the "Commonwealth [is] not to legislate in respect of religion" - and it is far from abnormal for a broad statement to be included in a section title with specific examples in the clauses. Most importantly

however, it would put to an end any further confusion over what special or particular freedoms or restrictions religious organisations deserve in Australia - because the answer would be, none whatsoever. No special benefits, no special restrictions, they would be treated exactly the same as everyone else. Which, I believe, is exactly what the overwhelming majority of Australians would want to see.