

Launch of
Carolyn Evans' *Legal Protection of Religious Freedom in Australia*

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It is always a privilege and a pleasure to return to the University of Melbourne Law School. I happily acknowledge the traditional owners of this place. I also pay tribute to my legal elders Cheryl Saunders and Michael Crommelin who were the supervisors of my LLM thesis here more years ago than I would care to remember. I am delighted to be here to launch the latest book by your Dean, Professor Carolyn Maree Evans. The book, *Legal Protection of Religious Freedom in Australia*, is, as you would expect, a thorough, readable, and dispassionate account of religious freedom under Australian law.

Those of us who are both legal practitioners and religious practitioners have long been indebted to Carolyn for her academic thoroughness and true impartiality in considering the place of religion and the role of law in its protection and restriction. Ever since she completed her doctoral thesis at Oxford in 1999, Carolyn has been sharing the wisdom of her views. Her definitive *Freedom of Religion Under the European Convention on Human Rights* published by OUP in 2001 is still an authoritative and useful text. Carolyn is the sort of black letter lawyer who does not often show her colours, and she is always looking for “balance”. I have always been impressed by her concluding observations in that first book: “Religion and belief have been important sources of inspiration for moral and political development, artistic and literary endeavours, and, most importantly, for individuals seeking to live their lives meaningfully and with integrity. Undoubtedly religious freedom has certain social costs and gives rise to the potential to create conflict, but it is nevertheless worthy of far greater protection than it is currently given under the (European) Convention. If religious vitality and tolerance is undermined, European democracy and pluralism will be the weaker for it.”

In 2006 Carolyn joined with her now Melbourne colleague Adrienne Stone and others to convene a conference on law, religion and social change at the Australian National University. The resulting book was published by Cambridge in 2008 with the title, *Law and Religion in Theoretical and Historical Context*. In the introduction, Carolyn noted, “It was not so long ago that confident predictions were being made about the eventual demise of religion... Now, however, religion is back on the public agenda both domestically and

internationally. Questions about the role of religion in public life are being prompted by a range of changes in many western states.”

It is therefore very timely that Carolyn now focuses on the legal protection of religious freedom in Australia. As you would expect, the book traverses uncontroversial topics such as the Australian context for religious freedom, freedom of religion or belief in international law, the concept of religion in Australian law, and the Australian Constitution and religious freedom. The book contains a series of useful appendices including the relevant articles of the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the Declaration on the Elimination of all forms of Intolerance and Discrimination based on Religion or Belief, as well as the UN Human Rights Committee's General Comment Number 22 “The right to freedom of thought, conscience and religion”.

As anyone knowing Carolyn would know, she does not shy away from the controversial issues of the day. However she is academically circumspect in expressing any final view of contemporary controversies. So let me offer a few observations on controversial matters raised in the book including “Exemptions from law: conscientious objection to the provision of abortion”, “Non-discrimination laws: friend or foe of religious freedom?”, Religious vilification, and the applicability of Sharia law.

Abortion

My views on section 8 of the *Abortion Law Reform Act 2008 (Victoria)* are well-known. Suffice to say I think a legal provision which requires a medical practitioner having a conscientious objection to aborting a post-viable, late term foetus to refer the mother to another medical practitioner known not to have the same conscientious objection is not only unprincipled; it is unworkable. While such a provision remains on the statute books, it is understandable that some critics of a Charter of Rights and Freedoms authorising such a law regard the Charter as a foil for the soft left political agenda rather than the legal protection for all rights and freedoms, including the freedom of conscience. In an evenhanded fashion, Carolyn describes the views of religious leaders including myself who have spoken of the “hallmarks of totalitarianism” and then quotes Dr Wendy Larcombe who argued that the provision was relatively inoffensive in that the term “refer” “should be understood in its ordinary sense rather than in the medical sense of providing a formal referral”. If that’s all it means, why make it a legal requirement? Carolyn notes, “Many women's rights groups were concerned that the referral provision was inadequate to protect properly the rights of women who need to access abortions and that the law went too far in protecting religious conscience at the expense of women's health. Both sides of the debate made rights claims and each believed that the law did not adequately protect their legitimate interests.” If the law does not require a formal referral, and if a doctor has a conscientious objection to the deliberate killing of a late term, viable foetus, why not simply discharge the doctor from any further legal obligation? Of course, if the foetus is not late term, there will be plenty of time for the

woman to find an abortion provider without the need for the conscientiously objecting doctor to refer in a non-legal, non-medical sense.

Non-discrimination

Church groups in Australia have been engaged in a gruelling campaign to maintain what they regard as justifiable exemptions from the provisions of equal opportunity employment laws. Cardinal Pell makes the point nicely:

Should The Greens have the right to prefer to employ people who believe in climate change, or should they be forced to employ sceptics? Should Amnesty International have the right to prefer members who are committed to human rights, or should they be forced to accept those who admire dictatorships? Both cases involve discrimination and limiting the freedoms of others, and without it neither organisation would be able to maintain their identity or do their job effectively. Church agencies and schools are not exempt from anti-discrimination law in New South Wales, and the language of ‘exemptions’ is misleading. Parliaments are obliged by international human rights conventions like the ICCPR to provide protection of religious freedom in any laws which would unfairly restrict the right of religious communities to operate their schools and services in accord with their beliefs and teachings.

While there may be strong agreement about the need to maintain a faith community’s right to employ in certain positions only persons who live in conformity with religious teaching, there is plenty of room for disagreement as to how most prudently and charitably to exercise that right. It is not only secularist, anti-Church people who think that Church organisations and leaders would be displaying homophobia by singling out only gays and lesbians for exclusion from employment in some key positions when heterosexual persons are also living in what the Church might formally regard as irregular situations. I applaud the Prime Minister’s statement today in response to the claims by the Australian Christian Lobby about the harmful effects of homosexual relationships. I agree with Ms Gillard’s claim that “To compare the health effects of smoking cigarettes with the many struggles gay and lesbian Australians endure in contemporary society is heartless and wrong”.

Here in Victoria, the Scrutiny of Acts and Regulations Committee of the Parliament conducted a lengthy review into the exceptions and exemptions to the *Equal Opportunity Act 1995*. As in the UK, many church personnel here presumed that the Charter (or Human Rights Act) was instrumental in calling into question the existing exemptions. That was not the case. They are quite separate statutes. A case could be made that a Charter espousing the key rights to religious freedom and conscience could assist in setting the appropriate limits on State intervention with Church organisations wanting to employ persons whose lifestyles (hopefully not just sexual) are consistent with church teaching.

During the 2009 National Human Rights Consultation, Bob Carr (ex Premier from New South Wales) told a conference convened by the Australian Christian Lobby and the Catholic Archdiocese of Melbourne that one of the chief advantages of not having a Charter was that church leaders could deal directly with government. He told the story of the two Archbishops of Sydney coming to see him as premier when there was discussion about a proposed Bill to restrict the freedom of Churches to employ only those persons living consistently with Church teachings. He was able to give them an immediate assurance that their interests would be protected. It is a matter for prudential political assessment. I think those days have gone. It is a good thing for society that elected political leaders and church leaders are able to meet and talk confidentially. Whatever the situation in the past, it is now not only necessary but also desirable for religious leaders to give a public account of themselves when seeking protection of freedom of religion within appropriate limits, especially when they are in receipt of large government funds for the provision of services to the general community, and not just to members of their faith communities. Religious special exemptions regarding employment are all the more defensible when religious personnel including religious leaders and those with the hands-on directing of religious agencies are prepared to appear before a parliamentary committee and provide a coherent rationale for those exemptions, rather than simply cutting a deal behind closed doors with the premier or prime minister of the day.

Having successfully fought off the prospect of a national human rights Act, 20 key church leaders met with Prime Minister Gillard on 4 April 2011 to plead for freedom to employ in church agencies personnel living and acting in accordance with the religious beliefs of the sponsoring churches. After the meeting, Cardinal Pell briefed the media about the meeting. He was reported in *The Australian* having told Ms Gillard: “We are very keen to ensure that the right to practise religion in public life continues to be protected in law. It is not ideal that religious freedom is protected by so called ‘exemptions and exceptions’ in anti-discrimination law, almost like reluctant concessions, crumbs from the secularists' table. What is needed is legislation that embodies and recognises these basic religious freedoms as a human right.” That sounds suspiciously like a Human Rights Act to me.

The Australian Catholic Bishops Conference has made a submission to the Commonwealth’s present inquiry into the harmonisation of discrimination legislation. In another submission to the inquiry, Professors Patrick Parkinson and Nicholas Aroney observe:

Great care needs to be taken to ensure that a focus on the first-mentioned right (freedom from discrimination) does not diminish the others (e.g. freedom of religion, association and cultural expression and practice). This can readily happen, for example, if freedom of religion is respected only grudgingly and at the margins of anti-discrimination law as a concessionary ‘exception’ to general prohibitions on discrimination. It can also happen if inadequate attention is paid to freedom of association and the rights of groups to celebrate and practise their faith and culture together.

These dangers are real. Some advocates for reform of anti-discrimination laws have a tendency to place a very high value on ‘non-discrimination’ and to concede ‘exceptions’ based upon freedom of religion, association or cultural expression only with great reluctance, if at all. Although they sometimes recognise that there is a need to give due weight to all human rights and to find an appropriate balance between them, it is generally not

acknowledged that posing the question as one of identifying *exceptions* to the principle of non-discrimination prejudices the inquiry in favour of the right to be free of discrimination and against the rights to freedom of religion, association and culture, understood as both individual and group rights.

Carolyn concedes that “the extent to which religious freedom or equality norms should prevail is a question that has proved particularly controversial in recent years in Australia.” She cannot see that any resolution is likely to attract a community consensus but points to the trend overseas and concludes that “the balance is likely to tilt more towards equality in coming years than it has previously”. Last year's amendments to the *Victorian Equal Opportunity Act* by the Baillieu government may point in the contrary direction. Those amendments replaced the more restrictive “inherent requirement” test for employment. The Victorian law once again permits religious bodies to be discriminating in their employment practices in relation to “religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity” provided only that the discriminatory practice “conforms with the doctrines, beliefs or principles of the religion” or “is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion”. The religious school can be discriminating in their employment of the gardener or maths teacher, just as they can be in their choice of the religion teacher or principal. Attorney General Robert Clark when introducing the amendments said that the “so-called inherent requirement test would have the consequence that faith-based schools and other organisations could be forced to hire staff who are fundamentally opposed to what the organisation stands for”. It would be regrettable if religious bodies were to exercise this liberty in a manner inconsistent with their own religious commitments to respecting the human dignity of all persons, including those who are gay or lesbian or not living in church authorised marriage relationships. The scrutiny of unauthorised sexual practices would need to be equally applied. I note that in the Parliamentary debate at least one Coalition member, Mr Newton Brown, warned, “I would like to put on record tonight that faith-based schools should be on notice. Yes, the election commitment to remove the inherent requirements test will be realised by this bill, as was promised by the Coalition, but make no mistake: this does not open the door for schools to engage in unfettered discrimination against people that is not justified in light of an organisation's beliefs.”

When seeking to balance conflicting rights, there may be a case for permitting a fuller expression of religious liberty and preferences when alternatives exist elsewhere in society for persons seeking non-discriminatory opportunities or services. For example, the UK now insists that all registered adoption agencies, including Catholic ones, provide a non-discriminatory service such that adoption would be as readily available to a same sex couple as to a man and woman wanting to adopt a child into their family. In my opinion, it would be no interference with the rights or dignity of gay and lesbian couples if some religious adoption agencies acting on their religious beliefs gave preference to married heterosexual couples when determining adoptive parents for a child, provided always that the agency was acting in the best interests of the child. There would still be a range of non-Church adoption

agencies providing services to all couples, including gay and lesbian couples. It is legislative overreach for the state to insist on uniform non-discrimination for all adoption agencies. If all schools or even the majority of schools were faith-based, there would be a stronger case for anti-discrimination provisions applying more broadly in employment situations for teachers. With the present mix, the Victorian Parliament has got the law right.

Religious Vilification

Since 11 September 2001, Australians have displayed an increased sensitivity to the demands of Muslim Australians that their perspective on pressing social and political questions be heeded. There has been spirited debate in the Australian community about the need for religious vilification laws to protect Muslims from uninformed attack by Christian fundamentalists. During the 2009 National Human Rights Consultation, we heard individuals, even church leaders, expressing concern that a national charter of rights might entail a national religious vilification law similar to that in Victoria. The Victorian law (enacted before the Charter and therefore without the benefit of a statement of compatibility) provides:

A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

In my view, the application of the Victorian religious vilification law has hindered rather than helped religious and social harmony. The *Catch the Fires* litigation in Victoria has placed a permanent cloud over the utility of all religious vilification laws in Australia. These laws cannot be administered with sufficient transparency and neutrality. Even if one were to accept the utility and desirability of racial vilification laws (which incidentally I do not, and never have), there is a strong case for stopping short of religious vilification laws or for at least enacting such laws only for criminal prosecution at the behest of the Attorney General. While it is inherently racist for a person to claim membership of the best race, it is no bad thing for a religious person to claim membership of the one true religion. That is the very point of religious belief. That is what religious people do. Within the great religious traditions, there are strands which urge universal respect and love for all persons regardless of their religious affiliation. But the State overreaches itself when it adapts laws prohibiting vilification on the grounds of a physical characteristic premised on absolute equality of all persons regardless of that physical characteristic to laws prohibiting vilification on the grounds of religious belief when there is no necessary presumption by believers that all religions are equally good and true. How are officers of the State to distinguish between the religious belief which might be robustly criticised and some of whose fanatical practitioners might be rightly reviled or ridiculed from those other practitioners who are to be respected regardless of the errancy of their beliefs or the potential of their beliefs to be misconstrued by others for destructive purposes?

After the *Catch the Fires* litigation had been remitted to VCAT having been all the way to the Victorian Court of Appeal, the parties ultimately reached a confidential settlement on 22 June 2007 – five years and three months after the offending seminar, four years and four months after the VCAT proceedings had first commenced, and with legal bills presumably run up to millions of dollars. VCAT published this agreed statement by the parties:

Joint Statement of the Islamic Council of Victoria Inc., Catch The Fire Ministries Inc., Daniel Nalliah and Daniel Scot

The Islamic Council of Victoria (the ICV) has reached an agreement with Catch the Fire Ministries, Pastor Daniel Scot and Pastor Daniel Nalliah about the complaint the ICV brought in the Victorian Civil and Administrative Tribunal (VCAT), concerning what it alleged were acts of religious vilification in contravention of s 8 of the Racial and Religious Tolerance Act 2001 (Vic).

Although some of the terms of that agreement are confidential, the parties have agreed to make this joint public statement.

Notwithstanding their differing views about the merits of the complaint made by the ICV, each of the ICV, Catch The Fire Ministries, Pastor Scot and Pastor Nalliah affirm and recognise the following:

- 1) the dignity and worth of every human being, irrespective of their religious faith, or the absence of religious faith;
- 2) the rights of each other, their communities, and all persons, to adhere to and express their own religious beliefs and to conduct their lives consistently with those beliefs;
- 3) the rights of each other, their communities and all persons, within the limits provided for by law, to robustly debate religion, including the right to criticise the religious belief of another, in a free, open and democratic society;
- 4) the value of friendship, respect and co-operation between Christians, Muslims and all people of other faiths; and
- 5) the Racial and Religious Tolerance Act forms part of the law of Victoria to which the rights referred to in paragraph 3 above are subject.

A welcome statement of principle about religious tolerance, this statement highlights the futility of the years of litigation over religious vilification. There are no grounds for thinking that such litigation does anything to foster greater religious understanding and tolerance, nor to provide greater protection and dignity for the practitioners of minority religions. There are many Australians who still carry a sense of grievance that these two religious pastors have been subjected to the full weight of the law, having had to expend much time and resources,

only to have the complainants come away with a laudable joint statement about respect and difference. Ironically, the whole nation became more apprised of the views of Messrs Scot and Naliah about Islam than they would ever have imagined possible when they first started their seminars.

Carolyn concedes that the *Catch the Fires* litigation has “caused enormous controversy in Australia and overseas”. Having traced the litigation all the way to the Court of Appeal, she notes, “There were areas of disagreement between the judges which have still not been resolved. Perhaps the most significant of these is whether ridicule or contempt expressed towards a *religion*, as compared to religious *believers* is sufficient for the purposes of the Act.” She concedes that “it is very difficult to draw a clear line between legitimate criticism of religion and the type of attack on religion that is likely to lead to religious hatred, contempt or discrimination against its followers”. Harking back to the need for balance, Carolyn notes, “It is unusual in public debate on important issues to require speakers to be balanced about issues about which they care deeply. While truth and balance may play a legitimate role in determinations of whether the Act has been breached, care needs to be exercised to ensure that this does not turn into determining the ‘objective’ truth of theological propositions, nor that it come to require blandness or even-handedness in public debate over religion.” I think Carolyn and I would at least agree that the formal agreed published statement at the end of the *Catch the Fires* proceedings is marked by nothing other than blandness and even-handedness, coming at the end of a very rancorous public debate about the core beliefs of Islam.

Sharia

Carolyn sees a place for religious law in the secular courts. In her final chapter she looks at the use of secular law in resolving intra-religious disputes, the use or enforcement of religious law in secular courts, and the establishment of formally recognised religious courts. She concludes:

For some religious people, the opportunity to have their disputes settled by religious law or religious judges is an essential part of their culture and personal beliefs. For others (including some people from the same religious tradition) such an approach is a threat to the notion of equality under the law and the separation of church and state. Even when the secular legal system does not give formal recognition to religious law, it is difficult to prevent informal mechanisms for dispute resolution emerging if there is sufficient demand for it in a religious community. For some, this is an argument for resisting such developments in Australia. For others, it is a warning that it is better to work with such legal systems to ensure that they comply with basic human rights and procedural fairness, rather than to keep them outside the fold where there are no such guarantees. As Australia becomes more multi-religious, these disputes are likely to become more frequent.

The recognition of universal human rights and the proper delimitation of such rights does not entail all persons being treated the same before the law of the State. Rowan Williams

occasioned great controversy in his 2008 Address at the Law Courts of London entitled *Civil and Religious Law in England: A Religious Perspective*. Much as Pope Benedict later did at the UN, he set out the claim that universalist claims to human rights and human dignity are derived from comprehensive world views informed by religious tradition. More inclusive than Benedict, he broadened his attention from Christianity to include Judaism and Islam, observing:

It never does any harm to be reminded that without certain themes consistently and strongly emphasised by the 'Abrahamic' faiths, themes to do with the unconditional possibility for every human subject to live in conscious relation with God and in free and constructive collaboration with others, there is no guarantee that a 'universalist' account of human dignity would ever have seemed plausible or even emerged with clarity.

But then he went on to deal with the issue of British Muslims being able to invoke Sharia law:

I have been arguing that a defence of an unqualified secular legal monopoly in terms of the need for a universalist doctrine of human right or dignity is to misunderstand the circumstances in which that doctrine emerged, and that the essential liberating (and religiously informed) vision it represents is not imperilled by a loosening of the monopolistic framework. At the moment, one of the most frequently noted problems in the law in this area is the reluctance of a dominant rights-based philosophy to acknowledge the liberty of conscientious opting-out from collaboration in procedures or practices that are in tension with the demands of particular religious groups: the assumption, in rather misleading shorthand, that if a right or liberty is granted there is a corresponding duty upon every individual to 'activate' this whenever called upon.

Williams has no difficulty conceding that citizens can boast “multiple affiliations” within the nation State. There are instances when a citizen ought to be entitled to resolve a conflict within his own ethnic community or according to the laws and tradition of her own religion.

Five months later, Lord Phillips, now President of the Supreme Court of the UK, who had chaired the Archbishop of Canterbury's lecture, gave his own endorsement:

It was not very radical to advocate embracing Sharia Law in the context of family disputes, for example, and our system already goes a long way towards accommodating the Archbishop's suggestion. It is possible in this country for those who are entering into a contractual agreement to agree that the agreement shall be governed by a law other than English law. Those who, in this country, are in dispute as to their respective rights are free to subject that dispute to the mediation of a chosen person, or to agree that the dispute shall be resolved by a chosen arbitrator or arbitrators. There is no reason why principles of Sharia Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution. It must be recognised, however, that any sanctions for a failure to comply with the agreed terms of the mediation would be drawn from the laws of England and Wales. So far as aspects of matrimonial law are concerned, there is a limited precedent for English law to recognise aspects of religious laws, although when it comes to divorce this can only be effected in accordance with the civil law of this country.

The State can still insist on monogamy, prohibiting the contracting of more than one marriage and criminalising bigamy. That is because the State has a legitimate interest in restricting marriage such that equal dignity and respect is accorded all parties to the marriage. There would be good reasons of public policy for the State to refuse to apply any sanction to a religious person wanting to enforce an agreement involving a polygamous marriage. State recognition of monogamy and criminalisation of bigamy are justified even when some

citizens hold religious beliefs permitting bigamy. The civil law can properly override religious belief and practice when such belief or practice is counter to the fundamental equality of all citizens. There is however a significant grey area: when Muslims (or any other persons) decide not to have their marriages performed by an authorised celebrant and registered under the Commonwealth *Marriage Act*. There may be issues with a person entering into multiple de facto marriages or even of entering into a de facto marriage with a person under the lawful marriage age. These problems should be addressed by the law in the same way whether or not any of the parties are Muslim.

Religious individuals and organisations can make a good case for opting out of the State regime when there is no risk to the fundamental human rights or human dignity of any party affected by the action. There are sure to be border line cases. Last week, my father when delivering the 2012 Hal Wootten Lecture at the University of New South Wales said he found Rowan Williams' view misconceived. He observed:

Therefore a Muslim is free to adhere to the beliefs, customs and practices prescribed by Shariaa law insofar as they are consistent with the general law in force in this country. That freedom must be respected and protected but that does not mean that Islamic Sharia should have the force of law.

He joined issue with a claim by the President of the Federal Supreme Court of the United Arab Emirates that the basic principles of Islamic Sharia are provided by “[b]oth the Koran and the Sunna [which] could be considered the constitution in other legislation systems, and therefore all other sources should agree with them. Thus, if juristic reasoning contradicts with them, it should be rendered invalid, and if customs contradict with them, they are also unacceptable; and this applies to all other secondary or ancillary sources.”

Putting to one side the observation about Rowan Williams' misconception and focusing on the claim by the Muslim judge, I respectfully agree with my father who asserted, “The common law does not go so far - it leaves a gap between the mandates of the law and the conduct that we choose to engage in according to our individual moral standards. We call that gap ‘freedom’ and it allows Australian law to protect the cultural moral values of our minorities. We value that freedom not only for the benefit of the individual but in order to maintain a free society”.

The real challenge for the future is determining the width of that gap not just for individuals but also for groups bound together by religious faith which differs from the comprehensive world view of the Australian majority. We know the gap is real for Muslims; it may also be a widening gap for Christians and Orthodox Jews wanting to profess and live their faith individually and collectively while honouring the values which unite us as Australians governed by the rule of law. It's that gap which provides the space for those citizens with multiple affiliations to achieve their full human flourishing in community while exercising their rights and duties under the law. In this most recent book Carolyn contributes to our

understanding and respect for this gap, and for this all Australians are the richer. With great pleasure I launch *Legal Protection of Religious Freedom in Australia* by Professor Carolyn Evans, Dean and Harrison Moore Professor of Law here at the Melbourne Law School.