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With rights can come a complex tangle of burdens

HENRY ERGAS
Follow @HenryErgas

By **HENRY ERGAS**, COLUMNIST
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According to Scott Morrison, the government will, by the end of this year, introduce legislation prohibiting discrimination on the basis of religion, along the lines of the anti-discrimination provisions covering race, sex, gender preference, age, ethnic origin and disability.

The fundamental question is whether that legislation will resolve or deepen the mess we're in.

To say that is not to deny the new prohibition's potential usefulness, which has been highlighted by the controversy over Rugby Australia's sacking of Israel Folau.

But while some of the threats to religious freedom involve discrimination against people because of their religion, many do not. On the contrary, they arise from the anti-discrimination provisions that are already in place.

The problem is simple: particularly in respect of gender preference, those provisions mandate conduct that clashes with the demands of the Abrahamic faiths. People of faith can therefore find themselves in situations where they must either breach the laws against discrimination or act against their innermost convictions, compromising their ability to live a life of integrity.

The result has been long-simmering tensions about what is and what is not allowed that burst into the open during the election campaign.

That those tensions have arisen is anything but mysterious. Since the Racial Discrimination Act was passed in 1975, “rights” have proliferated, as have the resources devoted to their implementation.

When additional rights were defined, there was plenty of celebration; less evident, however, was any realistic discussion of the burdens those rights entailed.

But rights are never costless, no matter how great their merits. Indeed, the opposite is generally true: if a “right” is worth having, it is precisely because it imposes corresponding obligations, allowing the right’s beneficiaries to claim that they have been “wronged” when those bearing the obligations do not respect them.

And the more sweeping the right, the weightier the obligations.

Moreover, rights are not mere legal entitlements; they are, as influential legal theorist Ronald Dworkin put it, “trumps”, overriding lesser claims and mere interests. When they are invoked, it takes much more than the ordinary considerations of public benefit to justify limiting them or setting them aside.

A proliferation of rights therefore stacks the deck with trumps. In the immediate future, that makes collisions between trumps inevitable and devalues all the other cards in the pack; in the longer term, it fuels pressures for every interest to be elevated into a right, so as to protect it from being eaten alive by the rights that have already been granted.

All that ought to have been predictable. And it should also have been predictable that the sex and gender rights, along with the prohibitions on offensive speech, would be played as trumps against the traditional freedoms of religion.

Nor would the consequences be pretty: as Hannah Arendt, who could hardly be accused of being a bigot, cautioned Americans when the “rights explosion” was in its initial stages, being able to choose our own associates is the “innermost principle” of a liberal society; given that, seeking to eliminate all forms of discrimination in social interactions cannot but cause “very important possibilities of free association and group formation (to) disappear”.

A decision should therefore have been made at the outset as to how conflicts were to be handled. Instead, as new rights were established and existing rights extended, the problems caused by collisions between rights were dealt with through exceptions and exclusions of uncertain scope and coverage — and in the haste to enact same-sex marriage, even the need for those was largely ignored.

Now, with myriad rights set in stone, the room for manoeuvre is limited. However, what should be obvious is that simply prohibiting discrimination on the basis of religion will not eliminate the thicket. Rather, if the path to religious freedom is to be cleared, the Morrison government's legislation must provide rules that better define the rights that faith communities and their members have relative to the existing prohibitions on discrimination; and it must also provide rules to guide the resolution of whatever clashes between those rights and others may nonetheless occur.

Quite contrary to the recommendations of the Ruddock review of religious freedom, that cannot be done merely by requiring the courts to apply broad criteria — such as "proportionality" and "minimum restrictiveness" — in weighing up the demands of religious freedom on the one hand, and of competing values on the other.

Those are, in effect, the kinds of terms that linguistic philosophers describe as "extravagantly vague". And stacking them on top of one another, as the review recommends, is a recipe for unfettered judicial discretion.

It is consequently unsurprising that the jurisprudence of the European Court of Human Rights, which broadly relies on the principles the review recommends, is inconsistent and unpredictable — as distinguished British judge Jonathan Sumption argued in his recent Reith Lectures.

And much the same can be said of the US federal courts that, under the 1993 Religious Freedom Restoration Act, are required to test religious freedom cases against criteria that are every bit as "extravagantly vague" as those applied by their European counterparts.

What then should the government do? Simply put, it should have the courage of its

convictions. If it is genuinely committed to protecting religious freedom, it should legislate a strong presumption in its favour, which may be rebutted in specific cases, but only when steep hurdles of public interest and necessity are cleared.

And it should ensure that the presumption is unequivocal, rather than being hemmed in by the weasel words governments instinctively turn to when they want to have their cake, eat it and give it to a friend, while handballing the tough decisions to the courts.

Last but not least, it should make it clear that the rights to the exercise and expression of religion cannot be overridden by contract, any more than can the existing protections against discrimination.

Of course, none of that is to suggest that religious freedom ought to be unbounded. John Locke was right: no one should be allowed, under the guise of liberty, to incite violence and destroy the civil peace. Yes, religion ought to be welcome in the public square, but not when it comes clutching a Kalashnikov and yelling “death to the infidels”.

But nor should religious freedom, which Australians have enjoyed since the colonies were barely toddlers, be sacrificed to the baying crowd. In this age of wrath and chatter, when the forces arrayed against it have such powerful friends and such weak opponents, preventing its loss will demand more than the usual dose of vigilance and determination.