

## **The Liberal and Post-Liberal Futures of Law and Religion in Australia**

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At the beginning of 2022, the Commonwealth Government's attempt to pass a Religious Discrimination Bill was shelved. The Bill and its State-based equivalents has dominated law and religion debate in Australia. This reflects more broadly a focus on questions of religious liberty. These are important questions. However, in this reflection I want to suggest that such a focus — or more particularly the terms in which it is addressed — points to an emerging dynamic: a contest between liberal and post-liberal voices. I will focus on Christian thought and practice as it interacts with the law, but I hope that my reflection resonates with anyone interested in examining how religion contributes to and shapes our common life. I will suggest that recent Christian arguments adopted a liberal conceptual apparatus, emphasising a model of separate spheres: the neutral or autonomous law regulating the sphere of religion. In contrast, I suggest that there is an emerging post-liberal criticism that will be increasingly voiced in Australia. Its focus will be on how Christian thought and practice can shape the purposes of the law.

Much of the conflict over the Religious Discrimination Bill centred on a provision that would secure the liberty of religious schools to select staff and students based on religious affiliation.<sup>1</sup> Vocal Christian advocates claim that conventional liberal principles demand this kind of provision. They argue that religious groups must be autonomous to support a key value — pluralism and diversity. That then requires State neutrality — a hands-off approach — in the face of different conceptions of the good.<sup>2</sup> In one version of this argument, the Christian legal thinktank Freedom for Faith advocates for a metaphorical 'zoning law' against 'the encroachment of the spreading city'.<sup>3</sup> What is demanded of law on these accounts is clear, if minimal: neutrality with respect to this religious sphere, meaning religious liberty protection understood as a zoning law. For some, the hope appears to be that this encourages a *détente* or *modus vivendi*. If we assert the neutrality of the law this will provide a 'live and let live' approach for different confessions. For others, the neutrality of the law sitting above our diversity appears to provide a shared 'public' language that can be used to convince others of the need for religious autonomy without recourse to religious talk.<sup>4</sup>

With the failure of the Religious Discrimination Bill, the separate spheres, autonomy and neutrality framing raised in Christian argument may be increasingly questioned. This is likely to result in different post-liberal accounts of the relationship between Christian thought and practice and the law that will compete with liberal frames. For these accounts (a version of

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<sup>1</sup> Religious Discrimination Bill 2022 (Cth) cl 7.

<sup>2</sup> See, eg, Australian Christian Lobby, Submission No 56 to Senate Legal and Constitutional Affairs Committee, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* (15 January 2019) 2; Anglican Church Diocese of Sydney, Submission No 7482 to Expert Panel, *Religious Freedom Review* (13 February 2018) 8.

<sup>3</sup> Freedom for Faith, Submission No 2520 to Expert Panel, *Religious Freedom Review* (29 January 2018) 91.

<sup>4</sup> Appeals to international law increasingly take on this role in Australian debates.

which I develop elsewhere), the law cannot be understood to be neutral.<sup>5</sup> It demands some kind of argument from somewhere as to its purpose, which then shapes how we understand, for example, questions of liberty. If so, then what is needed is deeper discussion of the good of religion — as a goal, an end — in our shared life that shapes the purposes of the law or our public institutions. Appeals to autonomy or pluralism and the neutral State will not secure religious liberty. They do not answer the question ‘why liberty for *religious* persons and groups rather than any other persons or groups?’ Securing religious liberty requires some understanding of why religion matters as integral to our society and the ends of the person, and thus why the law should serve it in some way.<sup>6</sup>

However, on the post-liberal view, this inquiry is not limited to a distinct domain of religious liberty discourse. If religion matters to our common life — if it is integral to society and to the ends of the person — then this should affect how we address central questions of constitutionalism that shape that common life. The liberal frame adopts a minimalist approach to law in its relationship to religious thought and practice: the law is a neutral regulator of confessional interests. Emerging post-liberal accounts will reject this. To take examples, general as well as particular to Australia, they will ask: What is the nature of sovereignty, generally and in relation to First Nations? What is the meaning of rights and of dignity? What is the role of civil society in our democracy? What is the right relationship between branches of government? Is there a right ‘mix’ between democratic and ‘aristocratic’ or expert-based forms of authority? What of a republic or constitutional monarchy? Indeed, the contention will be that questions of religious liberty — which remain important — can only be considered against the backdrop of some of these wider matters. For each of these, the analysis will involve asking how a Christian vision of the good life shapes any answer.<sup>7</sup>

Put simply then, these accounts will take up what I would characterise as a traditional component of at least Christian thought and practice: to propose something true about our common life or about the common goal of human flourishing, and develop how this shapes law and our legal institutions. On this view, the liberal hope of an autonomous religious sphere presided over and protected by a neutral State is unrealistic: neutrality is mythical. It is also potentially too self-focused and too self-limiting as to what is imaginatively possible.

Of course, attempting to shape our understanding of the law’s purposes or ends towards a vision of the good life poses a risk of authoritarian argument, but that is not inevitable. Post-liberal accounts can secure a concern for pluralism, understood as esteeming others for their different contributions to the project of society. Nevertheless, we should expect a noisy argument. Liberal voices will continue. Post-liberal voices will not be uniform. But especially, after the defeat of the Religious Discrimination Bill, the forms that argument may take is much more open.

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<sup>5</sup> Joel Harrison, *Post-Liberal Religious Liberty: Forming Communities of Charity* (Cambridge University Press, 2020).

<sup>6</sup> See, eg, *ibid* ch 5.

<sup>7</sup> For an important set of reflections, see Nicholas Aroney and Ian Leigh (eds), *Christianity and Constitutionalism* (Oxford University Press) (forthcoming).