

Submission to the Expert Panel on Religious Freedom

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This Expert Panel has been asked to examine and report on whether Australian law adequately protects the human right to freedom of religion and, in doing so, to particularly consider the intersections between religious freedom and other human rights. In addressing these issues we will make submissions below about whether freedom of religion is currently adequately protected in Australia, the potential impact of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) on religious freedom, and what measures might be taken to strengthen this freedom in the future.

1. Existing status of freedom of religion in Australia

It is important to emphasise from the beginning the fundamental importance of freedom of religion. We strongly agree with the observations that ‘[f]reedom of religion, the paradigm freedom of conscience, is of the essence of a free society’⁴, and that it ‘is the bedrock for every human right and it provides a sturdy foundation for limited government’.⁵ However, while freedom of religion is theoretically protected under both the *Australian Constitution* and broader Australian legal framework, the legal protection that is actually provided for religious freedom in Australia is, in practice, limited.⁶

We are increasingly concerned at the growing number of examples in recent years that demonstrate religious freedoms being undervalued and eroded in Australia. There are

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⁴ *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)* [1983] HCA 40; (1983) 154 CLR 120, 130 (Mason ACJ, Brennan J).

⁵ Jennifer A. Marshall, ‘Why Does Religious Freedom Matter?’ (The Heritage Foundation, Washington DC), 8.

⁶ See, for example, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Legal Foundations of Religious Freedom in Australia (Interim Report)*, Canberra, November 2017, viii.

numerous examples that can be pointed to, but in particular we would highlight the numerous complaints that have been made in recent years against individuals or groups who have sought to promote traditional marriage as an expression of their religious faith. Examples (from both before and during the recent same-sex marriage plebiscite campaign) include:

- The complaint lodged with the Tasmanian Anti-Discrimination Commission against the Catholic Archbishop of Hobart, Julian Porteous, after he authorised the distribution of a booklet entitled ‘Don’t Mess with Marriage’ at Catholic schools and churches;⁷
- The complaint made to the Queensland Anti-Discrimination Commission against Dr David van Gend relating to an article he wrote for The Courier-Mail that opposed same-sex marriage;⁸
- The numerous complaints lodged against conservative political activist Bernard Gaynor by gay-rights activist and serial litigator Gary Burns;⁹
- The controversy surrounding the ‘Keeping it Light’ video produced by the Bible Society and initially linked with Coopers Brewery;¹⁰ and
- The Mercure Sydney Airport Hotel cancelling a planned meeting at the hotel by four major Christian groups in September 2016 after complaints and threats by marriage-equality advocates.¹¹

These examples will undoubtedly multiply in coming years following the legalisation of same-sex marriage in Australia. The particular danger that lies in these examples is the chilling effect that such intolerance has on public debate and discussion. As was noted by Angela Shanahan:¹²

⁷ ‘Anti-discrimination complaint ‘an attempt to silence’ the Church over same-sex marriage, Hobart Archbishop says’, *ABC News*, 28 September 2015. <<http://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>>.

⁸ Angela Shanahan, ‘Discrimination police indulging in gay abandon’, *The Australian*, 15 October 2011. <<https://www.theaustralian.com.au/opinion/discrimination-police-indulging-in-gay-abandon/news-story/c1457f01388bc4f3b1fe0a1a974f82fd?sv=722e7dd39f14bfa10db69189e9be1cf9>>.

⁹ Nicola Berkovic, ‘Same-sex marriage opponents tongue-tied by the thought police’, *The Australian*, 28 November 2015. <<https://www.theaustralian.com.au/news/inquirer/samesex-marriage-opponents-tonguetied-by-the-thought-police/news-story/f4b1faf0bb7421ddf757b4e503d1dd27>>.

¹⁰ Paige Cockburn, ‘Coopers Brewery distances itself from Bible Society’s same-sex marriage video, faces backlash’, *ABC News*, 15 March 2017. <<http://www.abc.net.au/news/2017-03-14/coopers-brewery-not-involved-gay-marriage-video/8351894>>.

¹¹ David Crowe, ‘Same-sex marriage event off: threats to hotel staff’, *The Australian*, 17 September 2016. <<https://www.theaustralian.com.au/news/nation/samesex-marriage-event-off-threats-to-hotel-staff/news-story/d45bd0f9e9a774fc3e3d0741f176da13>>.

¹² Angela Shanahan, ‘Yes Side in Marriage Debate Ignores the Implications for Freedoms’, *The Australian*, 3 September 2017. <<https://www.theaustralian.com.au/news/inquirer/yes-side-in-marriage-debate-ignores-the-implications-for-freedoms/news-story/b119dbc7f7cad9f773f7f8ac7eef926d>>.

“If people ... are forced to appear before an Anti-Discrimination Commission ... then this is a threat to one of Australia’s greatest freedoms, the right to free speech. This is a major disincentive to people making a contribution to debate across Australia. Anti-discrimination bodies should not be used as star chambers by those who simply don’t like what someone else says”.

Of course, while freedom of religion is absolute in relation to the right to *hold* a belief, it is accepted that there are legitimate restrictions that may be applied to the right to *exercise* that belief. For example, religious beliefs never provide an excuse for violence or intimidation of others. It is important to note however that such restrictions should not be imposed lightly, and must leave the greatest possible scope for the freedom to operate. For example, Article 18(3) of the *International Covenant on Civil and Political Rights* allows the freedom to manifest one’s religion or beliefs to 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’.

To obtain a realistic understanding of the status of religious freedom in Australia it is necessary to consider the intersection between religious freedom and other human rights, particularly anti-discrimination laws. Indeed, the Joint Standing Committee on Foreign Affairs, Defence and Trade recently found in its Interim Report, *Legal Foundations of Religious Freedom in Australia* that ‘[a]n imbalance between competing rights and the lack of an appropriate way to resolve the ensuing conflicts is the greatest challenge to the right to freedom of religion’.¹³

Striking an appropriate balance is a challenging exercise, and often controversial. When considering this balance, it is important to recognise that discrimination *per se* is simply a recognition of difference and can be practised for justified reasons. Determining *when* discrimination should be appropriately exercised, and when legal limits should be enforced, is the critical question. As we observed in our recent *Submission to the Parliamentary Joint Committee on Foreign Affairs, Defence and Trade Human Rights Sub-Committee*:¹⁴

“In contemporary society, it is fair to say that ‘discrimination’ now has an inherently negative connotation. No one wants to be thought as discriminating against anyone or anything. However, humans discriminate all the time between what they think is good

¹³ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Legal Foundations of Religious Freedom in Australia (Interim Report)*, Canberra, November 2017, viii.

¹⁴ Joshua Forrester, Dr Augusto Zimmermann and Lorraine Finlay, *Submission to the Parliamentary Joint Committee on Foreign Affairs, Defence and Trade Human Rights Sub-Committee* (Submission 179) (June 2017), 38.

or bad for them. This is an inevitable consequence of having the capacity for conceptual thought. A person who prefers to drink water over bleach is exercising discrimination, that is, discerning that water is better to drink than bleach. The real issue, especially when determining thresholds for legal liability, is *when* discrimination can be exercised. In our view, South Africa's adoption of the standard of 'unfair discrimination' in its discrimination laws has much merit to it. This standard recognises that discrimination occurs, but there are circumstances when doing so warrants legal intervention".

This has parallels to an observation made by Justice Sachs from the Constitutional Court of South Africa concerning the meaning of equality:¹⁵

"[E]quality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference."

In our view, there is presently an unjustifiable imbalance between religious freedoms and anti-discrimination laws, with the balance weighted in favour of the latter. All too often, religious freedom in Australia is treated as a 'secondary' right that is not given equal weight with other human rights, in particular equality rights. This was evident during the debate surrounding same-sex marriage in Australia, where the Prime Minister declared that he believed in religious freedom 'even more strongly' than same-sex marriage, but went on to leave the question of protecting religious freedoms as an after-thought to be dealt with only once same-sex marriage had already been legislated.¹⁶

At the very least, religious freedom needs to be accorded equal weight with other human rights. In fact, there is a strong argument that the constitutional foundation provided for religious freedom in Australia actually means that what is required is not that a balance be struck between religious freedom and anti-discrimination laws, but instead that there is 'a constitutionally required preference for religious liberty.'¹⁷

¹⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6; 1998 (12) BCLR 1517 (9 October 1998).

¹⁶ 'Marriage legislation puts religious freedom in doubt', *The Australian*, 8 December 2017. <<https://www.theaustralian.com.au/opinion/editorials/marriage-legislation-puts-religious-freedom-in-doubt/news-story/ce9ec86ca4a6f93aadafab5ba283fee1>>.

¹⁷ Reid Mortensen, 'Rendering to God and Caesar: Religion in Australian Discrimination Law' (1995) 18 *University of Queensland Law Journal* 208, 231.

Religious freedom is not sufficiently protected when it exists merely as a narrow exemption that is grudgingly accepted in antidiscrimination legislation. This implicitly undervalues the importance of religious freedom, with the consequence that it is consigned to a secondary role and is left vulnerable to removal at a later date. This has been highlighted recently, with a number of senior parliamentarians and major political parties openly canvassing the removal of existing anti-discrimination exemptions.¹⁸ Freedom of religion should not be considered as an exemption. It is a fundamental freedom that deserves to be protected in a positive sense.

Our views relating to the existing status of freedom of religion in Australia have been further outlined in greater detail in our recent *Submission to the Parliamentary Joint Committee on Foreign Affairs, Defence and Trade Human Rights Sub-Committee*.¹⁹ A copy of that submission is attached as *Annexure 1* to this submission.

2. Potential impact of Marriage Amendment (Definition and Religious Freedoms) Act

Marriage is ‘[p]erhaps the most prominent example of a practice for which there are secular laws but which has a clear spiritual dimension ...’.²⁰ The recent introduction of same-sex marriage in Australia through the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) raises significant concerns with respect to religious freedom. These concerns are not fictitious or far-fetched, but are based on the real experience of persons who support traditional marriage in Australia, and also in jurisdictions that have introduced same-sex marriage. This was recognised in the *Supplementary Explanatory Memorandum* to the *Marriage Amendment (Definition and Religious Freedoms) Bill 2017* which observed that ‘[t]here is substantial experience of discrimination and intimidation against persons and entities who support traditional marriage in Australia and in jurisdictions that have legislated for same-sex marriage, in areas like employment, education, professional accreditation and commercial boycotts’.²¹

¹⁸ See, for example, Paul Karp, ‘Greens promise to end religious exemptions to Sex Discrimination Act’, *The Guardian*, 17 May 2016. <<https://www.theguardian.com/australia-news/2016/may/17/greens-promise-to-end-religious-exemptions-to-sex-discrimination-act>>. See also Department of the Attorney-General and Justice (Northern Territory Government), *Discussion Paper: Modernisation of the Anti-Discrimination Act* (September 2017).

¹⁹ Joshua Forrester, Dr Augusto Zimmermann and Lorraine Finlay, *Submission to the Parliamentary Joint Committee on Foreign Affairs, Defence and Trade Human Rights Sub-Committee* (Submission 179) (June 2017).

²⁰ *Ibid*, 42.

²¹ Parliament of Australia (House of Representatives), *Marriage Amendment (Definition and Religious Freedoms) Bill 2017 Supplementary Explanatory Memorandum and Supplementary Statement of Compatibility with Human Rights* (2017), [5].

An insight into the potential legal impact of redefining marriage, and its impact on religious freedom, can be seen by considering the examples of Canada and the United States of America. Since the legalisation of same-sex marriage in these jurisdictions there have been numerous legal complaints made against organisations and individuals who have not wanted to provide services for same-sex weddings, ranging from a religious organisation being fined for refusing to rent their hall to a same-sex couple to use for a reception following their marriage²² to individual bakers, florists and photographers being found guilty of discrimination when they refused (because of their religious beliefs) to provide services for same-sex weddings.²³

It is important to note here that religion ‘extends to faith and worship, to the teaching and propagation of religion, and to the practices and observances of religion’.²⁴ The exercise of religion therefore extends well beyond attendance at a place of worship, and may be exercised by both organisations and individuals.

It is also important to note here that freedom of speech and freedom of association are inextricably linked to religious freedom. This also necessarily includes the freedom to disassociate from practices inconsistent with one’s religious beliefs. If individuals are not allowed to express their religious beliefs in public or to live in a way that is consistent with those beliefs, or if they are forced to participate in practices that are antithetical to those beliefs, then they are being denied the opportunity to observe their religious faith.

This is where the intersection between religious freedom and anti-discrimination laws creates complexities. For example, ordinarily the idea that an individual should not be refused goods or services because of their sex, sexuality, race, colour, ethnicity, nationality, age or other innate characteristics is unproblematic. However, when anti-discrimination laws prevent an individual from disassociating from practices that are antithetical to their religious beliefs, this obviously creates significant difficulties for individuals wishing to exercise their religious freedoms.

In our view, it is important that the new marriage laws are amended to provide for an expanded exemption that allows conscientious objection where someone may be forced to knowingly and materially contribute to a same-sex marriage ceremony. The freedom of religion

²² *Smith and Chymyshyn v Knights of Columbus and Hauser and Lazar* (2005) BCHRT 544.

²³ See examples provided by Dr Augusto Zimmermann, *A Legal Opinion on the Potential Impact on Religious Freedom if the Marriage Act is Amended (to allow same-sex couples to marry)*, 5 September 2017 (attached as Annexure 2).

²⁴ *Adelaide Company of Jehovah’s Witnesses Inc. v Commonwealth of Australia* [1943] HCA 12; (1943) 67 CLR 116, 156 (McTiernan J).

encompasses the freedom to disassociate from spiritual practices not in keeping with one's religious beliefs. Marriage is an example of a practice that has a clear spiritual dimension. As we noted in our earlier *Submission to the Parliamentary Joint Committee on Foreign Affairs, Defence and Trade Human Rights Sub-Committee*, '[e]nforcing anti-discrimination laws with respect to providing goods or services to homosexual marriage or commitment ceremonies puts members of a number of religions in a quandary'.²⁵ This is because such a requirement is inconsistent with their religious beliefs, including being "squarely at odds with God's instruction that marriage is a union of a man and a woman".²⁶

Further, it is absolutely essential that the Australian legal framework provides for the clear protection of religious freedom in specific areas of concern that were highlighted during the same-sex marriage plebiscite and the ensuing parliamentary debate. In particular, we would encourage the Parliament to reconsider introducing amendments to the same-sex marriage law to extend the right to refuse to solemnise marriages to all celebrants where their genuine religious or conscientious beliefs do not allow them to do so; to protect the legal status and funding of faith-based charities which maintain a belief in traditional marriage; to ensure that freedom of speech is protected so that people can speak freely in support of traditional marriage without fearing legal consequences; and to include parental right provisions.

This submission is ultimately based upon the fundamental need for mutual respect and toleration. While we appreciate the arguments in favour of marriage equality, 'proponents of marriage equality must likewise appreciate the vital importance of freedom of conscience'.²⁷ This was a point emphasised by an amicus brief filed by a number of legal academics in *Obergefell v Hodges*.²⁸

"The court must protect the right of same-sex couples to marry, and it must protect the right of churches, synagogues, and other religious organizations not to recognize those marriages. This brief is an appeal to protect the liberty of both sides in the dispute over same-sex marriage ... No one can have a right to deprive others of their important liberty as a prophylactic means of protecting his own ... The proper response to the mostly

²⁵ Joshua Forrester, Dr Augusto Zimmermann and Lorraine Finlay, *Submission to the Parliamentary Joint Committee on Foreign Affairs, Defence and Trade Human Rights Sub-Committee* (Submission 179) (June 2017), 44.

²⁶ *Ibid*, 44.

²⁷ *Ibid*, 44.

²⁸ *Obergefell v Hodges*, 576 US (June 26, 2015). See Douglas Laycock, 'Brief of Douglas Laycock, Thomas Berg, David Blankenhorn, Marie Failing and Edward Gaffney as Amicus Curiae in Support of Petitioners of Same-Sex Marriage Cases (*Obergefell v Hodges* Etc)' [2015] *Public Law and Legal Research Paper Series* 1-2.

avoidable conflict between gay rights and religious liberty is to protect the liberty of both sides”.

3. Future measures

In our view, religious freedom is currently insufficiently protected within Australia. In particular, we believe that the constitutional protection provided under s. 116 of the *Australian Constitution* is lacking in the protection it extends. This is for a number of reasons. First, the constitutional provision only binds the Commonwealth and not the States. Secondly, it is drafted in restrictive language, particularly when compared to the broader constitutional protections provided in other countries such as the USA and Canada. Thirdly, s. 116 has been interpreted narrowly by the High Court of Australia, as evidenced by the restrictive purposive test applied in relation to the free exercise clause in *Kruger v Commonwealth (the Stolen Generations Case)*.²⁹ In relation to this final point, there is a strong argument to be made that this interpretation should be re-visited by the High Court and that a more natural reading of the free exercise clause would lead to it having a greatly expanded scope.

While we strongly believe that religious freedom is not sufficiently protected in Australia, we do not believe that this is necessarily best corrected by introducing general or broad-based new legislative measures or constitutional protections. In particular, we hold serious concerns about the potential introduction of a Bill of Rights in Australia. The key concern is that a Bill of Rights would not itself avoid questions arising about the balance to be struck between conflicting human rights. All that it would achieve would be to shift such questions from the Parliament to the Court. Given that such questions are potentially highly divisive, and also engage both personal values and community standards, they are much better suited to being decided by our elected parliamentary representatives who are ultimately responsible to the people, rather than unelected judges who are not. Shifting the responsibility for contentious social policy decisions from the Parliament to the Court would be a significant and undesirable change.

For the same reason, we would express concern about the introduction of a Religious Freedoms Act that would seek to specifically protect the right to freedom of religion. The concerns that we raised above in relation to a comprehensive Bill of Rights do not disappear when cherry-picking individual rights to be protected, rather than introducing a comprehensive instrument.

²⁹ *Kruger v Commonwealth* (1997) 190 CLR 1. See also ALRC Freedoms Report [4.21].

In our view, a much better way to proceed would be to look at amending existing anti-discrimination laws (at both the State and federal levels) so that they strike a better balance between conflicting human rights. This could be done by redefining what is actually meant by discrimination through the introduction of a general limitations clause of the kind identified by the Australian Law Reform Commission in its 2012 *Freedom Report*.³⁰ The effect of a general limitations clause is to re-calibrate the relationship between conflicting human rights, but it does so by using language that does not suggest that the freedom of religion is an inferior or secondary right.

(9 February 2018)

³⁰ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129), 2 March 2016, [4.61]-[4.62]; see also Joint Standing Committee on Foreign Affairs, Defence and Trade, *Legal Foundations of Religious Freedom in Australia (Interim Report)*, Canberra, November 2017, [7.34]-[7.35].