



Christ Church Cathedral Darwin

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The Expert Panel on Religious Freedom
Department of the Prime Minister and Cabinet
PO Box 6500
Canberra ACT 2600

Submission to the Expert Panel on Religious Freedom

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Introduction

In a liberal democracy it is the role of the state to safeguard the rights of the individuals and communities that make up the democracy. One of those key rights is religious freedom. It is in the public interest that people should be allowed to practise religion and promote religious beliefs both as individuals and in the private sphere, but also communally and in the public sphere. Such practice of religious freedom is essential to a functioning and harmonious multi-cultural society, especially given that most cultures have deep and enduring spiritual roots. In any given instance the burden is on the state to show why the general principle of religious freedom should be abrogated in the public interest, rather than the burden being on the religious organisation to show why it should be given liberty or freedom.

In other words the assumption is in favour of religious freedom and an argument needs to be made as to why a particular religious expression should be restricted or disallowed.

This submission is more concerned with the philosophical framework that should apply than with the legal framework. It is accepted that there are many key legal documents – such as the Australian Constitution, various Anti-Discrimination Acts, state legislation dealing with religious education, United Nations Treaties and so on – that touch upon religious freedoms. However none deal comprehensively with religious freedom, which is unsurprising given that our common law heritage tends not to lend itself to Bills of Rights. Possibly a good way of codifying rights including religious freedom would be for the Commonwealth to legislate for a Bill of Rights. However this paper will not deal with the legislative framework, but rather suggest the ends to which that legislative framework should aim.

The conclusion of this submission is that religious freedom is essential to Australia and ought to be respected and promoted in both private and public spheres. Nevertheless, religious freedom does not entail freedom from general social obligations, including the obligations on providers of commercial goods and services to provide those goods and services without discrimination.

The Right to Religious Freedom as Non-interference

In general, religious practice by individuals and communally that do not impact on the broader public should not be restricted. Clearly criminal acts by a religion that directly harm its members or those outside the religious organisation should be proscribed: child abuse, fraud, and other criminal activities should always be subject to the criminal law regardless of any “religious” defence. However activities which are against public sentiments or cultural norms are not proscribed simply on those grounds. For example, many religious bodies discriminate on the grounds of gender. In many Christian denominations only males can be ordained. Aboriginal ceremonies are often segregated by gender. In some religions, people in relationships outside heterosexual marriage cannot be ordained. Many of us in the Christian Churches (including the author) believe that such views are in error and should be changed but we would not welcome intervention by the state to force changes, even if we think such changes are desirable. As a basic principle, religious practices and the internal practices of religious organisations should not be proscribed or directed by the state except in cases of breach of the criminal law.

Simply, there is a basic right to non-interference that is central to liberal democracies. Unless clearly in the public interest (for example, to prevent criminal harm) there should be no interference with religious practice.

Religious Freedom and the Public Sphere

The situation becomes more interesting when the religion starts to impact on the public sphere. In general religious bodies and persons of faith are entitled to take part in the public sphere as are any other persons or bodies. Further everyone (and every organisation) has basic values and belief structures: whether these values and beliefs are religious is irrelevant. All can participate and attempt to influence the broader democratic society in which they nest. In doing so they are subject to the normal rules of discourse that guide a liberal democratic society – for example rules about defamation or vilification cannot be dodged by claiming religious freedom. So again, the right to religious freedom must encompass and protect the ability of religious organisations to take part in public debate. It is part of the right of religious freedom that those individuals and organisations may express their religion freely and openly and not be prevented from so doing.

A bigger challenge however arises when the person or religious body makes a claim on the broader community based on religious beliefs. This is not a new issue: conscientious objection seeking exemption from military service has been around for over a century and has never been particularly contentious. Likewise in most states and territories a health practitioner with a religious objection to abortion is not required to take part in the termination of pregnancy. More recently, religious bodies and individual religious ministers can refuse to conduct same-sex marriages. This is a recognition in the liberal democratic state that individuals and bodies can choose not to take part in activities which conflict with sincerely held beliefs regardless of broader social beliefs. In other words, the right to religious freedom encompasses the rights of individuals to be exempt from specific social obligations in order to practice the tenets of their religion.

However, there are limits to this principle. For example while an individual might be successful in seeking conscientious objection from military conscription, they cannot seek to avoid paying taxes simply on the grounds that some of the tax money will go to Defence. A health practitioner opposed to abortion must still refer a woman seeking abortion to another health practitioner who will accommodate that need. In other words, while an individual or religious body may seek exemption from a specific duty on religious grounds, they cannot refuse exemption from a general social

obligation. Exemption for an individual from conscription or from providing abortion – Yes. But exemption from taxation or providing good health care – No.

Religious Freedom and participation in economic activities

The same principle of complying with general social obligations can be applied to participation in economic activities. Over the last two hundred years we have moved to a position in which it is agreed that there is a general social interest in free trade, including the prohibition of discrimination in issues related to economic activity. Thus a hotel can no longer refuse to serve alcohol to a person on the basis of race or gender; a motel cannot restrict access to its rooms to only married heterosexual couples; a food provider cannot restrict the sale of their food to only those who comply with the rules of their religion. This is a good thing: it means commonly available goods and services are not restricted on economically irrelevant grounds such as religion, race, gender or sexuality. Anyone who wants to participate in business activity knows that they are not allowed to discriminate.

So is it a right based on religious freedom to be allowed to discriminate in the provision of goods and services provided on a commercial basis? For example, could a Christian or Muslim baker be allowed to refuse to provide a wedding cake to a gay couple? The initial response is no: a person involved in commercial services cannot be allowed to discriminate in the provision of those services. If an exemption is allowed for those who object to same-sex weddings, how could one logically differentiate that from other forms of discrimination? If for example a baker can refuse to bake a cake for a same-sex wedding, could they also refuse to bake bread for a gay couple? Could a Christian baker refuse to bake a cake for a Hindu wedding? Could a Christian motel owner be allowed to rent out motel rooms with double beds only to heterosexual couples who can prove their married status?

A response to this could be to compare the baker refusing to bake a cake to a doctor refusing to perform an abortion. It is then seen as a matter of an individual being guided by their conscience in the provision of a service. But there are significant differences here: the doctor must still ensure ongoing care of the patient; health care is not the same as an ordinary commercial service both economically and in terms of the relationships that are formed between patient and care-giver; and baking a cake is not generally a matter of life or death. The analogy between a health care professional and a commercial provider is simply not strong enough to justify discrimination in the ordinary provision of commercial goods and services.

At this time I turn from philosophy to a theological aside. For Christians who are genuinely concerned about providing services to same-sex weddings: they need have no fear. In Paul's letter to the Romans (Romans 13.1-7), St Paul advises Christians to respect and honour the ruling authorities and to pay their taxes. St Peter uses similar terms in advising Christians to honour the Emperor (1 Peter 2.17). These are key passages because at that time the Emperor was considered semi-divine: it was part of the civic religion to worship the Emperor. In later generations Christians who refused to worship the Emperor were martyred. But it is clear in these passages that to honour and respect the Emperor and to take part in the civic duty of paying taxes was not the same as worshiping the Emperor. Likewise paying taxes did not necessarily imply agreement or support for all those things the taxes were put towards.

In more modern terms, Christians can provide goods and services to same-sex weddings without condoning the wedding. They are simply being asked to comply with their social obligation to provide commercial goods and services without discrimination: to respect the law and to respect their fellow-citizens. They are not obliged to assent to the actions taking place in the wedding. Accordingly Christians should not be concerned that their religious freedom is being infringed upon by being

required to provide commercial goods and services without discrimination. We pay taxes without necessarily condoning all the purposes to which our taxes are put. Likewise the provision of goods and services does not imply that the merchant condones the lawful purposes to which the goods and services are put.

Summary

Religious freedom is essential to a functioning liberal democracy and should be promoted by the legislative framework in Australia. Indeed, people of faith and religious organisations should be encouraged to participate fully in public and community life. However religious freedom does not extend to an exemption from the general social obligations that all citizens and communities are expected to meet. When we look at the commercial provision of goods and services we observe that discrimination on religious grounds is quite properly not allowed. It is not an infringement on religious freedom to require merchants and commercial providers to comply with that law.

Please feel free to contact me if any matter requires clarification or if I can provide any further information.

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