

# Religious Freedom Review Submission

The debates surrounding same-sex marriage have once again highlighted the need for a definitive declaration regarding religious freedom in Australia. Although same-sex marriage is now legal [1], questions were raised in the lead up to the bill about the extent of religious freedoms and whether they are applicable in the first place. The arguments continue.

In the past a law about religious freedom was largely irrelevant because more cohesive societies followed their particular religion and any freedom or otherwise had been automatically dictated by that religion. Indeed, in that sense there was no 'freedom' at all. In today's multi-cultural societies however (especially applicable to a nation like Australia), what is considered a must under one spiritual ideology is not necessarily given the same status under another. Since any religion is a cumulative result of a people's perception paired with experiences across the generations that either contributed or undermined their society's viability, there are sentiments which have proven useful and others which were negative yet did not impact sufficiently for that group to remove itself from the scene.

By and large, the laws in a secular society reflect that development. Antagonism towards homosexuality for example has been superseded by the more rational recognition that homosexuals do not undermine their community after all, although in the past societies did survive despite many having homosexuality declared illegal based on the dictums of their religion.

Yet arguments about religious freedom persist. Their resilience does not derive so much from a rational analysis of their respective aspects, rather than the ongoing existence of religion being part of most people's lives. It helps to consider the historical context. In the year 1555 the Reverend Dr John Hooper, Lord Bishop of Gloucester, was burnt at the stake on the charge of heresy [2]. It is but one example of religious freedom not being tolerated under a form of conceptualisation that places one's fantasy above everything else.

In civilised countries at least such intolerance has been done away with. Today we are discussing whether someone can refuse to bake a wedding cake for a gay couple. Since the law does allow for religious freedom, or rather does not prescribe against the exercise of any religion starting with Australia's Constitution [3], the opportunity exists for someone to demand the right to follow their belief since even the Constitution seems to provide such a right. In effect the wording constitutes a double negative, always a source of potential conflict. It does not help when the Overview contributes to the confusion. First, here is the entire paragraph referring to religious freedom in the Constitution itself:

## **116. Commonwealth not to legislate in respect of religion**

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

And here is what the Overview has to say:

## **Rights**

The Constitution has no Bill of Rights, such as that found in the United States Constitution, which prevents a legislature from passing laws that infringe basic human rights, such as freedom of speech. Some express protections, however, are given by the Constitution against legislative or executive action by the Commonwealth, but not by the States. Examples are section 51(xxxi) (acquisition of property must be 'on just terms'), section 80 (trial by jury is required in relation to some criminal offences), and *section 116 (a right exists to exercise any religion)*. [4] (my italics)

Well, not exactly. If the law does *not* tell you to enter into whatever may be ascribed to a religious observance, that does not automatically mean a person is legally entitled to do whatever their religion may demand. If my religion tells me to burn a witch, does that mean I have legal protection to burn someone?

And that's the problem. While burning someone alive would be against the - secular - law, less dramatic acts are nevertheless given validity because the definition contains the a priori declaration of the principle. The presence of an a priori declaration gives rise to arguments simply due to its presence.

Consider for example the difference between the following two statements: "We have so many more people showing up, let's bring in twenty more chairs", and, "We have so many more people showing up, let's bring in twenty more chairs of whatever colour". Which of the two would cause more arguments? Surely the second would. The need for more chairs is obvious, but should they be blue, green, or red? And the meeting grinds to a halt.

In principle the 'whatever colour' addition is equivalent to the inclusion regarding the exercise of religious beliefs. Because religious beliefs are explicitly mentioned anyone can construe an argument based on just that, despite the original intention that religious beliefs should *not* be part of any legislation.

The double negative sees to it.

Australia's Constitution is not a constitution in the sense its United States version is. Rather than an ultimate basis for the law it represents a procedural document, and the shortcomings have caused problems before as Professor George Williams has pointed out in his article *Australian laws fall short when it comes to protecting religious liberty* [5].

Much better then to have a single negative. What is termed a "Basic Charter" [6] on this website provides a solution to the problem. Paragraph 4 reads:

4. No endeavour which seeks to influence and define people's lives may be enacted that has as its basis and justification the dogma of any religion, culture, or tradition.

Similarly, no activity pursued by any individual or individuals may be prohibited through justifications derived from the realms of religion, culture, or tradition.

Instead of giving free rein to religious sentiments the suggested constitutional framework does not confer any legal significance to acts of a religious nature to begin with (nor any acts derived from any culture and tradition). Rather than admitting religiosity and then curtailing its manifestation it only comes in once someone tries to justify some act through their religion and nothing else. At the moment we have the curious situation where imposing a religious belief on someone is ipso facto classified as 'freedom'.

Within the context of a multi-religious, multi-cultural and multi-traditional society the explicit definition of the overall behavioural and/or legal boundaries would be far more productive.

As the arguments coming from the religious sector around the same-sex marriage bill have shown, the lack of a precise placement of religious aspects within the general framework of society creates problems the nation can do without.

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## References

1. *Same-sex marriage bill passes House of Representatives after hundreds of hours of debate*, ABC News, 7 December 2017, <http://www.abc.net.au/news/2017-12-07/same-sex-marriage-bill-passes-house-of-representatives/9235560>.
2. M Wurzinger, *A burning*, October 2015, <http://www.otoom.net/aburning.htm>.
3. 116. *Commonwealth not to legislate in respect of religion*, Australia's Constitution, p. 27, [http://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Constitution.aspx](http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution.aspx).
4. *ibid*, p. viii.
5. G Williams, *Australian laws fall short when it comes to protecting religious liberty*, University of New South Wales Law, 21 November 2017, <http://www.law.unsw.edu.au/news/2017/11/australian-laws-fall-short-when-it-comes-protecting-religious-liberty>.
6. M Wurzinger, *Basic Charter*, January 2007, <http://www.otoom.net/basiccharter.htm>.