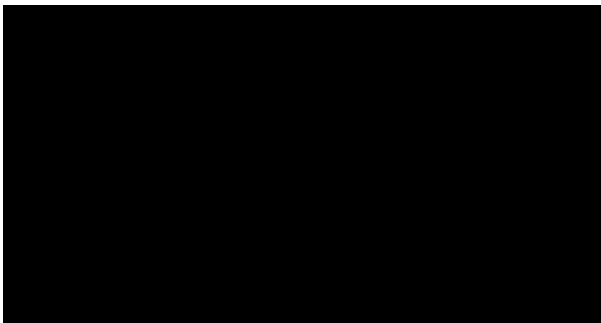




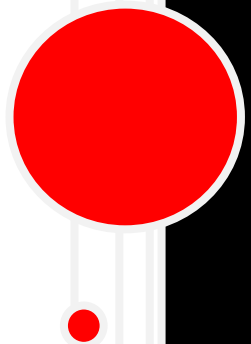
The Salvation Army

*The Salvation Army's response to the
Expert Panel on Religious Freedom*

14 February 2018



www.salvationarmy.org.au



Introduction

The Salvation Army Australia is part of a worldwide Christian movement and is one of Australia's largest providers of community and welfare services, including homeless and housing services, alcohol and other drug rehabilitation, family violence assistance, emergency relief, out-of-home and aged care and numerous other community engagement programs. In total there are more than 1,000 specialised social programs and activities, located in a vast network of other social support services, community centres and churches, providing assistance to more than 200,000 Australians. The Salvation Army has a national annual operating budget in excess of \$700 million. The Salvation Army Australia provides more than 2,200 points of contact for the community that range over vast distances. The Salvation Army's services and activities are overwhelmingly located in areas with significant socio-economic disadvantage.

The Salvation Army operates within a non-discriminatory framework where all are welcome to engage with our services and at our places of worship.

Furthermore, The Salvation Army is an equal opportunity employer where diversity and inclusion is promoted and practised.

The community services provided by The Salvation Army are vital in supporting so many Australians in need and form an essential part of our mission as an evangelical part of the universal Christian Church. It is for this reason that The Salvation Army has an interest in the intersections between the enjoyment of freedom of religion in Australia and other human rights and we are grateful for the opportunity to make this submission to the Expert Panel.

This short submission deals with the following subject areas:

- (i) The recent changes to the *Marriage Act* 1961 (Cth) -
 - a. Definition of 'Body Established for Religious Purposes';
 - b. Exposition of the beliefs and doctrines of a religion;
 - c. Protections of a church from discrimination claims by clergy;
 - d. Protection of those key individuals who are the senior members of the church, as opposed to simply protecting the church;
- (ii) Positive protections to freedom of thought, conscience and religion;
- (iii) Religious freedoms in respect of parents and educators;
- (iv) Charitable Institution status and tax implications.

It must be noted that nothing in this submission is intended to be read as The Salvation Army wanting to protect any expression which would threaten or harass a person or group of persons on the basis of sexual orientation, gender identity, intersex status, marital or relationship status or family responsibilities. The Salvation Army is mindful of the comments of the High Court of Australia that “freedom of religion, the paradigm freedom of conscience, is of the essence of a free society.”¹

This submission is driven by The Salvation Army’s desire for the protection of the enjoyment of freedom of religion in Australia as a basic human right, so that those who wish to express their religious beliefs and practices may do so without fear of persecution or discrimination.

Recent Changes to the *Marriage Act 1961* (Cth)

Comments in this part of the submission are made in reference to the recently enacted *Marriage Amendment (Definition and Religious Freedoms) Bill 2017* (Cth) (the ‘Bill’).

The Salvation Army respects the Parliament’s decision to pass this Bill in response to the desire of the Australian community as expressed in ‘Yes’ response to the recent same-sex marriage postal vote. In light of these recent changes in legislation, The Salvation Army urges the Expert Panel to consider the recommendations of the *Report of the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*, February 2017 (the ‘Senate Report’) which stated that, should legislation be enacted to change the definition of marriage, ‘the right to religious freedom should be positively protected’.

Whilst The Salvation Army acknowledges the certain specific protections currently provided in the Bill for ministers of religion and bodies established for religious purposes, we respectfully submit that the following areas warrant careful further consideration by the Expert Panel so that organisations such as The Salvation Army can continue to effectively provide their services whilst also adhering to their faith traditions.

(a) Definition of ‘Body Established for Religious Purposes’

It is important for the Expert Panel to remember that, for individuals and religious organisations, religious beliefs are more than simply personal views, able to be altered easily; such beliefs are fundamental to their very identity. The doctrines, teachings or principles behind such beliefs create an internal conviction that certain behaviours or actions are either required or prohibited. The individual (or group) has a duty to act according to that conviction, as to do otherwise would likely cause deep internal conflict, shame and even repercussions within that person’s community; consequences much more serious than those resulting from the abandonment of a personal point of view.

¹ Mason ACJ and Brennan J in *The Church of the New Faith v The Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120 at 130.

Article 18 of the *International Covenant on Civil and Political Rights* ('ICCPR') provides that the right to freedom of thought, conscience and religion should only be restricted or limited where absolutely necessary, and any such limitation should be no more than the minimum required in order to achieve the purpose. According to *The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, the rights granted under Article 18 include the freedom 'to establish and maintain appropriate charitable or humanitarian institutions'. The Salvation Army supports the view taken by the Senate Select Committee in recommending that the definition of 'body established for religious purposes' be clearly articulated. We share the views expressed in the Supplementary Explanatory Memorandum that any such definition should include 'faith based charities', such as adoption agencies, aged care services and out-of-home care services. This is of particular importance for The Salvation Army as many of the aforementioned services that we provide are primarily offered for charitable purposes rather than directly for religious purposes. Without such protections for organisations such as The Salvation Army (and all relevant individual decision makers within such bodies), religious institutions will suffer greater limitations to their religious freedoms than what are required in order to give effect to same-sex marriage.

Further, it is noted that exemptions from anti-discrimination law are necessary in order to allow religious bodies to appoint staff and managers that subscribe to the beliefs of the organisation. This is necessary in order for organisations to maintain their unique character and identity and continue to operate according to their faith traditions. The Salvation Army takes the view that these exemptions can be best ensured through an appropriately broad definition of 'body established for religious purposes'.

Furthermore and specifically in reference to the recent amendments to the *Marriage Act*, the carve out listed in s.47B is helpful but not conclusive. The reason for this is that long-established churches such as The Salvation Army have been set up for specific but interconnected purposes. When The Salvation Army's legal structure was established in the latter part of the nineteenth century / early twentieth century in England, it was envisaged that there would be two aspects to how the church would hold its assets – one half would be devoted to those assets which were for purely religious purposes (known as 'The General Work Trust') and the other half for assets used in the undertaking of social welfare services as a practical expression of the Christian Mission ('The Social Work Trust').

Essentially, The Salvation Army's concern with the present s.47B is that if someone wanted to challenge a refusal of hiring out a Social Work Trust owned hall etc. on the basis that it was unlawful discrimination, they *may* have an *arguable* case. The essence of the point is that the Social Work Trust was established for purposes that arguably don't necessarily overtly (i.e. in the plain text of the Trust Deed) touch on the subject of religion (which is what qualifies you for protection from discrimination claims under the amendments to the *Marriage Act*) but rather, on the helping of the needy. The Social Work trust has PBI status, which is another factor in suggesting that its property ought to be used for the benefit of the whole of the public, not just a section who subscribe to (or are willing to listen to) a particular belief structure. Yet it is the same Salvation Army (i.e. the Christian church) that runs both the General Work Trust and the Social Work Trust.

It would be an absurd result if The Salvation Army owned two church halls, one pursuant to the General Work Trust and the other pursuant to The Social Work Trust and one was used for religious purposes and the other for community purposes; the absurdity would arise from circumstances where The Salvation Army was entitled to rely upon the exemption in s.47B for declining to hold a same-sex wedding reception in one hall but was not able to rely upon the exception for declining to hold a same-sex wedding reception in the other hall owned by it (i.e. the same Christian church) but simply pursuant to a different Trust.

The Salvation Army proposes that simply the wording of s.47B of the *Marriage Act* be expanded upon to make it clear beyond doubt that a body established for religious purposes *includes all such other related entities and undertakings wholly or predominantly owned or operated by that body.*

(b) Exposition of the beliefs and doctrines of a religion

The Salvation Army notes and agrees with the various comments by the authors of the Supplementary Explanatory Memorandum, specifically at paras [77]-[79] and also in relation to the commentary regarding the ruling in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*.²

The Salvation Army asks that the Expert Panel recommend clarification as to how a religious body may be said to hold a relevant belief or a relevant marriage belief (or any component thereof).

(c) Protections of a church from discrimination claims by clergy

The Salvation Army is concerned that it may have some exposure in the future to claims by any of its clergy who seek to officiate same-sex marriages in breach of church-issued directions regarding how clergy are to respond to the issue when raised.

The Salvation Army, as a voluntary association seeks the ability to be able to continue to direct its clergy to follow church doctrine and teaching, without fear of the ability of any such member of the clergy being able to action their feeling of being aggrieved at the direction from their superiors, and without The Salvation Army being exposed to a legal liability. As a social justice movement, The Salvation Army is a broad church, which encourages social activism (however, always within its Christian ethos). It is conceivable that a well-intentioned member of the clergy may seek to officiate a same-sex wedding in breach of Salvation Army orders & regulations, or other ecclesiastical law processes. In such a case, The Salvation Army simply seeks the ability to regulate its clergy to act only in accordance with its own beliefs and practices.

² [2014] AVSCA 75

This could be easily attached to the existing s.47B, making it lawful for such a body established for religious purposes to give a lawful direction to any ministers of religion or religious marriage celebrants who are engaged with that body established for religious purposes.

(d) Protection of those key individuals who are the senior members of the church, as opposed to simply protecting the church

As The Salvation Army is an unincorporated worldwide association, like many other churches, there are often matters that are done by key individuals in leadership (sometime at a local, state or federal level), rather than through any separately identifiable legal entity. Accordingly, The Salvation Army simply seeks to ensure that no actual decision makers 'fall through the gaps' of the intended protections within the *Marriage Act* for bodies established for religious purposes.

This can be rectified by simply extending the relevant provisions of the exemptions to 'all officers, agents and assigns in respect of (or purporting to be in respect of) such body.'

Positive Protections to Freedom of Thought, Conscience and Religion

As noted by the Senate Select Committee in the Senate Report, The Salvation Army holds the view that positive protections are required in order to appropriately balance the right to freedom from discrimination with the right to freedom of thought, conscience and religion protected under Article 18 of the *International Covenant on Civil and Political Rights* ('ICCPR'). A similar view was taken in the *Marriage Amendment (Definition and Religious Freedoms) Bill 2017* (Cth), Supplementary Explanatory Memorandum and Supplementary Statement of Compatibility with Human Rights (the 'Supplementary Explanatory Memorandum').

The Salvation Army submits that Australia's current legislative framework does not provide adequate protections to persons and entities that hold traditional and/or religious beliefs about marriage, sexuality, gender and family. Whilst limited protections have been provided to religious institutions and ministers under the Bill, The Salvation Army supports the view taken by the Senate Select Committee that the rights to freedom of expression, association, thought, conscience or religion are not only provided to religious bodies, but extend to every individual as well as to corporate entities.

In this regard it is noted that, during the same-sex marriage debate, situations arose (on both sides of the debate) in which individuals were subjected to discrimination and detriment for expressing a traditional or religious perspective on marriage. Now that the Bill has been passed, there is greater potential for similar circumstances to arise. To this effect, protections should be introduced to provide a more adequate balance between anti-discrimination and anti-vilification laws and religious and conscientious freedom and to allow those that suffer detrimental conduct on account of such beliefs to seek appropriate legal remedies. Such protections should extend to holding, expressing or acting on such a belief, whether in private or in business, employment, community or public affairs.

Furthermore, such protections should also operate to ensure that persons and entities do not suffer detriment where they do not actively endorse or promote views on marriage, sexuality or gender where those views are inconsistent with their religious doctrines or genuinely held conscientious beliefs. For clarity, such protections should be limited in their application, and should in no way allow the expression of such beliefs in ways that are reasonably likely to harass, intimidate, threaten or bully another person or group of persons. On this basis, The Salvation Army urges the Expert Panel to consider the concept of an anti-detriment clause, as considered in the Senate Report. Anti-detriment clauses have been used in international jurisdictions such as Canada.³

Religious Freedom in Respect to Parents and Educators

As a provider of care and education to children, The Salvation Army has a strong interest in ensuring that the religious freedoms of parents and educators are upheld according to the standards set out in international human rights law. This is of particular concern to The Salvation Army given the number of parents within our Corps (church) congregations and communities who seek to raise their children according to religious principles.

Article 18 of the ICCPR provides for the liberty of parents and legal guardians ‘to ensure the religious and moral education of their children in conformity with their own convictions’. Furthermore, Article 14 of the *Convention on the Rights of the Child* specifically provides for the rights of the child to ‘freedom of thought, conscience and religion’ and the ‘rights and duties of parents...to provide direction to the child in the exercise of his or her right’.

It is to be expected that any significant legislative change to a core social institution, such as the recent changes to the definition of marriage, would subsequently alter the way in which that social construct is taught in public education. The Salvation Army understands and respects the fact that such legislative changes must necessarily be reflected in education. Furthermore, The Salvation Army unreservedly supports the role of education in the prevention of discrimination and bullying, particularly in relation to gender and sexuality. To this extent it is also important that a balance is struck with the religious freedoms outlined above. Any such change to education, without appropriate exemptions, will conflict with the rights of both children and parents with respect to religious and moral education. Unless balanced appropriately with religious freedoms, changes to public education also have the potential to curtail the rights of teachers and other educators to express their beliefs.

In this regard, Australia once more has the benefit of looking to international examples. We are aware of widely reported instances in which parents in Canada and other European countries were prevented from removing their children from education classes that taught views on marriage contradictory to the child or parent’s religious beliefs. The Expert Panel will be familiar with further examples, such as the decision of the English High Court in *Johns v Derby County Council* (2011) EWHC 375 (Admin), in which foster parents were prevented from fostering children on account of their religious views on sexuality. Prior to this issue being raised, the couple had successfully fostered several children.

³ *Civil Marriage Act 2005* (Canada) s 3.1.

On the basis of the above, we urge the Expert Panel to carefully consider the way in which subsequent changes to education are balanced with the religious freedoms of parents, children and educators. The Salvation Army supports the proposal put forward in the Supplementary Explanatory Memorandum, providing that a parent or student over the age of 16 may elect for their child or themselves, respectively, to be excused from a class or classes that teach material contradictory to the parent or student's religious or moral convictions. Similar provisions have been used in international jurisdictions such as New Zealand.⁴

Charitable Status and Tax Implications

In regard to the various intersections between religious freedom and the recent changes to marriage law in Australia, perhaps those most likely to directly impact The Salvation Army, along with many other charitable institutions, are the potential implications to charitable status, government funding and tax exemptions. Again, we refer to international jurisdictions, particularly the United States, United Kingdom and New Zealand who share the common law of charities with Australia. Under the common law, an Australian charity must be considered to be operating for public benefit and must also conform to public policy.

In New Zealand, the charitable status of Family First New Zealand was removed on the basis that its promotion of traditional marriage and family was no longer considered to be in the 'public benefit in a way previously accepted as charitable'.⁵ The New Zealand Charities Registration Board's decision was based on the common law of charities and as such, it is reasonable to anticipate that a similar decision could be reached with regard to Australian charities.

There has recently been the closure of several adoption and foster care agencies in the United Kingdom. One of the most significant contributors to the closure of these agencies was the decision of the Charities Commission for England and Wales to remove the charitable status of 19 Catholic agencies on the basis that the agencies' religious and moral convictions did not allow them to provide adoption or foster care services to same-sex couples.⁶ Although this decision was later overturned, it is demonstrative of the importance of legislative clarity around issues of religious freedom.

Further, in the United States, a Methodist organisation in New Jersey was stripped of its real estate tax exemption after refusing to allow one its church buildings to be used for a same-sex couple's commitment ceremony.⁷

⁴ *Education Act 1989* (NZ) s 25A.

⁵ New Zealand Charities Registration Board, *Deregistration Decision: Family First New Zealand* (21 August 2017) 57.

⁶ *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales 2009* UKFTT 376 (GRC) (01 June 2009).

⁷ Jill P Capuzzo, 'Group Loses Tax Break Over Gay Union Issue', *The New York Times* (online), 18 September 2007 <<http://www.nytimes.com/2007/09/18/nyregion/18grove.html>>.

The above examples compel a consideration of how such matters will be determined in Australia now that changes to the *Marriage Act 1961* (Cth) have been passed. Given the examples above, it is possible that the beliefs of an Australian charitable organisation as to same-sex marriage may become a determining factor in a decision as to whether such an organisation continues to be registrable as a charity at law. The Salvation Army strongly believes that without appropriate exemptions in charity law, religious institutions and faith based charities such as The Salvation Army may be at risk of losing their charitable status and may also be prevented from obtaining government funding, specifically where such funding is awarded on the basis of charitable status.

Similarly, such institutions may no longer be provided with certain tax exemptions and concessions, such as real estate tax benefits, income tax concessions and deductible gift recipient status endorsements, as well as fringe benefits tax advantages. The assistance provided to charitable institutions through such tax advantages and government funding is vital to their ability to continue to provide the vast amount of community services that they currently offer, in exchange for which society receives a massive benefit.

For this reason, The Salvation Army submits that a belief held by a religious institution or faith based charity that is based directly on the doctrines or teachings of that institution's faith, particularly as to marriage, sexuality, gender and family, should be specifically excluded from any consideration of whether or not that institution operates for the public benefit or conforms to public policy.

Furthermore, The Salvation Army notes and is concerned about the comments at [175] of the Supplementary Explanatory Memorandum and hopes that there will be no discrimination against faith-based charities by virtue of their faith, in the realm of allocation of government funding for social welfare and other related services. To do so, would deprive an overwhelming proportion of Australians of the opportunity to be pastored to and to receive social services from a person providing a practical expression of their faith. The Salvation Army needs assurance by the Expert Panel that there will be no ability of a funding body to discriminate based on religious beliefs or association and, because of its doctrines, tenets, beliefs or teaching about marriage (or expresses an opinion about any of those) acts or fails to do an act because of such doctrines, tenets, beliefs or teachings about marriage.

Conclusion

The Salvation Army welcomes the opportunity to contribute to the debate on religious freedom in the context of recently passed same sex marriage laws. The issues raised in this submission have attempted to reflect a respectful balance of a variety of community views and the rights of all members of the Australian Community to express those views. The Salvation Army recognises that there are complex issues to be considered by the Expert Panel and urges careful consideration of the protection of religious freedom within the wider context of recent changes to the Marriage Act.

The Salvation Army would welcome the opportunity to discuss the issues related to Religious Freedom with the Expert Panel.