

Submission to the Expert Panel on Religious Freedom

EXECUTIVE SUMMARY

The Church and Nation Committee of the Presbyterian Church of Victoria is concerned about religious freedom in Australia. In February 2017, the parliament's select committee on the exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill unanimously reported: "Overall the evidence supports the need for current protections for religious freedom to be enhanced. This would most appropriately be achieved through the inclusion of 'religious belief' in federal anti-discrimination law."¹

Therefore, we recommend that the Expert Panel find appropriate legal mechanisms to achieve the following:

1. Protect the right of religious organisations or individuals to withhold services or business that might result in them actively or tacitly supporting something that is in conflict with their religious beliefs or conscience.
2. Protect the right to speak freely, even if their religious views are perceived as insulting or offensive.
3. Protect the right of religious organisations to employ staff consistent with their beliefs and ethos, including the freedom to uphold moral standards within religious organisations.
4. Establish a National Religious Freedom Commissioner who will advocate for and be a watchdog of religious freedoms empowered by an appropriate legislative framework.

THE CHURCH AND NATION COMMITTEE (PCV)

The Church and Nation Committee of the Presbyterian Church of Victoria (PCV) exists to serve the General Assembly by providing information and guidance to both the Church and Nation. By Church we mean the PCV as our primary focus, and then the wider church in general. By Nation, we mean the governing bodies in particular and then the electorate at large.

The Committee comes to issues predicated on a high view of the Bible and of our Reformed heritage and a belief that Christianity ought to be a clear voice in the public square, for the common good.

¹ <https://www.theaustralian.com.au/news/inquirer/clash-of-rights-looms-insamesex-marriage-debate/news-story/e3ab746122ca9f5d8fa5788b6f765c52>

INTRODUCTION

Hostility toward those with religious convictions is growing rapidly in Australia and becoming more overt in business, education, politics, and the media. Historically, protection of religious freedom was rarely done legislatively since Australia was founded on principles of tolerance. The right to freedom of religion was assumed and therefore afforded the status of an assumed inviolability. However, more recently this has been eroded through growing legislative ambiguity and cultural drift.

The pluralistic society Australians are so proud of is at risk if the basic right to freedom of religion is not protected. This is the very right that provides the cohesion that communities of difference need to retain their identity. At the same time, it allows those communities of difference to mutually respect other communities. Due to recent legislative changes, these important social mores are under threat. The absence of any protections for religious freedom seriously threatens our national identity and way of life.

I. FREEDOM OF RELIGION IN THE CHRISTIAN TRADITION

Freedom of religion is a longstanding and important biblical, theological and social principle in the Christian tradition. The Bible teaches that people are to be persuaded to believe, not forced to conform (John 1:12–13). The Apostle Paul taught that “if you confess with your mouth that Jesus is Lord and believe in your heart that God raised him from the dead, you will be saved” (Romans 10:9–10). Note that outward confession, which could be coerced, is not enough—one must also believe in their heart. What happens in a person’s heart is only between them and God, and no external authority or coercion can force a person’s heart to change.

Jesus Christ himself emphasised the importance of the heart in his ministry, and did not seek mere outward conformity to laws or social norms. Rather, he wanted people to freely and joyfully accept the good news that Christians call “the gospel” (John 1:12–13; 3:16). Whilst this is not, strictly speaking, an expression of the modern liberal understanding of freedom of religion, it does demonstrate the biblical assumption that people ought not be coerced in their religious faith.

Likewise, a Christian anthropology (our understanding of humankind) invariably emphasises the dignity, capacity, worth, and reasonableness of the person. This is couched in the notion from the creation account in Genesis of people being created “in the image of God” (Genesis 1:27). Because people are created in the image of God, they reflect him; they are made for him. All people are, therefore, inherently religious and are made to be worshippers. This theological truth demonstrates the centrality of religious freedom in the Christian understanding of humankind: if everyone is religious, then religious freedom (or the lack thereof) affects everyone.

Further, because all people are made in God’s image, they have inherent worth and dignity. That means that someone’s deeply held convictions, decisions, and religious beliefs are worthy of respect. This is the case even if we think they are mistaken. Because they are God’s creatures, made in his image, Christians believe that all people have a right to hold the opinions and beliefs that they do, and to do so freely. This does not preclude others persuading them otherwise. But it does mean that a biblical anthropology offers good grounds for giving people freedom of religion.

These biblical principles of non-coercion and human dignity were reinforced in various ways throughout church history. But special attention can be given here to the teaching and practice of the Protestant Reformers, who are the founders of our particular tradition. Admittedly, religious tolerance was not widely practiced during the sixteenth and seventeenth centuries, especially with the

confessionalisation of different kingdoms and nations. This was a problem for both Roman Catholic and Protestant churches.

However, the Protestant tradition in general, and the Reformed and Presbyterian tradition in particular, has emphasised the importance of the conscience, one's own personal faith in God, and the ability for anyone to read and understand the Bible for themselves. Reformed theologians have taught that: just as no civil authority or church authority can come between a Christian conscience and God, so no civil authority or church authority can change an individual's heart and force them to have faith. In short, the Reformed Protestant tradition carried on the biblical principle that people cannot be coerced in their religious beliefs. Indeed, our Confession of Faith teaches that "God alone is Lord of the conscience."² Flowing quite naturally from this truth is something that will be discussed below; that people should be able to live according to their consciences and religious beliefs.

The western liberal order is built on Christian foundations stretching back through the Reformation, the medieval period, to the pre-Christian era. Many liberties we enjoy today, including freedom of religion, arise from Christian assumptions about God, humankind, and the purpose of social life. Therefore, as Christians, we understand very well the origin and foundations of religious freedom and its importance to the healthy functioning of society.

II. FREEDOM OF RELIGION VS. FREEDOM OF WORSHIP

Before proceeding, we should establish a working definition of freedom of religion. In order to do this, we will contrast freedom of religion with a principle it is commonly confused with: freedom of worship.

Freedom of worship is the freedom to worship according to the beliefs and practices of one's religion, whether it is privately in homes or in public worship gatherings (e.g. church services, or prayers at a mosque). This freedom implies that people ought not to interfere with, to use common parlance, what is essentially a private matter: how one chooses to formally worship in accordance with their religious beliefs. In short, what someone chooses to do at church on a Sunday morning shouldn't be anyone else's business. Freedom of worship does not extend to activities, behaviours, or beliefs that occur outside of formal worship settings. It is not uncommon for freedom of religion to be conflated, and made coextensive with, freedom of worship.

However, freedom of religion is much broader than freedom of worship. Freedom of religion entails the freedom to *worship* according to one's religion, but also to *live* according to one's religion. Article 18 of the United Nations International Covenant on Civil and Political Rights (ICCPR) includes the following provisions:

- 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
- 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
- 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public*

² Westminster Confession of Faith 20:2.

safety, order, health, or morals or the fundamental rights and freedoms of others.

Note subsection 18(1), which states that freedom of religion includes the freedom “to manifest his religion or belief in worship, observance, practice and teaching.” Worship is only one element of freedom of religion, according to the ICCPR.

As Reformed Christians, we find this broader definition of freedom of religion is compelling. We see religion as a whole-of-life endeavour, affecting every aspect of one’s existence. It cannot simply be bracketed off into 2 hours on a Sunday. Abraham Kuyper, Reformed theologian and pastor, said it well when he wrote that all of life is under the Lordship of Jesus Christ: “There is not one square inch of our existence” which is not under his reign.³ As Christians, that is our conviction.

To illustrate, we believe that manifesting our religious convictions extends to what we do on Sunday afternoon; what we discuss with our families at breakfast on Monday morning; how we behave in the car or on the train on the way to work; how we interact with our colleagues; what we do on our lunch break; what books we read on our commute home; what we read to our children before they go to bed; how we treat our spouse that evening; what we watch on television.

Another example is related to education. Our religious convictions impact our choices when it comes to educating our children. Many Christian parents choose to send their children to public school. Other parents choose to send their children to a Christian school so they can further inculcate their Christian values and beliefs during school hours. There are a variety of ways of manifesting one’s religious conviction when choosing how to educate one’s children.

There are any number of examples that could be called upon to illustrate what manifesting one’s religion is, and how far it extends. Every person, whether they are Christian or not, has the right to religious freedom. People should be free to act upon their deeply held religious convictions. This includes the right to manifest their non-belief; people who are of no particular creed or faith ought to be allowed to live according to their irreligious or non-religious convictions.

Section 18(3) of the ICCPR notes an important limitation on religious freedom. Religious freedom can be limited to “protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” This is a sensible approach. Christians respect the role of civil authorities to determine what constitutes an unreasonable breach of public safety, morals, order, health, or others’ freedoms. If someone has a religious practice which will fundamentally undermine human rights (e.g. female genital mutilation) or cause public disorder (e.g. public animal sacrifice), then the government would be acting reasonably to limit freedom of religion in those cases.

The question is, of course, where does one draw the line? What constitutes an unreasonable breach of human rights? What constitutes a breach of public morals bad enough to warrant a limitation of religious freedom? What should be considered a reasonable expression or manifestation of one’s religious belief?

There are a number of areas where there seems to be a growing perception amongst policy-makers that limitations of religious freedom are justifiable in order to protect human rights, prevent offence or hurt, and promote equality. These are zones where freedom of religion comes into conflict with competing freedoms and rights.

³ *Kuyper: A Centennial Reader*, ed. James D. Bratt (Eerdmans, 1998), 488

III. EQUALITY AND ANTI-DISCRIMINATION: CONFLICT ZONES

The right to equality and the right to not be discriminated against are emerging as dominant in human rights discourse and in public policy in Australia. However, the prioritising of these rights often comes at the expense of other rights, in particular the right to freedom of religion. This has become evident both in Australia and overseas.

We perceive the right to freedom of religion is being impacted in three distinct ways by this prioritisation of equality and non-discrimination. Such impact will be further discussed under the headings of (i) freedom of conscience, (ii) freedom of speech, and (iii) the gradual encroachment on the freedom of religion more generally.

i. Freedom of Conscience

Freedom of conscience is linked to freedom of religion in Article 18(1) of the ICCPR. Religious and non-religious people exercise this freedom when they live out their deeply-held convictions. A religious person or group will have a conviction that a particular course of action is required by their religion, and this course of action must be followed as a matter of conscientious duty. The duty stems from the commitment that person has to their god, and any failure to act on that conviction will be acting against their conscience. But freedom of conscience is being usurped in various ways.

For example, in Victoria, section 8 of the Abortion Law Reform Act 2008 requires doctors who refuse to provide an abortion to refer their patient to someone who will. Anyone who has a conscientious objection to abortion is required by this law to go against their conscience and provide a pathway for the patient to abort their baby. This example is not strictly related to equality and anti-discrimination but provides a window into the policy mindset which would restrict freedom of conscience at the expense of some other social policy aim.

Examples from overseas jurisdictions will illustrate the potential for adverse development in relation to freedom of conscience and freedom of religion. In 2014, city officials in Idaho dictated that Christian ministers must perform same-sex marriages or face fines.⁴

In New York, a judge “ordered the Giffords (Liberty Ridge Farm) to pay \$3,000 to Ms. Erwin and Jennifer McCarthy for ‘mental pain and suffering,’ in addition to \$10,000 for violating the state’s human rights ordinance.”⁵ This, despite evidence that the complainants already knew in advance that rental of the property for a same-sex wedding would be refused on religious grounds.

In Northern Ireland, a baker was asked to make a cake with a pro-gay marriage political slogan on it, which he refused to do on conscientious grounds. He was taken to a tribunal and then to court, and then lost his appeal, with the court ruling that it was discriminatory for him to refuse to supply the goods for a cause (same-sex marriage) he did not support.⁶

In contrast, Australian TV stations Channel Seven and Channel Ten refused in 2015 to air the ‘Marriage Alliance’ commercials (presumably) because they didn’t support the political message.⁷ In September 2016, a representative from McPherson’s Printing wrote to David Van Gend’s publisher informing them of the decision not to print his book ‘Stealing from A Child – The Injustice of Marriage Equality’

⁴ <https://www.washingtontimes.com/news/2014/oct/20/idaho-citys-ordinance-tells-pastors-to-marry-gays/>

⁵ <https://www.washingtontimes.com/news/2015/jun/28/christian-farm-family-penalized-in-gay-wedding-ref/>

⁶ <http://www.bbc.com/news/uk-northern-ireland-37748681>

⁷ <http://www.smh.com.au/entertainment/tv-and-radio/seven-and-ten-reject-anti-samesex-marriage-advertisement-20150807-giu2f0.html>

saying, "Due to the subject matter and content of your book, unfortunately, I have been instructed by senior management not to proceed with printing this title."⁸

ii. Freedom of Speech

Freedom of speech is a fundamental right. If we cannot 'insult' or 'offend' someone on the basis of their 'protected attribute' we are going to effectively shut down debate in the public square on all controversial issues. Most of us in society encounter offence or insult in various ways and to varying degrees of frequency throughout life. This is a part of living with other human beings who have different ideas and opinions due to their upbringing, background, life experiences, life-stage or world-view.

Even if insulting or offending people is rude, it should not be unlawful. While it may be rude to debate or even reflect on someone's social origin (e.g. growing up in a housing estate) or political opinion (e.g. communist) or sexuality (e.g. homosexual or bisexual) or race (e.g. aboriginality), it should not be illegal.

In particular, the basic moral teachings of the Bible regarding sexuality are now being described by some as offensive and akin to hate speech. There are cases in the UK, where street preachers have been arrested for offending hearers.⁹ Similarly, a café owner in Lancashire was threatened by police with arrest for displaying passages from the Bible on a TV screen, following a complaint from a customer.¹⁰ Adrian Smith from Manchester in England stated his opinion that churches should not be forced to marry same-sex couples on his Facebook page. He was accused by his employer, a housing association, of "gross misconduct" and threatened with dismissal. Because of his long service, he was only demoted but he lost 40% of his salary.¹¹ Smith was eventually vindicated in the County Court.

In Australia, two Presbyterians in Tasmania, Campbell Markham and David Gee, have been dragged before the Anti-Discrimination Commissioner after being accused of offending homosexuals and atheists because of comments on blogs regarding same-sex marriage and atheism.¹²

When the Catholic Archbishop Julian Porteous, also in Tasmania, produced and promoted the booklet, 'Don't Mess With Marriage' in 2015, transgender activist Martine Delaney lodged a complaint arguing that it was insulting and offensive to suggest that marriage was a "heterosexual union between a man and a woman" and that changing the law would endanger a child's upbringing.¹³ A year later, the Anti-Discrimination Commissioner finally decided it is not in the public interest to continue investigating the complaint. More recently, there was the situation of Madeline Sims. Ms Sims was sacked for voicing her support for the 'No Case' in the recent debate over the redefinition of marriage in the Marriage Act.¹⁴

⁸ <http://www.proprint.com.au/News/390585,mcpherson8217s-refuses-to-print-anti-gay-book.aspx>

⁹ <https://christianstogether.net/Publisher/Article.aspx?ID=191402> and <http://www.christian.org.uk/news/exclusive-video-preacher-arrested-by-british-police/>

¹⁰ <http://www.dailymail.co.uk/news/article-2041504/Police-tell-cafe-owner-Stop-showing-Bible-DVDs-arrest-you.html>

¹¹ https://www.hrlaw.co.uk/site/news/news_status_update_on_facebook_smith_v_trafford_housing

¹² <https://www.theaustralian.com.au/business/legal-affairs/preachers-in-free-speech-test-on-atheists-and-gays/news-story/c6039963d5224a7922a8f5cbbd65755e>

¹³ <http://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>

¹⁴ <http://www.abc.net.au/triplej/programs/hack/boss-fires-worker-over-same-sex-marriage-views/8961658>

iii. Freedom of Religion

With the redefinition of marriage under the Marriage Act, religious institutions and their ability to maintain their mission and identity has been severely challenged. Conflicts will emerge that curtail every religious organisation's right "to manifest their religion in practice and teaching." This includes the right to hire staff who believe and live out the teaching and ethos of the religious community. A number of examples can be cited from both Australian and overseas jurisdictions.

In 2010, the Charities Commission for England and Wales removed the charitable status of 19 Catholic adoption and foster agencies because they preferred not to adopt or foster to same-sex couples. This resulted in some of these agencies closing down.¹⁵

In New Zealand, Family First was deregistered by the Charities Board because of its commitment to traditional marriage concluding "it does not advance exclusively charitable purposes".¹⁶

In British Columbia, Trinity Western University required their students and staff to sign a community covenant which included a promise to abstain from sexual activity, unless it was between a husband and wife. This resulted in the British Columbia College of Teachers voting to refuse accreditation to anyone who graduates as a teacher from that institution. This was eventually overturned by the Supreme Court in 2000, and College of Teachers appeal against this decision was dismissed in 2001.¹⁷

However, when the same institution sought to begin a law school it was refused accreditation by the four Provincial Law Societies on the grounds it discriminated on sexuality. While two of those provinces have reversed their decision, the other two are now before the Supreme Court of Canada.¹⁸

In a further case in Canada, Justice Robert Reid in the Ontario Superior Court dismissed an application by Steve Turloukis to remove his children from school classes that went against his religious values saying, they supported "values of inclusion and equality over individual religious accommodation."¹⁹

In Victoria in 2016, the state government failed by just one vote to introduce its so-called 'Inherent Requirements' legislation.²⁰ This would have made it unlawful for religious organisations to discriminate in employment on anything other than an inherent requirement for the job. At the very least, it would have prohibited the requirement of administrative staff to hold and manifest the religious ethos of the school. At worst, it would have prohibited the requirement of all teachers to hold and manifest the religious ethos, effectively destroying the foundation of their mission and identity.²¹

In Victoria, the compulsory 'Safe Schools' program similarly denies parents their religious rights to withdraw their children from teaching that conflicts with their faith concerning sexuality. We believe

¹⁵ <http://www.telegraph.co.uk/news/religion/7952526/Last-Catholic-adoption-agency-faces-closure-after-Charity-Commission-ruling.html>

¹⁶ http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11908182

¹⁷ *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31

¹⁸ <http://vancouver.sun.com/news/national/trinity-western-at-scc>

¹⁹ <https://www.theaustralian.com.au/national-affairs/samesex-education-ruling-an-attack-on-parents-rights/news-story/40cbc380ef06af9ba0ca4a6382d83a4e>

²⁰ <http://www.theage.com.au/victoria/conservative-bloc-votes-down-equal-opportunity-bill-20161206-gt5ajh.html>

²¹ Mark Sneddon, 'Victoria's Equal Opportunity Act: Inherent Requirements and the Problem of Discrimination,' *ABC Religion & Ethics*, 22 Sep. 2016, <http://www.abc.net.au/religion/articles/2016/09/22/4543686.htm> (retrieved 13 Feb. 2018).

parents have the right to rear their children in ways consistent with their religious view as articulated in Article 18.4 of the ICCPR.

CONCLUSION

This submission has put forward a view that it is in the interests of all Australians to allow religious (and non-religious) people to engage fully in the public square. It has been acknowledged that there are increasing tensions caused by competing rights, with particular relevance to this enquiry being the tensions between the rights of religious communities and others.

The continual erosion of religious freedom in an increasingly secularised Australia warrants a watchdog to assert and defend religious freedoms when they come into conflict with other rights in the public square. The suggestion in the Freedom for Faith Submission to establish a National Religious Freedom Commissioner seems appropriate and we would endorse the arguments presented there. However, as the select committee on the exposure draft of the marriage amendment (same-sex marriage) bill unanimously reported: “Overall the evidence supports the need for current protections for religious freedom to be enhanced. This would most appropriately be achieved through the inclusion of “religious belief” in federal anti-discrimination law.”²²

Whatever the legislative mechanism used, there is a recognition that more needs to be done. Moreover, the effectiveness of any proposed Religious Freedom Commissioner would be tethered to the legislative enhancement of religious freedoms protecting freedom of conscience, speech and religion. Indeed, we would urge the Expert Panel to report that the Government should put in place effective legislative protections, and to do so regardless of whether they recommend instituting a Religious Freedom Commissioner.

RECOMMENDATIONS

What religious organisations and individuals really need by way of accommodation in law is as follows:

1. Protect the right of religious organisations or individuals to withhold services or business that might result in them actively or tacitly supporting something that is in conflict with their religious beliefs or conscience.
2. Protect the right to speak freely, even if their religious views are perceived as insulting or offensive.
3. Protect the right of religious organisations to employ staff consistent with their beliefs and ethos, including the freedom to uphold moral standards within religious organisations.
4. Establish a National Religious Freedom Commissioner who will advocate for and be a watchdog of religious freedoms empowered by an appropriate legislative framework.

²² <https://www.theaustralian.com.au/news/inquirer/clash-of-rights-looms-insamesex-marriage-debate/news-story/e3ab746122ca9f5d8fa5788b6f765c52>

A handwritten signature in black ink, appearing to read "Darren Middleton". The signature is fluid and cursive, with a large initial "D" and a long, sweeping tail.

Darren Middleton
Convener, Church and Nation Committee
Presbyterian Church of Victoria