

Submission

on the

Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill

to the

Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill

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1. Introduction

On 30 November 2016, the Senate resolved to establish the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill to inquire into the Commonwealth Government's exposure draft of the *Marriage Amendment (Same-Sex Marriage) Bill*.

FamilyVoice Australia is a national Christian voice, promoting true family values for the benefit of all Australians. Our vision is to see strong families at the heart of a healthy society: where marriage is honoured, human life is respected, families can flourish, Australia's Christian heritage is valued, and fundamental freedoms are enjoyed.

We work with people from all major Christian denominations. We engage with parliamentarians of all political persuasions and are independent of all political parties. We have full-time FamilyVoice representatives in all states.

Submissions are due on 13 January 2017.

2. Terms of reference

The committee will inquire into and report on, by 13 February 2017, the Commonwealth Government's exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill, with particular reference to:

(a) the nature and effect of proposed exemptions for ministers of religion, marriage celebrants and religious bodies and organisations, the extent to which those exemptions prevent encroachment upon religious freedoms, and the Commonwealth Government's justification for the proposed exemptions;

(b) the nature and effect of the proposed amendment to the Sex Discrimination Act 1984 and the Commonwealth Government's justification for it;

(c) potential amendments to improve the effect of the bill and the likelihood of achieving the support of the Senate; and

(d) whether there are to be any consequential amendments, and, if so, the nature and effect of those consequential amendments, and the Commonwealth Government's justification for them.¹

3. The purpose of marriage

The primary purpose of marriage is to provide a stable, enduring, loving environment into which children can be born through the sexual union of a husband and wife and raised by them to become responsible mature adults who can make a positive contribution to society.

Governments have a responsibility to cultivate a social environment conducive to providing a viable future for the nation. To have a viable future, any nation needs to maintain its population and culture. Throughout history, marriage has provided the bedrock of family life that is essential for the survival of society. As goes the family, so goes the nation.

This primary purpose of marriage is reflected by the historic common law recognition now enshrined in the *Marriage Act 1961*: “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.”²

Any attempt at changing this definition, either by legislation or by constitutional change, would undermine the very essence of marriage. Marriage forms the building blocks on which societies and nations are built, predating and preceding them across time and cultures.

The International Covenant on Civil and Political Rights (ICCPR) recognises the essential connection between man-woman marriage and family creation:

*The right of men and women of marriageable age to marry and to found a family shall be recognized.*³

The use of the term “men and women” in this Article is noteworthy because elsewhere in the ICCPR, terms such as “all peoples” or “everyone” are used. The reference here to “men and women” affirms the inherently complementary man-woman nature of marriage.

Ultimately, neither parliamentarians nor the public can change the biological and social reality that is marriage.

4. Freedom of religion

4.1. The nature of freedom of religion

The concept of *freedom of religion* arises from the capacity of humans to order their lives by thought, belief and reason, rather than by instinct. Governments acknowledging the humanity of their citizens will recognise their inalienable right to freedom of thought, belief and opinion, including the right to change religion or belief.

Christians understand the capacity of humans for thought, belief and reason to arise from being made in the image of God. As the *Stanford Encyclopedia of Philosophy* explains:

*One of the chief features of the divine image in human beings, then, is the ability to form beliefs and to acquire knowledge. As Thomas Aquinas puts it, “Since human beings are said to be in the image of God in virtue of their having a nature that includes an intellect, such a nature is most in the image of God in virtue of being most able to imitate God”.*⁴

Freedom of religion includes three distinct elements:

- the freedom to form, hold and change opinions and beliefs without government interference;
- the freedom to manifest those beliefs and opinions in public or private through speech and actions;
- the freedom of parents to raise their children in accordance with their opinions, beliefs and practices.

The International Covenant on Civil and Political Rights recognises these rights in Article 18:

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

4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.⁵*

The Australian Constitution, section 116, enshrines the principle of non-interference by government in religious belief or practice:

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.⁶

Consequently, the Commonwealth Parliament:

- cannot establish a State church;⁷
- cannot enforce religious observance;^{8, 9, 10}
- cannot prohibit religious observance;¹¹ and
- cannot impose a religious test for public office.¹²

The High Court of Australia has confirmed, in its judgement on the "Scientology case", that the legal definition of religion involves both belief and conduct.¹³ Justices Mason and Brennan held that "for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief..."¹⁴ Consequently, freedom of religion in Australia involves both freedom of belief and freedom of conduct giving effect to that belief.

As Augusto Zimmermann, a senior law lecturer at Murdoch University, has stated:

...religion is not an isolated component of life, because religion has broad, holistic implications for the lives of its adherents as a worldview that shapes the way individuals think and act.¹⁵

Likewise, Professor Robert P. George, a philosopher at Princeton University, expresses it this way:

[Religious freedom] is a right that pertains not only to what the believer does in the synagogue, church, or mosque, or in the home at mealtimes or before bed; it is the right to express one's faith in the public as well as private sphere and to act on one's religiously informed convictions about justice and the common good in carrying out the duties of citizenship.¹⁶

4.2. Justifiable limitations

Given that thought, belief and opinion are such fundamental parts of being human, freedom of belief, conscience or religion can be justifiably limited only to prohibit *serious* harm to other individuals or society.

The ICCPR recognises this when it states in Article 18(3) that limitations are justifiable only “to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

Religiously motivated violence, such as the siege of the Lindt Café in Sydney by Man Haron Monis,¹⁷ that threatens public safety and order, is clearly unacceptable and may be justifiably prohibited. Even in the face of harsh mockery, such violence is never justified, as political commentator John Stonestreet aptly noted:

What happened in Paris [with Charlie Hebdo] was despicable. No matter how offensive the magazine's cartoons might have been, nothing justifies murder.¹⁸

Limitations are also justified to protect individuals from serious harm. For example, in some parts of the world, abhorrent religious practices occur. Ritual child sacrifice, perpetrated by animistic witchdoctors on behalf of some people seeking fame and fortune, is still known in parts of sub-Saharan Africa.^{19,20} Female genital mutilation is practised in some Islamic countries and promoted by some Islamic authorities.^{21,22} With increasing migration from countries where these practices are known to occur, Australia must be vigilant prohibiting these harms to individuals.

While it may be asserted that same-sex marriage is a human right, the reality is that it is not, so it is erroneous to assert that it is a justifiable limitation on freedom of religion and conscience. As detailed earlier in this submission, the ICCPR recognises the opposite sex nature of marriage.

If there were any doubt about whether same-sex marriage is a human right, this was put to rest in the United Nations case of *Joslin v New Zealand*.²³ Joslin, a lesbian, had asserted that same-sex marriage was a human right under the ICCPR and that New Zealand was in breach of the covenant. But this was rejected by the UN Human Rights Committee:

In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.²⁴

Same-sex marriage can therefore not be used to justify restricting freedom of religion.

5. Exposure draft Marriage Amendment (Same-Sex Marriage) Bill

5.1. Exemptions generally

Any law which requires exemptions for people of faith is a bad law and should not be enacted in the first place.

Freedom of religion is a fundamental human right in and of itself that must be respected by the legislature. It is a right which should not be defined by the crumbs left over by newly invented pseudo-rights; a stand-alone right to be treated seriously, not merely “tolerated” by the provision of exemptions.

To force people of faith to live by exemption is to place religious freedom in grave danger. What the state provides with one hand it can take away with the other. Indeed, the Greens have called for religious exemptions to be removed altogether from the *Sex Discrimination Act*,²⁵ while the ALP has announced that it proposes to introduce an LGBT Commissioner to act as a watchdog,²⁶ who would

likely call for the removal of religious exemptions. At the state level in Victoria, the ALP recently attempted to weaken religious exemptions and only narrowly failed.²⁷ The vote was tied 19 all in the upper house.²⁸

It is clear therefore that any religious exemptions are likely to be short lived. In any event, antidiscrimination law exemptions have proved to be inadequate and have denied people the right to act according to their conscience informed by their beliefs.

A recent interstate example is the case of *Christian Youth Camps v Cobaw Community Health (Cobaw)* in the Victorian Court of Appeal.²⁹ A brief summary of the case from the Queensland University of Technology follows:

This case involved a consideration of the interaction of the rights to freedom from discrimination and freedom of religion. The respondent (Cobaw) is an organisation concerned with the prevention of youth suicide. The appellant (CYC) had a camp facility established by the Christian Brethren Trust, connected with a church known as the Christian Brethren. The Christian Brethren are opposed to homosexual activity as being against biblical teaching. Cobaw wished to hire a camp facility from the appellants for the use of same sex attracted young people. CYC (by its camp manager) refused.

It was held in the Victorian Civil and Administrative Tribunal (VCAT) that the refusal amounted to unlawful discrimination on the basis of the sexual orientation of those who would be attending the proposed camp. Before the Tribunal, CYC contended that if, contrary to their principal submission, the refusal would otherwise have constituted unlawful discrimination, the exemption provisions in the Equal Opportunity Act 1995 (Vic) (the EO Act) concerning religious freedom were applicable, such that there had been no contravention. These exemptions apply to conduct 'by a body established for religious purposes' (section 75(2)) and to discrimination by a person which is necessary for that person 'to comply with the person's genuine religious beliefs or principles' (section 77). The Tribunal held that neither exemption was applicable.

On appeal to the Court of Appeal, CYC disputed the finding that its refusal was unlawful discrimination, maintaining that there was a fundamental distinction between an objection to 'the syllabus' to be taught at the proposed camp — that is, to beliefs or opinions which would be expressed by Cobaw to those attending the camp — and discrimination on the basis of the sexual orientation of those attending. The Tribunal's decision was upheld by a majority of the Court of Appeal in this judgment.³⁰

In 1998 the Catholic Education Office (CEO) of the Archdiocese of Sydney refused an applicant classification as a teacher because of her "high profile as a co-convenor of the Gay and Lesbian Teachers and Students Association and her public statements on lesbian lifestyles".³¹

The CEO claimed a religious exemption under the *Sex Discrimination Act 1984* on the basis that homosexual behaviour ran contrary to the "doctrines, tenets, beliefs and teachings of the Church", which a teacher would be required to uphold. The matter was decided by the Australian Human Rights Commission (at that time the Human Rights and Equal Opportunity Commission).

The AHRC found against the CEO, not only acting as arbiter of what constituted Catholic teaching, but ruling that Catholic beliefs ran in favour of the complainant, Jacqui Griffin. In its ruling, the AHRC went so far as to say:

If the employment of Ms Griffin would injure the religious susceptibilities of these students and their parents, the injury would be founded on a misconception. Indeed it would be not an injury to their religious susceptibilities but an injury to their prejudices.³²

Such arbitrary use of antidiscrimination provisions demonstrates how severely restricted freedom of religion has become.

A further example is Wesley Mission, which was taken to the Equal Opportunity Division of the Administrative Decisions Tribunal (NSW) in 2008 over their refusal to accept a foster parenting application from a homosexual couple.

In its ruling, the Tribunal effectively positioned itself as an authority on religious beliefs. There was no doubt that Wesley Mission had a shared religious belief that precluded accepting a homosexual couple as foster carers. The Tribunal trampled on the religious freedom of Wesley Mission by purporting to know better than the body concerned (a) what its religion was and (b) what its doctrines were.

The Tribunal's findings that (a) the "religion" of the Wesley Mission was "Christianity" and (b) that "Christianity" has no doctrine that "'monogamous heterosexual partnership within marriage' is both the 'norm and ideal'" are extraordinary.³³

Thankfully the Tribunal's decision was overturned in 2009 by the NSW Administrative Decisions Tribunal Appeal Panel. The Tribunal was ordered to re-determine the case on the basis that the "religion" of the Wesley Mission was "Wesleyanism".³⁴ When the matter was considered again in 2010 by the NSW Administrative Decisions Tribunal, the complaint was finally dismissed.³⁵

Although common sense ultimately prevailed, Wesley Mission was needlessly put through a great deal of trouble and expense in the process.

A more recent example is that of Tasmanian Catholic Archbishop Julian Porteous. Transgender activist and Federal Greens candidate Martine Delaney lodged a complaint against Archbishop Porteous for distributing a booklet in Catholic schools entitled "*Don't Mess With Marriage*."³⁶

Sydney Catholic Archbishop Anthony Fischer said of the complaint:

*Fair-minded readers of the bishops' statement on marriage would see it was a very carefully worded and indeed compassionate statement, not designed to provoke or hurt anyone*³⁷

However, in spite of this, the Tasmanian Anti-Discrimination Commissioner found that the action was in possible breach of the law and the matter proceeded before eventually being withdrawn by the complainant.^{38,39}

Whatever the outcome of the complaint may have been had it not been withdrawn, the mere fact that the complaint was entertained has a stifling effect on freedom of speech and freedom of religion. It sends a strong message to anyone who dares to challenge the state-sanctioned LGBTIQ orthodoxy that they may be hauled before an antidiscrimination tribunal – an experience costly in both time and money.

The Cobaw case, and other similar cases both in Australia and overseas, amount to a conflict between two systems of belief. The complainant, namely the person who initiated the discrimination complaint, considered certain behaviour morally acceptable. The respondent, against whom the complaint was made, believed that behaviour to be morally unacceptable. The effect of the Tribunal's decision, upheld by the Appeal Court, was to impose the complainant's belief system on the respondent, thereby denying the latter's freedom of conscience.

Since the Cobaw organisation was able to book an alternative venue for its camp, its freedom to act in accordance with its beliefs was not compromised by the decision of CYC camp manager to decline the Cobaw organisation's request.

The supposed exemptions for religious beliefs and religious organisations, in this case and most other similar cases, proved to be inadequate and ineffective. They have failed to protect the freedom of conscience of the respondent. Instead, the law has enabled the complainant to trample on the freedom of religion of the respondent.

5.2. Proposed exemptions

The proposed exemptions contained in the draft Bill are far too narrow and fail to protect freedom of religion and conscience. The exemptions only cover ministers, celebrants, religious bodies and organisations.

As highlighted earlier in this submission, Article 18(1) of the ICCPR details that the right of freedom of religion applies to everyone – not simply to ministers, celebrants, religious bodies or organisations. The exemptions in the draft Bill fail to take freedom of religion seriously. Without broader exemptions, religious persecution will be licensed, as has occurred overseas.

Cake bakers

Cake bakers have been a favourite target of homosexual activists. In the UK, Asher's Bakery was punished for failing to bake a cake with a pro-gay marriage message. *The Guardian* reported:

A bakery in Northern Ireland owned by evangelical Christians has lost an appeal to overturn a conviction that found it guilty of discrimination for refusing to bake a pro-gay-marriage themed cake.

The court of appeal in Belfast on Monday upheld a previous judgment last year that Ashers Bakery had discriminated against a customer on the grounds of sexual orientation.

The family-owned firm in the original case was also ordered to pay £500 compensation to the local gay rights activist Gareth Lee, whose legal action was backed by the Equality Commission for Northern Ireland.

Lee had tried to buy a cake depicting the Sesame Street characters Bert and Ernie below the motto 'Support gay marriage' for an event to mark International Day Against Homophobia in 2014.⁴⁰

One gay man wrote a column in *The Telegraph* decrying the decision and standing up for Asher's Bakery:

There are some pretty silly laws on the UK's statute books. But the Court of Appeal in Belfast has today confirmed one that might be the silliest of the lot: if you're a gay man, you're now legally entitled to force a devout Christian to bake you a cake.

I am a gay man. I support equality under the law for people of all sexual and gender inclinations. More to the point, I love cake. Nonetheless, I'm siding with the Christians. This gay plaintiff is wrong; the law is wrong. Nobody should be forced by law to bake anybody else a cake. Ever.⁴¹

A similar cake baking case unfolded in the United States in the state of Oregon:

Aaron and Melissa Klein ran a family bakery for several years until 2013, when a lesbian couple, Rachel and Laurel Bowman-Cryer, whom they had served many times, ordered a

wedding cake. Aaron declined on religious grounds and swiftly found himself the target of a complaint lodged with the Oregon Bureau of Labor, a torrent of social media abuse, and a boycott.

Though the family had hoped to pass on Sweet Cakes by Melissa to their five children, the boycott reduced them to working from their home kitchen and forced Aaron to take a job as a garbage collector.

This spring, labor commissioner Brad Avakian fined the Kleins \$135,000 and ordered the couple "to cease and desist from publishing, circulating, issuing or displaying, or causing to be published ... any communication to the effect that any of the accommodations ... will be refused, withheld from or denied to, or that any discrimination be made against, any person on account of their sexual orientation." In other words, if the Kleins promised to fight the ruling, they could be fined again.⁴²

Commentator Brendan O'Neill has voiced concerns about the targeting of Christian bakeries and the intolerance of the wider gay marriage agenda, as News.com.au reported:

"Here's what freaks me out about gay marriage," he told the audience. "It presents itself as this kind of liberal civil-rightsy issue, but it has this really ugly intolerant streak to it.

"Anyone who opposes gay marriage is demonised, harassed."

O'Neill said he felt there was a real "ugly element" to the debate where people who opposed same-sex marriage were ostracised for having a different opinion and used the recent cake shop cases in the US and the UK as examples.

"I think you really see it in this whole cake shop phenomenon," he said. "This whole thing around the western world where people are going to traditional Christian cake shops and saying to them, **'hey you, stupid Christian, make this cake for me'** and if they don't they call the police. There are equality cases, shops have closed down. It's a 21st Century form of religious persecution. It's horrendous."⁴³ (emphasis added)

Such coercion can be seen as not only breaching freedom of religion and conscience but also as state sanctioning a type of servitude or forced labour, which is prohibited by ICCPR Article 18.

Sadly, cake bakers have not been the only ones targeted.

Wedding venues

Owners of wedding hire venues have also been persecuted for conscientiously objecting. *The Daily Signal* reported of the experience of Cynthia and Robert Gifford, who own a family farm:

The phone call at 8:30 p.m. seemed routine for Cynthia and Robert Gifford—a bride-to-be inquiring about holding a wedding at their home, Liberty Ridge Farm in upstate New York.

Then Cynthia Gifford realized the caller wanted to book their family farm near the village of Schaghticoke for a same-sex wedding. She politely declined.

"We're not hateful people," Gifford said in an interview with *The Daily Signal*, holding back tears. "We just believe that a marriage is between a man and a woman, and we do not want to hold a [same-sex] marriage ceremony here on our family farm because the state tells us we have to do it."

...

Initially, Gifford—a Christian, as is her husband—had no idea the caller was recording their conversation.

That was Sept. 25, 2012. The lesbian couple, Melisa Erwin and Jennifer McCarthy, soon filed a complaint with the New York State Division of Human Rights.

In July, an administrative law judge ruled that by not agreeing to hold the wedding at their home, the Giffords discriminated against the couple, who had their wedding elsewhere. A state human rights commissioner last month fined the Giffords \$10,000 and ordered them to pay the women \$1,500 each.⁴⁴

Similarly, owners of a wedding venue in Iowa were persecuted for their beliefs:

Charged with discriminating against a gay couple, the owners of another Christian family-run business are being forced to shut their doors.

...

Betty and her husband, Richard, are the owners of Görtz Haus Gallery in Grimes, Iowa. In 2002, they purchased the 77-year-old stone church and transformed it into a bistro, flower shop, art gallery and wedding venue.

On August 3, 2013, a gay couple from Des Moines asked to rent Görtz Haus for their wedding.

Because of their Mennonite faith, the Odgaards told the couple they could not host their wedding.

Within 24 hours, the couple filed a discrimination complaint through the Iowa Civil Rights Commission.

"We knew that the business was going to be in trouble almost immediately," Richard, 69, said. "We had to get rid of the wedding business to avoid another complaint and possibly a higher penalty."

The Odgaards never admitted to any discrimination, but agreed to a \$5,000 settlement.

They also returned two non-refundable deposits for couples who, after hearing media reports, didn't want to use their space for their weddings anymore.

"It was just the right thing to do," Richard said.

...

After leaving the wedding business, Görtz Haus went on life support.

...

Betty said the situation drove her into a "really dark depression"—so bad, that she had to seek the help of professionals.

"I'm a melancholy artist and no stranger to depression, but this took me down to the darkest I've ever been before," she said.⁴⁵

Failing to protect religious freedom not only violates the ability of individuals to act according to their conscience but in many cases will cost them the ability to earn a living, another fundamental human right.

Wedding photographers

Wedding photographers have also had their freedom of conscience rights quashed in the US:

the Supreme Court of New Mexico ruled that the First Amendment does not protect a Christian photographer's ability to decline to take pictures of a same-sex commitment ceremony—even when doing so would violate the photographer's deeply held religious beliefs. As Elaine

Huguenin, owner of Elane Photography, explained: "The message a same-sex commitment ceremony communicates is not one I believe."

But New Mexico's highest court, deciding an appeal of the case, ... agreed with the New Mexico Human Rights Commission and ruled against Elane Photography, concluding that neither protections of free speech nor free exercise of religion apply.⁴⁶

A photography company in San Francisco was forced to close its doors after politely refraining to photograph a gay wedding:

Confronted over their decision not to take pictures at same-sex weddings, a Bay Area photography company opted to permanently put on its lens caps and shut its doors, according to a statement posted on the company's website.

Urloved photography, a San Rafael husband-and-wife team, said it had recently referred a San Francisco gay couple to another photographer for their wedding photos because they "have different personal beliefs that we have difficulty with."

"We genuinely felt referring this couple to a photographer who does share their personal beliefs would provide them with the best service for their special day," a statement on urlovedphotography.com reads.

...

The business owners, Nang and Chris Mai, apologized to the couple, then closed up shop after they said they were bombarded with nasty calls and e-mails.

"We have been flooded with hate calls, e-mails and accusations that inaccurately depict our business," the couple wrote. "On top of that we have come to a difficult decision that we will no longer be in the wedding photography business."⁴⁷

In order to limit demonisation, harassment and persecution of conscientious objectors, the exemptions must cover all faith adherents, not simply church leaders.

Religious exemptions should be recognised for any legal person – natural or corporate – who holds a genuine and conscientious belief that some of the protected attributes are morally unacceptable.

A general religious exemption from provisions of the Act should be modelled on the provision in the *Defence Act* for exemption from military service:

(1) The following persons are exempt from service in the Defence Force in time of war...

- (h) persons whose conscientious beliefs do not allow them to participate in war or warlike operations,*
- (i) persons whose conscientious beliefs do not allow them to participate in a particular war or particular warlike operations,⁴⁸*

The current exemptions in the draft Bill should be replaced by a simple provision for exemption from the *Marriage Act 1961*, *Sex Discrimination Act 1984* and any other applicable antidiscrimination law for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the Acts, or with particular provisions of the Acts.

In the case of a complaint, the role of a tribunal or court would then be limited to determining whether the person held conscientious beliefs that did not allow them to comply with the Acts.

This would obviate the need for courts or tribunals to determine such matters as "doctrines", "tenets" or "beliefs" of a religion, matters more theological than judicial, and which

antidiscrimination tribunals have an appalling record of determining. Courts, tribunals and judges are ill-equipped to determine such matters, as Justice Nettle observed in his *Catch the Fire* judgement: "In my view it was calculated to lead to error for a secular tribunal to attempt to assess the theological propriety of what was asserted at the Seminar."⁴⁹ Justice Nettle determined that the Victorian Civil and Administrative Tribunal had erred in nineteen findings.⁵⁰

In the *OV & OW v Wesley Mission* case, the NSW Supreme Court found that the NSW Antidiscrimination Tribunal had wrongly identified the "religion", wrongly determined the question of "doctrinal conformity" and was wrong about "religious susceptibilities".⁵¹

Recommendation

A simple provision for exemption should be added to the Marriage Act 1961, Sex Discrimination Act 1984 and any other applicable antidiscrimination law for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the Acts, or with particular provisions of the Acts.

6. Conclusion

Marriage as an institution recognises biological and social reality. It was not created by statutory law or court ruling. Neither did it come into being by a popular vote. Ultimately, it cannot be redefined by any of those methods either.

In the event that the state takes the Orwellian step of redefining marriage, an exemption to protect freedom of religion and conscience is necessary. Ideally, laws should not be enacted which require exemptions for people to freely practise their faith in the first place.

Current religious exemptions to antidiscrimination laws have proved inadequate, as a number of examples provided highlight. As such, any exemption should be broad so that freedom of religion and conscience are sufficiently protected and persecution is not licensed by the state.

The current wording in the draft Bill – applying only to ministers, celebrants, religious organisations or bodies – is far too narrow. An exemption which recognises freedom of religion and conscience for all, modelled on the provision in section 61A of the *Defence Act*, is necessary to prevent individuals being coerced to act against their consciences.

7. Endnotes

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- 1 [http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Same_Sex_Marriage/Terms_of Reference](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Same_Sex_Marriage/Terms_of_Reference)
- 2 Australasian Legal Information Institute, *Marriage Act 1961*, section 5, http://www.austlii.edu.au/au/legis/cth/consol_act/ma196185/s5.html
- 3 Office of the High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
- 4 "Religion and Science", 3.1 Concord, *Stanford Encyclopedia of Philosophy* (27 May 2010).
- 5 International Covenant on Civil and Political Rights, Article 18: 1-4, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
- 6 *Commonwealth of Australia Constitution Act 1900*, Sec. 116
- 7 Countries that have established a religion include: the Church of England in UK, the Lutheran Church in Denmark, the Eastern Orthodox Church in Greece and the Roman Catholic Church in Argentina
- 8 Religious observance is enforced in Saudi Arabia, including five daily prayers, fasting during Ramadan and the modesty of women's dress under *sharia* law by the religious police, or *mutawwiin*; see "Saudi Arabia Law Enforcement", *Encyclopedia of the Nations* (Illinois: Advameg, 2007–2013)
- 9 Religious observance is enforced in the West Bank: Eric Westervelt, "Police Enforce Ramadan Fasting Rules in West Bank", *NPR* (Washington, DC, 11 October 2007)
- 10 Religious observance is enforced in parts of Indonesia: Jane Perlez, "Spread of Islamic Law in Indonesia Takes Toll on Women", *The New York Times* (New York, 27 June 2006)
- 11 Prohibition of house churches in the People's Republic of China has been reported. See "China—Son of Christian Leader Beaten Unconscious", *Barnabas Fund Prayer Focus Update*, No 145 (November 2008)
- 12 A religious test for public office in Pakistan was imposed on Pakistan-born Daniel Scot, who had to pass an exam on Islam before gaining a lectureship in mathematics at the University of Punjab. See Roslyn Phillips, "Religious Vilification: The Daniel Scot Decision", resource paper in *Light* (Adelaide, May 2005), 8–11
- 13 *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* [1983] HCA 40; (1983) 154 CLR 120
- 14 *Ibid.*, para 17; their judgement was qualified by also holding that "though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion."
- 15 Augusto Zimmermann, "The Secular Challenge to Freedom of Belief", *News Weekly*, (28 February 2015)
- 16 Robert P. George, "What Is Religious Freedom?", Public Discourse, The Witherspoon Institute, 24 July 2013, <http://www.thepublicdiscourse.com/2013/07/10622/>
- 17 Dan Box, "Sydney siege inquest: Lindt Cafe deaths investigated", *The Australian* (29 January 2015): <http://www.theaustralian.com.au/in-depth/sydney-siege/sydney-siege-inquest-lindt-cafe-deaths-investigated/story-fnqxbywy-1227200443586>
- 18 J. Stonestreet, "We Aren't Charlie: The Decline of Satire and Culture", *Breakpoint* (16 Jan 2015), <http://www.breakpoint.org/bpcommentaries/entry/13/26699>
- 19 Sadio Kante, "Mali's human sacrifice - myth or reality?", *BBC News* (20 September 2004)
- 20 Amy Fallon and Amy Corderoy, "Tortured by a witch doctor, saved by Australian surgeons", *Sydney Morning Herald* (12 May 2012)
- 21 Janet Fife-Yeomans and Matthew Benns, "Peddling pages of barbaric savagery: Islamic shops still selling female mutilation books", *Daily Telegraph* (17 November 2014):

<http://www.dailytelegraph.com.au/news/national/peddling-pages-of-barbaric-savagery-islamic-shops-still-selling-female-mutilation-books/story-fnfn0zn5-1227125017909>

²² "Iraq crisis: Islamic State militants order genital mutilation for females in Mosul, says United Nations", *ABC News* (15 September 2014): <http://www.abc.net.au/news/2014-07-25/militants-order-female-genital-mutilation-in-iraq/5622826>

²³ *Joslin v New Zealand*, Human Rights Committee, 17 July 2002, <https://web.archive.org/web/20151121150042/http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/CCPR.C.7.5.D.902.1999.En?Opendocument>

²⁴ *Joslin v New Zealand*, Human Rights Committee, 17 July 2002, para 8.3, <https://web.archive.org/web/20151121150042/http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/CCPR.C.7.5.D.902.1999.En?Opendocument>

²⁵ 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>

²⁶ Jason Tin, "Labor plans to introduce a watchdog for gay and lesbian rights", *News.com.au*, 21 May 2016, <http://www.news.com.au/national/federal-election/labor-plans-to-introduce-a-watchdog-for-gay-and-lesbian-rights/news-story/0b10d024e4ac2aa964b42c9137bccdb4>

²⁷ Australian Associated Press, "Religious exemptions bill defeated in Vic", *News.com.au*, 6 December 2016, <http://www.news.com.au/national/breaking-news/religious-exemptions-bill-defeated-in-vic/news-story/84b538b91c91b6f820b9e0ec85710e13>

²⁸ "Victorian Parliament rejects Andrews' Government's crackdown on religion", *FamilyVoice Australia*, 7 December 2016, <http://www.fava.org.au/news/2016/victorian-parliament-rejects-andrews-s-governmental-s-crackdown-on-religion/>

²⁹ *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014)

³⁰ Australian Centre for Philanthropy and Nonprofit Studies, "Christian Youth Camps Limited & Ors v Cobaw Community Health Service Limited & Ors [2014] VSCA 75", *Queensland University of Technology* (4 June 2014): <https://wiki.qut.edu.au/dosearchsite.action?queryString=Cobaw>

³¹ "Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the ground of sexual preference", *Human Rights and Equal Opportunity Commission, HRC Report No. 6* (1998): http://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/discrimination_sexual_pref.pdf

³² "Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the ground of sexual preference", *Human Rights and Equal Opportunity Commission, HRC Report No. 6* (1998): http://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/discrimination_sexual_pref.pdf

³³ *OV and anor v QZ and anor (No.2)* [2008] NSWADT 115, at 119, 126-128

³⁴ *Members of the Board of the Wesley Mission Council v OV and OW (No 2)* [2009] NSWADTAP 57

³⁵ *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293

³⁶ "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>

³⁷ Robert Hiini, "Move against Archbishop Porteous 'astonishing' and 'alarming': Archbishop Fisher", *The Catholic Weekly*, 14 November 2015, <https://www.catholicweekly.com.au/i-will-not-stay-silent-in-the-face-of-astonishing-and-alarming-move-archbishop-fisher/>

³⁸ Robert Hiini, Anti-discrimination commissioner notifies archbishop of possible breach of the law, *The Catholic Weekly*, 13 November 2015, <https://www.catholicweekly.com.au/anti-discrimination-commissioner-reportedly-finds-archbishop-julian-porteous-in-possible-breach-of-act/>

-
- ³⁹ Andrew Drummond, Same-sex marriage discrimination case ends, News.com.au, 5 May 2016, <http://www.news.com.au/national/breaking-news/antigay-marriage-book-complaint-withdrawn/news-story/d57663aa660ffab8a0c65f90d19c2590>
- ⁴⁰ Henry McDonald, "'Gay cake' row: born-again Christian bakers lose court appeal", *The Guardian*, 24 October 2016, <https://www.theguardian.com/uk-news/2016/oct/24/born-again-christian-ashers-bakery-lose-court-appeal-in-gay-cake-row>
- ⁴¹ Neil Midgley, "As a gay man, I'm horrified that Christian bakers are being forced to surrender their beliefs", *The Telegraph*, 24 October 2016, <http://www.telegraph.co.uk/news/2016/10/24/as-a-gay-man-im-horrified-that-christian-bakers-are-being-forced/>
- ⁴² Steve Weatherbe, "Christian bakers raise \$355,000: were forced to close store after refusing to bake same-sex 'wedding' cake", *LifeSiteNews*, 15 July 2015, <https://www.lifesitenews.com/news/christian-bakers-raise-355000-will-appeal-oregon-discrimination-fine>
- ⁴³ Emily Moulton, "Q&A recap: Same-sex marriage, relevance of royal commissions and corporate tax practices", *News.com.au*, 17 August 2015, <http://www.news.com.au/entertainment/tv/ga-recap-samesex-marriage-relevance-of-royal-commissions-and-corporate-tax-practices/news-story/16f3c96eea1e3315f530e62aa1e2f7ca>
- ⁴⁴ Kelsey Harkness, "Farmers to Lesbian Couple: 'We're Not Hateful People'", *The Daily Signal*, 26 September 2014, <http://dailysignal.com/2014/09/26/farmers-lesbian-couple-hateful-people/>
- ⁴⁵ Kelsey Harkness, "Fearing Another Lawsuit, Christian Business Owners Stopped Hosting All Weddings. Now Their Business Is Dead.", *The Daily Signal*, 19 June 2015, <http://dailysignal.com/2015/06/19/fearing-another-lawsuit-christian-business-owners-stopped-hosting-all-weddings-now-their-business-is-dead/>
- ⁴⁶ Ryan T. Anderson, "Same-Sex Marriage Trumps Religious Liberty in New Mexico", *The Daily Signal*, 22 August 2013, <http://dailysignal.com/2013/08/22/same-sex-marriage-trumps-religious-liberty-in-new-mexico/>
- ⁴⁷ Evan Sernoffsky, "Marin photogs shut business rather than shoot same-sex weddings", *SFGate*, 18 November 2014, <http://www.sfgate.com/news/article/Marin-photographers-shut-business-rather-than-5899471.php>
- ⁴⁸ *Defence Act 1903 (Cth)*, s61A
- ⁴⁹ *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006), para 36: <http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html>
- ⁵⁰ *Catch the Fire Ministries*, paras 38-61: <http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html>
- ⁵¹ *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010), paras 41, 45 & 46, [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2010/155.html?stem=0&synonyms=0&query=title\(Wesley%20\)](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2010/155.html?stem=0&synonyms=0&query=title(Wesley%20))