

Freedom of conscience undermined

Bill Shorten has just said unequivocally that, should a Liberal government introduce exemptions for businesses, allowing them to refuse to provide services for gay weddings, Labor would repeal them.

Michael Safi, The Guardianⁱ

One of the most tangible consequences of changing the definition of marriage is seen in the impact on bakers, photographers, florists, printers and others who are in the business of providing services to weddings.

Numerous cases from jurisdictions where same-sex marriage has been legalised demonstrate the use of anti-discrimination laws to force individuals to provide services for same-sex weddings or face significant fines or other consequences. It was anticipated in a recent federal Senate Inquiry that, in some instances, activists will seek out businesses run by those who, as a matter of conscience, do not wish to participate in same-sex weddings, in order to mount an anti-discrimination case against them.ⁱⁱ

The service providers in each case do not refuse service on the basis of a person's sexual orientation or gender identity; they regularly serve customers irrespective of their identity. Instead, the objection is the specific request to provide services for a same-sex wedding, because they consider it to be a participation in an activity, or communication of a message, with which they disagree.

The quintessential example of this is the case of Barronelle Stutzman, a Washington State florist. Robert Ingersoll had been a friend and regular customer at her florist for around a decade, and she served him without incident. When he asked her to arrange the flowers for his wedding to another man, Mrs Stutzman sat down with him, told him that she loved him, and explained that her Christian beliefs meant that she could not participate in the wedding. She referred him to three nearby florists who would be able to assist. Mrs Stutzman was sued by the Washington State Attorney-General and Mr Ingersoll for discrimination. She lost the case at first instance, and is, at the date of publication, having her appeal heard in the Washington State Supreme Court.

Other examples of people being penalised for declining to participate in same-sex weddings include:

- Cake shop owners Aaron and Melissa Klein, who were ordered to pay US\$135,000 for their refusal to provide a cake for a same-sex wedding.ⁱⁱⁱ They eventually had to shut down their business.
- Jack Philips, who was required to provide "comprehensive staff training," alter company policies and file quarterly compliance reports after declining to bake a cake for a same-sex wedding.^{iv}
- Daniel McArthur, owner of Ashers Bakery in Belfast, who was found to have committed "sexual orientation discrimination" for declining to produce a cake which read: "Support Gay Marriage." Counsel for Mr McArthur argued that it was the message, and not the person, which was problematic for Mr McArthur, and he would have similarly refused the same request from a heterosexual person. He was ordered to pay £500 in damages.^v Following

this, Ashers Bakery was targeted again, this time by an LGBTI activist from London who ordered an engagement cake for a same-sex engagement party online.^{vi}

The Commonwealth Government's Exposure Draft of the *Marriage Amendment (Same-Sex Marriage) Bill*, which was released in anticipation of a plebiscite, offered no protections for the conscience of people in similar situations to those mentioned above. Evidence before a Senate Committee looking into the Exposure Draft demonstrated that the LGBTI community overwhelmingly supports the denial of any such protections being included in legislation to redefine marriage.^{vii} Additionally, Labor has indicated that not only would any conscience protections contained in any marriage amendment legislation be repealed under a future Labor government.^{viii} but it would also appoint a dedicated LGBTI Anti-Discrimination Commissioner to specifically deal with cases of alleged discrimination against LGBTI persons.^{ix}

States should not define the limits of conscience

There are differing views amongst people of faith and others about whether baking cakes, taking photographs or providing other services are "morally neutral" actions when it comes to same-sex weddings^x, but the decision about the bounds of conscience in such cases must be made by the individual and not dictated by the State. Any attempt from a legislative body, an anti-discrimination tribunal or a court to make decisions about individual matters of conscience is a drastic overreach.

Balancing competing human rights

The right to live free from discrimination is a recognised human right, as is freedom of conscience.^{xi} So what happens when two human rights conflict? The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant for Civil and Political Rights^{xii} were adopted by the UN Economic and Social Council in 1984 to provide guidelines for consistent interpretation and application of the principles contained in the ICCPR. Article 36 reads:

When a conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context especial weight should be afforded to the rights from which no derogation may be made under article 4 of the Covenant.

While freedom of conscience and the right to live free from discrimination are both contained in the ICCPR, in determining a priority, it is instructive to note that only freedom of conscience is a right from which no derogation may be made under article 4 of the Covenant. This is why it is important to protect the conscience rights of individuals.

The Siracusa Principles indicate that when rights conflict, the right to the free exercise of conscience should be prioritised. However, in countries where same-sex marriage has been legalised, anti-discrimination laws are being used to give precedence to the right to live free from discrimination. The same could happen in Australia if same-sex marriage is legalised. As a comprehensive report from the Australian Law Reform Commission on rights and freedoms notes:^{xiii}

It is not clear that freedom to manifest religion or belief should extend to refusing to provide, for example, a wedding cake for a same-sex couple. Protecting individuals from

discrimination in ordinary trade and commerce seems a proportionate limitation on freedom of religion.

These comments foreshadowed the Australian Law Reform Commission would support an overriding and undermining of freedom of conscience should same-sex marriage be legalised in Australia.

For these reasons, Australians can be certain that a redefinition of marriage to accommodate the rights of some will threaten the freedoms of all.

ⁱ Safi M. Why Knot? A spirited panel discussion on marriage equality – as it happened. Guardian Australia. 31 March 2016. Available at: <https://www.theguardian.com/australia-news/live/2016/mar/31/why-knot-a-spirited-panel-discussion-on-marriage-equality-live>

ⁱⁱ Parliament of Australia. Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill. Transcript of Public Hearing, 24 January 2017. Available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2F7ab289ba-8a7a-457b-9a15-6eb03d85696b%2F0007%22>

ⁱⁱⁱ Bureau of Labor and Industries. In the matter of: Case Nos. 44-14 & 45-14. Melissa Elaine Klein, dba Sweetcakes by Melissa, Ultimate Findings of Fact. Available at: <https://www.oregon.gov/boli/SiteAssets/pages/press/Sweet%20Cakes%20FO.pdf>

^{iv} *Mullins v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ~ 1-2, 370 P.3d 272 (2015)

^v *Lee v McArthur* [2016] NICA 39

^{vi} Adeogun E. Christian bakery Ashers refuses new ‘gay cake’ order. Premier Christian Radio. 2 May 2017. Available at: <https://www.premierchristianradio.com/News/UK/Christian-bakery-Ashers-refuses-new-gay-cake-order>

^{vii} Parliament of Australia. Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill. Transcript of Public Hearing, 24 January 2017. Available at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2F7ab289ba-8a7a-457b-9a15-6eb03d85696b%2F0007%22>

^{viii} Safi M. Why Knot? A spirited panel discussion on marriage equality – as it happened. Guardian Australia. 31 March 2016. Available at: <https://www.theguardian.com/australia-news/live/2016/mar/31/why-knot-a-spirited-panel-discussion-on-marriage-equality-live>

^{ix} Beech A. Election 2016: Labor plans to appoint discrimination commissioner to ensure LGBTI people ‘feel safer’. ABC News. 21 May 2016. Available at: <http://www.abc.net.au/news/2016-05-21/election-2016-labor-promises-lgbti-discrimination-commissioner/7434660>

^x See, for example, the opinions expressed in: <http://www.biblesociety.org.au/news/would-you-bake-a-cake-for-a-gay-wedding>

^{xi} UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171. Available at: <http://www.refworld.org/docid/3ae6b3aa0.html>

^{xii} United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984)

^{xiii} Australian Law Reform Commission. Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (ALRC Report 129). Available at: https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_129_final_report_.pdf