

MARRIAGE ALLIANCE

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The Expert Panel on Religious Freedom
C/O Department of the Prime Minister and Cabinet
PO Box 6500
Canberra ACT 2600

By email: religiousfreedom@pmc.gov.au

Dear Committee Secretary,

THE EXPERT PANEL ON RELIGIOUS FREEDOM

Marriage Alliance is pleased to have the opportunity to provide a submission to the Expert Panel on Religious Freedom.

Marriage Alliance is an independent alliance bringing together individuals and organisations supporting a common cause. We are one of the four auspicing organisations of the Coalition for Marriage which provided the vehicle for the “No” campaign at the 2017 marriage postal survey.

We exist to provide a voice for the nearly 5 million Australians who voted to retain the man-woman definition of marriage.

Marriage Alliance submits in broad terms that:

- freedom of thought, conscience, religion and belief constitute a “package” of human rights which are recognised as being of primary importance;
- speaking of religious freedom in terms of “exemptions” indicates a misunderstanding of the nature of the right to religious freedom;
- religious freedom is a right afforded to all people, not only to “ministers of religion, religious marriage celebrants and religious bodies and organisations”; and

MARRIAGE ALLIANCE

- the rights of the nearly 5 million Australians who voted for man-woman marriage in the postal plebiscite must be upheld.

Thank you for considering this submission.

Yours sincerely,

Sophie York
Spokeswoman
Marriage Alliance

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Terms of reference

The terms of reference for the inquiry are:

Objective

The Panel shall examine and report on whether Australian law (Commonwealth, State and Territory) adequately protects the human right to freedom of religion.

Scope

In undertaking this Review, the Panel should:

- *Consider the intersections between the enjoyment of the freedom of religion and other human rights.*
- *Have regard to any previous or ongoing reviews or inquiries that it considers relevant.*
- *Consult as widely as it considers necessary.¹*

Submissions are due by 14 February 2018.

The panel is to report its findings to the Prime Minister by 31 March 2018.

About us

Marriage Alliance is an independent alliance bringing together individuals and organisations supporting a common cause. We are one of the four auspicing organisations of the Coalition for Marriage which provided the vehicle for the “No” campaign at the 2017 marriage postal survey.

We exist to provide a voice for the nearly 5 million Australians who voted to retain the man-woman definition of marriage.

Introduction

The scope of this inquiry is broad. Our submission is centred around consequences of the change to the *Marriage Act 1961* and related issues.

During the passage of legislation in late 2017 to enact same-sex marriage, all those who voted, including and especially those who voted to retain marriage as being between a man and a woman during the postal plebiscite were told that consideration of any rights and freedoms would take place at a later inquiry. (We have been advised that a number of those who voted ‘Yes’ voted in the belief that they could safely do so on that basis, that is, that their rights would not be curtailed as a result of voting ‘Yes’.)

Legislation was rushed through parliament and no serious consideration was given to the rights of the nearly 5 million Australians who voted to retain the definition of marriage, except for some very basic and narrow exemptions.

¹ Religious Freedom Review Terms of Reference, <https://www.pmc.gov.au/resource-centre/domestic-policy/religious-freedom-review-terms-reference>

It is therefore imperative that the rights of the millions of Australians who do not support same-sex marriage are taken seriously and not merely paid lip service.

This submission focusses on freedom of religion and belief, being the matter under inquiry by the panel. Having said that, the International Covenant on Civil and Political Rights links freedom of thought, conscience, religion and belief as a package deal, as do the Siracusa Principles. Both documents will be referred to later.

Australia is a signatory to these and other landmark human rights instruments. These instruments impose serious obligations on signatories. Unfortunately, these are not currently reflected in Australian law. This dereliction, coupled with changes to the *Marriage Act 1961*, has and will lead to an environment of increasing encroachment on freedom of religion and belief.

This submission makes a number of recommendations as to how freedom of religion and belief can be better protected.

Our country is at a crossroads moment. The panel can deal with this existential threat to freedom of religion and belief, or it can ignore it and let the problem become further exacerbated.

Religious freedom in Australia

“Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society.”

Mason ACJ & Brennan J - *Church of the New Faith v Commissioner of Pay-Roll Tax*

In order to determine whether and to what extent current legislation fails to adequately protect religious freedoms, it is important to be clear about the breadth of freedoms afforded by the international human rights instruments to which Australia is a party.

International Covenant on Civil and Political Rights

Article 18 of the International Covenant on Civil and Political Rights (**ICCPR**) provides:

- 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.*

CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)

The UN Human Rights Committee² has described the right to freedom of thought, conscience and religion as “far-reaching and profound,” noting that Article 4.2 of the ICCPR provides that the right “cannot be derogated from, even in time of public emergency.”

Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR

The UN Commission on Human Rights³ adopted the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (**Siracusa Principles**), which were formulated at a conference sponsored by non-governmental organisations to achieve consistent interpretation and application of the clauses in the ICCPR which deal with the limitation of rights granted under it⁴.

Article 58 of the Siracusa Principles provides that the “freedom of thought, conscience and religion” is “not derogable under any conditions even for the asserted purpose of preserving the life of the nation.”

The intersection between religious freedom and same-sex marriage

Unlike the right to religious freedom, there is no recognised human right to marry a person of the same sex. The United Nations Human Rights Committee (**UNHRC**) ruled that it could not find a violation of human rights from a state party to the ICCPR “by mere refusal to provide for marriage between homosexual couples”⁵ and a similar ruling was made by the European Court of Human Rights⁶.

In addition to stating that there is no right to same-sex marriage, the UNHRC has also stated that the right to be free from discrimination is not the same thing as receiving equal treatment in all circumstances. It said:

“The enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance... not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”⁷.

As noted above, the ICCPR recognises as “a purpose which is legitimate under the Covenant” both a right to religious freedom and the right to marry a person of the opposite sex, leading to the conclusion that – according to the UNHRC – differential treatment in pursuit of these rights does not amount to discrimination.

For this reason, an attempt to balance the right to religious freedom with a non-existent ‘right’ to same-sex marriage or a right to live free from discrimination in a manner which requires “identical treatment in every instance” is not a necessary or appropriate goal for legislators.

² UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4, available at: <http://www.refworld.org/docid/453883fb22.html> [accessed 4 January 2017]

³ UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, available at: <http://www.refworld.org/docid/4672bc122.html> [accessed 4 January 2017]

⁴ Australian Law Reform Commission, Traditional Rights and Freedoms - Encroachments by Commonwealth Laws, Report No 129 (2015)

⁵ *Ms. Juliet Joslin et al. v New Zealand*, Communication No. 902/1999, U.N. Doc. A/57/40 at 214 (2002)

⁶ *Schalk and Kopf v Austria* (no. 30141/04) and *Chapin and Charpentier v. France* (no. 40183/07); *Schalk and Kopf v Austria* no. 30141/04)

⁷ UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, available at: <http://www.refworld.org/docid/453883fa8.html> [accessed 10 January 2017]

Given that same-sex marriage has now been legislated for, it is incumbent on parliament to protect what are, in fact, inalienable human rights (namely, of religion, belief and conscience).

Religious freedom is a right, not an exemption to anti-discrimination legislation

In light of the breadth and fundamental nature of the right to religious freedom outlined in the ICCPR and associated documents, it is patently incorrect to describe legislative provisions protecting this right and allowing for its exercise as “exemptions” to anti-discrimination legislation.

Religious freedom is a right in itself and, while the ICCPR also recognises the right to “equal and effective protection against discrimination on any ground,”⁸ this right is not afforded the same non-derogable status which attaches to the right to religious freedom. Speaking of religious freedom in terms of “exemptions” to protections against anti-discrimination inverts the relative importance of these rights.

Religious freedom is a right given to all persons

Religious freedom is a human right, which means it is available to all persons irrespective of employment status. As stated in the High Court case of *Church of the New Faith v Commissioner of Pay-Roll Tax* by Mason ACJ and Brennan J:

[Religious freedom] Protection is accorded to preserve the dignity and freedom of each man so that he may adhere to any religion of his choosing or to none. The freedom of religion being equally conferred on all, the variety of religious beliefs which are within the area of legal immunity is not restricted.⁹

The current protections for religious freedom in the *Marriage Act 1961* are afforded only to ministers of religion, religious marriage celebrants and those who work for religious bodies and organisations.¹⁰

To the extent that it provides no protection to those who do not work in these capacities, the current legislation does not adequately prevent encroachments upon religious freedom.

Religious freedom includes, but is not limited to, the freedom to worship

Freedom of religion is not limited to worship but is comprised of both belief and conduct. As High Court judges Mason ACJ and Brennan J put it: “...religion encompasses conduct, no less than belief”.¹¹

Article 18 of the ICCPR describes the right to religious freedom in broad terms, ensuring all people the freedom to manifest religion or belief through individual or collective acts done in public or private. The UN Human Rights Committee¹² has said that this includes the freedom to prepare and distribute religious texts or publications. The ability to prepare and distribute religious publications is already under threat at a state level, as demonstrated by the case of the Catholic Archbishop of Hobart, Archbishop Julian Porteous. This matter will be discussed further below.

⁸ Article 26 of the ICCPR

⁹ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*, 27 October 1983, para 8, <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1983/40.html>

¹⁰ *Marriage Act 1961*, ss 47, 47A & 47B

¹¹ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*, 27 October 1983, para 14, <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1983/40.html>

¹² UN Human Rights Committee (HRC), CCPR General Comment No. 22, see footnote 1

The current protections in the *Marriage Act 1961* only allow for ministers of religion and religious marriage celebrants to refuse to solemnise same-sex marriages, and for religious bodies and organisations only to refuse to make facilities available to, or to provide goods and services for, a same-sex wedding.

These limited protections do not cover the breadth of protections which are required to ensure that a person who is not a minister of religion or religious marriage celebrant remains able to exercise their right to manifest their religious beliefs, including a belief as to the nature and purpose of marriage, collectively or individually, in public or in private.

Objections to same-sex marriage are not solely faith-based

The current “exemptions” for religious ministers, religious marriage celebrants and religious bodies contained in the *Marriage Act 1961* are largely based on an incorrect assumption that the only objections to same-sex marriage are faith-based, and that the interest of people of faith in the marriage discussion is limited to a preservation of their own position.

The grandfathered clause relating to civil marriage celebrants is based on this incorrect assumption. The Attorney-General’s Department explains:

Can new or aspiring marriage celebrants become a religious marriage celebrant?

Persons who are registered as a marriage celebrant after 8 December 2017 and are a minister of religion, will be able to be recognised as a religious marriage celebrant.

Persons who are registered as a marriage celebrant after 8 December 2017 to perform civil ceremonies (and who are not a minister of religion) will not have access to the religious marriage celebrant sub category.¹³

In other words, if you are registered as a civil celebrant by 8 December 2017, the government will continue to permit your freedom of conscience. However, if you are registered after 8 December 2017 then too bad. This displays a staggering ignorance of the nature of freedom conscience. Freedom of conscience is a timeless and universal human right. It is not a right that can be extinguished at some arbitrary date. Nor is it a right which can be granted to some categories of people and not to others – universal human rights apply universally.

Recommendation 1

That Parliament enshrine civil marriage celebrants’ conscience rights as permanent and timeless.

¹³ Marriage celebrants programme, Attorney-General’s Department, December 2017, <https://www.ag.gov.au/FamiliesAndMarriage/Marriage/Documents/Fact-Sheet-New-subcategory-of-religious-marriage-celebrant.pdf>

Religious freedom must be protected beyond the event of a same-sex wedding

The protection provided in the *Marriage Act 1961* is limited only to the circumstances of a wedding ceremony between two people of the same-sex (and then only very narrowly) and does not address broader religious freedom issues in a society which permits same-sex marriage.

As discussed in the next section, consequences of the redefinition of marriage extend to education, employment, trade and commerce, freedom of speech and other areas. Protections for religious freedom are necessary in these areas as well.

Threats to religious freedom

There have already been examples in Australia where the religious freedom of an individual or group of people has been restricted or threatened because of their views on same-sex marriage.

Threats to religious freedom in relation to education

Article 18(4) of the ICCPR includes the freedom of parents “to ensure the religious and moral education of their children in conformity with their own convictions.” This freedom is threatened by the redefinition of marriage.

The Safe Schools program will shortly become compulsory in Victorian public secondary schools and is used in many schools around the country. Parents are not required to consent, or even to be notified, that their child’s school has adopted the program. The Departments of Education in New South Wales and Queensland refuse to publish lists of participating schools. This is clearly in conflict with a parent’s right to ensure the religious and moral education of their children in conformity with their own convictions, provided for by the ICCPR.

The Safe Schools program teaches, among other things, that sexual activity between people of the same sex is normal, which is contrary to the teachings of major faiths including Christianity, Judaism and Islam.

In countries where same-sex marriage has been legalised, education departments have made programs similar to Safe Schools compulsory, because once a law was enacted that deemed homosexual marriage to be “equal” to heterosexual marriage, sex education was changed to also make “equal” all forms of sexual activity.

Ten years after same-sex marriage was legalised in Ontario, Canada, complex sex education was made compulsory in all schools, including Catholic schools¹⁴.

In one case regarding the inclusion of picture books introducing same-sex marriages as learning materials for the Kindergarten and Year One students, the Supreme Court of Canada said that not having the books available risked “trumping a broader tolerance program and denying certain children the chance to have their families accorded equal recognition and respect in the public school system”¹⁵. In response to an argument that the material was not age-appropriate, the Court responded that “tolerance is always age appropriate.”

¹⁴ Leslie, K. (2015). Ontario’s new sex ed curriculum will teach consent in Grade 2. *Global News*. Retrieved from <http://globalnews.ca/news/1844927/ontario-revises-sex-education-curriculum/> [accessed 10 January 2017]

¹⁵ *Chamberlain v. Surrey School District No. 36* [2002] 4 SCR 710

At the end of 2016, parent Steve Turloukis lost the right to remove his children from classes which presented homosexual sexual activity as normal. The court acknowledged that this infringed upon his right to religious freedom, but prioritised the policies of the Board of Education over his beliefs¹⁶. An appeal court subsequently upheld this ruling.¹⁷

It is important to understand that sex education for children by school authorities is not (or ought not be) about sexual techniques or sexual activity. Sex education is about informing schoolchildren of the biological aspects of sex to do with the corresponding biology of male and female bodies, including those components which are procreative. It informs, objectively demystifies and provides a respectful context for understanding human biological development and purpose.

Any sexual education which proposes the inculcation of sexual techniques or sexual activity, without moral or religious context or boundaries, becomes a matter which falls within the exclusive purview of parents.

Presently there is no protection provided for the rights of parents over the education of their children in relation to sexual activity. Commonwealth legislation fails to prevent encroachment upon religious freedom in this respect.

Recommendation 2

That Parliament enact legislation to recognise the right of parents to educate their children in accordance with their beliefs.

Threats to religious freedom – case studies

In Australia, there have been numerous cases of people and businesses being persecuted for their views around marriage.

During the postal plebiscite in 2017, a teenaged Christian from Canberra, named Madeline, was fired from her job with a party business for posting a profile picture on Facebook with the message “It’s OK to vote No”.¹⁸

Sydney-based GP Pansy Lai, who appeared in a Coalition for Marriage TV advertisement, was physically threatened and a petition sought to destroy her ability to earn a living by calling for her deregistration as a medical practitioner.¹⁹

Also in 2017, IBM and its managing partner Mark Allaby were targeted by same-sex marriage activists due to his role on the board of the Lachlan Macquarie Institute, an internship program for young Christians.

¹⁶ *E.T. v. Hamilton-Wentworth District School Board*, 2016 ONSC 7313

¹⁷ “‘No evidence’ Hamilton school board violated dad’s religious freedom over sex ed.: judge”, CBC News, 26 November 2017, <http://www.cbc.ca/news/canada/hamilton/hamilton-school-board-steve-pourloukis-appeal-religion-1.4420440>

¹⁸ Joe Kelly, “Same-sex marriage scandal: job lost over No”, *The Australian*, 20 September 2017, <https://www.theaustralian.com.au/news/nation/ssm-scandal-job-lost-over-no-vote/news-story/ebbb05e754f8d554f0fee31051053c3f>

¹⁹ Lily Mayers and Ky Chow, Same-sex marriage survey: Petition to deregister Pansy Lai, doctor in No campaign ad, taken down, *ABC News*, 4 September 2017, <http://www.abc.net.au/news/2017-09-04/same-sex-marriage-petition-against-doctor-pansy-lai-taken-down/8869260>

And it wasn't the first time Allaby had been pressured to resign from a role. In 2016, he was forced to step down from the board of the Australian Christian Lobby, and eventually left his employment at PricewaterhouseCoopers, due to a similar campaign by same-sex marriage activists.²⁰

In 2016, a Northern Territory teacher was threatened with disciplinary action for comments he posted on Facebook in his own time which were opposed to same-sex marriage.²¹

Also in 2016, an Adelaide university student was suspended for offering to pray for a student stressed about her workload and for later stating his view regarding homosexuality. Despite saying that he would treat a gay person kindly but didn't agree with their choice, he was ordered to undergo "re-education". The student subsequently sought legal advice and the allegations against him were withdrawn.²²

Ruth Tinkle wrote a letter to her local newspaper objecting to what she believed to be was the newspaper's "active promotion" of homosexuality in 2015. A copy of her letter was posted on Facebook, and people were urged to harass the Lobethal bakery where she worked by asking for rainbow cakes to be baked.²³

Marriage Alliance's *Consequences: Changing the law on marriage affects everyone* details a number of other examples. One of the most high profile campaigns against a company was that experienced by Coopers Brewery, which did not even initially take a position on the issue of marriage but merely hosted a debate:

In March 2017, the Bible Society of Australia released the first video in its Keeping It Light series. The video series sought to feature respectful discussions between people holding opposing views on key issues in an attempt to demonstrate that a 'light' conversation could be had even over serious topics. The first video featured two members of federal parliament, Andrew Hastie and Tim Wilson, discussing same-sex marriage over a Coopers beer. The Coopers Brewery also printed commemorative beer cans for the Bible Society's 200th anniversary. A social media storm ensued, with LGBTI activists calling for a boycott of Coopers Brewery for its association with the Bible Society. A number of bars responded, announcing that they would no longer stock the Coopers brand. The boycott came despite previous support from Coopers for events such as Adelaide's annual Feast Festival, a fortnight-long LGBTI-pride festival. The pressure was too much for Coopers. Its owners asked the Bible Society to take the video down, released a video of apology, withdrew the commemorative beer cans from circulation, and signed up as corporate supporters of Australian Marriage Equality.²⁴

Melbourne IT specialist Lee Jones and transgender Australian Defence Force officer Catherine McGregor have also been targeted:

²⁰ "IBM: 'No comment' on whether employees can be involved with religious groups outside of work", Marriage Alliance, 23 March 2017, http://www.marriagealliance.com.au/ibm_no_comment_on_whether_employees_can_be_involved_with_religious_groups_outside_of_work

²¹ <https://www.theaustralian.com.au/news/nation/christians-under-siege-religious-freedom-inquiry-hears/news-story/7fd9b95abf53553556cb373fe8b64aec>

²² Rebecca Urban, "Christian under siege, religious freedom inquiry hears", *The Australian*, 6 May 2017, <https://www.theaustralian.com.au/news/nation/christians-under-siege-religious-freedom-inquiry-hears/news-story/7fd9b95abf53553556cb373fe8b64aec>

²³ Brett Williamson, "Lobethal Bakery faces customer boycott after anti-gay and lesbian letter to editor in local paper", *ABC News*, 30 July 2015, <http://www.abc.net.au/news/2015-07-30/lobethal-bakery-face-boycott-after-anti-gay-stance-by-staffer/6659594>

²⁴ *Consequences: Changing the law on marriage affects everyone*, https://d3n8a8pro7vhmx.cloudfront.net/marriage/pages/1839/attachments/original/1505496213/Consequences-Changing_the_Law_on_Marriage_Affects_Everyone.pdf?1505496213

Melbourne IT specialist Lee Jones was general manager of a company which was contracted to work on the Safe Schools program. Asked his opinion of the program in a staff meeting, Jones said that while he was happy to work on the program, he wouldn't want his own children exposed to some of its more explicit material. His comments were reported to the company owners and he was dismissed for creating an "unsafe work environment."

Even those who themselves identify as LGBTI are not immune from pressure from the LGBTI lobby. Transgender Defence Force captain Catherine McGregor was sacked from advocacy group Kaleidoscope Australia for expressing concerns about extreme LGBTI sex education and gender theory in a News Limited publication.²⁵

Daily Telegraph columnist Miranda Devine wrote of the experience of a Christian hairdresser immediately following the same-sex survey result:

WITHIN hours of the same-sex marriage announcement on Wednesday, an outspoken No voter who owns a beauty salon in Perth was floored by a gay wedding request.

Belinda received a booking inquiry on her salon's Facebook page from gay couple Brad and Chris for "a full body wax to make our honeymoon extra special".

"My partner Chris and I have started planning our big day for Jan now the vote thing is over, So excited!"

Belinda, who is afraid to use her real name, is certain she is being trolled by gay activists.

"It's not genuine. They know I'm an active No voter and they think they can goad me..."

"Are they going to turn up at the shop tomorrow? Where do I stand now if there are people out there deliberately trying to force me to participate in gay weddings?"

Belinda says her Catholic faith prevents her from endorsing a gay wedding.

"But I've been in business 15 years and I have heaps of gay clients. I have no problem with gay people but I need a safeguard from crazy people."²⁶

The environment for conscientious objectors will become more and more precarious if their freedoms are not protected in legislation.

Recommendation 3

That Parliament enact legislation to uphold freedom of thought, conscience and religion (article 18), and the related freedoms of expression (article 19) and association (article 21).

²⁵ *Consequences: Changing the law on marriage affects everyone*, [https://d3n8a8pro7vhm.cloudfront.net/marriage/pages/1839/attachments/original/1505496213/Consequences-
Changing_the_Law_on_Marriage_Affects_Everyone.pdf?1505496213](https://d3n8a8pro7vhm.cloudfront.net/marriage/pages/1839/attachments/original/1505496213/Consequences-Changing_the_Law_on_Marriage_Affects_Everyone.pdf?1505496213)

²⁶ Miranda Devine, "Yes vote means a new minority needs protection", Daily Telegraph, 18 November 2017, <https://www.dailytelegraph.com.au/rendezview/yes-vote-means-a-new-minority-needs-protection/news-story/3ae65b7f6e1093222c5dcfea18b58bbe>

Threats to religious freedom posed by state and territory anti-discrimination legislation

In 2015, the Australian Catholic Bishops issued a pastoral letter titled “Don’t Mess with Marriage,” which was distributed to, amongst others, parents of children in Catholic schools around Australia. Rodney Croome, at the time the national director for Australian Marriage Equality, encouraged complaints to be made to the then-Tasmanian Anti-Discrimination Tribunal, because of the broad nature of the anti-discrimination provisions in that state²⁷.

The Catholic Archbishop of Hobart, Archbishop Julian Porteous, and every Catholic Bishop in Australia were told that they had a case to answer before the Tasmanian Anti-Discrimination Commission. The matter was eventually discontinued at the request of the complainant, but the law in Tasmania which allowed for this to occur remains, and the “exemptions” provided by Commonwealth legislation do not address this, despite the UN Human Rights Committee stating²⁸ that the freedom of religion includes the distribution of religious publications.

In Victoria, it was recently proposed that an “inherent requirement” test be placed upon faith-based schools and other institutions, requiring the institution to demonstrate a nexus between a person’s role and their profession of a particular faith. Had the legislation passed, it would have meant that the State (through its anti-discrimination tribunals), and not the institution itself, would be given the ability to determine the extent to which employing people of faith was necessary to maintain the ethos of the particular religious institution. This would have been a dramatic overreach by the State, and it would not have been addressed by any Commonwealth legislation.

In not addressing the impact of state anti-discrimination laws on religious freedom, the amendments to the *Marriage Act 1961* failed to prevent an encroachment on religious freedom in this respect.

Recommendation 4

That Commonwealth legislation protecting freedom of thought, conscience and religion and belief cover the field so that state anti-discrimination laws do not violate these freedoms.

Threats to religious freedom posed by financial coercion

Groups such as the National Association of Community Legal Centres²⁹ and the Australian Council of Human Rights Agencies³⁰ have proposed that the tax-exempt status of churches and other institutions be linked to their approval of same-sex marriage. This demonstrates that there are ways other than a direct restriction on teaching or practice, to encroach upon the religious freedom of individuals and groups.

The likelihood of a group having its charity status targeted is not merely hypothetical. Following the legalisation of same-sex marriage in New Zealand, family group Family First NZ had its charity status

²⁷ Australian Marriage Equality. AME Media Release: Gay students at risk from denigration. Educators who allow distribution violate duty of care. 24 June 2015. Available at: <https://www.australianmarriageequality.org/2015/06/24/media-release-church-school-marriage-booklet-likely-violates-anti-bias-law/>

²⁸ UN Human Rights Committee (HRC), CCPR General Comment No. 22, see footnote 1

²⁹ National Association of Community Legal Centres. Submission to the Senate Legal and Constitutional Affairs Committee into the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012*, 2012. Available at: <https://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx> [accessed 10 January 2017]

³⁰ Australian Council of Human Rights Agencies. Submission to the Senate Legal and Constitutional Affairs Committee into the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012*, 2012. Available at: <https://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx> [accessed 4 January 2017]

revoked.³¹ Family First NZ's position on the issue had not changed, but rather the board's view of the organisation had. However, that did not prevent it from losing its status.

Given that there is nothing contained in current Commonwealth legislation which would prevent this from occurring, it fails to protect religious freedom in this respect.

As Australians were repeatedly promised throughout the same-sex marriage postal survey that there would be no adverse consequences to changing the definition of marriage, it is only appropriate that anti-detriment legislation be enacted.

Recommendation 5

Anti-detriment provisions be enacted to protect organisations from discriminatory government treatment, for example with respect to funding or charity status, due to their relevant marriage belief.

Threats to religious freedom posed by the labelling of views as “extreme”

In Australia, there is a growing tendency which labels views supporting a man-woman definition of marriage as “extreme” or “fringe,” with consequences for those who hold them.

For example, the contracted printer for a book which provided child-centred discussion of the consequences of redefining marriage declined to print the book days before its scheduled launch “due to the subject matter and content.”³²

In the United Kingdom, where same-sex marriage has been legal for some years, we are seeing this idea manifest in more troubling circumstances. For example, a couple was denied the ability to adopt the two children they had been fostering because they had expressed the view that the children needed a mother and a father, a view which the social worker responsible for the case deemed couple be “detrimental to the long term needs of the children.”³³

Additionally, the Independent Reviewer of Terrorism Legislation appointed by the UK Government, recently warned that proposed counter-extremism laws, which could define ‘extremism’ as anything contrary to British values (including the value of ‘tolerance’) could see restrictions such as a ban from the use of social media and a restriction on the right to association be imposed on “people who are miles away from being terrorists, but may just practise religion in a conservative way.”³⁴

His warnings were confirmed when, speaking about “anti-liberal values,” Dame Louise Casey, the UK Government’s integration tsar, told a House of Commons’ Communities and Local Government Select Committee³⁵:

³¹ https://www.mercatornet.com/family_edge/view/promoting-the-traditional-family-is-not-charitable-nz-group-told/19835

³² Australian Marriage Forum. Media Release: Unbelievable! Commercial printer acts as censor; bans book against same-sex ‘marriage’. 23 September 2016. Available at: <http://australianmarriage.org/media-release-censored-opusgroup-refuses-print-dr-van-gends-book/> [accessed 10 January 2017]

³³ Chaplain, C. (2016). Christian couple blocked from adopting foster children amid 'gay parents' row. *Evening Standard*. Retrieved from <http://www.standard.co.uk/news/uk/christian-couple-blocked-from-adopting-foster-children-amid-gay-parents-row-a3388456.html>

³⁴ Ley S. (Presenter). (2016, December 30). Interview with Independent Reviewer of Terrorism Legislation, David Anderson QC [Radio broadcast]. In *World at One*. United Kingdom: BBC Radio Four. Available at: <http://www.bbc.co.uk/programmes/b085hs88>. [accessed 10 January 2017]

³⁵ Sculthorpe, T. (2017). Religious extremists ARE infiltrating other schools in the same way as in the Trojan Horse scandal, integration tsar Louise Casey warns MPs. *Daily Mail Australia*. Retrieved from: <http://www.dailymail.co.uk/news/article-4102908/Religious-extremists-infiltrating-schools-way-Trojan-Horse-scandal-integration-tsar-Louise-Casey-warns-MPs.html#ixzz4VY2JL6e4> [accessed 12 January 2017]

“it is not OK for Catholic schools to be homophobic and anti-gay marriage. That is not OK either—it is not how we bring children up in this country... “It is often veiled as religious conservatism, and I have a problem with the expression ‘religious conservatism’, because often it can be anti-equalities. We have got to be careful that people can choose, obviously, to live the lives that they want to live, but that they cannot condemn others for living differently.”

Her words send an ominous warning that belief in marriage being between a man and a woman will be likened to extremism in the future and punished accordingly. Nobody should be condemned or penalised for living and believing differently to Dame Louise Casey’s views. Society is a shared space.

Threats to religious freedom posed by repeal of existing protections

Just prior to the federal election in 2016, Opposition Leader Bill Shorten attended a forum where he was asked about providing protection for the religious freedom of wedding service providers such as bakers, photographers and florists who did not wish to participate in a same-sex wedding.

While current legislation does not contain any such protection, Mr Shorten committed a future Labor government to repealing any accommodation even if it were to be provided³⁶. This proposition expressed by Mr Shorten has also been articulated by the Australian Law Reform Commission which also proposed that there be no legal protection for the religious freedom of wedding service providers, calling the denial a “proportionate limitation on freedom of religion.”³⁷

Additionally, in submissions to a 2012 inquiry into anti-discrimination laws, organisations such as the ACT Human Rights Commissioner³⁸, the Public Interest Advocacy Centre³⁹ and the Women’s Electoral Lobby Australia⁴⁰ all recommended review periods and/or sunset clauses for any “exemptions” for religious belief which would originally be provided under anti-discrimination laws.

These comments demonstrate the imperative for a stand-alone act that protects religious freedom, rather than simply a broadening of exemptions (which can be easily removed).

Conclusion

Freedom of thought, conscience, and religion and belief are fundamental human rights protected by the ICCPR. These are rights which protect all – believers and non-believers alike. They are certainly not restricted to those behind the pulpit, but extend to those in the pews and to those of no faith.

In light of real threats to the freedom of average Australians – not just ministers of religion – it is clear that current legislation falls short in providing adequate protection.

³⁶ Karp, P. (2016). Shorten: Labor won't change discrimination laws to please same-sex marriage opponents. *The Guardian*. Retrieved from <https://www.theguardian.com/australia-news/2016/mar/31/shorten-labor-wont-change-discrimination-laws-to-please-gay-marriage-opponents> [accessed 4 January 2017]

³⁷ Australian Law Reform Commission (2015), see footnote 3

³⁸ ACT Human Rights & Discrimination Commissioner. Submission to the Senate Legal and Constitutional Affairs Committee into the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012*, 2012. Available at: <https://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx> [accessed 4 January 2017]

³⁹ PIAC. Submission to the Senate Legal and Constitutional Affairs Committee into the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012*, 2012. Available at: <https://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx> [accessed 4 January 2017]

⁴⁰ Women’s Electoral Lobby Australia. Submission to the Senate Legal and Constitutional Affairs Committee into the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012*, 2012. Available at: <https://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx> [accessed 4 January 2017]

The rights of millions of Australian to freedom of thought, conscience, religion and belief must be upheld. Wherever the ICCPR article 18 freedoms come into conflict with same-sex marriage, the article 18 freedoms must always take precedence due to their non-derogable nature.

Same-sex marriage can therefore never be used as a justification for violating these human rights, and it is a furphy to suggest that there is to be a balancing act between freedom of religion and conscience on the one hand and same-sex marriage on the other.

There are a number of activities which are permitted by law in Australia but which do not require condoning nor participation by others. Gambling, the consumption of alcohol and now, same-sex marriage, are examples.

Freedom of religion and conscience are integral to a free society. In an environment that is increasingly hostile to basic freedoms, it is imperative that parliament enacts legislation to protect these rights.

Australians were repeatedly promised during the postal survey that there would be no adverse consequences to redefining marriage, that it was all upside and no downside.

The integrity of the relationship between the Australian people and their democratic representatives is now pending.

Parliament must now follow through and fulfil what was promised.