



# Submission to Religious Freedom Review

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## 1. Introduction

- 1.1. Religious freedom is a cornerstone freedom in our society and our current understanding of the right to free speech arose initially from an agreement that people should be able to believe and worship in their own way.
- 1.2. Your inquiry was formed in response to concerns that amendments to the Marriage Act might impinge on the free exercise of religion. We invite the inquiry to go beyond that position. There are areas where religious freedom needs to be protected that have nothing to do with same sex marriage.
- 1.3. While the threat to freedom of religion in the Marriage Act is so far theoretical, and based on experience overseas rather than here, there are current and real threats to religious liberty under various state acts of parliament.
- 1.4. The Human Rights Acts of Tasmania, Victoria and New South Wales have all been used to discriminate against people based on their religious belief, with varying levels of success.
- 1.5. Further, what is effectively anti-blasphemy law has been implemented in a number of states under the guise of anti-vilification legislation, most recently in the ACT, and in a number of states original anti-blasphemy legislation still subsists, although never invoked in modern times. While anti-vilification legislation may arguably be justified on the basis of biologically fixed physical characteristics such as race and gender, there is no justification for extending it to protect a system of belief.
- 1.6. Blasphemy should not be illegal in Australia as it affords a protection from criticism of religious thought. Just as the religious should have freedom to practice their religion and express their beliefs, others should also have the right to criticise those beliefs.
- 1.7. This submission therefore recommends that:
  1. ***The Commonwealth government legislate to ensure that religious freedom is protected uniformly across Australia. This could be done by uniform legislation after agreement between the states, or using the Foreign Affairs power and the international human rights instruments that Australia has ratified.***
  2. ***That complaints of religious vilification or discrimination should not be heard by a non-judicial tribunal and must be commenced in a court.***
  3. ***All blasphemy laws should be repealed so that any person can criticise any organisation, or person, on the basis of their theology, ethics and morality, or their practice. This includes repealing or overriding the inclusion of religion in various state discrimination acts as well as in the Victorian Racial and Religious Tolerance Act.***
  4. ***It should be recognised as a right that religious institutions can teach and practice in line with their theology in the widest range of cases, but certainly in the case of sexual relations.***
  5. ***Religious institutions should be able to hire employees who align with their practices and beliefs, and reject those who don't, as a consequence of, and in furtherance of, their right to religious freedom.***
  6. ***Religious adherents, not just clergy, should be able to express opinions on the basis of their understanding of the theology, ethics and morality of their chosen religion, without penalty.***
  7. ***All citizens, whether religious or not, should be guaranteed the right to withhold their commercial services on whatever basis they choose. This should not extend to the provision of products.***

## 2. Why religious freedom is important

- 2.1. Religious freedom is widely recognised as a right in the European world. This follows from an intense period during and following the Protestant Reformation when religious conflict was widespread, including in England. Church and state were intertwined, and a change in a ruling hierarchy could lead to religious discrimination when the new rulers were from a different denomination to those displaced.
- 2.2. Over time a truce was effectively declared, such that, even when a church was established in a country, individuals were still free to believe and worship in their own way. When Australia was settled, English law, including the *Act of Uniformity*, and the *Test Acts*, discriminated against Roman Catholics and Protestants. The Church of England continues to be the established church in England.
- 2.3. The founders of Australia were concerned to ensure religious freedom, including banning the establishment of any religion, and they were so concerned that they cemented it into the constitution.
- 2.4. Religious freedom is often listed alongside other rights, such as freedom of belief and conscience, making it similar to, but separate from, them. We contend that it holds a stronger position than the individual rights, with respect to the power the state might exercise.
- 2.5. Religious belief deals with a deeply held view of reality, and human relationships and obligation within that reality. It is systematic, and is transmitted through a community of believers, generally over a long period of time. For believers it goes to the essence of their being.
- 2.6. Governments have a right to moderate individual rights, but this has to be justified. In the case of religious rights the onus rests even more strongly on the government to justify its actions than it does on individual rights. This does not amount to an absolute prohibition on governments restricting religious rights, but it should make them more than usually cautious.
- 2.7. Historically freedom of religious belief predates the idea that there is a general right to free speech and belief. Allowing for differences of opinion on a matter as fundamental as the nature of God, led to a widespread understanding that all fields ought to be open to free dispute. The Protestant Reformation, with its emphasis on the individual, and the individual's right to read scripture and determine their own relationship to God, added to the spread of the idea that speech must be free.
- 2.8. The general arguments in favour of free speech have been touched-on by many other submissions, but religious freedom adds another dimension to these.
- 2.9. Religion is a group activity, and an adherent participates in a group which systematically imparts knowledge and understanding to members of that group. Religious freedom involves the protection of the proper independence of religious organisations within society, able to operate without onerous control by the State.
- 2.10. Religious organisations have much wisdom on moral and human issues to offer our society. A difference of opinion that arises only from one person's experience is in most cases likely to be fairly shallow. But if that opinion arises from training and practice within a tradition it is much more likely to be well-founded. Religious practice ensures that, particularly in questions of ethics and morality, society will be provided with a range of well-founded, systematic options from which to negotiate an outcome.
- 2.11. The obverse of this is that, while some religious belief may seem odd to modern day secularists, it should be given the benefit of the doubt because it has stood the test of time. There are inevitable fashions in ideas, and religious beliefs are one way not to be captured by recent trends. (Religious traditions will sometimes have encountered these ideas in earlier eras, and have a long history of reflection on them).

### 3. Current situation in Australia

- 3.1. Apart from S116, religious freedoms are generally dealt with by state legislation. We do not have the resources to provide an exhaustive analysis of the various pieces of legislation but note the following.

### 4. Section 116

- 4.1. Section 116 provides:

*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.<sup>i</sup>*

- 4.2. While this is stronger protection than is given to any other form of belief in the constitution, it is still relatively weak. The High Court has interpreted it very narrowly, so that it has very limited application.

### 5. State Legislation

- 5.1. Each of the states has legislation which prevents discrimination on the basis of some form of religious belief or activity. In the case of New South Wales it is limited to “ethno-religious origin”<sup>ii</sup>. In the case of the others it is “religious...conviction” (ACT<sup>iii</sup>, WA<sup>iv</sup>) “religious belief or activity” (NT<sup>v</sup>, Qld<sup>vi</sup>, Vic<sup>vii</sup>), “religious appearance or dress” (SA<sup>viii</sup>), “religious activity” (Tas<sup>ix</sup>). Victoria also has the Racial and Religious Tolerance Act 2001 which makes illegal conduct which “...incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons” on the basis of “religious belief or activity”<sup>x</sup>. The ACT and Queensland legislations also have these provisions.
- 5.2. The effect of these laws is not to guarantee the right to express a religious opinion, but merely that someone who has these opinions should not be discriminated against.
- 5.3. Where they prevent “hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the ground of...religious conviction...” they effectively act as a blasphemy law.
- 5.4. Australia arguably has some existing blasphemy laws inherited through the common law, which would prevent criticism of the Anglican Church. Some states may also still have the Blasphemy Act of 1697 in force, although it has been repealed in the Commonwealth, Qld, WA and Tas.

### 6. Problems with state legislation

- 6.1. The first problem is that the differing state legislations, coupled with the almost universal coverage of the Internet, make it likely that any act of “vilification” or “blasphemy” will occur in some way in all states of Australia because it may either be recorded or published to the Internet, and then downloaded and viewed anywhere.
- 6.2. In defamation law a litigant can sue in any place where a publication is downloaded and viewed (*Gutnick v Dow Jones*). This general position appears has been adopted with respect to the anti-discrimination act in New South Wales in the case of *Burns v Gaynor & Ors*<sup>xi</sup>, although an appeal in the High Court is ongoing.
- 6.3. Depending on the High Court’s ruling this situation lends itself to forum shopping where the most extreme legislation becomes the *de facto* standard.
- 6.4. It is in the interests of all states and all Australians for this situation to be remedied by ensuring uniform legislation. Alternatively each state could insert a provision that the legislation only applies to residents, but this would create an undesirable inconsistency where the damage from two actions

- could be the same, but only one could be litigated because the person who committed it was a state resident, while the other was not.
- 6.5. The second problem is that in a number of states, blasphemy laws may still exist, and the addition of religious belief to anti-vilification legislation effectively creates blasphemy laws.
  - 6.6. We prefer not to have anti-vilification legislation. Rather than decrease hostility in society, it tends to increase it. To the extent that it cures real ills, it only allows people who fit into particular classes access to remedies. If abuse and harassment has reached a stage where state intervention is warranted, then it should be available to individuals on the basis of their circumstances alone, not the group they belong to, or identify with.
  - 6.7. The addition of religion to the lists of factors for potential discrimination or vilification is partly as a result of pressure from Islamic<sup>xii</sup> groups. There have also been attempts at the UN to incorporate anti-blasphemy clauses by Islamic nations. Islam regards any comments critical of the prophet Mohammed, or the Koran, as blasphemous, and to some devout Muslims this is even punishable by death. This led to the Charlie Hebdo<sup>xiii</sup> killings.
  - 6.8. Australians generally have taken a more liberal attitude. A work of art, such as Andres Serrano's *Piss Christ* is undoubtedly blasphemous. But it was allowed to be exhibited in Melbourne, despite then Catholic Archbishop of Melbourne seeking a court injunction restraining its exhibition<sup>xiv</sup>.
  - 6.9. Australians generally have seen freedom of expression encompassing the right to be offensive about a religion, or to denigrate its followers. If we followed a different path, then many of the new atheists would be taken to court for vilification. In *The God Delusion*<sup>xv</sup> Richard Dawkins likens teaching religion to children to "child abuse". It is hard to see how this would not fit a number of the definitions of vilification under some of the state legislation.
  - 6.10. As part of your review we recommend that you propose that all of the states that have not already done so, explicitly repeal any blasphemy legislation that applies in their area. We also recommend that religious vilification be removed as a cause of action by those states that have it in their anti-discrimination or other acts.
  - 6.11. Another problem with state legislation is that the initial assessments are often done by non-judicial bodies. This leads to the process becoming the punishment. While it is possible for a complainant to make a short statement of claim without many particulars, it is incumbent on the respondent to justify their position. Complainants often have time on their hands, and in many cases respondents do not.
  - 6.12. A good example of this is the case of the Catholic Archbishop of Hobart, Julian Porteous<sup>xvi</sup>, where a complaint was made about a pamphlet teaching a standard Roman Catholic view of marriage by a gay activist. While the complaint was ultimately withdrawn<sup>xvii</sup>, he would have had to devote an inordinate amount of time to dealing with it. At the very least such complaints should have to be made through the formal legal system, with the complainant liable for costs if they fail.
  - 6.13. **Recommendation 1: The Commonwealth government legislate to ensure that religious freedom is protected uniformly across Australia. This could be done by uniform legislation after agreement between the states, or using the Foreign Affairs power and the international human rights instruments that Australia has ratified.**
  - 6.14. **Recommendation 2: That complaints of religious vilification or discrimination should not be heard by a non-judicial tribunal and must be commenced in a court.**
  - 6.15. **Recommendation 3: All blasphemy laws should be repealed so that any person can criticise any organisation, or person, on the basis of their theology, ethics and morality, or their practice. This includes repealing or overriding the inclusion of religion in various state discrimination acts as well as in the Victorian *Racial and Religious Tolerance Act*.**

## 7. Same sex marriage

- 7.1. While this submission is not primarily concerned with same sex marriage, we would like to make the following points. It should be noted that our Executive Director, Graham Young, wrote an op-ed piece some years ago advocating for no definition of marriage, and for the matter to be a purely private one with no government registration.
- 7.2. The Marriage Law postal survey, public debate and subsequent amendments to the Marriage Act showed that Australians are divided on the nature and essence of marriage. Two views (at least) of marriage exist in Australia: the *conjugal* view, which defines the essence of marriage as a union of male and female; and the view of marriage as a personal union of two people irrespective of sexual gender - the *genderless* concept of marriage. Commonwealth law has been expanded to cover two different concepts of marriage. The new diversity of ethical views has been covered in law.
- 7.3. While Australians voted in a large majority to change the *law* of marriage, this does not mean that many Australians have changed their *concept* of marriage. The high participation rate in the postal survey suggests that approximately 40% of the population<sup>xviii</sup> holds to the traditional, conjugal view. Many of these will be citizens whose religious beliefs govern their concept of marriage. Many of those who accepted that Australian marriage law should be properly changed in response to a new majority vote, have not necessarily surrendered their personal belief that marriage is in essence a conjugal union.
- 7.4. Adherents of the conjugal view of marriage will include religious Australians, whose world-view, traditions, ethics and personal beliefs govern their viewpoints. They are full members of the Australian body politic, part of the spectrum of pluralistic diversity that makes up our nation. In a pluralistic society embracing a large range of world-views (religious, secularist, anti-religious and more), our legal and political system should provide a basis for us to live and work together. As far as possible, our laws should avoid enforcing the particular ethics of some Australians on the consciences of other Australians. In a secular nation, this means that governments should not interfere in the religious life of Australians without reasonable cause. By maintaining this position, our laws will support mature civic pluralism.
- 7.5. Mature pluralism is the ability to live with disagreement, even about deeply held beliefs. The obvious fact is that Australians have a real issue of personal and institutional disagreement about the essence of marriage. It is one thing for the *law* regulating marriage is to be changed; it is quite another matter for laws to enforce compliance of consciences about *personal beliefs* about the essence of marriage.
- 7.6. This can be demonstrated by looking at the area of divorce. Legalising divorce has not led to the position where individuals have to approve of divorce, or divorced couples. People feel free to express their opinions about the rights and wrongs of marital relationships of a heterosexual kind (see, for example, the current discussion about the Joyce marital arrangements), so it would be discriminatory not to allow the same for same sex marriages.
- 7.7. In our view that means that it is quite appropriate for churches, and believers, to teach that the only legitimate form of marriage is the traditional form.
- 7.8. Had the poll had been taken 10 years ago, it may well have failed<sup>xix</sup>. The law changed because campaigners were free to campaign against the law. We would not live in a democracy if that were not the case. While they campaigned there was no suggestion that they should in some way be penalised because they disagreed with the majority view. The same has to apply to those who oppose the current law.
- 7.9. Just as no one suggested that gays and lesbians should not be able to be involved in providing social services because they didn't agree with the dominant view 10 years ago, neither should churches be

denied now. Yet we see in a number of overseas jurisdictions that churches have been forced to withdraw from foster care and public adoption because of same sex marriage legislation.

- 7.10. This is wrong. It privileges same sex marriage above all other considerations. All organisations have cultures and these are imparted when they conduct business. Attitudes towards same sex marriage will be only one part of the culture of an organisation. Christian believers are taught to bring a sense of service and humility to what they do, treating each person as though they were Christ. They are taught that the first shall be last, and that position and wealth are ultimately unimportant. These are not positions held by the population at large, but they could be very important in the nurturing of people put into their systems. They are values likely to be missing from secular organisations doing the same work. Why should they be made secondary to an issue of intimate relationships?
- 7.11. There needs to be legislative protection to ensure that disagreement by any person or organisation with the amendments to the marriage act cannot disqualify them from doing government work.
- 7.12. **Recommendation 4: It should be recognised as a right that religious institutions can teach and practice in line with their theology in the widest range of cases, but certainly in the case of sexual relations.**
- 7.13. **Recommendation 5: Religious adherents, lay as well as clergy, should be able to express opinions on the basis of their understanding of the theology, ethics and morality of their chosen religion, without penalty.**

## 8. The Christian Bakers Case

- 8.1. The so-called Christian Bakers Case<sup>xx</sup> raises some interesting issues. Broadly we have no problem with the concept that if someone comes into your store and wants to buy an off-the-shelf product, and they abide by all of your rules of commerce, they should be able to do so. The general social utility in this over-rides any right to free speech.
- 8.2. However, this cannot be the case with a contract for service. People have to be free to withhold their labour if they want to. If they can't we are enforcing a species of slavery.
- 8.3. To return to the Joyce example. On the assumption that Barnaby Joyce marries his current partner after divorcing his wife, a whole range of people may disapprove and decide they do not want to provide services for the wedding. This could range from the florist, through the caterers to the organist. This won't cause a problem for the couple as there will certainly be other professionals who will be prepared to fill the gap. Those refusing would be expressing their clear position on the situation, and in fact the refusal of service is itself a form of free speech.
- 8.4. The odd thing about the Christian Bakers case is that the plaintiffs bothered to take the bakers to court. Most people faced with a similar situation would just have found another baker and moved on. The issue appears to be an attempt to force people to approve of the marriage, and to punish those who don't. While this is an understandable human motivation, it is not the place of the law to provide the method of putting it into action. This is a social, not a legal, issue. Inasmuch as a solution is required it should be a social solution, not a legal one.
- 8.5. **Recommendation 6: All citizens, whether religious or not, should be guaranteed the right to withhold their commercial services on whatever basis they choose. This should not extend to the provision of products.**

## 9. False equivalence of sexual practice with race or gender

- 9.1. Sexual relations are not the same substance as race or gender. Race and gender are primarily biological facts, although there may be some social overlay. Sexual relations, and attraction, are, to a significant

- degree, voluntary. It is therefore entirely appropriate that moral systems have views on what is good and bad sexual behaviour. You would invite a Twitter avalanche of #MeToos if you claimed that male sexual harassment was OK, “because it is just biologically programmed behaviour”. It would be said, quite rightly, that men have control over their actions independent of their desires and biological urges.
- 9.2. In which case it is appropriate for religions to express and teach moral views of sexual relations which may, or may not, approve of same sex relations, as humans have agency in this area and can therefore be guided and adopt different behaviours to others, even when they have the same sexual alignment.
  - 9.3. It would be perverse to exclude this one sector of one area of human relationships from ethical guidance but allow it in all other areas of human biological existence. Logically this means that they need to be able to offer assistance to people based on their moral world view. If individuals don’t want assistance from that ethical or moral direction, then there are other organisations that can meet their own needs.
  - 9.4. So there should be no possibility of a ban on religious organisations being involved in providing services to the community, and receiving tax deductibility, or government funding, for that involvement, if that is the general government policy in that area. Over the last 30 years there has been a tendency for the government to outsource social welfare functions of government not-for-profit organisations, including those owned by various religions. This is set to increase with the full roll-out of the NDIS. The reasons for outsourcing are to provide a more effective service, more attuned to the client’s needs, and in the process give better outcomes, including budget savings. If various religious bodies are excluded from some parts of that welfare delivery system because of views on same sex marriage it actually lessens the effectiveness of them, rather than increasing them. This will reduce the diversity and richness of service delivery, since spiritual needs are important to a significant proportion of the community.
  - 9.5. Further it would be a denial of their real right to free speech. They would be being discriminated against for exercising that right, and effectively being coerced not to exercise it. This would be a Potemkin Village approach to free speech.

## 10. Right to hire

- 10.1. A further issue is the right of religious organisations to hire people who align with their ethical and moral world view. If one accepts that religious organisations have a right to free speech, then they have to be able to express it. Religious organisations are organisations, so they have to be able to express their views collectively. Denying them the right to hire only staff who adhere to their world view is to effectively deny them the right of free speech. It would deny to religious organisations the right that currently applies to other organisations (such as political parties), to hire on the basis of their values.
- 10.2. Congruence between behaviour and values is essential for the credibility and effectiveness of religious organisations. Nothing undermines an expressed moral position more effectively than the charge of hypocrisy. This can be seen in the damage done to various religious organisations by the child abuse scandals, which is larger than the damage done to secular organisations by the same scandals. The reason for this has to be that the religious organisations expressly hold themselves to a higher standard, so are guilty of hypocrisy in a way that the secular organisations are not.
- 10.3. A religious organisation cannot effectively advocate for its moral and ethical position if the people it employs don’t uphold those positions themselves. So the moral and ethical beliefs and behaviours of potential employees are an integral part of their right to free speech.
- 10.4. **Recommendation 7: Religious institutions should be able to hire employees who align with their practices and beliefs, and reject those who don’t, as a consequence of, and in furtherance of, their right to religious freedom.**



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- <sup>i</sup> [http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol\\_act/coaca430/s116.html](http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/coaca430/s116.html)
- <sup>ii</sup> [http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol\\_act/aa1977204/](http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/nsw/consol_act/aa1977204/)
- <sup>iii</sup> <http://www.legislation.act.gov.au/a/2016-49/current/pdf/2016-49.pdf>
- <sup>iv</sup> [https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/wa/consol\\_act/ccaca1913252/](https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/wa/consol_act/ccaca1913252/)
- <sup>v</sup> [https://www.austlii.edu.au/cgi-bin/viewdb/au/legis/nt/consol\\_act/aa204/](https://www.austlii.edu.au/cgi-bin/viewdb/au/legis/nt/consol_act/aa204/)
- <sup>vi</sup> [https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/qld/consol\\_act/aa1991204/](https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/qld/consol_act/aa1991204/)
- <sup>vii</sup> [https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol\\_act/rarta2001265/](https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/rarta2001265/)
- <sup>viii</sup> [http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/sa/consol\\_act/eoa1984250/](http://www.austlii.edu.au/cgi-bin/viewdb/au/legis/sa/consol_act/eoa1984250/)
- <sup>ix</sup> [https://www.austlii.edu.au/cgi-bin/viewdb/au/legis/tas/consol\\_act/aa1998204/](https://www.austlii.edu.au/cgi-bin/viewdb/au/legis/tas/consol_act/aa1998204/)
- <sup>x</sup> [https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol\\_act/rarta2001265/](https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/rarta2001265/)
- <sup>xi</sup> <http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCATrans/2017/136.html>
- <sup>xii</sup> <https://www.theaustralian.com.au/national-affairs/move-for-blasphemy-law-could-turn-us-into-saudi-arabia/news-story/2e24bb72c93bca28c25b0ea305f9420c>
- <sup>xiii</sup> [http://www.huffingtonpost.com.au/entry/charlie-hebdo-cartoons-paris-french-newspaper-shooting\\_n\\_6429552](http://www.huffingtonpost.com.au/entry/charlie-hebdo-cartoons-paris-french-newspaper-shooting_n_6429552)
- <sup>xiv</sup> <http://www.heraldsun.com.au/news/law-order/andres-serrano-piss-christ-triggers-religious-fury-and-court-battle-in-1990s-trials/news-story/5e997822f57fce0ea4dcdf066ef7b79e>
- <sup>xv</sup> Dawkins, R, 2006, *The God Delusion*, Bantam
- <sup>xvi</sup> <http://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>
- <sup>xvii</sup> [https://www.sydneycatholic.org/news/latest\\_news/2016/201656\\_413.shtml](https://www.sydneycatholic.org/news/latest_news/2016/201656_413.shtml)
- <sup>xviii</sup> <http://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0>
- <sup>xix</sup> <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fprspub%2F1040109%22>
- <sup>xx</sup> <http://dailysignal.com/2017/12/05/4-highlights-christian-bakers-wedding-cake-case-supreme-court/>