Legal implications of same sex marriage for Christian life and ministry

Neil J Foster
Lower Mountains Anglican Parish, 22 Oct 2016

**Legal implications of same sex marriage for Christian life and ministry**

Neil Foster

It is an honour to be asked to speak to you about this topic today. I am looking forward to hearing what Peter Jensen has had to say from a Biblical perspective on the nature and goods of marriage. My task is the much more humble one of outlining the possible legal implications for Christian life and ministry should “same sex marriage” be introduced into Australia. I hope that in doing so Christians will be better equipped with good reasons as to why this change to the law would be a bad idea, and should the change take place, to be aware of possible challenges to living out their faith in society, and to the courageous proclamation of the gospel of Jesus Christ.

A few matters of terminology. I use the phrase “same sex marriage” (henceforth without the quotes, or the briefer “SSM”) without accepting the view that a relationship between two persons of the same sex can appropriately be called a “marriage”. There are Biblical arguments as to why this is problematic. But the terminology is commonly used in Australia today, and it will be convenient to use it here. I will not, however, be describing this possible change as “marriage equality”, for the reason that what is involved in allowing same sex attracted persons to marry each other is not simply the removal of an artificial barrier to create “equality”. It involves a fundamental redefinition of the status of marriage, as it has been historically understood. That redefinition may be argued for on various grounds, but it is certainly not a simply matter of “equality”.

This paper will not present in detail the reasons why, even without a Biblical worldview, one might oppose the introduction of SSM. There are good reasons for this, simply based on the welfare of the community, of children in particular, and the purposes of the institution of marriage. But the purpose of this paper is more limited- to explore the possible legal ramifications of SSM for those who hold a Biblical view of marriage.

To be clear, these negative legal ramifications for the Christian community are not the sole, nor indeed the primary, reason for opposing this change. Concern for the welfare of

1 BA/LLB (UNSW), BTh (ACT), DipATh (Moore), LLM (Newc); Associate Professor in Law, Newcastle Law School, University of Newcastle, NSW; lecturer in Law and Religion. The views expressed here are, of course, my own and are not to be attributed to my University. For more on this and related areas, see my blog at https://lawandreligionaustralia.wordpress.com.

2 For a more detailed explanation, see Neil J Foster, ”Opposing same-sex marriage is not discrimination” (2011), at: http://works.bepress.com/neil_foster/40/.

our neighbours should the change occur is the main justification for opposition. Nor do I assume that this change is inevitable. It has happened elsewhere in the Western world, and we are often told that the “tide of history” is inevitable - but other major political changes have been described in this way and have still not arrived (for example, an Australian republic.)

But it is wise to be aware of what might happen should the current moves be successful. And a clear-minded awareness of the implications may indeed be another good reason why the change should not happen. We in Australia have now had time to observe some of the implications in other places around the world, and what might in some other circumstances be described as “fear-mongering” can be seen to be present in cold, hard overseas court cases and damages awards.¹

In the rest of this paper, I will set the scene by describing the role that Christianity has played in the development of marriage law in our country. We will then sum up where the current legal proposals for SSM are at the moment. After that I will turn to possible implications of SSM for clergy (in both marriage celebration and preaching), for other believers involved in the “wedding business”, and then Christian organisations and schools.

1. Background - Marriage and Christianity in our culture

Marriage, of course, was around long before Christianity.

Already in the centuries before Christ, classical Greek philosophers treated marriage as a natural and necessary institution designed to foster the mutual love, support, and friendship of husband and wife, and to produce legitimate children who would carry on the family name and property.²

But in our Western culture, and in particular in the common law tradition which Australia inherited from the UK, Christianity played a key role in shaping our marriage. (For an excellent scholarly overview of the history, see the Witte book on the reading list.)

It is fascinating to read, for example, this comment by Brennan J in the High Court decision of R v L (1991) 174 CLR 379 at 391:

The legal nature of the institution of marriage is not to be found in the common law. Holdsworth³ observes that "(t)he temporal courts had no doctrine of marriage",⁴ and he records that jurisdiction in matrimonial causes was vested in the ecclesiastical courts from at least the 12th century⁵ until the 19th century. The doctrines of the law of marriage were developed in the ecclesiastical courts, not in the courts of common law. Sir William Scott (later Lord Stowell) in Lindo v. Belisario⁶ referred to differing opinions as to the nature of marriage: the early opinion of the Ecclesiastical Court that marriage is "a sacred, religious, and spiritual contract", another opinion that it is merely a civil contract. His Lordship thought that neither of those opinions was completely accurate, holding marriage to be "a contract according to the law of nature, antecedent to civil institution, ... a contract of the greatest importance in civil institutions, ... charged with a vast variety of

¹ For an excellent discussion of some of the results of the change that took place in the UK in 2013-2014, see a series of video interviews with Mike Ovey at https://vimeo.com/180563201.
³ Cited by Frank Brennan SJ in the very helpful piece noted on the reading list, at 91.
⁷ [1795] EngR 4123; (1795) 1 Hag Con 216, at pp 230-231 [1795] EngR 4123; (161 ER 530, at pp 535-536).
obligations merely civil". In *Hyde v. Hyde and Woodmansee*¹¹ Lord Penzance defined marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others" and that definition has been followed in this country and by this Court.¹² It is the definition adopted by the *Family Law Act, s.43(a)* of which requires a court exercising jurisdiction under that Act to have regard to "the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life". Marriage is an institution which not only creates the status of husband and wife but also, without further or specific agreement, creates certain mutual rights and obligations owed to and by the respective spouses.¹³ (emphasis added)

It is not so surprising, then, that proposed changes to the nature of marriage are seen to challenge established religious world-views.

Of course, the fact that marriage in its origins was seen to be a matter of ecclesiastical law does not mean that it continued to be so- it had implications in various areas, which meant that as a status it needed to be dealt with under the common law and equity. There is some comment on this in the more recent case of *PGA v The Queen* [2012] HCA 21, where the question raised by *R v L* came up in a slightly different form. The majority there commented:

[44] In the period in which Hale wrote, and until the significant legislative changes in the course of the 19th century, each of the three jurisdictions in England represented by the courts of common law, the courts of equity and the ecclesiastical courts, had distinct roles in matters affecting matrimonial status.¹⁴ The law applied in the common law courts had absorbed much canon law learning and it defined basic concepts such as legitimacy, procedural rights at law between spouses, and the duties and responsibilities of husbands, including their rights and duties in respect of the contracts and torts of their wives. Marriage had important consequences in property law, for establishing and securing inheritance of legal estates in land. In such contexts a court of common law would determine whether there had been a marriage. The common law also provided forms of action such as breach of promise to marry, criminal conversation by adulterers and seduction of daughters.

The article by Browning, as well as the book by Witte, discusses aspects of the development of Christian thought about marriage in different eras. One thing he points out is that Christianity shaped some of the pre-existing views about marriage to view marriage in a Biblical sense as a “covenantal” relationship- not purely a private consensual contract, but a contract-like relationship in which many of the most important terms and conditions were pre-defined.

The institutional status of marriage has traditionally functioned as a legal covenant defining the mutual rights and obligations that contracting couples freely chose [to enter into] but did not themselves create or define.¹⁵ (at 169)

What then are the purposes of this relationship according to the Christian worldview (the dominant Western view for at least the last 1000 years)? Elements of the relationship of marriage that can be seen in the Bible include:

• Creation of a new family unit (*Genesis* 2:24: “Therefore a man shall leave his father and his mother and hold fast to his wife, and they shall become one flesh”);²²

---

¹¹ (1866) LR 1 P and D 130, at p 133.
¹⁴ See the discussion by Professor Cornish in *The Oxford History of the Laws of England*, (2010), vol 13 at 724-726.
• Between a man and a woman (God’s image seen in “male and female”, Genesis 1:27);
• Intended to be for life (Matthew 19:4-6, Jesus teaches that there should be no divorce, except for adultery);
• Exclusive (adultery, sexual relationships with someone else’s partner, is condemned.)

Later the theologian Augustine identified three major purposes of marriage:
  i. Procreation and education of children;
  ii. Sexual fidelity to one partner;
  iii. A permanent union or partnership.

The Book of Common Prayer, of course, reflects these views in its statements about the purposes of marriage:

First, It was ordained for the procreation of children, to be brought up in the fear and nurture of the Lord, and to the praise of his holy Name.
Secondly, It was ordained for a remedy against sin, and to avoid fornication; that such persons as have not the gift of continency might marry, and keep themselves undefiled members of Christ's body.
Thirdly, It was ordained for the mutual society, help, and comfort, that the one ought to have of the other, both in prosperity and adversity.

These characteristics were generally reflected in the law of marriage in Western societies. In addition there were limits on the closeness of relationships that would prevent people marrying, drawn initially from proscriptions in the book of Leviticus.

2. The state of play- where SSM is at the moment in Australia

We have seen, of course, in recent years the movement for recognition of homosexual sex as a normal and natural part of human life, and the accompanying desire to recognize homosexual relationships by the label “marriage”.

While the narrative in the media over the last few years (both here and elsewhere in the Western world) has been of a “popular” groundswell of support, leading to the inevitable “tide of history” onto the right side of which one should get, it may be doubted whether this is the full story.¹⁸

Here it is instructive to note that there is some evidence that activists in this area seem to have been consciously following a “playbook” setting out a strategy for changing social attitudes to homosexuality. The book, After the Ball: How America will conquer its fear and hatred of Gays in the 90s by Kirk and Madsen (Penguin, 1989) sets out a carefully crafted strategy to move popular US thought in the direction of the acceptance of

¹⁶ It should be added that other evidence from the Biblical material, related to the “formal” nature of the “leaving” of one family unit and the joining of a new one, suggests that marriage in the Biblical view is always a status created through a public ceremony witnessed by at least some other members of the community, not just a “private” agreement between the parties. For discussion of this see Foster (2009) on the reading list.
¹⁷ See Browning, 172-173.
¹⁸ For comment on the surprisingly fast change in “public opinion” on same sex marriage, see this sympathetic article (ie the author supports the change) Nate Silver, “Change Doesn’t Usually Come This Fast” (Jun 26, 2015) at http://fivethirtyeight.com/datalab/change-doesnt-usually-come-this-fast/. See also See Christopher Caldwell “Gay Rites: A review of From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage by Michael J. Klarman”, in Claremont Review of Books: Vol. XIII, Number 1 - Winter 2012/13: “Public opinion does not change this fast in free societies. Either opinion is not changing as fast as it appears to be, or society is not as free.” - at: http://www.claremont.org/article/gay-rites/#.VgAA5nihDzI.

Neil Foster
homosexual relationships and conduct as normal and acceptable.” Strategies put forward include “desensitising” (by providing a regular stream of “inoffensive” images and comments about gay persons), “jamming” (where remarks opposing homosexuality are linked to clearly unacceptable attitudes such as racism, and hence people become scared to utter them), and “conversion” (where regular images and accounts of “normal”-looking gay persons are used to persuade “bigots” that they are in fact normal.)

A quote is fascinating:

The objection will be raised--and raised, and raised--that we would 'Uncle Tommify' the gay community; that we are exchanging one false stereotype for another equally false; that our ads are lies; that that is not how all gays actually look; that gays know it, and bigots know it. Yes, of course--we know it, too. But it makes no difference that the ads are lies; not to us, because we're using them to ethically good effect, to counter negative stereotypes that are every bit as much lies, and far more wicked ones; not to bigots, because the ads will have their effect on them whether they believe them or not. (emphasis added)20

The ways in which these strategies were implemented over the succeeding decades are fairly obvious. Normalisation of homosexual desires and behavior became a common trope of popular movies (eg Four Weddings and a Funeral, Brokeback Mountain) and television sitcoms (eg Will and Grace, Modern Family.) Rarely did popular media of this sort feature the less mainstream elements of the gay sub-culture, which no one would deny are prevalent.

The very word “normal” becomes a key part of the debate. On no statistical meaning of the word “normal” (connected with average or median) is homosexual orientation or behavior such in Western or other societies. The best recent statistical analyses suggest that perhaps 3.0% of the adult population identify as gay, lesbian or 'other'.21 Yet the word “normal” seems to have undergone a clear shift from “this is true of the majority of society” to “this is or should be regarded as acceptable behaviour”. Hence Senator Penny Wong can attack another politician for suggesting that her same sex relationship is not “normal”:

"I find it sad that senior politicians in this country seem to want to tell my children and children of other same-sex couples that somehow they are not normal," Senator Wong told ABC radio on Monday.22

How does this move to change popular views on homosexuality relate to the push for same sex marriage? It seems obvious now to many to say that removing unwarranted discrimination against same-sex attracted persons must mean removing the “barrier” to their being married. But in fact, of course, for many years the fight against irrational hatred and discrimination against gays took place without it being said that “same sex marriage” was the end goal. Laws were changed in many areas to allow same sex couples to enjoy the benefits previously reserved for married couples. Indeed, in Australia after a massive legislative re-jig which took place in the Commonwealth sphere in the Same-Sex Relationships (Equal Treatment in Commonwealth Laws — General Law Reform) Act 2008 (Cth), along with similar State law reform, it has become quite difficult to find any area

20 See extracts from the book at http://www.massresistance.org/docs/issues/gay_strategies/after_the_ball.html . While the website is clearly an opponent of the movement, it seems to accurately record the strategy.
21 From pp 147-157, extracted at the website linked at n 7 above.

Neil Foster
where benefits are conferred on the parties to a marriage which are not also equally conferred on parties to a (mostly heterosexual) *de facto* relationship or a same sex partnership, so long as minimal standards of the length and seriousness of the relationship are satisfied.

But the equating of “incidental” rights and obligations attaching to marriage, to those attached to same sex relationships, has not been seen as a sufficient “stopping point” for law reform. The issue has become clearer: what is desired is not simply formal legal equality between the relationships, but the label “marriage”. While that is missing, society has not yet reached the point of total affirmation of a homosexual relationship as of equal “worth” to a heterosexual marriage. As *Hebrews* says: “Let marriage be held in honor among all” (*Hebrews* 13:4, ESV). The “honor” given to marriage now is to be extended to same sex relationships.²³

Indeed, if one may be allowed a bit more speculation, it could be suggested that what is most desired by SSM activists is not best described as “same sex marriage”. What is often fundamentally aimed at is a “same sex wedding”.

The difference of course is between the traditional customary and legal ceremony that sees a marriage entered into, and the ongoing relationship. A number of commentators have doubted whether the majority of homosexual partnerships have the characteristics of longevity, exclusiveness, and fidelity which are meant to characterise the union of man and woman entered into “for life”, “to the exclusion of all others” in accordance with the traditional legal definition put forward in *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130 at 133.²⁴ Of course there are some; just as today there are many “traditional” man/woman marriages where these ideals are not met. But they are not the norm.

However, we cannot ignore the powerful emotional impact of a family-based “white wedding”. Such an event brings together, commonly, not simply the two parties but their friends and extended and close family, and is one of the rare days in a person’s life where they experience being both the centre of attention, and the subject of unconditional affirmation from their circle of family and friends. Despite the cynicism of many, weddings are still regarded as a highlight of a person’s life. Magazines and whole industries are devoted to their staging. Large amounts of money are spent. It may be that it is precisely the lack of a *wedding* that is seen as the major injustice to a same sex attracted person.

In 2004 both sides of Federal Parliament were happy to pass a law reaffirming the classic definition of man/woman marriage.²⁵ But over the subsequent years the pressure to change the law of Australia has been mounting. In particular the movement to redefine marriage to cover same-sex relationships gained momentum in the United States of America and in the United Kingdom. In the UK the law was changed by the “odd couple” coalition of Conservatives and Liberal Democrats presided over by Prime Minister David Cameron, in

---

²³ Perhaps the concluding words of that verse would be not necessarily supported by today’s activists: “and let the marriage bed be undefiled, for God will judge the sexually immoral and adulterous”. But fidelity and monogamy are of course a key part of what “marriage” has always meant, and indeed one of the reasons that “honour” is given to those who keep their marriage vows, doing so being contrary to sexual desires experienced for other possible partners.

²⁴ For links to academic studies demonstrating the lack of longevity and fidelity in same sex relationships, see M R Hasson “Open monogamy: What gays can teach straights about marriage, according to some people” (July 30, 2010) http://www.mercatornet.com/articles/view/open_monogamy/.

²⁵ There are a number of myths associated with this 2004 legislation. It did not fundamentally change the law of marriage in Australia; it did not suddenly introduce a new requirement that all celebrants should refer to marriage as a “man/woman” relationship. For my detailed attempts to correct these myths, see “John Howard and the Myths of the 2004 Marriage amendments” (Sept 24, 2016) https://lawandreligionaustralia.wordpress.com/2016/09/24/john-howard-and-the-myths-of-the-2004-marriage-amendments/.
the enactment of the *Marriage (Same Sex Couples) Act* 2013. In the United States the controversial 5-4 decision of the US Supreme Court in *Obergefell v Hodges*, 576 U.S. ____ (2015) found an implied “constitutional right” to same sex marriage which extended across the US, effectively negating legislation which had been passed (in some cases by way of State Constitutional amendment) reaffirming classic marriage.

There has been a long list of attempts to enact laws in Australia recognising same sex marriage in Federal Parliament. A briefing paper prepared for Parliament and updated in July 2016 records that:

Since the 2004 amendment to the *Marriage Act 1961* (Cth) which inserted the current definition of marriage, a 18 bills dealing with marriage equality or the recognition of overseas same-sex marriages have been introduced into the federal Parliament. Not all bills have come to a vote and no bill has progressed past the second reading stage. Consequently no bill has been debated by the second chamber. To date, the bills have been introduced by members of parliament representing the Australian Democrats, Australian Greens, Australian Labor Party, Liberal Democratic Party, Liberal Party of Australia and by Independents. (emphasis added)

In other words, it is certainly not true to say that “Parliament has not dealt with” this issue. It has, and all attempts to change the law have so far failed. On Monday 12 September 2016, the *Marriage Legislation Amendment Bill* 2016 was introduced into the House of Representatives by the Leader of the Opposition, Bill Shorten, and the *Marriage Legislation Amendment Bill (No 2)* 2016 was introduced into the House by a Greens MP and two independent MP’s. The two Bills seem almost identical. Both, of course, were attempts to “pre-empt” the holding of a plebiscite on the topic.

As is well known, the Turnbull Government went to the most recent Federal election promising to hold a popular vote of the Australian people to determine whether, as has been alleged on many occasions, the majority support the change to recognise SSM. On 14 September 2016 Federal Attorney-General, Senator the Hon George Brandis QC introduced into Parliament an enabling Bill to allow the plebiscite, the *Plebiscite (Same-Sex Marriage) Bill* 2016. The Bill was being debated at the Second Reading state from Oct 11-13, and on Oct 19, but at the time of preparing this paper had not passed the House of Representatives.

On Oct 11, 2016, the Attorney-General released an Exposure Draft of the legislation that would, if it were to pass the Federal Parliament, introduce same sex marriage to Australia– the *Marriage Amendment (Same-Sex Marriage) Bill*. There is a good summary of the provisions of the legislation in a press release issued by the Attorney-General.

On the same day the leader of the Opposition announced that his Party would be voting against the enabling Plebiscite Bill when it reaches the Senate. It seems clear, at least

---

26 NF: Note this unfortunately misleading description, not exactly incorrect but giving the wrong impression again. The current definition of marriage as a legal concept was not introduced in 2004, except in the purely formal sense that it was added to the “definitions” provision of the *Marriage Act*.


31 See “Same-sex marriage: Plebiscite would harm gay and lesbian people, Bill Shorten says” (ABC News).
Legal implications of same sex marriage for Christians

Neil Foster

if all the cross-bench members who have indicated their intentions maintain those intentions, that the Bill will be defeated in the Senate.

The ALP and the Greens will presumably now be urging the Government to put its legislation directly to a Parliamentary vote. The Government, however, has steadfastly maintained that it went to the recent Federal election with a promised plebiscite as the only route to introduction of same sex marriage, and that if there is no plebiscite, the matter will have to be dealt with by some future Government after the next Federal election. I have previously commented on the options of plebiscite or referendum, and suggested that the change actually requires a formal Constitutional amendment, rather than a simple majority plebiscite vote. Other commentators have recently also suggested that a referendum is the only way to be sure, if one wants to make this change, that it is constitutionally valid. Still, this is very much a minority view, and at the moment the Government believes that the change can be made by the Parliament, while honouring its promise to the Australian people to put the matter to a plebiscite first.

There is no doubt that among the reasons the change has been opposed by believers, are legitimate concerns about the implications of the change for religious freedom. Religious freedom concerns range across a number of issues. The most obvious is whether ministers of religion, who are currently authorised to celebrate marriages under Australian law, will be obliged to celebrate same sex marriages. But other issues include:

- the right of other, civil, celebrants to decline to celebrate a same sex marriage, including not only “private” celebrants but also Government registry officers;
- whether individual businesses involved in the “wedding industry” will be able to decline to offer their artistic support for services for same sex ceremonies;
- whether religious organisations who offer their premises for weddings will be able to decline to offer them for such ceremonies;
- whether religious schools will be able to teach their pupils the views of their religious traditions about marriage, once same sex marriage is lawful;
- whether financial support currently offered to religious organisations who provide important services to the community will be conditioned on support for same sex marriage;
- whether there will be further pressure on those who think that same sex marriage is a bad idea to not be able to put forward their views in public under “vilification” or similar laws.

None of these issues are imaginary, all have been raised by similar changes that have taken place overseas. In the rest of this paper I want to comment briefly on examples of these issues, and the ways that the Exposure Draft Same-Sex Marriage Bill deals with these matters, and to suggest that it needs to deal with some that are not so far addressed.

(Another preliminary comment may be in order. I should make it quite clear that “Option A” as far as I am concerned is for the law not to be changed at all in this way. “Option B” is for proper religious freedom protections to be provided, if the law is to be changed. But somewhat ironically, I am concerned that Option B may undermine Option A. If strong religious freedom protections are provided, then it becomes more likely that in a plebiscite some warm-hearted Christians whose instinct is to compromise, may agree to the change to SSM out of sympathy for those pressing for it. This in my view would be a mistake, as SSM will be bad for society in the long term, however strongly religious freedom rights are protected.

Still, at the moment my concerns are not really justified. The current version of protections provided in the Bill is only just satisfactory, as I will say below. Activists have already attacked even that level of protection as totally unacceptable, "and so it may be unlikely that even this will survive a subsequent Parliamentary vote, which would be required if a plebiscite were successful. Still, it needs to be clearly said that these protections are insufficient."

3. Implications for clergy as marriage celebrants

Ministers of religion are currently authorized to celebrate legally recognized marriages in two ways under the *Marriage Act* 1961 (Cth). One avenue is if they are ministers of a “recognised denomination” under Subdiv A of Div 1 of Part IV of the Act. Section 26 of the Act authorises the Governor-General to make proclamations “recognising” certain denominations, which allows those groups a number of privileges in terms of celebration. The Anglican Church of Australia is of course one those denominations, along with a whole range of other groups.

The other avenue by which a minister of religion might be a marriage celebrant is through specific approval by the Department under Subdiv C of Div 1 of Part IV - while the Act doesn’t make this very clear, this group in practice is divided into “civil” celebrants, and “religious” celebrants who may come from smaller groups which are not “recognised” denominations, or even lone congregations.

Currently s 47 of the Act specifically provides as follows:

**Ministers of religion not bound to solemnise marriage etc.**

47. Nothing in this Part:
(a) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise any marriage; or
(b) prevents such an authorised celebrant from making it a condition of his or her solemnising a marriage that:
- (i) longer notice of intention to marry than that required by this Act is given; or
- (ii) requirements additional to those provided by this Act are observed.

All proponents of the SSM change so far have said that they would not require ministers of religion to perform same sex weddings. A Private Member’s Bill introduced by the Leader of the Opposition on 1 June 2015, for example, provided, in Schedule 1 clauses 5 & 6, an amendment to s 47 which said that that a minister of religion may not be obliged (by the *Marriage Act* or any other Act, such as a law prohibiting sexual orientation discrimination) to solemnise a same sex marriage.

Protections of this sort were introduced in the UK when that country's *Marriage (Same Sex Couples) Act* 2013 was introduced- see the complex section 2 of the Act, accompanied by an amendment to the *Equality Act* 2010, s 25A, which explicitly provides that there is no breach of sexual orientation discrimination laws by a member of the clergy declining to be involved in a same sex wedding. (The complex nature of these provisions, however, may point to the need for much more careful drafting than the somewhat minimal s 47 amendments proposed in Australia at the moment.)

There is no denying, of course, that if same sex marriage is introduced there may be political pressure put on ministers of religion to solemnise same sex marriages. (A press

---


35 The *Marriage Amendment (Marriage Equality) Bill* 2015.
report from the UK indicates that, even with the so-called "quadruple lock" protection for the Church of England under their legislation, two same sex activists were threatening to take the church before the European Court of Human Rights to enforce a right to be married in their local Church of England building. However, proposals at the moment seem to genuinely provide protection for religious marriage celebrants.

The current Exposure Draft Same Sex Marriage Bill ("the SSM Bill") makes it quite clear that ministers of religion will not be obliged to celebrate same sex marriages. A redrafted section 47, which as we have seen already provides a general principle that ministers may decline to solemnise marriages, explicitly deals with the new situation in proposed s 47(3):

(3) A minister of religion may refuse to solemnise a marriage despite any law (including this Part) if:
(a) the refusal is because the marriage is not the union of a man and a woman; and
(b) any of the following applies:
   (i) the refusal conforms to the doctrines, tenets or beliefs of the religion of the minister’s religious body or religious organisation;
   (ii) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion;
   (iii) the minister’s conscientious or religious beliefs do not allow the minister to solemnise the marriage.

It is important to note that this provision allows refusal of a same sex marriage “despite any law”. This means that as well as the Marriage Act 1961 not imposing an obligation to solemnise such a union, this provision will over-ride other Commonwealth law that might have been argued to impose such an obligation, as well as competing State or Territory laws.

The main relevant Commonwealth law that might have been argued to oblige a minister of religion to solemnise a same sex union would be the Sex Discrimination Act 1984 (Cth) ("SDA"), which since 2013 makes it unlawful to discriminate against persons in the provision of “services” on the basis of sexual orientation (see s 22 of that Act). But the new s 47(3) will over-ride that provision. To make this completely clear the Bill in Schedule 1, Part 2 amends s 40(2A) of the SDA (which already says that decisions taken in “direct compliance with” the Marriage Act are not viewed as unlawful) to clarify that decisions taken which are “authorised by” the Marriage Act will also not be unlawful.

State and Territory laws also make sexual orientation discrimination unlawful. The wording of s 47(3) will make it clear that permission given by the Commonwealth Parliament to a minister of religion not to solemnise a same sex union will over-ride any conflicting subordinate laws (through operation of s 109 of the Constitution or else similar provisions governing Territories.) It seems apparent that the “marriage” power under the Constitution would authorise this type of direct over-riding of State law if necessary to implement Commonwealth marriage law.

It is also worth noting that s 47(3)(b)(iii) is a good provision which will protect the consciences of ministers of religion who may be more theologically “conservative” than the denominations to which they belong- their own “conscientious or religious belief” will authorise a refusal to solemnise even if their broader group supports same sex marriage."

---


37 This is a problem that had been identified by Professor Rex Ahdar in relation to the analogous New Zealand legislation: see Rex Ahdar “Solemnisation of Same-sex Marriage and Religious Freedom” (2014) 16/3 Ecclesiastical Law Journal 283 – 305 at 285.

Neil Foster
4. Implications for other marriage celebrants

Another important protection provided for religious freedom is that private civil celebrants, appointed in accordance with the provisions of Subdivision C of Division 1 of Part IV of the Marriage Act, will be able to decline to solemnise same sex marriages if they have a “conscientious or religious” objection to doing so—see proposed new s 47A. (Some of the celebrants appointed under this part of the Act, as noted, are ministers of religion of smaller religious groups, but they will be protected under the amended s 47 already noted.)

However, no such provision is made for public servants (usually employed by the States and Territories), who are authorised to solemnise marriages under s 39 of the Marriage Act.

This is a topic that of course has been controversial. In the UK the case of the late Lillian Ladele, a marriage registration official with Islington in London who did not wish to register same sex “civil partnerships”, went all the way on appeal to the European Court of Human Rights. The Court ruled that her religious freedom had been impaired by the Council’s insistence that she register such partnerships, despite the ease with which her conscientious objection could have been accommodated by rostering on other employees. However, the Court then ruled that the Council were entitled to dismiss her in the interests of supporting “diversity”. (See my paper commenting on this case in more detail, with links to earlier discussion.)

In the United States of America, similar issues were raised in the case of Kim Davis, registrar from Kentucky, who declined to solemnise same sex marriages where, by local law, her name had to appear on the marriage certificates that were issued. Again, there were easy ways to accommodate her beliefs, which had not been implemented. It may be worth repeating a couple of comments I made in my post on her case:

- Religious freedom is about more than the right to hold certain beliefs internally; it is about a right of “free exercise” of religion which will mean that a person will live out their religious beliefs in everyday life. Indeed, it is a fair criticism of someone who claims to be a believer that their life does not match their claimed religious beliefs. All of us are grateful when people with deep religious beliefs live out those beliefs in caring for the poor and marginalised, in generous giving to worthy causes, and in looking after people in their local communities. So we need to resist the occasional “reframing” of religious freedom in terms of “a right to worship”; it is much more than that.
- Do these same principles apply, then, to a public servant? Or must we require all public servants to park their fundamental religious freedom rights at home when coming to work? The answer is that public servants do have, and should be allowed to exercise, religious freedom. It is not a question, as some have put it, of a public servant being “allowed to disobey the law”. The law should contain, and in most Western countries does contain, recognition of religious freedom rights, and relying on such a provision means that one would not be disobeying the law, one would be acting within the law.

In recognition of the fact that religious freedom as a principle applies to all Australians, even public servants, there should be a similar provision to proposed s 47A that extends to registry officials. Arrangements can no doubt be made to ensure that adequate services to meet the needs of same sex couples are available in each registry office.

---

* See Eweida and others v The United Kingdom - 48420/10 36516/10 51671/10 59842/10 - HEJUD [2013] ECHR 37 (15 January 2013) [http://www.bailii.org/eu/cases/ECHR/2013/37.html


* See “Jail time for Kentucky County Clerk” (Sept 5, 2015) at [https://lawandreligionaustralia.wordpress.com/2015/09/05/jail-time-for-kentucky-county-clerk/](https://lawandreligionaustralia.wordpress.com/2015/09/05/jail-time-for-kentucky-county-clerk/).

Neil Foster
5. Implications for businesses in the “wedding industry”

There are then a number of issues raised for ordinary believers who may be in the so-called “wedding industry”- those whose businesses support weddings. These will include florists, photographers, invitation and stationery producers, and bakers.

We may note that some of these issues are already raised by Australia law, and could be raised before SSM becomes a reality. To be clear, the legal issue presented is that of discrimination on the grounds of sexual orientation. Where the law forbids such discrimination, it may be argued that to refuse to produce, say, a wedding cake for a same sex wedding, when a similar cake would have been produced for the wedding of a man and a woman, is discriminatory.

It has of course been argued by those accused of discrimination in many of these cases that the business owner concerned is not discriminating against someone on the basis of their sexuality as such.\(^4^1\) They are simply declining to devote their artistic talents to the celebration of a relationship they believe to be contrary to God’s word. But that argument, as we will note below, has been rejected many times by courts overseas.

It is not entirely clear why we have not had such cases in Australia so far, as such a refusal might be given to a “commitment ceremony” or the like, even if it is not called a wedding. It may be that Australians are not as litigious as citizens of the US. It might even be because the proponents of SSM realise that US-type litigation (if undertaken before the change takes place) would make many Australians think twice about the mantra “our marriage equality will make no difference to you”. They may be right, which is why it is well worth publicising these cases that have actually happened overseas more widely here and now!

So there are a number of small business operators who service the wedding industry who may have conscientious or religious objections to being required to devote their artistic and other talents to the celebration of a relationship they see as contrary to God’s purposes for humanity. These are not theoretical issues, there a number of cases from overseas that have already seen people in these circumstances fined for illegal discrimination. I will discuss a few cases to give a feel for the issues.

Christian small business owners, a New York couple, the Giffords, were fined $13,000 for declining to make their venue available for a same sex wedding ceremony, and a New York State appeal court upheld the verdict: see *Gifford v McCarthy* (NY Sup Ct Appellate Divn, 3rd Dept; 14 Jan 2016; matter no 520410) (the case is also referred to as *Gifford v Erwin*).\(^4^2\)

The Giffords argued that they had not declined the booking “because of the sexual orientation” of the parties, but because as Christians they could not support the celebration of a same sex “marriage”, believing it to be contrary to God’s word in the Bible. In other words, their refusal was on the basis of the message of celebration that would be conveyed by the event, in which they would have to be intimately involved as hosts of the venue.

The lawyers for the Giffords, the Alliance Defending Freedom (“ADF”) draw a helpful analogy to a different set of facts. As they note, the law does not require the Giffords to coordinate or host every event that a person…requests. For example, if the infamous Westboro Baptist group asked the Giffords to host an event that would

\(^4^1\) See, for example, the moving account provided by Baronelle Stutzmann, who has been sued for not providing flowers for the same sex wedding of a gay man she had served for many years with flowers: [https://youtu.be/6Tnr6BvOpzg](https://youtu.be/6Tnr6BvOpzg).

express their false message that God hates people in same-sex relationships, the Giffords would not be discriminating based on religion if they declined the event because they did not want to host expression that violates their belief that God loves everyone…. The statute does not require that they treat all messages equal."

Note that this case, like others of its nature, is not about a right to decline to provide services to gay people because of some form of unreasoned hatred. Instead, the question of whether a service provider whose work is essentially artistic and creative, should be required to use their skills to provide support for, and celebration of, a message that they find clashes with their deep religious commitments.

But the court rejected this argument. Peters PJ, with whom the other judges concurred, said (at pp 6-7):

Such attempts to distinguish between a protected status and conduct closely correlated with that status have been soundly rejected (see Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of the Law v Martinez, 561 US 661, 689 [2010]; Lawrence v Texas, 539 US 558, 575 [2003]; Bob Jones Univ. v United States, 461 US 574, 605 [1983]). The act of entering into a same-sex marriage is “conduct that is inextricably tied to sexual orientation” and, for purposes of the Human Rights Law, we hold that there is “no basis for distinguishing between discrimination based on sexual orientation and discrimination based on someone’s conduct of publicly committing to a person of the same sex” (Elane Photography, LLC v Willock, 309 P3d 53, 62 [Sup Ct NM 2013], cert denied ___ US ___, 134 S Ct 1787 [2014]; accord Craig v Masterpiece Cakeshop, Inc., ___ P3d ___, ___ 2015 WL 4760453, *6, 2015 Colo App LEXIS 1217, *15-18 [2015]). Accordingly, petitioners discriminated on the basis of sexual orientation when they refused to host the McCarthys’ wedding on the premises. (emphasis added)

Other cases noted here include

• Elane Photography, LLC v Willock, 309 P 3d 53 (NM, 2013), which was one of the first where a State Supreme Court upheld a ruling that a Christian wedding business (there a photographer) was guilty of sexual orientation discrimination by declining to offer their services to a same sex wedding.
• State of Washington v Arlene’s Flowers Inc, Ingersoll & Freed v Arlene’s Flowers Inc (Ekstrom J, Nos 13-2-00871-5, 13-2-00953-3; 18 Feb 2015), involving a florist, noted above.
• The Masterpiece Cakeshop decision noted in the Gifford quote above involved refusal to create a wedding cake celebrating a same sex marriage,“ as did the decision in
• Re Klein dba Sweetcakes by Melissa and anor (Commissioner of the Bureau of Labor and Industries, State of Oregon; Case Nos 44-14, 45-14; 21 April 2015),“
• Outside the US, in Northern Ireland the Ashers Bakery case is still before the courts. “ This case (see Lee v Ashers Baking Co Ltd [2015] NICty 2 (19 May 2015)) is particularly striking because the customer who wanted a cake adorned with “Sesame Street” characters and celebrating same sex marriage, wanted it for a celebration, but not for a wedding. Yet it was still held that a refusal to provide the cake was discrimination on the grounds of sexual


Neil Foster
orientation! I have some hopes that the length of time the appeal in the case has been reserved (it was heard in May 2016), may mean that the trial decision will be overturned.

A common theme in all these decisions is the view that a decision not to provide artistic and creative support for a same sex wedding must amount to discrimination against the persons involved on the basis of their sexual orientation. This is a view which I have suggested is wrong, and there is at least one lower court ruling in Australia that supports my view." In Bunning v Centacare [2015] FCCA 280 (11 February 2015) the judge commented at para [39] that

"sexual orientation", as the term is used in s.4 of the Sex Discrimination Act 1984 (Cth), covers only that which it expressly covers, i.e., the state of being. It does not cover behaviours.

There is also one US decision recognising the difference, in Hands on Originals, Inc v Lexington-Fayette Urban County Human Rights Commission (Fayette Circuit Court, Civil Branch, 3rd Div, Ky; Civil Action No 14-CI-04474; James D Ishmael Jr, J; 27 April 2015), where a T-shirt printer escaped liability for declining to print a shirt with a message supporting “gay pride”.

The forthcoming Ashers Bakery case may provide the best opportunity for a superior court to clearly distinguish between support for a “message” and discrimination against a person themselves; as mentioned, the cake in that case was not going to be used at a wedding, but simply as a political statement, and may provide a good chance for the appeal court to stress the distinction between these things.

However, it has to be said that in Australia the decision in Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors [2014] VSCA 75 (16 April 2014) suggests that a similar view to that expressed in the overseas cases will be taken here to a refusal to offer services for the celebration of a same sex marriage." In that case CYC, a Christian youth camping organization, had been informed that a booking for their site was wanted from a group supporting same sex attracted young people, and that “the forum was to be used to propagate or encourage the notion that homosexuality was part of the normal range of human sexualities to young people” - para [52]. Having declined the booking the group were sued for sexual orientation discrimination. Part of their defence was that the camp did not enquire as to people’s sexuality or turn people away because they were homosexual; simply that they would not facilitate the message of support for homosexual activity being presented by Cobaw.

But the majority of the Victorian Court of Appeal rejected that claim, saying that sexual orientation is “part of a person’s being or identity” and that:

To distinguish between an aspect of a person’s identity, and conduct which accepts that aspect of identity, or encourages people to see that part of identity as normal, or part of the natural and healthy range of human identities, is to deny the right to enjoyment and acceptance of identity. 50

---

50 Maxwell P at [57], quoting Judge Hampel in the lower Tribunal decision, Cobaw Community Health Services Ltd v Christian Youth Camps Ltd & Rowe [2010] VCAT 1613 (8 Oct 2010) at [193]. See para [59] where Maxwell P says that « her Honour was right to reject the distinction between “syllabus” [the teaching to be conveyed on the weekend] and ‘attribute’, for the reasons which her Honour gave. »
In essence, the court was saying that to criticise homosexual sexual activity is to attack those people who identify as homosexual. In particular the following quote at [61] from the UK Supreme Court decision in Bull & Bull v Hall & Preddy [2014] 1 WLR 3741 was supported, where Lady Hale said:

Sexual orientation is a core component of a person’s identity which requires fulfilment through relationships with others of the same orientation.\(^{51}\)

In response, it cannot be stressed too strongly that those who suggest some allowance should be made for “wedding industry” refusals are not saying that there should be some general exemption from all laws aimed at preventing discrimination on irrelevant grounds against same sex attracted persons. No-one sensible is suggesting – I am not suggesting– that bakers should be able to decline to provide pavlovas or pizzas to gay people, or that they should not be served roses or tulips in a florist’s shop simply on the ground of their sexual orientation. Many of the cases overseas have involved businesses who were perfectly happy to serve gay customers generally.

But when it comes to a specific ceremony the sole aim of which is to celebrate and rejoice over the entry into a long-lasting same sex relationship, which is contrary to the moral teaching of most mainstream religious groups: then these people have simply wanted to be able to politely decline to be dragooned into providing their support.

In Australia we have “balancing clauses” in discrimination law protecting religious organisations (such as proposed s 47B to be introduced by the SSM Bill); but we also have some laws protecting the rights of individual believers.

In Victoria s 84 of the Equal Opportunity Act 2010 provides:

**Religious beliefs or principles**

84 Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person’s religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.

This sort of provision, interpreted generously to recognise the serious importance of the internationally recognised right to religious freedom of all Australians, should be included into the proposed Bill. Parliament could include, for example, s 47C providing that:

[NF Proposed] 47C A person may, despite any law, refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage, if

(a) the refusal is because the marriage is not the union of a man and a woman; and
(b) the refusal conforms with the doctrines, beliefs or principles of their religion.

It has to be said, though, that the chances of such a provision being added to the SSM Bill seem pretty slim.

6. Implications for Christian organisations generally

Reference to the CYC v Cobaw case brings us to the position of Christian organisations generally. Australian laws on sexual orientation discrimination, and on sex discrimination generally, usually include “balancing clauses” in the law stating that decisions

\(^{51}\) At [2014] 1 WLR 3755 [52].
made by religious organisations to comply with their religious doctrines will not amount to unlawful discrimination. So this will mean that a religious group will not be forced to provide services for a same sex wedding.

Proposed new s 47B of the SSM Bill is a good provision of this sort, allowing religious groups or organisations who make halls or other facilities available for weddings, to decline to do so on conscientious or religious grounds:

47B Religious bodies and organisations may refuse to make facilities available or provide goods or services

(1) A religious body or a religious organisation may, despite any law (including this Part), refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage, if:

(a) the refusal is because the marriage is not the union of a man and a woman; and
(b) the refusal:
   (i) conforms to the doctrines, tenets or beliefs of the religion of the religious body or religious organisation; or
   (ii) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

This principle, that requiring a religious group to provide facilities for a celebration of a relationship which they regard as fundamentally contrary to their moral views, seems sensible and was reflected previously in Canada in the decision of the British Columbia Human Rights Tribunal in *Smith v. Knights of Columbus* 2005 CarswellBC 3654, 2005 BCHRT 544. There a religious group was allowed to decline to rent a hall they owned for the purposes of a wedding reception associated with a same sex wedding.

But of course laws allowing religious freedom in this way may change. In the Commonwealth sphere, a general provision allowing religious groups not to be impacted by sex and sexual orientation discrimination laws, s 37 of the *Sex Discrimination Act* 1984, was amended in 2013 to carve out a “rebalance” of the balancing provision so that an aged-care facility run with Commonwealth funding by a religious group may not decline to accept residents on the basis of the “prohibited grounds” of discrimination under that Act. See s 37(2):

(2) Paragraph (1)(d) does not apply to an act or practice of a body established for religious purposes if:

(a) the act or practice is connected with the provision, by the body, of Commonwealth-funded aged care; and
(b) the act or practice is not connected with the employment of persons to provide that aged care.

It is doubtful whether religiously-run aged care facilities around Australia were besieged by aged gay couples demanding to be provided with shared accommodation. However, the amendment was clearly passed to “signal” that so-called “exemptions” in favour of religious groups could be wound back. (Note also that the provision still allows religious groups to employ people from their own religion or who adhere to their moral values- it is simply the residents who cannot be turned away.)

A more recent example is to be found in the State of Victoria, where we can see what a progressive Government when given free reign is capable of. Like other discrimination laws around Australia, balancing clauses in Victorian law have allowed religious groups to operate in accordance with their faith convictions. But amendments now before the Victorian Parliament, in the shape of the *Equal Opportunity Amendment (Religious Exceptions) Bill*

---


Neil Foster
2016, propose to “amend the Equal Opportunity Act 2010 to modify the religious exceptions in relation to the employment of a person by religious bodies and schools” (to quote from the Bill).53

These amendments may or may not pass. And the fact that “balancing clauses” favouring freedom of religion are inherently subject to the vagaries of the political process should not surprise us. While they are in operation, however, they are valuable and may serve to protect and preserve gospel ministry. For example, in NSW the decision in in OV & OW v Members of the Board of the Wesley Mission Council [2010] NSWCA 155 (6 July 2010) upheld the right of the evangelical Wesley Mission to not offer fostering services to same sex couples.

So churches and religious organisations ought to be grateful where these clauses operate, and continue to argue for their inclusion to support religious freedom.

7. Implications for Christian schools

Will the introduction of SSM have an impact on the operation of Christian schools? Might a school, for example, choose not to employ a teacher who is involved in a same sex marriage?

If the current “balancing provisions” are in place, then it seems that this right of a school would be preserved. Under s 38 of the SDA 1984, for example, it is said not to be unlawful discrimination on the basis of sexual orientation where a school makes an employment decision based on its faith commitments.

Educational institutions established for religious purposes

(1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

While most believers would rankle at the fairly patronizing phrase “religious susceptibilities” (it sounds like an allergy of some sort!), the effect of the provision is fairly clearly to allow a school with a commitment to a Biblical view of sexual morality to operate in accordance with that commitment and not employ a member of staff who had contracted a same sex marriage. Of course, if the relevant clause were to be amended in the direction of the currently proposed Victorian “inherent requirements” changes, that may be harder to make out. Then there would be debate as to which staff positions had an “inherent requirement” that the staff member adhere to Christian values as a role model for children. While a very good case can be made in most Christian schools, I imagine, that the school operates as a whole community committed to Christ, and so that it is an inherent requirement for everyone from the Principal up to the gardener to live out the Christian life, including a provision of this sort in the legislation will raise serious issues as to the authority to determine the question. Is the issue simply one for the school, or must it be determined by an external Tribunal or Court?


Neil Foster
These questions may arise at the moment, even before SSM is introduced. But one difference that formal recognition of SSM will make is that there will probably be then increased political pressure to water down or abolish the balancing clauses in respect of same sex married couples. It is one thing to allow a religious school to teach that de facto couples are not living in accordance with the Bible; but it may be thought politically harder to argue that a sexual relationship which has now been “sancitified” with the name of marriage, can be held out as immoral. A change of this sort is not inevitable, but the argument may need to be had.

8. Free speech implications for clergy- teaching in church

If SSM is introduced, then, will it still be possible to teach in church and church-related contexts that homosexuality is sinful? Again, I think so, but pressure for change may mount.8

At the moment there are laws around Australia that prohibit what is broadly called “homosexual vilification”. Such a law, for example, is s 49ZT of the Anti-Discrimination Act 1977 (NSW) (the “ADA”):

49ZT(1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group.

There is a defence under s 49ZT(2)(c) for:

(c) a public act, done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

It seems fairly clear that a calm and reasoned explanation of the Bible’s teaching in a church service or school scripture class would probably fall well and truly within this exception. In addition, of course, such a discussion should not even arguably fall foul in any event of the main provision, as one would hope that in most circumstances a discussion of Biblical morality would not amount to the “incitement of hatred or serious contempt or severe ridicule”. But drawing the lines here may be problematic.

So far there have, as far as I am aware, been no actions against clergy or others in a specifically “religious” context for providing the Bible’s teaching on these matters. There have been “complaints” made by a group opposed to Christianity about sermons delivered in some churches that meet in public schools.9 But so far as I am aware, those complaints have not led to any drastic action being taken. In any case, it has to be said that the defence applicable under s 49ZT(2)(c) would ensure that such comments were not even plausibly “unlawful”. However, of course, it may be possible for a public sector landlord to decide to withdraw a lease of this sort if it disagreed with statements being made, even if those statements were not unlawful. (And in NSW, at any rate, evicting someone from rented premises on the grounds of their religious beliefs is not unlawful, as there is no general ground of “religious belief” as a basis for discrimination in NSW or Commonwealth law.)

---


Having said that there has been no action against clergy under “homosexual vilification” laws, there has been one action taken on the basis of an exposition of orthodox Christian belief, against the Roman Catholic Archbishop of Hobart, Julian Porteous. This action, however, taken by a homosexual activist against the Archbishop for distributing a respectful exposition of Catholic doctrine to Catholic schools, was not taken under the usual form of “anti-vilification” laws. Instead, it was taken under a unique provision of Tasmanian law, s 17 of the Anti-Discrimination Act 1998 (Tas) which makes it unlawful conduct which “offends, humiliates, intimidates, insults or ridicules another person” on a prohibited ground, including sexuality.\(^6\)

In the end the action was discontinued, but not before all the Catholic bishops in Australia had been ordered to respond to the accusations that the booklet they had authorized had caused “offence” to the complainant in Tasmania.\(^5\) The Tasmanian law at the time had a “defence” provision, s 55, similar to the defence provision in the NSW law noted above, but with the notable omission of a “religious” purpose operating as a defence. Since then the Tasmanian Government has introduced an amendment to the Act to add a “religious purpose” defence, though the amending Bill has not passed the lower house yet.\(^5\) But this amendment alone is not sufficient to provide proper protection for free speech; clearly a Christian might want to say something in public even if they are not speaking as part of a church service or religious activity.

Thankfully there is no real equivalent to the Tasmanian law elsewhere at the moment (other “anti-vilification” laws at least operate on “incitement to hatred”, not mere “offence”). The only equivalent is s 18C of the Racial Discrimination Act 1975, but that operates on the ground of race, not sexuality.

9. Free speech implications for believers generally

If clergy are probably protected from actions under so-called “hate speech” laws when making comments about homosexuality in church, what about believers generally? The situation is not too bad. Not all States and Territories forbid vilification on sexual orientation grounds, and those that do generally have balancing clauses protecting free speech like that in s 49ZT(2) noted above, including conduct “done reasonably and in good faith, … for other purposes in the public interest, including discussion or debate about and expositions of any act or matter”. In general a good faith expression of a polite opinion, not targeted as an insult or attack on someone else, ought to fall within this sort of provision.

However, as mentioned previously, if same sex marriage were to be introduced, there may be political pressure to tighten up these provisions; or it may be argued by some that a statement opposing homosexuality could no longer be made “in good faith”, as the community had put its stamp of approval on such behaviour.

It may be instructive to consider a case that arose in the UK. In *Mbuyi v Newpark Childcare (Shepherds Bush) Ltd* (Case No 3300656/2014; ET, 21 May 2015) the claimant, Sarah Mbuyi, got into a conversation with a fellow worker, “LP”, about the Christian view of homosexuality. The details of the conversation were in dispute, but Employment Judge


\(^8\) See the Anti-Discrimination Amendment Bill 2016 (54 of 2016), introduced into the Tasmanian House of Assembly on 20 Sept 2016, 2\(^{nd}\) reading speech 22 Sept 2016.

Neil Foster
Broughton said, at para [46], that on the evidence that had been accepted by the employer (who claimed that their decision had been made solely on Ms Mbuyi’s evidence) the conversation involved LP asking questions about Ms Mbuyi’s church, mentioning that she (LP) was a lesbian and asking whether she would be welcomed at the church, and enquiring as to whether God would approve of her relationship. Ms Mbuyi conveyed that, while God accepts sinners, God was “not OK” with homosexual behaviour. LP was upset and complained to a supervisor.

On the basis of that conversation Ms Mbuyi was called to a disciplinary hearing without being told beforehand of the allegations, nor being warned that serious consequences might follow. She was asked whether, if she had been asked to read a book to the children in her care about a same sex family, she would do so; she responded that she would probably get a colleague to read it. She was then asked, without having used the word herself at all, “Do you think LP is wicked?” – see para [60]. Her response was “we are all wicked”; but this comment was later used as part of the evidence to suggest that she had been “harassing” her colleague. A few days later she was dismissed for “gross misconduct” on the basis of harassment, specifically (see [68]):

On Monday 6 January 2014 you entered into a conversation in the workplace with your colleague, LP, and the topic moved on to the issue of homosexuality… During that conversation you stated that homosexuality was a sin.

Ms Mbuyi then found other work, but took action against her former employer for discrimination based on harassment, direct discrimination on the grounds of religion or belief, and indirect discrimination on the same grounds. To summarise, her claim of harassment failed for the interesting reason that, when asked how she felt about the whole episode, she responded (see [132]) that “It was great. I could tell the gospel”! In other words, she said she did not feel bad about the incident.

However, her claim for discrimination was successful, not being dependent on how she felt about the incident. (And, of course, as a matter of precedent for the future, not all Christians dismissed in these circumstances would necessarily feel the same way!) The most obvious basis for her claim was that of “indirect discrimination”- that a requirement had been placed on her that, while not directly discriminatory, had a more serious impact on those with her religious belief than it would on others.

This was indeed one of the grounds accepted by the Tribunal for her case succeeding. In terms of s 19 of the Equality Act 2010 (UK), a “provision, criterion and/or practice” (PCP) had been applied to her, that employees should not express any adverse views on homosexuality or describe it as a “sin”. (See para [101.1]) This PCP put “evangelical Christians” at a disadvantage in comparison to people in the community generally. Judge Broughton noted that art 9 of the European Convention on Human Rights protected religious freedom, and in particular that:

[106] The manifestation of religious belief may take the form of worship, teaching, practice and observance. Bearing witness in words and deeds is bound up with the existence of religious convictions (Kokkinakis v Greece, 25 May 1993, ECHR).

The Judge also noted that while an earlier approach in the UK suggested that an employee who found their religion clashing with their job, should just get another job (see [111]), this was no longer the approach favoured in the European Court of Human Rights since the decision in Eweida & Ors v UK [2013] (see the quote at [112]). Here the employer needed to consider whether it was “proportional” to a “legitimate aim” to have treated the claimant in this way.

Neil Foster
While the Judge accepted that a desire to have a “non-discriminatory” workplace was a legitimate aim, the way that the claimant had been treated in these circumstances was not a “proportionate” response- see the discussion at paras [187]-[193]. Features that led to this conclusion were that, if the issue of “discussions about homosexuality” was the real concern, then the colleague LP (who, on the accepted findings, had initiated the conversation) had not been disciplined; that no prior warning was given; that no opportunity was given for an undertaking to be offered that similar conversations would not be initiated by the claimant in the future.

The decision on “indirect” discrimination seems justifiable. To dismiss an employee on the basis of a one-off conversation on a topic initiated by a fellow worker clearly seems disproportionate to legitimate aims of avoiding discrimination and harassment. While dismissal might be justified if there is a pattern of unwanted conversations foisted on others, as Judge Broughton said, here:

“there had been no warning and the dismissal was based primarily on an honest reply to a query”.

While this was a good outcome, it has to be said that a case like this might not go the same way in NSW. While it would be unlikely that Ms Mbuyi would have committed “homosexual vilification”, if she were dismissed she would not in this State have a claim on the basis of religious discrimination (such not being unlawful in NSW.) However, if an employer had its own policy whereby it undertook not to discriminate on the grounds of religion, a claim might be made for breach of that policy if actionable.

10. Conclusion

I should say that, despite the length of this paper, I have not dealt with all the possible challenges to religious freedom that might flow from SSM. Some of the wider issues that might come up also include

- whether financial support currently offered to religious organisations who provide important services to the community will be conditioned on support for same sex marriage (so a Christian welfare organization might find government funds cut off; or there may be pressure to reduce the tax exemptions available to churches if they do not “toe the line” on this issue);
- religious groups that offer other services, such as educational institutions, may find their students unable to work in the wider culture unless they affirm the validity of SSM (a Canadian Christian university, Trinity Western, is facing these issues at the moment, when a number of Law Societies in Canada have said that the “covenant” to observe Biblical sexual morality required of all students while studying, makes its law students unsuitable to practice law). ^

However, what we have seen so far is enough to indicate that there will be some issues raised for religious freedom for Christian life and gospel ministry should same sex marriage be introduced. While for the moment clergy will probably be able to resist being forced to solemnize such “marriages”, and if the Government’s draft Bill as introduced were enacted religious groups may be able to decline to provide premises for such weddings, there are a number of other concerns. Individual believers and small businesses involved in weddings may find difficult decisions of conscience- public service registrars, florists,


Neil Foster
photographers, bakers, wedding invitation producers, may all be required to either devote their services to the celebration of a same sex union or to give up their job. While ministers for the moment will be allowed to continue to preach the Bible’s view on sexuality (except perhaps where laws like the current Tasmanian provisions are in force), individual believers may face informal penalties (such as dismissal or eviction) for expressing opposition to same sex marriage.

Of course, as noted already, some of these legal constraints on action and speech may be operative even now, based on a particular view of “sexual orientation” discrimination law. But if Australia chooses to put society’s stamp of approval on homosexual behaviour by redefining “marriage” to include same sex unions, then the pressure for such litigation to take place, and for laws which currently provide some protection from action to change, will mount.

Does all this matter? Of course there are more important issues than whether a same sex couple “marries” or not. For their own eternal destiny what matters is whether or not they repent and put their trust in the Lord Jesus, his death and resurrection, for their salvation.

But I think it matters because we as God’s people want to bring him glory in everything, and God is glorified when his purposes for marriage in this age are observed and seen to work for the flourishing of humanity. Christian people will want to live in accordance with God’s word, and will refuse to support the worship of the modern idols of sexuality as a marker of “identity”. All will need to be satisfied in their own consciences about this, but it seems pretty clear to me that we do not want to send a message that we support the establishment of a relationship which is founded on a sexual union forbidden by the word of God. Christian schools will want to model godly Christian living and not put before children the false model of a same sex union. Christian organisations will want to present a Christian worldview to those whom they serve. In order to keep on serving God and presenting the gospel, some organisations may have to take a stand on these issues. (Recently, for example, the US equivalent of our AFES, the IVCF, has made it clear that its staff cannot work for them and support same sex marriage. This, not surprisingly, has generated media outrage. IVCF, to their great credit, are standing firm.)

In order to keep on teaching the Bible, clergy and other Christians will need to be prepared to keep on teaching from Romans 1, and I Corinthians 6, and 1 Timothy 1, despite the offence those passages may cause those committed to same sex ideology.

Should we then, be using the law to defend our rights to religious freedom, or should we simply “turn the other cheek” and take whatever punishment is provided? There is a time for the second option. But I want to say that there is a time for the first option as well! The apostle Paul, when facing challenges from authorities to gospel proclamation, was prepared to use the legal structures of the Roman Empire to keep on preaching the gospel. In Acts 16, after being miraculously freed from prison in Philippi when he should not have been locked up in the first place, Paul did not choose to “sneak away” in the middle of the night.

35 But when it was day, the magistrates sent the police, saying, “Let those men go.” 36 And the jailer reported these words to Paul, saying, “The magistrates have sent to let you go. Therefore come out now and go in peace.” 37 But Paul said to them, “They have beaten us publicly, uncondemned, men who are Roman citizens, and have thrown us into prison; and do they now throw us out secretly? No! Let them come themselves and take us out.” 38 The police reported these words to the magistrates, and they were afraid when they heard that they were Roman citizens. 39 So they came and apologized to them. And they took them out and asked them to leave the city. 40 So they went out of the prison and visited Lydia. And when they had seen the brothers, they encouraged them and departed. )Acts 16:35-40, ESV)

Paul waits until he has had an apology from the local magistrates, not for his own satisfaction, but to make it crystal clear that what had happened to him was unlawful, and should not happen to the believers he would be leaving behind in Philippi. Later, in Acts 22:25-29, when he is about to be flogged by a Roman tribune, he also uses the legal protection his Roman citizenship gives him to escape the flogging and to further his chances of gospel preaching in the future. He then appeals to the Roman Emperor as part of his legal rights, in Acts 25:11, to avoid being handed over to the Jewish authorities, a move which leads to the gospel finally reaching Rome!

So Paul uses legal rights, when available, to keep on serving Jesus and preaching the gospel. The legal system, Paul tells us in Romans 13:1-7, has been instituted and appointed by God and is God’s servant, whether it knows it or not! Where there are freedoms and opportunities given by the law to allow godly Christian living and gospel proclamation to continue, then I think that it is a perfectly godly reaction to use those things God has given. Of course there may come a time when the law fails to protect religious freedom, and we suffer its penalty. But let’s not assume that is always God’s purpose!

For those who find themselves in need of legal help in defence of religious freedom, there is a good organization called the “Human Rights Law Alliance”, which aims to provide low cost legal representation for these cases. I recommend them as a good group. 61

Let me encourage us all, as Paul urges us to do, to pray:

1 Tim 2 First of all, then, I urge that supplications, prayers, intercessions, and thanksgivings be made for all people, 2 for kings and all who are in high positions, that we may lead a peaceful and quiet life, godly and dignified in every way. 3 This is good, and it is pleasing in the sight of God our Savior, 4 who desires all people to be saved and to come to the knowledge of the truth.

We have no need to fear that the forces opposed to God will triumph! But let’s ask that while we serve him here we will be given wisdom and grace to relate to our society, and continued courage to proclaim God’s word in truth so that he will be glorified.

Further reading

• Brennan, Frank “Church-State Concerns about Same Sex Marriage and the Failure to Accord Same Sex Couples their Due”, in C Parker & G Preece (eds) Theology and Law: Partners or Protagonists? (Adelaide: ATF Press, 2005) 83-111 (also part of a journal series, Interface, (2005) vol 8/1).

61 See https://hrla.org.au.