



Quaker Peace & Legislation Committee

14 February 2018

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

Dear Philip Ruddock,

The Religious Society of Friends (Quakers) welcomes the opportunity to make a submission to the Religious Freedom Review.

We note that the proposal for the Review arose from the 2017 postal survey on same-sex marriage and the subsequent legal recognition accorded to marriage by LGBTIQ couples. We will therefore focus our comments on issues that emerged in response to the introduction of marriage equality.

The impact on Quakers of amendments made to the Marriage Act since the Marriage Amendment Act 2004 provide an excellent case study in the issues surrounding religious freedom. In line with the experience of Quakers set out below, we urge the Expert Panel to consider that religious freedom is not only about the extent to which religious belief does or does not justify discrimination against one's fellow human beings, but also encompasses the rights of people of faith to include and to celebrate the diversity of human relationships, families and experiences.

Background

Quakers have long supported religious freedom. The faith and practice of the Religious Society of Friends are founded in every person having direct access to the inner light, whether that be the light of Christ or conscience. Strict enforcement of worldly forms in religion, and mandatory adherence to particular beliefs, are inconsistent with our hope to speak from personal experience as we seek to "answer that of God in everyone".

Quakers have manifested support for religious freedom in different ways since the 17th century. An early form of religious freedom was entrenched in the constitutional framework of the colony of Pennsylvania, which at its founding was an attempt to create a

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society based on Quaker principles, sometimes called the 'Holy Experiment'. Today, Quakers strongly support the statements of religious freedom embodied in the Universal Declaration of Human Rights and international human rights conventions, and work in a range of ways and forums to foster interfaith dialogue and understanding.

Support for religious freedom is also driven by a basic Quaker religious principle, or Testimony, to the equality of all people. Quaker faith is but one option and no religious community can answer the spiritual or philosophical needs of all persons. Outside the sphere of religion, the Equality Testimony has also motivated Quakers to work for the abolition of slavery, for equality for women and, since the 1960s, for equality for LGBTIQ people.

Whether Australian law (Commonwealth, State and Territory) adequately protects the human right to freedom of religion. Section 116 of the Australian Constitution provides a measure of protection of freedom of religion at the Commonwealth level, stating:

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.

This provision has been interpreted narrowly by Australian courts when compared to similar constitutional guarantees of religious freedom overseas, such as the First Amendment to the United States Constitution. Australian courts have tended to examine the purpose, rather than the effect, of legislation when considering its consistency with section 116 of the Constitution. Unsurprisingly, we understand that no laws made by the Australian Parliament, have ever been successfully challenged for inconsistency with section 116.

However, legislation clearly can have the effect of prohibiting the free exercise of religion, regardless of the law's purpose. In some circumstances, Parliament or the courts may impose limitations on the free exercise of religion that are entirely appropriate due to the interaction between religious freedom and other human rights. This is particularly the case where a religious practice involves the causing of harm to those who are vulnerable, be they adults unable to consent to the practice, children, or animals that may be subjected to cruelty.

It is less easy to justify restrictions on the free exercise of religion that involve no harm to any person and, in some circumstances, benefit to the persons involved. The Marriage Amendment Act 2004 is a clear case in point where Parliament effectively prevented Quakers from extending equal treatment to LGBTIQ people, prohibiting the free exercise of one of the most basic of Quakers' religious principles: the equality of all people.

Case study: Quakers and the Marriage Act

Quakers interest in religious freedom as it relates to marriage is longstanding. From the Religious Society of Friends earliest days in England, we have held that "the right joining in marriage...is the Lord's work and we are but witnesses". Quaker weddings involve the couple making their vows before God, witnessed by those assembled. No minister presides. As such, the legal status of such marriages in England was for a long time precarious.

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Lord Hardwicke's Marriage Act of 1753 established strict requirements for valid marriages to be conducted in the Church of England. However, the Act included express exemptions for Quaker and Jewish marriages which continued to be conducted outside the Church of England. The recognition of Quaker marriages has therefore been part of Australia's law since colonial times.

Australia's Marriage Act 1961, rightly extended recognition of marriages to those conducted by a much wider range of religious communities. The Religious Society of Friends is a "recognised denomination" under the Marriage Act, and therefore Quaker wedding ceremonies give rise to a legally recognised marriage under Australian law.

Quakers and marriage equality

In 2005, Australian Quakers received their first request by a same-sex couple for a Quaker wedding ceremony. After a period of consideration, the couple's Meeting decided that it would be consistent with the Testimony to Equality to celebrate the marriage in a Quaker ceremony.

However, despite Quakers being a recognised denomination under the Marriage Act, and despite having determined that the solemnisation of the marriage would be in the form and the ceremony considered sufficient by Quakers, the Marriage Amendment Act 2004 prevented Quakers supporting the marriage to full and equal legal recognition.

The Marriage Amendment Act 2004 expressly limited, for the first time in Commonwealth legislation, the definition of 'marriage' to heterosexual unions. The Government at the time stated that one of the purposes of the amendments was to '[express] the fundamental Judeo-Christian view and that marriage is a lifelong union between a man and a woman to the exclusion of all others'.

It was a source of distress for Quakers that we were prevented from treating requests by LGBTIQ couples to celebrate their marriages in the same way as those received from heterosexual couples. The 2004 law was, in effect, an absolute prohibition on the free exercise of Quakers' belief in the equality of LGBTIQ people in the matter of marriage. As a result, the celebration of LGBTIQ marriage from that time was a form of civil disobedience but could not, unfortunately, result in legal recognition until the law was changed.

The express narrowing of the definition of marriage to one interpretation of the 'Judeo-Christian' view could not be justified on the basis of preventing harm to others' rights. The marriage of LGBTIQ people brought no detriment to others. No religious community was then, or is now, forced to marry any couple. Indeed, the only legal impact of the Marriage Amendment Act 2004 was that LGBTIQ people were excluded from equal rights under Australian law and, as a result, the free exercise of religion by those who wished to marry LGBTIQ couples was prohibited. The emotional impact on LGBTIQ people, their children and other family members was significantly greater.

Quakers, therefore, welcomed and celebrated the enactment of the Marriage Amendment (Definition and Religious Freedoms) Act 2017, and worked to support the cause of marriage equality during the preceding postal survey. The law granted equality to LGBTIQ Australians and, furthermore, has removed a prohibition on Quakers acting in accordance with our Testimony of Equality.

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Quakers' experience with the prohibition of LGBTIQ marriage between 2004 and 2017 demonstrates the complexity of protecting religious freedom in a pluralistic and multicultural society.

Quakers recommend that guidelines be prepared to ensure consideration of religious freedoms under Statements of Compatibility prepared in accordance with *Human Rights (Parliamentary Scrutiny) Act 2011*:

1. take full account of the *effect* of proposed legislation on religious freedom, and
2. reflect the full diversity of religious beliefs in Australian society.

Marriage Amendment (Definition and Religious Freedoms) Act

While Quakers broadly supported the Marriage Amendment (Definition and Religious Freedoms) Act 2017, some provisions of the 2017 Act raise questions for how they will work in practice to support religious freedom. For example, the new section 47B to the Marriage Act, which provides that:

- (1) A body established for religious purposes may 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 the refusal:
 - (a) conforms to the doctrines, tenets or beliefs of the religion of the body;
 - or
 - b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

- (3) This section does not limit the grounds on which a body established for religious purposes may 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.

While Quakers support religious communities retaining full discretion as to whose marriages they celebrate, the extension of full discretion to "bodies established for religious purposes" may prove problematic in practice. There are a number of scenarios that could arise as a result of section 47B that may have unintended consequences of *limiting* religious freedom. These relate to the celebration of a marriage by one religious community that supports marriage equality in facilities owned by another body established for a religious purpose. Two examples serve to illustrate the potential difficulty:

1. Quakers are a small denomination and, in many places around Australia, have entered into arrangements to use facilities owned by other denominations for our Meetings for Worship, including Meetings for Worship for Marriage. If a Quaker Meeting agreed to hold an LGBTIQ wedding on such premises, could the denomination owning the facilities use section 47B to refuse to allow the wedding to go ahead at Quakers' usual place of worship?
2. Some couples, particularly those in which one person has a serious or terminal illness, seek to marry in hospital or at an aged care facility. If a Quaker LGBTIQ couple in such a situation sought to marry, could a hospital or aged care facility

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owned by another denomination refuse to allow a Quaker wedding to proceed, despite the grave risks to life or health that could occur if the wedding took place off premises?

Legislation that seeks to prioritise religious freedom of particular religious bodies over all other rights, without 'limiting the grounds' on which such bodies may claim religious freedom, can have the unintended consequence of reducing religious freedom for others.

Given the uncertainty around section 47B, Quakers recommend clarifying and 'where necessary, narrowing the scope of "bodies established for religious purposes", and the circumstances in which it applies, to ensure better protection for those whose religious faith moves them to support equal marriage rights.

Conscientious objection

The marriage equality postal survey, and subsequent parliamentary discussion, raised the question of-whether a right to 'conscientious objection' on religious ground to providing ordinary, commercial services to LGBTIQ couples should be recognised by Australian law.

As one of the historic peace churches, Quakers have a long history of conscientious Objection, back to the 17th century when the first generation of Quakers proclaimed their absolute opposition to fighting wars "under any pretence whatsoever". At times, Quakers have suffered legal penalties for this stand even as Quakers sought through efforts such as the Friends Ambulance Unit in World War I and subsequently to relieve the suffering of the wounded.

We consider that conscientious objection has developed a clear meaning over the years. It means taking a principled stand against harming your fellow human beings or other living creatures. The clearest example of this is the refusal to take up arms.

Conscientious objection does not refer to just any strongly held personal belief. For example, no matter how strongly you hold the conviction, refusing to serve women or people of colour is not an act of "conscientious objection". It is simply discrimination.

According equal rights to all, including to use commercial services provided by a business, harms no-one. A religious person is not forced to alter their beliefs or their religious observances by providing a service in an ordinary commercial situation. On the other hand, refusing to provide services to people based on their inherent characteristics harms the person discriminated against. Such harm is compounded where there may be only a limited number of providers of certain services, such as in small and remote communities.

Quakers recommend that any legislative recognition of a right to conscientious objection on religious grounds be strictly limited to cases where the conscientious objector objects to causing demonstrable harm to another person or living creature.

Conclusions

The experience of the postal survey on marriage equality and subsequent legislation have highlighted the complexity of religious freedom. Broad brush attempts to protect religious freedoms, and assumptions about what people of faith believe, can lead to reductions in

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religious freedom overall.

Religious freedom is also rightly subject to limitations. It is not, nor should it be, absolute. This has been recognised internationally in Article 18 of the International Covenant on Civil and Political Rights, which includes both a clear statement of the right to freedom of religion, and the limitations that may be placed on the manifestation of one's religion.

We trust that these views will be of assistance to the Expert Panel and would be pleased to provide further information if requested.

Yours sincerely,

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Convenor
Quaker Peace and Legislation Committee

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