

14 February, 2018

The Hon Philip Ruddock
Chair
Expert Panel on Religious Freedom
Department of the Prime Minister and Cabinet
Canberra

(submitted by email)

Submission to Expert Panel on Religious Freedom

Justice Connect's Not-for-profit Law Service welcomes the opportunity to make a submission to the Expert Panel.

Justice Connect is a legal assistance charity that has worked for 25 years to improve legal and life outcomes for vulnerable people and community groups, through our specialist services and pro bono referral network of over 10,000 lawyers.

About Not-for-profit Law

Not-for-profit Law is an Australia-wide specialist program of Justice Connect. Not-for-profit Law provides free and low cost legal assistance to not-for-profit (**NFP**) community organisations and social enterprises. Not-for-profit Law provides services directly (in the form of legal information, advice and training) and brokers referrals for pro bono assistance from its member law firms and barristers.

By helping those involved in running NFPs to navigate the full range of legal issues that arise during the lifecycle of their organisation, Not-for-profit Law saves their time and resources. This allows them to focus on achieving their mission, whether that is helping vulnerable people, environmental conservation, or working towards social cohesion.

Not-for-profit Law advocates for an improved legal and regulatory framework for the NFP and social enterprise sector, and to ensure law reform considers the impacts of regulation especially on small to medium sized organisations. Effective and appropriate regulation supports efficient and well run NFPs and social enterprises; a thriving sector benefits all Australians.

Scope of our submission

We note the Panel's task is to examine and report on whether Australian law (Commonwealth, State and Territory) adequately protects the human right to freedom of religion.

Our submission deals with the intersection of charity law, discrimination law and tax. We focus on the extent to which charities can manifest religious faith without adversely affecting their charity status.

In particular, concerns have been expressed about whether churches and faith-based charities will be able to continue to access tax concessions, discriminate against same sex couples, and advocate for traditional marriage. We address each of these inter-related issues in our submission.

In relation to the extent to which charities and other NFPs should be able to discriminate on religious grounds, we note the submission of the Human Rights Law Centre which we have reviewed and endorse.

Summary

No changes are needed to charity legislation:¹

- In relation to **discrimination** – the ability of religious organisations to discriminate (whether the exemptions that permit that are wound back or increased) should be dealt with in discrimination laws, not by way of shorthand amendment to charity legislation (as was attempted by those moving proposed amendments to the *Marriage Amendment (Definition and Religious Freedoms) Bill 2017*). Provided charities comply with discrimination laws, their charity status will not be at risk. No special protection of charity status is warranted, for religious bodies or any other type of charity.
- In relation to **advocacy** – all charities can already legally advocate for changes to government policy provided the issues are relevant to charity’s purpose(s). This remains the case under the current law, even as governments come and go. Charities can already advocate for traditional marriage (where this is in pursuit of their charitable purpose) and this would not be curtailed by any changes to discrimination or other laws.
- In relation to **tax concessions** – an organisation’s charity status, and therefore related charity tax concessions and benefits, will not be at risk all of a sudden because of the legalisation of same sex marriage. As stated above, charities must comply with discrimination laws (whatever they may be), must not have a disqualifying purpose (such as engaging in activities which are unlawful or contrary to public policy or promoting a political party)², and must be for public benefit.

We recommend:

1. That the ability to discriminate should continue to be dealt with in discrimination law, rather than in the legislation dealing with charities, primarily for the sake of coherence and simplicity, which promotes compliance, but also recognising that there are many charities and other NFPs which are not registered with the Australian Charities and Not-for-profits Commission (**ACNC**).
2. Harmonisation and simplification of discrimination laws, including a single definition of religious body for discrimination law purposes in all jurisdictions.
3. That the consolidated and modernised discrimination law proposed by the Human Rights Law Centre (whose submission to this inquiry we endorse) should include the same protection from discrimination for volunteers and unpaid workers as for paid employees

Key concepts

Religious charity

In this submission, the term ‘**religious charity**’ means a charity which has advancing religion as one of its purposes. It might be a church which has advancing religion as its *only* purpose, or it might be a **faith-based charity**.

Faith-based charity

The term **faith-based charity** is generally used to refer to a charity which is established by a religious organisation to do good works. It may or may not have an expressly religious purpose. Public benevolent institutions (**PBIs**) are sometimes referred to by commentators as “faith-based charities”.

PBIs enjoy the maximum possible charity tax concessions including Deductible Gift Recipient (**DGR**) status, which means that donations are tax deductible. It is important to note PBI is a concept unique to Australia and, as its

¹ In particular the *Charities Act 2013* (Cth), and the *Australian Charities and Not-for-profits Commission Act 2012* (Cth)

² *Charities Act 2013* (Cth) s11.

name conveys, is about greater tax concessions for providing *public* benevolence – services to help members of the public in need.

If a faith-based charity such as a PBI is registered with the ACNC, it may or may not be registered with a charity subtype of “advancing religion” alongside other sub-types such as advancing social welfare.

Public benefit

All charities must be for public benefit³ as opposed to, for example, serving private interests by generating private profit. This requirement has been the subject of a great deal of case law, much of which continues to be relevant for interpreting the public benefit requirement under the *Charities Act 2013* (Cth) (**Charities Act**).

Public policy

Under Australian law, an organisation will be disqualified from having charitable status if it has a purpose which is contrary to public policy.⁴ **Public policy in this context has a particular legal meaning and is different to government policy.** It includes such things as “the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security.”⁵

Access to tax concessions

“Public benefit” and “public policy” requirements

An organisation will not have access to charity tax concessions unless it meets (amongst other things) the public benefit and public policy requirements. These are different but overlapping concepts.⁶

The law in relation to whether opposition to same sex marriage violates the requisite ‘public policy’ and ‘public benefit’ tests is quite different in Australia to that overseas. Both the meaning of these terms, and the requirements relating to them, are different in Australia to elsewhere. What we do share with overseas jurisdictions is the tendency for some commentators to make superficial and alarmist references to overseas experience, “skip[ping] over the hard work of figuring out how the public policy rule would apply to churches and other religiously affiliated organisations that discriminate on the basis of sexuality.”⁷

We agree with the view expressed by the Acting Commissioner of the ACNC in his 24 November 2017 letter to Senator Dean Smith⁸ (copy attached) that “these [overseas] cases provide limited guidance or assistance in determining questions of charity status under Australian law.”

Our submission hopes to clarify for the Panel the public policy and public benefit requirements as they stand in Australia.

Religious charities and public policy

For an organisation to meet the legal definition of charity, it must not have a purpose which is contrary to public policy.⁹

³ *Charities Act 2013* (Cth) s5.

⁴ *Charities Act 2013* (Cth) s11.

⁵ *Charities Act 2013* (Cth) s11(a).

⁶ G E Dal Pont, *Law of Charity* (LexisNexis, 2nd ed, 2017) 71 [3.48].

⁷ Samuel D. Brunson and David J. Herzig, ‘A Diachronic Approach to Bob Jones: Religious Tax Exemptions after Obergefell’ (2017) 92(3) *Indiana Law Journal*, 1179.

⁸ The Acting Commissioner’s letter was publicly released and is appended to our submission.

⁹ *Charities Act 2013* (Cth) s11

The courts have been reluctant to utilise the public policy requirement in deciding on charity status because of the difficulty in determining what public policy is.¹⁰ Illegal purposes are clearly contrary to public policy, but beyond that, courts are reluctant to draw arbitrary lines, and the concept has not been widely used by the courts except to deal with matters violating such fundamental things as the rule of law, the constitutional system of government, the safety of the general public and national security.¹¹ In part, this is in recognition that reasonable minds can differ on what would be contrary to public policy, and also that the line between what is consistent with public policy, and what is contrary to it, shifts over time. For example, racial discrimination and slavery were once widely regarded as acceptable.

In our view, it is unlikely that an Australian court would find that a charity which advocates legally for traditional marriage is acting contrary to public policy.

It is conceivable (but by no means certain) that we could reach a point where there is no longer any significant degree of respect in the Australian community for the traditional view of marriage. If that point is reached, then it may be more likely that a court would find that advocating for traditional marriage is contrary to public policy. However, a more straightforward, and therefore more likely, approach would be for the court to utilise the public benefit concept to determine whether a charity advocating for traditional marriage is doing more harm than good.¹²

A further reason why courts have only rarely needed to resort to using the public policy concept to disqualify a charity is that it is only needed when there is no specific legislation rendering something illegal (for example discrimination on the basis of race, or slavery). Where such legislation exists, the charity can simply be disqualified on the basis of promoting illegality.

In summary, in our view the likelihood that a charity advocating for traditional marriage would be disqualified on public policy grounds is almost non-existent currently, and even if societal attitudes shift significantly, the prospects for this to occur would still be low. We cannot future proof all our laws for major societal shifts of this nature – that is why we have a democratic system with parliaments and courts playing their respective roles to ensure laws evolve over time (as the slavery example highlights).

Government policy distinguished from public policy

Under the Charities Act, “Activities are not contrary to public policy merely because they are contrary to government policy.”¹³ This makes sense. Otherwise large numbers of charities would face deregistration every time there was a change of government. So, even if same sex marriage is to be regarded as government policy, there is no prohibition against opposing it. Charities opposing it would not be acting contrary to *public* policy, only expressing a view which is contrary to government policy.

In *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539, the High Court decided that in Australia, the generation of public debate about government policy is beneficial to the public.¹⁴ **This is a clear example of, and binding authority for, a charity being able to advocate against the policy of the government of the day without losing charity status on the grounds of public benefit or public policy.**

¹⁰ See the discussion in Dal Pont, *Law of Charity* at [3.46].

¹¹ These are the examples of public policy set out in Section 11 of the *Charities Act 2013* (Cth).

¹² See the discussion below about public benefit.

¹³ *Charities Act 2013* (Cth) s11.

¹⁴ The majority decided not to follow the English line of cases including *Bowman* and *McGovern*.

Religious charities and public benefit

All charities must be for public benefit.¹⁵ Public benefit is presumed where the purpose is advancing religion,¹⁶ but can be rebutted with evidence of detriment to a section of the public.¹⁷

If a charity advocates for traditional marriage in pursuit of its religious purpose, there could be an argument that this advocacy is detrimental to same sex couples. Advocates of same sex marriage might argue, for example, that following the changes to the *Marriage Act* 1961, same sex couples should be able to live their lives without suffering the harmful effects of ongoing controversy. Religious charities might argue that any such detriment is outweighed by the public benefits associated with promoting religious freedom, generating public debate,¹⁸ and promoting free speech.

For charities registered with the ACNC, it would fall to the Commissioner of the ACNC to determine whether the benefits outweigh the detriment.¹⁹ There is within the ACNC's enabling legislation an appeals process for challenging decisions of the Commissioner. It is our view that this existing process is both fair and sufficient.

Ability of faith-based charities to discriminate

To what extent should faith-based charities be able to discriminate?

On the question of the extent to which religious bodies *should* be able to discriminate, we endorse the submission of Human Rights Legal Centre.

In summary, the Human Rights Legal Centre's recommendations are to repeal the blanket religious exemptions which allow religious organisations to discriminate in the provision of facilities, goods and services which they provide to the public, and to replace them with a narrower general limitations clause. Alternatively, they recommend that religious exemptions in employment should be narrowed to only permit discrimination when they are required to fulfil the 'inherent' requirements of a position (for roles closely connected with religious worship, observance, practice or teaching). Also that there should be no religious exemptions in employment for organisations that receive government funding.²⁰

We focus our submission on how a charity's actions in discriminating against same sex couples may affect its charity status.

If the existing blanket exemption for religious bodies is removed in favour of a more proportionate approach, how might this affect charity status?

Some charities may choose to express their opposition to same sex marriage by breaking the law. This could involve isolated instances, or a workplace policy which promotes civil disobedience. For example a charity which adopts a policy that employees are *at liberty* to discriminate unlawfully against same sex couples in the provision of services, or a policy that *requires* employees to do so. If this amounted to a purpose of engaging in or promoting activities that are unlawful, then it would be a disqualifying purpose, and the organisation would not be eligible for charity status.²¹

¹⁵ *Charities Act 2013* (Cth) s5.

¹⁶ *Charities Act 2013* (Cth) s7.

¹⁷ *Charities Act 2013* (Cth) s6.

¹⁸ See *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539.

¹⁹ *Charities Act 2013* (Cth) s6.

²⁰ Human Rights Law Centre, *Submission to the inquiry into the status of freedom of religion* (2018); recommendations 7- 11.

²¹ *Charities Act 2013* (Cth) s11.

If a blanket exemption for religious bodies is retained, what does this mean for charity status?

We endorse the submission of the Human Rights Legal Centre, which is in favour of removing the existing blanket exemptions for religious bodies, and introducing general protection provisions against discrimination. However, in the event that some form of blanket exemption is to remain for religious bodies, we draw the Panel's attention to some technical issues and make recommendations as follows.

1. We recommend that the ability to discriminate should continue to be dealt with in discrimination law, rather than in the legislation dealing with charities, primarily for the sake of coherence and simplicity, which promotes compliance, but also recognising that there are many charities and other NFPs which are not registered with the ACNC.

A note about Public Benevolent Institutions (PBIs)

Many faith-based charities are registered by the ACNC with a sub-type of advancing religion as well as having PBI status. These organisations would qualify for blanket discrimination exemptions as religious bodies if the requirement is that the organisation has a purpose of advancing religion – in the case of a PBI, the religious purpose is in addition to the purpose of providing benevolent relief.

However, if the requirement is to be that the *main* purpose of the organisation must be religious, there is room for debate regarding whether a PBI can have two main purposes: the provision of benevolent relief, and the advancement of religion. Allowing two main purposes would be consistent conceptually with the nature of “faith in action” in many religions: where a person or an organisation does good works as an expression of their religious faith, the religious purpose and the “good works” purpose are intertwined. Each is conducive to the other, rather than one being predominant over the other. But, in our opinion, based on plain language and the case law,²² the better view is that a charity can only have one main purpose. Consideration could be given to clarifying this (i.e. the one ‘main’ or two ‘main’ purpose point) in the relevant legislation.

Ability of faith-based charities to advocate for traditional marriage

It is vital for the benefit of all Australians that *all* charities be able to advocate in pursuit of their charitable purpose, as currently allowed under the law. Religious charities are no exception.

Charities may express their opposition to same sex marriage by advocating for a change in the law, where this is relevant to their charitable purpose(s).

Some are concerned that the ACNC may revoke charity status on the grounds that because Parliament has now legislated to allow same sex couples to marry, this means that it is *public* policy to allow same sex couples to marry, and this means that it is contrary to public policy to continue to promote a traditional view of marriage. This concern is based on a misunderstanding of the nature of the legal definition of “public policy” for the purposes of Australian charity law, as outlined above.

PBIs will need to take care to ensure that any advocacy for changing the law in relation to same sex marriage is relevant to their charitable purpose(s).

By definition, the main purpose of a PBI is the provision of benevolent relief, and so it will not always be justifiable for a PBI to advocate against same sex marriage. In our view, this is appropriate. If a PBI wishes to advocate for same sex marriage on religious grounds, it would need to have a religious purpose, or leave the advocacy activities to a related entity which has the requisite religious purpose (for example, the founding religious body which established the PBI). To be explicit, it would be allowable for the PBI's related church to advocate against same sex marriage (as it may already do on other issues such as abortion).

²² For example *Maclean Shire Council v. Nungera Co-operative Society Ltd* (1995) 86 LGERA 430

'Public' benevolence should not allow a significant section of the public who may be in need of benevolence, to be excluded simply because they have married as permitted by law. Just as it would not be 'public' benevolence to exclude members of the 'public' who hold religious beliefs that are not consistent with the religious beliefs of the particular faith based PBI.

Need for consistency and simplification

2. We recommend harmonisation and simplification of discrimination laws, including a single definition of religious body for discrimination law purposes in all jurisdictions.

Note of caution. For those organisations which are registered as charities by the ACNC, it may seem appealing to categorise organisations as religious bodies by reference to whether the charity is registered by the ACNC with a sub-type of advancing religion. However, care should be taken with this approach, given that not all religious organisations are registered by the ACNC – it is an 'opt in' system for charities (as a gateway for being eligible for Commonwealth charity taxation concession and other benefits) but, as yet, not for other types of NFPs. Also, as discussed in detail above, an organisation may have multiple charitable purposes including advancing religion, and complexity is likely to arise in relation to whether the charity would need to have a *sole* purpose of advancing religions, or a *main* purpose, or simply a purpose, in order to access the religious exemptions.

Additional point regarding volunteers and discrimination law

Protection from discrimination for volunteers is not clearly provided under current federal anti-discrimination laws.

3. We recommend that the consolidated and modernised discrimination law proposed by the Human Rights Law Centre (whose submission to this inquiry we endorse) should include the same protection from discrimination for volunteers and unpaid workers as for paid employees.

Conclusion

Changes to the laws dealing with charities are unnecessary.

The key building blocks of charity law which are relevant to religious freedom are that all charities must operate for the public benefit, must not have a purpose which is contrary to public policy, are free to advocate in pursuit of their charitable purpose(s) and can only discriminate within the law.

These building blocks remain unaffected by the introduction of same sex marriage, and do not need revisiting in light of any changes to discrimination or other laws which might arise from the present inquiry.

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Australian Government



Australian
Charities and
Not-for-profits
Commission

24 November 2017

File Ref: EXT2017/141

Senator Dean Smith
Senator for Western Australia
Parliament House
Canberra ACT 2600

By email: senator.smith@aph.gov.au

Dear Senator

Interaction between Marriage Amendment Bill and Charities Act

Thank you for your letter dated 22 November 2017 with respect to concerns raised by religious charities about amendments to the *Marriage Act 1961* (Cth) to enable same sex couples to marry.

Your specific questions and my answers are as follows:

- 1. Whether a religious charity which currently holds and/or expresses a view or position on marriage will be able to continue to do so without any negative impacts on its charitable status following the enactment of amendments to the *Marriage Act 1961* (Cth) to allow same-sex couples to marry (the Future Marriage Act).**

The short answer to this question is yes.

I assume that 'religious charity' means a charity *with a purpose of advancing religion*.

The *Charities Act 2013* (Cth) (**Charities Act**) defines charity and charitable purpose for the purposes of all Commonwealth law. The definition utilizes familiar concepts developed in the common law of charity. The purpose of advancing religion has long been recognized as charitable at common law and is one of the charitable purposes listed in Section 12(1) of the Charities Act. The Charities Act also reflects the common law in providing that the purpose of advancing religion





(along with certain other charitable purposes) is presumed to be for the public benefit.

Australian courts have defined 'religion' broadly. The leading authority is *Church of the New Faith v Commissioner of Pay-roll Tax*.¹ In that case, the following indicia of religion were identified:

- Belief in a supernatural Being, Thing or Principle
- Acceptance of canons of conduct in order to give effect to that belief
- Ideas that relate to man's nature and place in the universe and his or her relation to things supernatural
- The adherents of the religion constitute an identifiable group or group and see the collection of ideas/practices as constituting a religion.

Advancing religion involves the promotion of spiritual teaching and observances that serve to promote and manifest that teaching. The courts have held that there are various ways of advancing religion. Examples include providing and maintaining facilities for worship, supporting religious clergy, and missionary bodies. A purpose must be directly or immediately religious to be considered as advancing religion.

Different religions take different positions on a range of social issues, including marriage. The law of charity does not endorse the beliefs or practices of one religion over another.

It follows that if a charity with a purpose of advancing religion currently holds and/or expresses a view or position on marriage that is based on the beliefs, tenets or doctrines of the religion it advances, its status as a charity as defined in the Charities Act will not be negatively affected by reason merely of its continuing to hold and/or express that view following the enactment of the Future Marriage Act.²

¹ (1983) 154 CLR 120.

² We note that in *Cobaw Community Health Services v Christian Youth Camps Ltd & Anor* (Anti-Discrimination) [2010] VCAT 1613 (8 October 2010), the Victorian Civil and Administrative Tribunal defined 'doctrine' to mean the core architectural statements of faith and the body of teachings that describes the fundamental shape of a form of religious belief and held that a belief held by members of the Christian Brethren in Victoria about marriage, sexual relationships and homosexuality did not constitute a doctrine of the Christian Brethren within that definition.



- 2. Whether the lawful refusal to conduct a marriage ceremony, deliver goods and services or hire facilities to same-sex couples or other couples, in accordance with the Future Marriage Act and current exemptions in federal, state and territory anti-discrimination laws, will result in any adverse consequences in relation to the entity's charitable status.**

The short answer to this question is no.

A charity's purposes must be charitable purposes or purposes that are incidental or ancillary to, and in furtherance or aid of its charitable purposes and must not have disqualifying purposes.³ The purpose of engaging in, or promoting activities that are unlawful or contrary to public policy is a disqualifying purpose.⁴ Public policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security.⁵ Activities are not contrary to public policy merely because they are contrary to government policy.⁶

If a charity refused to conduct a marriage ceremony, deliver goods and services or hire facilities to same-sex couples or other couples and such activities were lawful pursuant to the Future Marriage Act and exemptions in applicable anti-discrimination laws, no question of the charity having a disqualifying purpose of engaging in unlawful activities would arise, because the activities would not be unlawful.

In my view, neither would such activities raise a question of the charity having a disqualifying purpose of engaging in activities contrary to public policy, for two reasons. First, I do not consider that 'public policy' in the definition of 'disqualifying purpose' extends to discrimination against individuals or couples on the basis of their sexual orientation or marital status; secondly, even if these are matters of public policy in this context, in the area of discrimination, the content of such policy is expressed in the relevant law, so that activities that are explicitly authorized by law cannot be against public policy.

The ACNC is aware that those raising concerns about the possible effects of the Future Marriage Act have cited cases in other jurisdictions, including the United States, Canada, the United Kingdom and New Zealand. In these cases, courts have entertained the proposition that 'opposition' manifested in various ways to same sex marriage might threaten an entity's charitable or tax-exempt status on the grounds that such opposition would be contrary to 'public policy' or not for the public benefit.⁷ In my view, these cases

³ Paragraphs (b) (i) and (ii) and (c) of the definition of charity in s 5 of the Charities Act.

⁴ Subsection 11 (a) of the Charities Act.

⁵ See the Example to subsection 11(a) of the Charities Act.

⁶ See the Note to subsection 11(a) of the Charities Act.

⁷ These cases are discussed at [58]-[69] of Submission 57 to the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (prepared by Mark Fowler, dated 10 January 2017). See also Submission 62 to the Select Committee (prepared by the Institute for Civil Society, dated 13 January 2017), which provides examples of anti-detriment



provide limited guidance or assistance in determining questions of charity status under Australian law.

However, one way to address the concerns that have been raised may be to provide in the amending legislation that nothing in the legislation adversely affects an entity's charitable status by reason only that the entity holds or expresses a position on marriage after the enactment of the legislation that, if held or expressed prior to the enactment of the legislation, would not have had such an effect.

Should you wish to discuss this matter further, please telephone me on the number below.

We have copied this letter to our responsible minister, the Hon. Michael Sukkar MP, Assistant Minister to the Treasurer.

Yours sincerely

Murray Baird
Acting Commissioner

Direct: 03 8346 7933
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Attachments:

1. Submission 57 to the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill.
2. Submission 62 to the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill.

protections for religious and conscientious objectors in the legislation for same-sex marriage in Canada and a number of US states.