Solidarity: The Journal of Catholic Social Thought and Secular Ethics

Volume 7
Issue 1 *Religious Liberty*

Article 4

2017

Same-Sex Marriage, Freedom of Speech and Religious Liberty in Australia – A Critical Appraisal

Augusto Zimmermann
University of Notre Dame Australia, zimmermann.augusto@gmail.com

ISSN: 1839-0366

Same-Sex Marriage, Freedom of Speech and Religious Liberty in Australia – A Critical Appraisal

Abstract
Passing legislation to approve same-sex marriage presents an immediate challenge to free speech and religious liberty. Unfortunately examples from all over the world reveal that legalisation of same-sex marriage may infringe the fundamental rights of the citizen. Some people have been found at the receiving end of severe persecution as well as protracted and expensive legal action for holding the view that marriage should be kept only between a man and a woman. Although the Australian government seems committed to holding a popular plebiscite, so that the people can finally decide on the matter, it is hard to conceive how such debate can be conducted when the advocates of traditional marriage have been prevented from freely voicing their opinions by intolerant 'gay rights' activists and anti-free-speech legislation.

Same-Sex Marriage, Freedom of Speech and Religious Liberty in Australia – A Critical Appraisal

Augusto Zimmermann

I. First Considerations

Passing legislation to approve same-sex marriage is a divisive issue not only here in Australia but also in many countries around the world. About 20 countries have already legislated to approve same-sex marriage, most recently in Ireland through popular referendum and in the United States through the landmark Supreme Court decision in *Ogbergefell* (although this decision is an example of a judicially created and enforced right, not the product of legislation).

Now, unfortunately, examples from all over the world reveal that legalisation of same-sex marriage potentially infringes the fundamental rights and freedoms of citizens. Some people have found themselves at the receiving end of quite severe persecution as well as protracted and expensive legal action for merely holding the traditional and time-honoured opinion that marriage should only be between a man and a woman.[1]

The Coalition federal government has said that it wants to see a plebiscite held on the same-sex marriage issue, while the Labor Party and the Greens reject such a plebiscite and wish the idea to be simply voted upon in Parliament. The plebiscite legislation currently faces defeat on the floor of the Senate without the opposition's support, given it is also opposed by the Greens and the Nick Xenophon Team.[2]

Although the federal government has committed itself to holding a plebiscite so that the people will be allowed to express an opinion on the matter, I wonder how this can be achieved when advocates of the traditional view of marriage are considerably prevented from expressing their opinions by intolerant activists and anti-free-speech legislation. Indeed, most jurisdictions in Australia have enacted laws that effectively put an unreasonable burden on freedom of speech and religious liberty.

For instance, in Tasmania the state anti-discrimination law bans any conduct that "offends, humiliates, intimidates, insults or ridicules" on the basis of sexual orientation or gender identity. New South Wales, Queensland and the ACT have similar laws prohibiting sexual discrimination based on conduct that incites "hatred", "serious contempt" or "severe ridicule". South Australia and Western Australia ban such discrimination on similar grounds in the workplace, education and other spheres.

The majority of the Australian people might not necessarily agree with the traditional definition of marriage but surely they should at least have the right to hear both sides of the debate. And yet, some cases described in this article provide a good illustration of how behind

[1] For critical analysis of the situation, see: Ryan T. Anderson, *Truth Overruled: The Future of Marriage and Religious Freedom* (Washington D.C.: Regnery, 2015).

[2] Jared Owens, 'Marriage equality plebiscite: Labor looking down noses, Ciobo says', *The Australian*, 26 September 2016, at http://www.theaustralian.com.au/national-affairs/marriage-equality-plebiscite-labor-looking-down-noses-ciobo-says/news-story/e3c748a67b56edc4f3d9351040509868.

the veneer of equality and tolerance there lies a radical movement that accepts no dissent and that enforces compliance with heavy and expensive judicial action.

II. A Preliminary Discussion: Benefits of Free Speech

Free speech constitutes a core principle of every functional democracy. Every totalitarian regime restricts speech as a matter of course[3]. In contrast, democracy implies the free exchange of ideas so that both good and bad ideas ought to be allowed and encouraged.[4] This principle is essential to a well-functioning democracy since 'open discourse is [more] conducive of discovering the truth than is government selection of what the public hears. Free statement of personal beliefs and feelings is an important aspect of individual autonomy'.[5]

From a democratic perspective free speech does not disadvantage minority groups nor does it favour those with more power. To the contrary, political elites feel tempted to limit free speech, if such a restriction serves their own narrow or self-serving interests. Of course, those interests might be 'the retention and accumulation of power and the financial advantage it brings'.[6] Conversely, as Wayne Grudem reminds us, 'without freedom of speech … rulers could suppress any criticism of their actions and prohibit opposing candidates or any critics from being able to express their views in public. Then a true democracy would cease to exist in that society'.[7]

Therefore free speech is essential to protect democracy itself. Nobody denies the harm of hate speech, but speech rights are most necessary for the weak, not the powerful. Since power corrupts and government power tends to naturally corrupt, if a society safeguards freedom of speech, then its government becomes far more accountable to the people. As it has been correctly reminded, 'Freedom of speech allows people to speak out and criticize the government when they think it is doing something wrong'.[8] Consequently, freedom of speech ought to be viewed as a fundamental mechanism against the concentration of power. As the former Australian Human Rights Commissioner, Tim Wilson, recently stated, 'it [is a] foolish assumption that free speech favours those with power. Anyone who has studied a skerrick of history knows that protecting free speech is about giving voice to the powerless against the majority and established interests'.[9]

Naturally, absolute free speech under all circumstances can never be a possibility. There are demonstrable exceptions whereby reasonable limits to speech may provide greater service to freedom than open discourse. Within the boundaries of speech that should enjoy some protection, certain limited categories of speech have lower value, most notably sexually explicit speech that falls short of obscenity.[10] Accordingly, the government may even permit such things as a ban on some words on daytime radio, and regulate the location of the sex industry

---

[3] Joe Dolce, 'Free Speech and the Stokie Case' *Quadrant* 53.7-8 (2014): 32, 32.
[4] David Flint and Jai Martinkovits, *Give us Back our Country* (Ballarat/Vic: Connor Court Publishing, 2013), 166.
[5] Kent Greenawalt, 'Free Speech in the United States and Canada,' *Law and Contemporary Problems* 55.1 (1992): 5, 16.
[6] Ibid., 82.
[7] Wayne Grudem, *Voting as a Christian: The Social Issues* (Grand Rapids/MI: Zondervan, 2012), 171.
[8] Ibid., 170.
[9] Tim Wilson, 'Insidious Threats to Free Speech', *The Weekend Australian*, 5-6 April 2014, 17.
[10] To be sure, the American founders would be quite horrified and outraged that their First Amendment's free speech guarantee has today been used by the Supreme Court to declare invalid, for example, laws that regulate obscenity and laws that protect children from indecent materials on the internet.

and brothels, but it should not sustain any general prohibition of all forms of speech simply because they are thought to be offensive. Further, speech can be controlled to some higher degree in time of serious national crisis such as in time of war. Finally, direct acts of violence and direct attacks on the physical integrity of another person should never be tolerated. Above all, as Professor Grudem points out:

> Any speech, in order to be properly restricted by law, needs to *directly cause actual harm* to another person, as inciting to riot in a crowded theater would do. In fact, it is exactly the *free discussion of differences* regarding moral values and principles that is necessary to allow democracy to work these questions out fairly and reasonably in the political process.[11]

Ultimately, however, democracy requires that citizens must be strong enough to tolerate robust expressions of disagreement and personal opposition. That being so, a democratic society 'may forbid uncivil remarks in formal settings like the courtroom'[12], but citizens should at least have the basic right to choose the words that best reflect their own personal feelings, and 'strong words may better convey to listeners the intensity of feeling than more conventional language.'[13] After all, 'if the principle of freedom of speech does not protect speech that other people find offensive or objectionable, then it is not really freedom of speech at all'.[14]

III. Attacks on Religious Freedom in Australia: A Few Examples

About eight years ago the Cobaw Community Health Service's "Way Out Project" tried to book a camp at a Christian Youth Camps (CYC) facility on Philip Island to run a suicide prevention workshop for rural gay youth. The camp manager refused the booking on the grounds that part of the group's syllabus was contrary to traditional Christian values. In 2010, the Victorian Civil and Administrative Tribunal (VCAT) found both the manager and CYC had discriminated on the basis of sexual orientation. In 2014, CYC challenged the decision in the Victorian Court of Appeal, which eventually found there was no legal error in VCAT's decision and exemptions to preserve religious freedoms did not apply in this case.

In a nutshell, the appeal court held that the refusal of accommodation was not necessary to comply with the genuine religious beliefs or principles of the appellants. In so doing, the court did not overlook the fact that CYC's own constitution requires that events at the facilities be conducted 'in accordance with the fundamental beliefs and doctrines of the Christian Brethren', and in a way which will 'create an atmosphere throughout the facilities that is obviously Christian'.[15] But those requirements do not, in the court's view, convert a secular purpose into a religious purpose.[16] Arguably, the court might have viewed it differently had CYC existed for the sole purpose of providing for camps and conferences which were avowedly Christian in character.[17]

In this sense, the appeal court did not take into account the scriptural mandate for Christians to proselytise, meaning that such organizations need to reach out to non-Christians

[11] Grudem, n.7, 184.
[12] Greenawalt, n.5, 16.
[13] Ibid.
[14] Grudem, n.7, 181.
[15] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75, 248.
[16] Ibid.
[17] Ibid, 249.

in a way that does not undermine their own faith and beliefs. It is difficult to avoid the conclusion that the final outcome of this case undermines freedom of conscience. For the owners of CYC, the ruling means that they are forced to allow their facilities to be used for the promotion of values and activities that they completely disagree with. The court simply compels a religious organisation to make their own property available for purposes that effectively undermine their own religious values and principles. Ben O'Neill comments on the implications of this important aspect of the ruling saying:

> The very essence of freedom of conscience is that people must be allowed to make their own assessment of what is true and untrue, and that the government must not subjugate this judgement to views of its officials. However, according to the Judge in this case, 'To object to a forum which presents a message of acceptance of same-sex attraction is to deny the right to equality of treatment based on sexual orientation, or to be free from discrimination on that basis.[18]

Another interesting case involves an attack on the free speech of a medical doctor from Queensland. In October 2011 Toowoomba GP Dr David van Gend was forced to appear before Queensland's Anti-Discrimination Commission to respond to a complaint about an article that he wrote for The Courier-Mail arguing against any change to marriage laws. The complainant, the gay activist and serial litigator from NSW, Gary Burns, claimed the entire point of that article amounted to vilification simply because he didn't like the doctor's point of view: 'The lack of a general statement with regards to all families with only a parent of one sex shows how vilifying the statement is towards same-sex families and also fails to recognise the structure of modern families and the involvement of the community around those families in raising children'.[19]

In the letter sent to Dr van Gend the Commission stated that its decision to accept the complaint 'does not indicate that the complaint has merit'. The complainant, Mr Burns, did not have to appear before the commission and would suffer no penalty for his non-appearance. His complaint was ultimately withdrawn, but not before the doctor was forced to appear before the Commission and spend a few thousand dollars on legal fees. According to Dr van Gend's own words, 'It costs you time, legal expense and anxiety, and although in my case there was very little of any … other people would not enjoy the experience'. Dr van Gend was left wondering what next for other individuals with an opinion on the subject:

> I had nothing to 'conciliate'. I resent being compelled to allocate patient consultation time to converse with this Sydney homosexual activist, as I consider that to be rewarding political harassment . . . at the personal cost of some thousands in legal advice and time off work, and the wearing of a defamatory accusation of being a hate-speaker and vilifier. [What of] the next complaint that any activist cares to lodge with the commission? I have to go through the same disgusting process.

As another example, conservative political activist Bernard Gaynor has been the subject of 28 complaints during a period of just 24 months—all lodged by one man, Gary Burns, the Sydney gay rights activist and serial litigator. So far, none of the complaints has been substantiated but Gaynor must head back into costly legal fights that are also part of a strategy to allow anti-free speech laws in one state to be used against those living in another. He has

[18] Ben O'Neill, 'Anti-Discrimination Law and the Attack on Freedom of Conscience', *Policy*, 27: 2 (2011): 5.
[19] Angela Shanahan, 'Discrimination police indulging in gay abandon', *The Australian*, 15 October 2011.

spent more than $50,000 in legal fees fending off the complaints and believes the system encourages anti-free-speech activists such as Burns to lodge complaints. As Gaynor points out,

> I am winning the legal battles at the moment, but the process is the punishment… There is no risk to the person lodging these complaints. The NSW tribunal has the power to impose a penalty of up to $100,000 per complaint and that penalty goes to the person who lodges the complaint. So you have a system that is designed to generate complaints.[20]

There is also the controversial decision in *Gary Burns v Tess Corbett* involving a senior citizen in rural Victoria who stood as a candidate in the 2013 federal election and told her potential constituents what she thought about what was right and wrong in human sexuality. Although Ms Corbett lives in Victoria and the "derogatory" statements were made in Western Victoria (a different state and jurisdiction), nonetheless a NSW Tribunal sentenced her in absentia forcing her, first, to apologise to Mr Burns in writing and, second, to publish an apology in a prominent position in the Sydney Morning Herald and at her own expense. The apology was required to inform the readers that the Tribunal had found that Ms Corbett's words "vilified homosexual people", and that such words amounted to "unlawful homosexual vilification". She lodged an appeal before the Appeals Panel of the New South Wales Civil and Administrative Tribunal (NSWCAT) but, on 14 August 2014, the NSWCAT dismissed her application on grounds that the original decision had made no legal error so that the re-hearing on the merits was unjustified. [21]

When one reads the report of Ms Corbett's case and the unsuccessful appeal, not only did NSWCAT's Appeals Panel dismiss her appeal but it found that because she had not appeared at first instance she was not entitled to be heard at all; and neither the original tribunal nor the Appeals Panel thought there was anything wrong with finding her personally responsible for publications in NSW newspapers over which she had no control and which were not contemplated when she made her political statements in rural Victoria. As such, the six members of NSWCAT (including two judicial members) agreed with a gay rights activist who makes a habit of taking people who say things he does not like about homosexuals to court. According to them, the anti-vilification provisions of NSW's 1977 *Anti-Discrimination Act* trump the freedom of political communication that the High Court has said is essential to the operation of the system of representative government to which Australia has been committed since it was federated in 1901.

There is also the situation involving the Catholic Archbishop of Tasmania, Julian Porteous, who was brought to a commission because he authorised the distribution of a booklet entitled "Don't mess with Marriage" to parents of Catholic school students in sealed envelopes and in churches.[22] In this carefully written booklet the church expresses its utmost respect for the dignity of homosexuals while promoting the goodness of a man-woman marriage and why children are affected if they miss out on a mother and father. Chris Berg from the Institute of Public Affairs correctly said about this that,

---

[20] Nicola Berkovic, 'Tongue-tied By The Thought Police', *The Weekend Australian,* 28-29 November 2015, 19.
[21] *Corbett v Burns* [2014] NSWCATAP 42 (14 August 2014), 64.
[22] Author Unknown, 'Anti-discrimination complaint 'an attempt to silence' the Church over same-sex marriage, Hobart Archbishop says' (28 September 2015) Australian Broadcasting Corporation <http://www.abc.net.au/news/2015-09-28/anti-discrimination-complaint-an-attempt-to-silence-the-church/6810276>.

> It's hard to overstate how moderate this booklet is. It offers no fire or brimstone. It's gentle and Christian, of the suburban pastoral variety. There's much expression of sympathy for same-sex attracted people who also want to follow religious teachings that preclude their sexuality. It is a calm explanation of a major position on a prominent political policy issue.[23]

Archbishop Porteous's chief accuser, Martine Delany, the Greens candidate for the federal seat of Franklin, took a complaint to the Tasmanian Anti-Discrimination Commissioner, arguing that the booklet 'does immeasurable harm to the wellbeing of same-sex couples and their families across Tasmania'. According to her, the booklet's content breaches a section of Tasmania's Anti-Discrimination Act that makes it illegal to insult, offend or humiliate a person or group on the basis of a listed attribute.[24] In lodging this complaint Delaney claimed that the language used in the booklet somehow implies that homosexuals engage in criminal activity because the words "messing with kids", in her own opinion, can be used as 'a code for sexual abuse or paedophilia'.[25]

Although Ms Delaney withdrew her complaint apparently for tactical reasons ('My primary reason is the tribunal process is a very long and drawn out process and during that time the message of this booklet is going to continue to be spread,' she told AAP), it is deeply disturbing that a Catholic archbishop was dragged to an anti-discrimination authority for merely expressing a traditional view on the subject that until quite recently was shared by both the major political parties as well as a large segment of the population. This leaves religious organisations open to attack from outsiders and leaves their practices and beliefs unguarded. If religious organisations can be punished for expressing their traditional views on marriage, family and a child's right to a father and mother, then I wonder what else they and their followers might be punished for once same-sex marriage is legalised in Australia. They may, in fact, have no right to respectfully disagree or even refuse to celebrate same-sex marriage.

To be fair, Tim Wilson, the former Human Rights Commissioner, has severely criticised the Tasmanian legislation for over-reaching and imposing "soft censorship" on society.[26] States must therefore take extra care to properly ensure that laws combatting discrimination do not unduly inhibit fundamental rights and freedoms. This is especially so in states with a common law legal tradition. Since the existing Tasmanian legislation sets the harm threshold far too low by prohibiting acts that are reasonably likely to offend, insult or humiliate, the low harm threshold raises quite serious questions of constitutional validity in terms of the implied freedom of political communication.

Arguably, the operation of existing s 17(1) of the Anti-Discrimination Act 1998 (Tas) impermissibly infringes the freedom of political communication because such a provision cannot be sustained under the Commonwealth Constitution. The terms used in this section – namely "offend, humiliate, intimidate, insult, or ridicule" – are notoriously uncertain and, as such, they directly affect discussions about public morality and political matters. The undesirable outcome is further aggravated by the fact that the present notion of 'being offended' is dangerously emotive. According to the respected American theologian Dr Albert Mohler, who is President of the Southern Baptist Theological College, 'desperate straits are no longer required in order for an individual or group to claim the emotional status of

[23] Chris Berg, 'Same-Sex Marriage: When Did Dissent Become Discrimination', *The Age*, 22 November 2015.
[24] Ibid.
[25] 'Anti-discrimination complaint', n.22.
[26] Berkovic, n.20, 10.

offendedness. All that is required is often the vaguest notion of emotional distaste at what another has said, done, proposed, or presented'.[27] Hence, Dr Mohler concludes:

> Being offended does not necessarily involve any real harm but points instead to the fact that the mere presence of such an argument, image, or symbol evokes an emotional response of offendedness.[28]

The uncertainty caused by such deeply vague and subjective notions ("offend, humiliate, intimidate, insult, or ridicule") create an undeniablely chilling effect not only on established organisations, religious or not, but individuals honestly engaged in well-meaning discussions concerning the most relevant issues of public morality. To make it worse under such laws, judges are instructed to approach the conduct in question not by community standards but by the standards of the alleged victim group.[29] Testing to the standard of the 'reasonable victim' lowers an already minimal harm threshold, adding further imprecision and uncertainty, increasing the sections' potentially chilling effect on speech. This goes in line with the morally relativistic tendency to suppress moral debate as a way of 'celebrating diversity'.[30]

Although opinion polls appear to indicate that the majority of Australians support same-sex marriage, you might think there would be no need for the homosexual lobby to attack the liberty of religious communities and freedom of conscience. But instead of doing so, the state Commission decided that the Catholic Church had a case to answer under Tasmania's Anti-Discrimination Act. Do Australians really wish to live in a country where a disagreement of opinion can result in dragging someone before an anti-discrimination board? Writing for the Australian newspaper, columnist Angela Shanahan correctly states:

> If people … are forced to appear before an Anti-Discrimination Commission … then this is a threat to one of Australia's greatest freedoms, the right to free speech. This is a major disincentive to people making a contribution to debate across Australia. Anti-discrimination bodies should not be used as star chambers by those who simply don't like what someone else says. [31]

IV. One Way Road?

There should be a fair and reasonable debate about whether Australia should legalise homosexual 'marriage'. However, it appears that anyone who supports traditional marriage is being called a 'bigot' and a 'homophobe'. Labor leader Bill Shorten called them 'haters'. This is despite the fact that the current law says that marriage is only between a man and a woman. Ironically, calls for draconian anti-discrimination laws not to apply during the public debate if a plebiscite on same-sex marriage is held were met with further charges of offence and vilification by the homosexual lobby.

---

[27] R A Mohler Jr., *Culture Shift: The Battle for the Moral Heart of America* (Colorado Springs/CO: Multnomah Books, 2008), 30.
[28] Ibid., 31.
[29] Anna Chapman, 'Australian Racial Hatred Law: Some Comments on Reasonableness and Adjudicative Method in Complaints Brought by Indigenous People' *Monash University Law Review*, 30 (2007): 27, 31-32.
[30] Peter Kurti, 'The Forgotten Freedom: Threats to Religious Liberty in Australia', CIS Policy Monograph n.139, *The Centre for Independent Studies*, 2014, 12.
[31] Angela Shanahan, 'Discrimination police indulging in gay abandon', *The Australian*, 15 October 2011.

Recently, a meeting by four major Christian groups (Sydney Anglicans, the Sydney Catholics, *Marriage Alliance* and the *Australian Christian Lobby)* at the *Mercure Hotel* at Sydney Airport had to be cancelled 'after a social media storm triggered phone calls that "rattled" employers and left the [hotel] concerned about the safety of staff and guests'.[32] These groups simply wished to discuss the campaign to oppose any change to the *Marriage Act*.

This was the mildest of meetings, not a public rally. But some same-sex marriage activists appear to believe that anyone who does not entirely support their cause is to be hated, humiliated, and intimidated. Such activists phoned the *Mercure Hotel* and intimidated staff, including making physical threats. The *Mercure Hotel* confirmed the threats were real and shut down its *Facebook* page after 160 people left '1 star reviews'.[33] Ironically, the ACCOR Group, which runs the *Mercure Hotel*, is actually a corporate supporter of a prominent homosexual group lobbying for change in the definition of marriage.[34] So much for tolerance…

Indeed, supporters of same-sex marriage often claim a debate on the topic will unleash the haters. But the threats by gay lobby activists have forced Christians to cancel a meeting. What other future events will they close down? What advertisements will they stop? Commercial TV channels have refused to air advertisements supporting marriage and opposing 'homosexual 'marriage'. Christian commentator Bill Muehlenberg points out the irony: "The group that shouts the most about tolerance is the least tolerant… The group that shouts the most about bigotry is the most bigoted… The group that shouts the most about hate is the most hateful."[35]

Given the notoriously aggressive tactics of the homosexual lobby, particularly against the traditional doctrines of the Christian churches, one wonders if it might be possible for one of these religious organisations to actually use the anti-discrimination law for the purpose of suing people who make offensive remarks about their values and traditions.

The Australian Sex Party (ASXP) has recently released a rather distasteful video attacking the reputation of the Catholic Church. It presents a musical satire that clearly vilifies Catholicism for supposedly meddling in government policy decisions such as same-sex marriage and the tax-exemption of religious institutions. The video also goes on to allude to pedophilia within the Vatican and even features a bloodied Christ on a crucifix bobbing his head from side to side to the tune of musical accompaniment.

Such a video would make a great test under Tasmania's Anti-Discrimination laws. After all, Archbishop Porteous was brought to a local commission simply for authorising the distribution of a booklet that expresses the Church's respect for the dignity of homosexuals while promoting the goodness of traditional marriage. As Chris Berg mentioned, 'it's hard to overstate how moderate this booklet is… It's gentle and… it is a calm explanation of a major position on a prominent political policy issue'. Conversely, the video released by the Australian

[32] David Crowe, 'Marriage Event Off: Threats to Hotel Staff', *The Weekend Australian*, 17-18 September 2016, 1.
[33] 'Hotel Confirms Physical Threats Over ACL Conference, Crickey, 20 September 2016, at https://www.crikey.com.au/2016/09/20/mercure-confirms-threats-over-australian-christian-lobby-event/.
[34] Australian Marriage Equality, 'Marriage Equality Supporters', http://www.australianmarriageequality.org/open-letter-of-support/.
[35] Bill Muehlenberg, 'This is How Homosexual Activists "Debate" – And This is How Democracy Dies,' CultureWatch, 17 September 2016, at https://billmuehlenberg.com/2016/09/17/homosexual-activists-debate-democracy-dies/ . See also: Bill Muehlenberg, 'Let Me Explain Hate to You', CultureWatch, 29 January 2016, at https://billmuehlenberg.com/2015/01/29/let-me-explain-hate-to-you/.

Sex Party is no doubt deeply offensive and it was clearly intended to offend, insult and humiliate the Catholic Church.

Section 17(1) of the Anti-Discrimination Act 1998 (Tas) prohibits acts that are reasonably likely to offend, insult or humiliate. The terms used in this section – namely "offend, humiliate, intimidate, insult, or ridicule" – can be easily applied to the message of the video. These words create a legal limitation not only on religious people and organisations but also on non-religious organisations such as the Australian Sex Party.

Curiously, being offended does not have to involve any real harm, but points to the fact that the presence of such an argument, image, or symbol may evoke an emotional response of 'offendedness'. Indeed, a breach of Section 17(1) does not even require anyone to be effectively offended, insulted, humiliated. Instead, all that is required is that 'a reasonable person […] would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed'. What is more, the courts would have to approach the conduct in question not by community standards, but by the standards of the offended group, namely the Catholic Church.

Of course, some groups may feel quite tempted to restrict free speech on less favourable groups (such as the Catholic Church) since this would automatically serve to benefit their personal interest. However, such a restriction is legally impossible because they cannot be justified by the explicit provisions of the anti-discrimination legislation.

You may argue that the Church should not make use of a bad law in order to suppress what is a clearly an act of religious intolerance and vilification. This is a moral question and not a legal question, since it is quite clear that, legally speaking, the Church would have grounds to lodge a complaint against the Australian Sex Party under the anti-discrimination legislation.

Or should the notorious legislation be applied only to the advantage of certain 'minority groups', and not for every person or group who may suffer from unreasonable discrimination? Arguably, allowing speech by some groups while prohibiting certain forms of speech against other less favourable groups is highly undemocratic since it unfairly favours one side of the debate against the other.

V. Legalising Same-Sex Marriage: Possible Implications for Free Speech

The possible legalisation of same-sex marriage presents an immediate challenge to freedom speech and religious liberty in Australia. Arguably, churches and Christian organisations would be pushed to the margins of social life and disadvantaged in their public influence and participation in public activities. Related to this situation, in the United States, soon after that country's judicial elite arbitrarily imposed the legalisation of same-sex marriage,

> the Obama administration handed down regulations requiring all entities contracting with the federal government to adhere, without exception, to absolute non-discrimination on the basis of sexual orientation and gender identity. A plethora of state and local governments are acting in similar ways. They are banning the participation of any organization that refuses to be publicly committed to absolute non-discrimination concerning sexual orientation, gender and gender identity … In the State of Massachusetts, [for example,] a venerable and respected charitable organization was forced to stop its work of placing children and infants

through adoption because it refused to violate church teachings by accepting a total nondiscrimination policy on sexual orientation.[36]

In his latest book Dr Mohler Jr argues, rather convincingly, that 'these cases are only the leading edge of a massive reorientation of American public life and American law'.[37] Ever since marriage was re-defined by the Supreme Court of the United States, to enable two people of the same sex to marry in that country, business owners have been fined and put out of business when they have declined to provide services for same-sex weddings. Consider the following examples:

- Christian bakers in Oregon were found guilty of discrimination for declining to provide a wedding cake for a lesbian couple.[38]

- A Colorado baker who declined to provide a cake for a same-sex wedding was ordered by the State's Civil Rights Commission either to serve gay couples or face fines despite it being against his beliefs as a Christian.[39]

- New Mexico's Supreme Court ruled that Christian photographers who declined to photograph a same-sex union violated the state's Human Rights Act.[40]

- A Christian florist in Washington was prosecuted for refusing to provide flowers for a same-sex couple's wedding.[41]

- In New York owners of a farm were found to have violated the civil rights of a lesbian couple when they declined to host the couple's same-sex "marriage" ceremony and fined $13,000.[42]

So it does not come as a surprise that Tim Wilson has admitted that businesses and churches in this country could face prosecution under existing anti-discrimination laws if same-sex Marriage is legalised. However, Wilson believes that basic freedoms can still be protected by providing exceptions and exemptions for businesses and churches.[43] Some of his arguments have been criticised on the grounds that exemptions and exceptions might conflict with other laws and that, ultimately, the courts would have to decide how effective these exceptions and

[36] R. Albert Mohler, Jr, *We Cannot be Silent: Speaking Truth to a Culture Redefining Sex, Marriage & the Very Meaning of Right & Wrong* (Nashville/TN: Thomas Nelson, 2015), 122.
[37] Ibid.
[38] 'Bakery Risks Lare Fina for Anti-Gay Discrimination', *USAToday*, 3 February 2015, at http://www.usatoday.com/story/news/2015/02/02/bakery-same-sex-oregon-fined-wedding-cake/22771685/
[39] 'Colorado Baker Must Make Cakes for Gay Weddings, Panel Rules', *Daily News*, 30 May 2014, at http://www.nydailynews.com/life-style/colorado-baker-cakes-gay-weddings-panel-rules-article-1.1811676.
[40] 'Female Photographer sued for refusing to take pictures at lesbian couples' commitment ceremony', *Daily Mail*, 23 November 2013, at http://www.dailymail.co.uk/news/article-2511580/Female-photographer-sued-refusing-pictures-lesbian-couples-wedding.html.
[41] 'Judge finds Washington Florist over Same-Sex Wedding Flowers', *ABC*, 28 March 2015, at http://www.abcfoxmontana.com/story/28635727/judge-fines-washington-florist-over-same-sex-wedding-flowers.
[42] Kirsten Andersen, 'Catholic Couple Fined $13,000 for Refusing to Host Same-Sex Wedding at their Farm', *LifeSiteNews*, 20 August 2014, at https://www.lifesitenews.com/news/catholic-couple-fined-13000-for-refusing-to-host-same-sex-wedding-at-their.
[43] 'Who will be persecuted?' *The Australian Family Association*, 2015.

exemptions will be.[44] Referring to this problem, the Reverend Peter Kurti, a research fellow at the Sydney-based Centre for Independent Studies, reminds us that,

> Judges charged with identifying the appropriate balance between exempt and discriminatory behaviour may well move in the direction of developing a narrowing conception of religious liberty as they accord priority to issues of sexual identity over those of religious belief and practice. The campaign to promote same-sex marriage, which actively pursues the diminution of the religious sphere in liberal society, would therefore form part of the same wider social trend that pursues its goal of equality both by attempting to secure the removal of all differences between people, and by reducing the range and scope of exempted conduct.[45]

Furthermore, these exceptions and exemptions are likely to be temporary for the following reasons:

1. The 2012 ALP dissenting Senate report on a Same-Sex Marriage bill warned that such assurances are hollow and tactical in nature rather than a matter of substance. They pointed out how Denmark has passed legislation to compel churches to officiate at Same-Sex Ceremonies. [46]
2. The Greens have called for an end to the exemption of religious bodies from the operation of anti-discrimination laws.[47]
3. Thirty GLBTI, human rights and legal lobby groups to the 2012 inquiry into the Consolidation of Commonwealth Anti-Discrimination Laws argued that they wanted no exemptions or narrow or temporary exemptions only for faith-based organisations, let alone for businesses and other groups. [48]
4. At least one prominent Australian lawyer, David Glasgow, has publicly repudiated any idea of exceptions and exemptions from anti-discrimination law or a same-sex marriage bill saying that it is not reasonable for business with religious objections to opt out of participating in Same-Sex Marriage.[49]

If a robust discussion about same-sex marriage is to take place in Australian society, there needs to be enough legal protection for individuals and religious organisations to express their views in the public square. Since same-sex marriage is a contentious issue that the government wishes the Australian people to decide in a plebiscite, it is necessary to have a debate in which both sides are allowed to present their case openly without fear of intimidation or unfair accusations. Accordingly, anti-discrimination laws that consider "offence" to be a valid requirement for taking legal action essentially violate a fundamental right of the citizen to express freely or without any risk of persecution their own personal opinions, no matter how undesirable such personal opinions might be. Such laws should not make hurt feelings, insult and offensiveness legitimate reasons to restrict freedom of speech because such a very low threshold invariably impairs the ability of the targeted group's ability to express their own ideas and respond to adverse comments. As properly noted by Canadian lawyer Edward H. Lipsett,

---

[44] Ibid.
[45] Peter Kurti, 'The Forgotten Freedom: Threats to Religious Liberty in Australia', CIS Policy Monograph No.139, 2014, 15.
[46] Who will be Persecuted?, n.43.
[47] Greg Sheridan, 'Churches are Drifting too Far From the Marketplace of Ideas', *The Australian,* 4-5 June 2016, 26.
[48] Who will be Persecuted?', n.43.
[49] Ibid.

> much speech criticized as "hate speech" is in response to rebuttal of speech by or in favour of the "protected" groups. Allowing or even encouraging speech by or supportive of "protected" groups while prohibiting certain forms of speech against such groups unfairly favours one side of the debate against the other (or at least appears to do so) and violates the principle of neutrality. Again, it allows the proponents of some viewpoints to "fight freestyle" while requiring others to observe "The Marquis of Queensbury Rules". Rather than enhancing the participation or credibility of the "protected" group, this real or perceived unfairness might actually create a "backlash" against them that could be more harmful to them than the impugned speech. [50]

Increasingly, the same-sex marriage lobby is using anti-discrimination legislation to prevent dissenting voices from expressing their views in the public square. That being so, Tim Wilson is aware of the potential impacts of same-sex marriage advocacy on religious liberty and freedom of conscience.[51] He is actively seeking to address these issues and this should provide some optimism to supporters of traditional marriage who are deeply concerned that once same-sex marriage is legalised the state would equate their traditional view with bigotry so that further legislation could be enacted that would subject them to harsh discriminatory treatment. This is not an unreasonable assumption since, as Heritage Foundation's Ryan T. Anderson points out, '[i]f marriage is redefined, believing what virtually every human society once believed about marriage … would be seen increasingly as a malicious prejudice to be driven to the margins of culture'.[52]

VI. The Statist Nature of Redefining Marriage

There is an undeniable statist nature in this discussion about legalising same-sex marriage. The state is effectively asked to redefine the meaning of an institution that, according to traditional Christian teachings as well as the founders of classical liberalism is actually antecedent to the formation of civil government. As the great liberal philosopher, John Locke, pointed out in *Two Treatises on Civil Government*, 'the first society was between man and wife, which gave beginning to that between parents and children'.[53]

In this sense, the proponents of same-sex marriage seek to redefine a pre-political institution that actually limits the power of the state. In 'Gay Marriage and the Growth of State Intervention', Gerard Calilhanna argues that '[h]ere we have a major example of extreme statism, where a crucial pre-state institution that limits the power of the state is supressed and replaced by an institution that depends on the state for its existence".[54] Likewise, political commentator Brendan O'Neill explains that, broadly speaking, 'gay marriage expands rather than diminishes the power of the state over our lives'.[55] Therefore, as he puts it,

---

[50] Edward H. Lipsett, 'Case Comment Saskatchewan (Human Rights Commission) v Whatcott, 2013 SCC 11' Manitoba Law Journal, 2013, at <http://robsonhall.ca/mlj/sites/default/files/articles/Whatcott%20-%20Blog%20Post%20Version_0.pdf>.

[51] Tim Wilson, 'Religious freedom isn't a trump card, but it does need to be part of rights debate,' *Tim Wilson, Ideas, Commentary and Solutions for Australian & International Public Policy,* 22 October 2015, <http://www.timwilson.com.au/articles/religious-freedom-isnt-a-trump-card-but-it-does-need-to-be-part-of-rights-debate-sydney-morning-herald> .

[52] Ryan T. Andearson, 'Marriage: What It Is, Why It Matters, and the Consequences of Redefining It', *The Heritage Foundation,* 2775 (March 11 2013): 10.

[53] John Locke, *Second Treatise of Civil Government* (1690), Chapter VII.

[54] Gerard Calilhanna, 'Gay Marriage and the Growth of State Intervention,' *Quadrant* (September 2012): 62.

[55] Brendan O'Neill, 'Here's My Beef With Gay Marriage', *Catallaxy Files,* August 24 2015.

> gay marriage has nothing to do with liberty. The presentation of this as a liberal, or even libertarian, issue is highly disingenuous. For in truth, gay marriage massively expands the authority of the state in our everyday lives, in our most intimate relationships, the ultimate provider of validation to our lifestyle choices, while empowering it to police the cultural attitudes and consciences of those of a more religious or old-fashioned persuasion.[56]

And that is what is behind the same-sex agenda, consciously or not. Many homosexuals actually do not really want to get married. They would much prefer not to subject themselves to any such legal constraints that obviously reduce the ability to pursue their own personal freedom from enduring relationships. "But behind the entire agenda", as we are reminded by Charles Colson, "is an effort to weaken the family, because so long as the family becomes the primary source of loyalty to the individual, then the government, the powers-that-be, the cultural elite, or the media elite do not have ultimate control over how we live our lives".[57]

So here lies a fundamental question: Is the push for legalisation of same-sex marriage really founded in authentic tolerance? Given the cases mentioned above, it appears that the same-sex lobby can be quite intolerant. It generally believes that church teachings about marriage constitute an offence against homosexuals, and so that they should not be tolerated under anti-discrimination laws. Accordingly, it becomes unacceptable for a church to actually make its doctrinal case for traditional marriage since that case itself is regarded as being "offensive" and "politically incorrect".

According to Paul Kelly, editor-at-large for the Australian newspaper, "there can be no doubting that among same-sex marriage activists the political will exists … to force the voice of the churches out from the public square on the grounds of offensiveness". Kelly then reminds us that legalisation of same-sex marriage implies that the laws of the state and the laws of the churches would be in conflict over the new meaning of marriage, thus leading to the important question of whether the push for such a change may be at least partially motivated by a certain disregard for religious liberty and freedom of conscience. "For Australia and its alleged open spirit of debate", says Kelly, "this is an unprecedented situation. It reveals an aggressive secularism dressed in the moral cause of anti-discrimination justice but with a long-run agenda that seeks to transform our values and, ultimately, drive religion into the shadows. The vanguard for this drive is the same-sex marriage campaign".[58]

VII. An Ancillary Question: Can the Federal Parliament legalise Same-Sex Marriage?

Australia has an express provision in its Constitution granting federal Parliament power to introduce legislation on the topic of marriage and correlating issues. In light of such provision, an amendment to the federal Marriage Act (the *Defence of Marriage Act*) was enacted in 2004, which defines marriage as the union between one man and one woman to the exclusion of all others.

---

[56] Brendan O'Neill, 'The Trouble With Gay Marriage', *Spiked*, 27 May 2015.
[57] Charles Colson, *My Final Word: Holding Tight to the Issues that Matter Most* (Grand Rapids/MI: Zondervan, 2015), 50
[58] Paul Kelly, Threat to Religious Freedom from Same-Sex Debate, *The Weekend Australian*, 28-29 November 2015, 15.

Australia's express constitutional provisions indicate that the *Marriage Amendment Act* is legally valid, thus precluding any State or Territory from introducing same-sex marriage Acts. Hence the advocates of same-sex marriage did not challenge the amendment to the Marriage Act in court. Rather they pushed for same-sex marriage at the State and Commonwealth levels.

For instance, when the government of the Australian Capital Territory attempted to legalise same-sex marriage in that particular jurisdiction, the High Court struck down the law as being constitutionally invalid. That decision was made in 2013.

But here is the conundrum. The Commonwealth Parliament may not have the power to redefine the meaning of marriage. In the ACT case, of course, the full High Court argued that marriage is:

> [A] consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.

Such a definition was not required to deal with that particular issue in this case. In reaching such a view the High Court went beyond the accepted principles of constitutional interpretation since the Court could have reached precisely the same result by simply stating that the ACT Act conflicted with the federal Marriage Act.

To the extent that the decision sought to lay down the parameters the marriage in the *Constitution* and to include same sex marriage within those parameters, it is of dubious precedential value. After all, there was no need for the Court to consider the scope of the meaning of marriage in the Constitution to answer that question. There is therefore an argument that the Court's decision on the topic is *obiter.*

That being so, the definition given by the Court does not form part of the *ratio decidendi* ('the reason for the decision'). The opinion generates only *obiter dictum* ('remark in passing'), which is not binding although it can be persuasive. Indeed, it appears that such an opinion operated as a kind of 'Trojan Horse' that opened the way for the federal government to believe that it can widen its own powers under Section 51(xxi) of the Australian Constitution.[59]

It is undeniably within the limits of the Commonwealth Parliament to introduce legislation that reinforces the traditional meaning of marriage. Such a definition is given by Lord Penzance in *Hyde v Hyde* (1866), which defines marriage as 'the voluntary union for life between one man and one women, to the exclusion of all others'.[60] What is not clear, however, is whether the federal Parliament could actually do otherwise – namely to change the meaning of 'marriage'.

The High Court has repeatedly affirmed that the connotation or meaning of a given word must remain as fixed as it was established at the time the law was originally enacted. Under

[59] Christopher James Dowson, 'Beyond Juristic Classification: The High Court's Decision in Commonwealth v Australian Capital Territory - Same-Sex Marriage Case' *The Western Australian Jurist,* 5 (2014): 293, 293.
[60] *Hyde v Hyde* (1866) LR 1 P & D 130, 133.

orthodox rules of Australian legal interpretation, 'the meaning to be given to a term is that which it had at the date of the Constitution, 1900'. [61] As Jeremy Kirk points out,

> Australian literalist orthodoxy falls within the realm of originalism ... [which] indicates that constitutional words are to be given their full, natural or literal meaning as understood in their textual and historical context... Provisions are to be understood according to their essential meaning at the time they were enacted in 1900. [62]

In an article reviewing the High Court's 2013 decision, law professors Nicholas Aroney and Patrick Parkinson explain that '[o]ne of the most fundamental principles of constitutional interpretation is that the words of the Constitution are to be understood by reference to their meaning when enacted in 1900'.[63] They go on to remind us of Justice William Windeyer's statement in the *Professional Engineers* case in 1959, which explained that regarding constitutional interpretation '[High Court judges] are not to give words a meaning different from any meaning they could have borne in 1900. Law is to be accommodated to changing facts. It is not to be changed as language changes'.[64]

Traditionally speaking, therefore, the courts have adopted a method that concentrates primarily on the essential meaning that the word had at the date when the law was enacted.[65] This goes precisely in line with what John Quick (one of the drafters of the Constitution) and Robert Garran (who played a significant role in the Australian federation movement) explained in their standard commentary on the Australian Constitution. Quick and Garran commented that the intention of the Australian Framers was to prevent the federal Parliament from expanding its limited and specified powers by simply changing the meaning of any word in the Constitution. As stated by Quick and Garran in their seminal contribution:

> Every power alleged to be vested in the National government, or any organ thereof, must be affirmatively shown to have been granted. There is no presumption in favour of the existence of a power; on the contrary; the burden of proof lies on those who assert its existence, to point out something in the Constitution which, either expressly or by necessary implication, confers it. Just as an agent, claiming to act on behalf of his principal, must make out by positive evidence that his principal gave him the authority he relies on; so Congress, or those who rely on one of its statues, are bound to show that the people have authorized the legislature to pass the statute. The search for the power will be conducted in a spirit of strict exactitude, and if there be found in the Constitution nothing which directly or impliedly conveys it, then whatever the executive or legislature of the National government, or both of them together, may have done

---

[61] Leslie Zines, *The High Court and the Constitution* (3rd ed., Butterworths: Sydney, 1992), 16 (citing R v Barger (1908) 6 CLR 41 at 68, *King v Jones* (1972) 128 CLR 221 at 229; *Bonser v La Macchia* (1969) 122 CLR 177; *Attorney-General (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559, 578.

[62] Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism,' *Federal Law Review,* 27 (1999): 323, 324-5.

[63] Patrick Parkinson and Nicholas Aroney, 'The Territory of Marriage: Constitutional Law, Marriage Law and Family Policy in the ACT Same-Sex Marriage Case,' *Australian Journal of Family Law,* 28.1 (2014): 3.

[64] *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Association of Professional Engineers* ('*Professional Engineers' Association*') (1959) 107 CLR 208, 267 (Windeyer J) *Professional Engineers' Association* (1959) 107 CLR 208, 267.

[65] Geoffrey Lindell, 'Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey – Northam America and Australasia,' *Sydney Law Review,* 30 (2008): 38.

> in persuasion of its existence, must be deemed dull and void, like the act of any other unauthorized agent. [66]

At the time of constitutional enactment, the word marriage meant a union of a man and a woman – 'and this would almost certainly have been regarded as an essential part of the connotation, and not merely the denotation, of the word'. [67] Indeed, Quick and Garran provide the following meaning to the institution:

> Marriage is a relationship originating in contract, but is something more than a contract. It is what is technically called a status, involving a complex bundle of rights, privileges, obligations, and responsibilities which are determined and annexed to it by law independent of contract. According to the law of England a marriage is a union between a man and a woman on the same basis as that on which the institution is recognized throughout Christendom, and its essence is that it is (1) a voluntary union (2) for life (3) of one man and one woman, (4) to the exclusion of all others.[68]

According to the Court's most traditional method of interpretation, the meaning of a word must be limited to what such word actually meant at the time the law was enacted. If this were applied to the institution of marriage, then not even the federal Parliament has the constitutional authority to redefine marriage, but only a limited power to regulate on the institution, which does not encompass expanding its meaning to same-sex relations. Such interpretation effectively denies the federal Parliament any power to redefine the meaning of marriage, since this would go outside of the scope of the term's original meaning.[69] According to law professor Geoffrey Lindell,

> At the time of federation the meaning of the term 'marriage' most commonly acknowledged was that contained in the cases which refused to recognise foreign polygamous marriage because such unions did not satisfy the traditional meaning of marriage now explicitly embodied in the Marriage Act 1961 (Cth). Not surprisingly this will make it difficult for the Court to accept that same-sex marriages now come within the meaning of the term 'marriage' in s51(xxi) of the Commonwealth Constitution – a view that has already attracted some judicial support. [70]

High Court judges, both past and present, have in *obiter dicta* expressed their personal opinions on the matter. Justice Gerard Brennan, for example, relied on the history of the Court to communicate that it is 'beyond the powers of the Commonwealth Parliament to legislate for any other form of marriage besides that encompassed by its traditional definition'.[71] By contrast, activist judges such as Michael McHugh adopted a more 'progressive' approach, stating:

---

[66] John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Sydney NSW: Angus & Robertson), 789.
[67] Katy A. King, 'The Marriage Amendment Act: Can Australia Prohibit Same-Sex Marriage?' *Pacific Rim Law & Policy Journal*, 16.1 (2007): 137, 154.
[68] Quick & Garran, n.67, 608.
[69] King, n.68, 154. See also: Dan Meagher, 'The Times Are They a-Changing? – Can the Commonwealth Parliament Legislate for Same Sex Marriages?' *Australian Journal of Family Law*, 1 (2003): 3.
[70] Lindell, n.66, 39.
[71] Ibid.

> In 1901, 'marriage' was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of Commonwealth the power to legislate for same sex marriages, although arguably marriage now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others. [72]

When considering the constitutionality of same-sex marriage it is important to consider that the constitutional framers recognised that the specified powers set out in the Constitution should not be immutable forever. For this reason they provided a proper mechanism in section 128, which ensures that any change to the powers set out in the Commonwealth Constitution must be subject to the will of the people, and not the convenience of government from time to time.[73]

In this sense, it is reasonable to argue that same-sex marriage should only be legalised via constitutional amendment – not via federal plebiscite or federal legislation– pursuant to section 128. Barry Maley, a senior fellow at the Centre for Independent Studies, therefore seems quite correct to comment that, when it comes to whether the marriage of same-sex couples can be legalised via parliamentary vote or national plebiscite, Australians are being short-changed and rushed to judgment because their constitution apparently has actually been misinterpreted.[74] Given the wide-ranging legal, social and economic consequences of repealing the definition of marriage provided in the federal *Marriage Act*, 'it appears as though the most legally certain, and indeed politically realistic, means by which the institution of marriage could be varied to accommodate homosexual unions is through an amendment of the Constitution pursuant to the s 128 referenda mechanism'.[75]

VIII. Final Considerations

In a truly egalitarian society every citizen's right is respected without infringing the rights of another. Nothing excuses undermining these rights in the name of "marriage equality" so that the debate about marriage should not be accomplished at the cost of the citizen's right to participate in the democratic process and to share his or her values and beliefs freely. Accordingly, religious people have the same right as anybody else to express their opinions in the public sphere. Their objections to same-sex marriage are not about an attempt to break any law or to impose discrimination upon homosexual people, but they reflect a simple disagreement on what the nature of marriage ought to be. They are just trying to remain true to their beliefs as their consciences dictate. They are not looking for trouble and they do not wish

---

[72] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553 (McHugh J). Likewise, in *Attorney-General (Cth) v Kevin & Jennifer & Human Rights and Equal Opportunity Commission* (2003) the Full Court of the Family Court of Australia has supported an evolution in the definition of marriage in the context of today's society: '[W]e think it plain that the social and legal institution of marriage as it pertains to Australia has undergone transformations that are referable to the environment and period in which the particular changes occurred. The concept of marriage therefore cannot, in our view, be correctly said to be one that is or ever was frozen in time'. (2003) 30 FCA 94 (Nicholson CJ, Ellis and Brown JJ), at http://www.austlii.edu.au/au/cases/cth/FamCA/2003/94.html.

[73] 'Dissenting Report by Coalition Senators', Report on 'Marriage Equality Amendment Bill 2010', Legal and Constitutional Affairs Legislation Committee, the Senate, June 2012, 77.

[74] Barry Maley, 'The High Court, Democracy and Same Sex Marriage', CIS Occasional Paper 147, Sydney NSW: July 2016.

[75] James McLean, 'The Constitutionality of Same-Sex Marriage,' *The University of Notre Dame Australia Law Review*, 15.1 (2013): 21.

to deny homosexuals their fundamental rights. They only ask not to be coerced into violating their own consciences and religious beliefs.

Before a plebiscite on same-sex marriage can even take place in this country, it is necessary to address the intolerable impact that anti-discrimination laws are having on free speech. This is a worthwhile endeavour and, surely, none of the cases mentioned above should ever have happened. These cases support the concerns among free-speech advocates and religious groups that anti-discrimination laws will be used to silence the "no campaigners" in the lead-up to a promised plebiscite on the matter.[76] As a society we really need to ask ourselves if we should undermine the rights of one group in order to protect or promote the interests of another. A real democracy, and we must never forget this, implies that controversial issues will be resolved democratically by the people only after a truly open and robust debate has taken place.

[76] Berkovic, n.21, 19.