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Metford Community Baptist Church Men's Breakfast, Saturday Oct 19, 2019 "Religious Freedom and Discrimination Law"

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Thanks very much for the invitation to talk about this important area. I thought, since we are here today at a "Men's Breakfast", that we might start by talking about what discrimination is, and where it is unlawful. After all, would it not be possible that one of the ladies in Metford Baptist would like to have come along today? Are we unlawfully discriminating by holding a "men only" event? Or perhaps we could see the word "men" as having an age aspect to it, such that the event might exclude, say, someone who was 15 years old who wanted to come along? You may be relieved to know I don't really think so! Not every act of "choosing" or "preferring" or "selecting" people amounts to unlawful discrimination.

Joking aside, for the last few decades the law of Australia, like the law of most Western countries, has contained provisions making it unlawful to unjustly discriminate against persons on the basis of certain characteristics that they bear. The laws were first introduced to deal with what were real and historic injustices to people on the basis of their race. The terrible legacy of racial discrimination led to laws forbidding people from being denied jobs and public services on the basis of the colour of their skin, starting with the civil rights movement in the US and then spreading to other countries.

From the point of view of the Christian message, these in general are, in my view, good laws. The Bible tells us that God does not discriminate on the basis of race, and it is good for our laws to reflect God's values at this point- where race is not relevant to decision-making, people should not be subjected to decisions on this irrelevant ground which is just who they are. You can see this spelled out in the New Testament, in particular, where the older specific laws set up in the Old Testament for God's people Israel are removed, and a relationship with God is now open to all people. We see this theme stretching from Genesis 1:27, where we see that God created *all* humanity in his image, through to Paul's words in Galatians 3:28:

²⁸ There is neither Jew nor Greek, there is neither slave nor free, there is no male and female, for you are all one in Christ Jesus.

Hence it seems right that people not be turned away from jobs, or schools, or café's, because of their race, and I think Christians ought to support such laws.

However, in more recent years we have seen an expansion of anti-discrimination laws, covering a number of other "protected characteristics". Some of them are ones where Christians generally would agree that these are areas where decisions should not be made on irrelevant grounds; but in more recent years there has been a lot of debate about when some of these matters become "relevant". In addition, once we move beyond racial discrimination laws, we start to get to the point where laws preventing discrimination may clash with strongly held religious views.

For example, when the *Sex Discrimination Act* 1984 was introduced, it was seen immediately that a provision saying that employment decisions could never be based on sex, would clash with the view of the Roman Catholic church that ordained priests could only be male. Indeed, many Christian churches, and other religions, take the view that there are appropriate and different roles for men and women in some areas of life, and to over-ride those views would cause a real clash with religious freedom. So from the very beginning this was recognised by the legislation.

The main provisions used to reflect the need to recognise religious views were sections 37 and 38 of the SDA. This is what they say.

Section 37:

37 Religious bodies

- (1) Nothing in Division 1 or 2 affects:
 - (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
 - (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
 - (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
 - (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

And section 38, dealing with religious schools:

38 Educational institutions established for religious purposes

- (1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c)¹ renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.
- (2) Nothing in paragraph 16(b)² renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with a position as a contract worker that involves the doing of work in an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.
- (3) Nothing in section 21³ renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed

There's even an interesting exemption which applies to "voluntary bodies", in s 39:

¹ Forbidding discrimination in employment.

² Forbidding discrimination in providing work to contractors.

³ Forbidding discrimination in educational decisions to do with students.

39 Voluntary bodies

Nothing in Division 1 or 2 renders it unlawful for a voluntary body to discriminate against a person, on the ground of the person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding or family responsibilities, in connection with:

- (a) the admission of persons as members of the body; or
- (b) the provision of benefits, facilities or services to members of the body

In fact, if we come back to the question we started with today- "is it unlawful to have a "men's breakfast" where ladies are not invited?", we can see that two of these provisions provide the answer. Under s 37(1)(c) we could argue that a church-sponsored "men's breakfast" was a "religious observance or practice", and so it is not unlawful to set up a rule to allow only men to participate in this. And also under s 39 we can say that the church is a "voluntary body", and so it is not unlawful to "discriminate against a person, on the ground of the person's sex", "in connection with" "the provision of benefits, facilities or services to members of the body".

Now the men's breakfast example is a fairly trivial one- I'm not aware of any church that has ever been sued for running one of these! But hopefully you can see that the law which makes certain types of discrimination unlawful, contains within itself provisions that exempt certain religious activities, or activities of "voluntary bodies", from being unlawful.

Religious Freedom

Why does the law do that? The answer really is that we are balancing out two important human rights here. On the one hand, it seems wrong to discriminate unfairly against someone by subjecting them to a detriment- denying them a job or a meal in a restaurant- because of some characteristic they have which is irrelevant to that activity. But on the other hand, our Western society has recognised the importance of religious freedom as a fundamental human right, and so we want to make space, within certain limits, to allow people to live out their religious beliefs.

I have written a longish paper on protection of religious freedom in Australia under current laws.⁴ I will link to it in the full version of the paper. But there I give a couple of important quotes on the topic:

"Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society.."⁵

"Religious faith is a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity."

Religious freedom has been a key part of our common law tradition. In addition, in more recent years, it has been recognised as a vital part of the human rights framework set up by international human rights treaties. For example, the *International Covenant on Civil and Political Rights*, ICCPR, which Australia has committed itself to abide by, says in art 18:

⁴ Neil J Foster, "Religious Freedom in Australia overview 2017 update" *Human Rights Law Alliance* (2017), available at: http://works.bepress.com/neil_foster/112/.

⁵ Church of the New Faith v Commissioner for Pay-Roll Tax (1983) 57 ALJR 785 at 787, per Mason ACJ and Brennan J.

⁶ Christian Youth Camps Limited v Cobaw Community Health Service Limited [2014] VSCA 75 at [560] per Redlich JA.

- 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
- 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
- 3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
- 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

So, Australia should be protecting religious freedom. But at the moment the protections are very patchy. We do have a provision in our Federal Constitution, s 116, which forbids the Commonwealth Parliament from making "any law for...prohibiting the free exercise of any religion"- but it has been interpreted quite narrowly, and in any event only applies to the Commonwealth Parliament, leaving the States quite free to limit religious freedom. There are some State or Territory laws which implement a Bill or Charter of human rights; but not in NSW, and the ones elsewhere have not been very effective in protecting religious freedom so far.

As it turns out, one of the key ways of protecting religious freedom in Australia in recent years has been through discrimination laws. This happens in two ways. **One** is that there are laws which make it unlawful to discriminate against someone on the basis of their religious belief or activity. The **second** way that discrimination laws protect religious freedom is that, in laws that forbid discrimination on other grounds, those laws provide exemptions, or what I prefer to call "balancing clauses", recognising the need to allow believers to express their faith in their actions. In the rest of my presentation, I want to talk about these two ways that discrimination laws actually protect and support religious freedom. I will also mention some areas where they could be improved!

1. Laws forbidding religious discrimination

One way to protect religious freedom is to make it unlawful for people to treat religious people badly on the basis of their religion. These are "religious discrimination laws".

In fact, most States and Territories have had laws prohibiting such discrimination for a while now.⁸ But not many people know that there is no such prohibition in NSW law at the moment. In this State, should you wish to, you can put up a sign in your coffee shops saying "we do not serve Buddhists", and that would not be unlawful.

Closer to reality, however, this means that religious people in NSW are not protected from what seems to be an increasing intolerance and animosity. A young bloke from our church, a couple of years ago when the same-sex marriage debate was on, had a job serving at a café, until one day the boss heard him chatting with some people from church who had come into the café, about what was happening at church. The boss effectively told him not to come back, as "we don't want Christians working here"!

That is not common, but it is certainly becoming more possible. There is one other law on this area that can help- a law which has been very obscure but has come to notice in the last

⁸ See the 2017 paper noted above, at n 4, at pp 27-28 for a full list.

⁷ See Neil J Foster. "Freedom of Religion and Balancing Clauses in Discrimination Legislation" *Oxford Journal of Law and Religion* Vol. 5 (2016) p. 385 – 430; available at: http://works.bepress.com/neil foster/108/

year due to the case of Israel Folau! That is s 772 of the Fair Work Act 2009, which reads like this:

Employment not to be terminated on certain grounds

- (1) An <u>employer</u> must not terminate an <u>employee</u>'s employment for one or more of the following reasons, or for reasons including one or more of the following reasons:...
- (f) race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, **religion**, political opinion, national extraction or social origin;...
- (2) However, <u>subsection</u> (1) does not prevent a matter referred to in <u>paragraph</u> (1)(f) from being a reason for terminating a person's employment if:
- (a) the reason is based on the inherent requirements of the particular position concerned; or
- (b) if the person is a member of the staff of an institution that is <u>conducted</u> in accordance with the doctrines, tenets, beliefs or teachings of a **particular religion or creed**-the employment is terminated:
 - (i) in good faith; and
- (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.

This law applies across the board to all employees in Australia (it is based on an international treaty). But it only applies to termination of employment, being sacked, and it only applies to employees. Still, it is one protection that applies, and we await to see if Israel Folau can rely on it when his case finally gets to court.

In light of the various gaps in the State laws, though, I think the Morrison Government's recent proposals to introduce a *Religious Discrimination Bill* are a fairly good idea. I have commented in this Bill in some detail on my blog. In brief, as it stands at the moment (the draft Bill has not yet been formally introduced into Parliament), it would make direct and indirect discrimination on the grounds of religion unlawful, but at the same time it would provide that religious groups are allowed to operate in accordance with their beliefs. This means that where the religion of a person or body is *relevant*, then it will not be unlawful to make a decision based on that ground.

So, for example, a café owner will not be able to exclude employees simply because they are Christians, or Muslims, or Jews, or atheists. But a Christian school should be able to say, to preserve the ethos of the school, we will only employ those who are Christians, or at least those who will agree not to undermine Christian teaching on key issues such as sex by what they say or do.

In my submission I mention some areas where the draft Bill could be made better. It currently excludes religious groups (other than schools) from protection if they engage in "commercial activity". Arguably a Christian hospital or aged care centre have to charge commercial fees to operate, but in my view, they should be able to also say that they want to only hire staff who share their Christian ethos.

I also think more work needs to be done on a clause which is intended to protect believers from being sacked or disciplined for speaking about their religious beliefs outside working hours. As currently drafted, it seems to not operate where a large business can show allowing such views would be financially costly. I think this is silly, and the clause needs to be redrafted.

⁹ For a copy of my official submission on the Bill, see "Submission on the Religious Freedom draft laws" (Sept 30, 2019) https://lawandreligionaustralia.blog/2019/09/30/submission-on-the-religious-freedom-draft-laws/.

I am not sure what the Bill will look like when introduced- at the moment there still seems to be an intention to introduce the Government's preferred version before the end of the year. Nor do we know if it will make it through the Senate! But I think it is a worthwhile exercise.

2. Other discrimination laws allowing recognition of religious freedom.

The second way in which religious freedom is connected to discrimination laws at the moment is that there are "exemptions" (I prefer to call them "balancing clauses") in many of the laws dealing with discrimination on other grounds. The ones that seem to be particularly important are in laws prohibiting discrimination on the grounds of sex, marital or relationship status (whether someone is married, single, divorced, living *de facto*), sexual orientation, or transgender status. Each of these grounds for discrimination overlaps to some extent with behaviour that a religious person may see as contrary to their beliefs.

Thus, the Bible tells us that there are some roles in churches that are not appropriate for women. But discrimination law says that all jobs must be open to men and women. The Bible makes it clear that sex is only appropriate within marriage, and so if one of the church staff is living in a *de facto* relationship, the church may wish to remove them. But discrimination law forbids "marital status" discrimination. The Bible tells us that homosexual behaviour is contrary to God's will, and also that human beings are created in one of two sexes, which are not seen as changeable. Discrimination laws may say that a youth worker cannot be disciplined for homosexual behaviour (as that is seen as an essential part of their "sexual orientation"), or for their decision to "transition" from male to female.

So you can see that there would be a number of problems for churches if these discrimination laws did not contain "balancing clauses" like the ones I mentioned previously. For example, the Commonwealth SDA 1984 s 37, which we looked at previously, allows churches to take sex and sexual orientation into account when appointing leaders for their ministries. It allows a church to say to a youth worker, you cannot be living with your girlfriend while running our youth group, as we want you to both teach and model Christian values to our teenagers. And it allows the same decisions to be made where a youth worker, say, decides that they are "same sex attracted" or want to "transition" to another gender.

These balancing clauses also provide protection for Christian ministries other than churches. To give one example, the NSW *Anti-Discrimination Act* 1977 ("ADA") also forbids "homosexuality discrimination". But a few years ago the Wesley Mission, which runs a "fostering" service for children in need, declined to accept an application to be foster parents from a gay couple, saying that in their belief a married man and woman provided the best environment for raising a child.¹⁰ The NSW ADA has one of these balancing clauses I mentioned, s 56:

56 Religious bodies

Nothing in this Act affects—

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order.
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,
- (c) the appointment of any other person in any capacity by a body established to propagate religion, or

¹⁰ See the case at OV & OW v Members of the Board of the Wesley Mission Council [2010] NSWCA 155.

(d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

In the Wesley Mission case, after some dispute in a Tribunal hearing, the NSW Court of Appeal held that the relevant religious beliefs were those held by the Wesley Mission (not necessarily those held by the whole of Christianity, or even those of the Uniting Church.) And under those religious beliefs, declining to accept gay foster parents was something that "conformed to the doctrines of that religion", and in addition was "necessary to avoid injury to the religious susceptibilities of the adherents". Hence the decision of the Wesley Mission was not unlawful discrimination.

So these balancing clauses can be very helpful. However, there are always possibilities for things to not go so well. Let me given you two examples.

One area of concern is if the court which applies the balancing clause takes too narrow a view of the protection provided. This happened, in my view, in a case a few years ago in Victoria, *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75. In that case, CYC, linked to the Christian Brethren church, were running a camping operation which they allowed to be used by secular groups as well as religious groups. They were asked to take a booking from Cobaw, which said up-front that they wanted to run a camp for same-sex attracted young people to spread the message that "homosexuality was a normal and natural part of life". The manager of the camp politely declined, saying this was contrary to the religious views of the Brethren church.

In this case CYC were held to have acted illegally. There were a number of different reasons, but in particular one thing that was notable was that the court took evidence from different "theological experts" about the doctrines of Christianity, and ended up supporting the view that matters of sexual behaviour were not part of the "doctrines" of the Christian faith! This unfortunately demonstrates that Australian courts still have some way to go in working out how to deal with religious freedom cases.

The second area of concern is that we may see these balancing clauses whittled away by Parliaments. The example here is s 37 of the SDA, which we have looked at previously. While the main part of s 37 is good, back in 2013 there was an amendment made when the Commonwealth Parliament passed laws making it unlawful to discriminate against someone based on their sexual orientation or "gender identity". Section 37(2) was added:

- (2) Paragraph (1)(d) does not apply to an act or practice of a body established for religious purposes if:
- (a) the act or practice is connected with the provision, by the body, of Commonwealth-funded aged care; and
- (b) the act or practice is not connected with the employment of persons to provide that aged care.

The effect of s 37(2) is that if a Christian body is running an aged care hostel which is funded by the Commonwealth Government, then they are not allowed to implement any policies which discriminate against the residents of the hostel on the grounds dealt with in the SDA- which, you may recall, include sex, marital status, sexual orientation or gender identity. This means that they cannot stop a same sex older couple from sharing accommodation, for example. Nor, incidentally, can they stop a heterosexual couple from living together if they are not married.

Notice that the exemption to the balancing clause does not apply to employment! This means that Christian aged care hostels can still require that their staff members model Biblical values, and if they want to, exclude a staff member who is openly gay. But they have to accept these decisions from residents.

Now the fact is that there was no huge community problem of gay older couples being excluded from church-run aged care! But the amendment seems to have been put in as a matter of principle- the principle of starting to "wind back" religious freedom protections. So far this amendment has not been followed by any others of a similar nature- but more may be coming.

In terms of the future of these balancing clauses, you should be aware that there is an inquiry being conducted by the Australian Law Reform Commission into the whole question of the interaction between religious freedom and discrimination laws. The inquiry hasn't released its first discussion paper yet- it is apparently waiting until the Government introduces its Religious Discrimination Bill into Parliament, partly I imagine to see how the Government frames the "balancing clauses" in that Bill. But the ALRC exercise will be happening next year.

One reason for the ALRC inquiry is the debate that we saw in Federal Parliament at the end of last year about the suggestion that Christian schools were expelling, or refusing to enrol, homosexual students. All the evidence I have seen is that this claim was a total "furphy"! No Christian schools were turning away gay students on the basis of their "sexual orientation".

However, what Christian schools are concerned with is the conduct of their students, not their internal sexual desires. They want the power to say to students, as a Christian school where your parents have sent you to learn and model the Christian faith, we do not allow public displays of same sex attraction at school, we will not support you starting a "Gay Pride" group, we will not let you bring your same sex partner to the school formal.

Christian schools also want to be able to say to their staff- not just the religious education teacher, but all staff- that they should teach and model Biblical values in their lives as a whole, including in their sexual activities.

After this "furphy" came out last year, you may recall that there were a number of private member's bills introduced into the Federal Parliament supposedly to deal with the issues. In fact, some of these bills ended up going far beyond the supposed problems in schoolsone Bill introduced by ALP Senator Wong would have arguably applied to "education" conducted not just by schools, but in churches and Sunday Schools and youth groups. Because the Government at the time had lost its majority in the House of Representatives, there was a chance that this very harmful Bill might have gone through. I am convinced that it was only by God's providence (and the prayers of his people) that we narrowly avoided this outcome (at the last minute some of the cross-benchers in the Senate withdrew their support).

How should we respond?

How should we as Christian people respond to these challenges? Briefly, I think we should not give up- we should keep seeking to have our voices heard through the democratic structures of the Australian society. We should keep on praying. And above all, we should keep on trusting our sovereign Lord to be working out his purposes for the glory of his Son!

We should not give up. We are blessed in this country with a Parliamentary democracy which allows different points of view to be debated and discussed. Sometimes the results of the democratic process are quite unexpected! I don't think in the beginning of 2019 that many people thought that the Morrison government would be re-elected. But here we are, at a crucial stage in the history of our nation when religious freedoms are being debated, and we have the blessing of an evangelical Christian Prime Minister who understands the issues. He of course will have to navigate all his different responsibilities and use the wisdom God gives him to lead the country for the benefit of all Australians. But he is someone who "gets religion", and I think we can rely on him not to let these matters be disposed of lightly.

 $^{^{11}}$ See my blog post at the time, "ALP Bill on religious schools and students" (Nov 29, 2018) $\underline{\text{https://lawandreligionaustralia.blog/2018/11/29/alp-bill-on-religious-schools-and-students/}}.$

Occasionally you will hear Christians say something that sounds very spiritual: "A bit of persecution would be good for the church, we should just not worry about politics". And while it is absolutely true that, should persecution become harsher, God can use that for his glory, I am convinced that in the meantime we should use the resources we have to preserve religious freedom in Australia so that the gospel can be proclaimed freely. After all, the apostle Paul, in the book of Acts, was regularly rejected and persecuted. Sometimes he just moved on. But there were other occasions, especially when the interests of fellow believers were at stake, where he relied on the Roman legal system. In Acts 16, when miraculously released from prison in Phillipi after being unfairly locked up, he did not sneak away, but demanded and received an official apology from the local officials, sending a clear message that preaching the gospel in Phillipi was not a crime! Later he used his status as a Roman citizen to escape a flogging, and to allow him to appeal to Caesar and be sent to preach the gospel in Rome at Roman expense!

The legal system, I am saying, is a good gift of God, which we can often use to defend religious freedom. That I think is why Paul writes in this way in 1 Timothy 2:1-4

2 I urge, then, first of all, that petitions, prayers, intercession and thanksgiving be made for all people—² for kings and all those in authority, that we may live peaceful and quiet lives in all godliness and holiness. ³ This is good, and pleases God our Savior, ⁴ who wants all people to be saved and to come to a knowledge of the truth.

We should also keep praying, then- pray for leaders and others in authority to govern wisely and to allow the gospel to be preached so that more and more people may come to know the Lord Jesus as Saviour.

But finally, of course, the great thing we know is that whether we are locked up for our faith, or not, God is in control. Being a faithful believer may see us attacked and denigrated by others; it may increasingly be seen as a reason to sack us or not give us jobs. But God is still in charge. I was very encouraged recently just reading this passage from 1 Peter, written by Peter to believers in the Roman Empire who were facing terrible punishments for their faith.

18 Slaves, in reverent fear of God submit yourselves to your masters, not only to those who are good and considerate, but also to those who are harsh. 19 For it is commendable if someone bears up under the pain of unjust suffering because they are conscious of God. 20 But how is it to your credit if you receive a beating for doing wrong and endure it? But if you suffer for doing good and you endure it, this is commendable before God. 21 To this you were called, because Christ suffered for you, leaving you an example, that you should follow in his steps.

22 "He committed no sin, and no deceit was found in his mouth."

23 When they hurled their insults at him, he did not retaliate; when he suffered, he made no threats. Instead, he **entrusted himself to him who judges justly**. 24 "He himself bore our sins" in his body on the cross, so that we might die to sins and live for righteousness; "by his wounds you have been healed." 25 For "you were like sheep going astray," but now you have returned to the Shepherd and Overseer of your souls.

When we suffer because we are faithful, this is glorious in God's sight. Like the Lord Jesus, we should, when faced with unfair penalties and treatment from others, entrust ourselves to the one Judge whose verdict really matters, He who judges justly, the Father of our Lord Jesus Christ, who when Jesus returns will raise us up to be in glory with him forever. In the meantime, though, work to preserve the freedom to preach, pray, and trust the always faithful God.