Submission

to the

Review of Religious Freedom

by the

Expert Panel of the Prime Minister and Cabinet

Department of the Prime Minister and Cabinet
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1. Introduction

On 22 November 2017, the Prime Minister, the Hon Malcolm Turnbull MP, announced the appointment of an Expert Panel to examine whether Australian law adequately protects the human right to freedom of religion.

FamilyVoice Australia is a national Christian voice – promoting true family values for the benefit of all Australians. Our vision is to see strong families at the heart of a healthy society: where marriage is honoured, human life is respected, families can flourish, Australia's Christian heritage is valued, and fundamental freedoms are enjoyed.

We work with people from all mainstream Christian denominations. We engage with parliamentarians of all political persuasions and are independent of all political parties.

FamilyVoice has had a longstanding interest in freedom of religion in Australia. We have made numerous submissions to inquiries touching on this right, particularly in relation to anti-discrimination and anti-vilification laws and proposals for bills or charters of rights.

1.1 Terms of reference

The terms of reference most applicable to the review include the following:

- consider the intersections between the enjoyment of the freedom of religion and other human rights
- have regard to any previous or ongoing reviews or inquiries that it considers relevant
- consult as widely as it considers necessary

2. Context

Australia is a multicultural society and home to many people who hold a religious belief of some kind. Increasingly, many Australians are also choosing not to identify as religious, and the growing secularization of society has also given rise to some hostility towards people of faith, highlighting the absence of clear protections for many of the fundamental freedoms we have traditionally taken for granted. This growing hostility and the absence of protections together present a significant threat to the strong cohesion that Australian society has historically enjoyed. Few rights associated with religious freedom, such as freedom of speech, conscience and association, are protected either. Australians are free to enjoy such freedoms so long as parliaments do not pass laws that infringe these rights, but there are no protections in place to prevent infringement from possibly occurring.

In fact, the danger of infringement can already be seen in the following areas:

- Expansion of protected attributes within anti-discrimination laws, which directly challenge aspects of religious faith and practice, such as 'lawful sexual activity'; religious moral values often mandate sexual practices that are heterosexual in nature, and exist within a marital relationship;

- A number of these newly protected attributes are also not inherent characteristics, such as sex/gender and race;

- Moves toward removing exemptions and exceptions in anti-discrimination law. For example, the recent Northern Territory discussion paper examining the 'modernisation' of anti-discrimination laws proposed removing exemptions for religious bodies that allow them to only employ people who hold to their religious doctrines and practice;

- The removal of exemptions is a real problem because exemptions are the major way that State and Federal governments are currently dealing with their obligations to protect religious freedom in Australia.

This review has arisen out of the same sex marriage debate in Australia, which highlighted a number of questions about the freedom to hold dissenting views of marriage after its definition was changed in law. Many Australians with a religious worldview are worried that both State and Commonwealth laws are increasingly impinging on their personal convictions. They are worried that our laws do not adequately protect their freedom to hold and express religious views in the public square. Currently there exists:

- a provision in the Constitution which applies only to Commonwealth law;
- a provision in the Tasmanian Constitution;
- Exceptions and exemptions in anti-discrimination laws.

2.1 Human rights law

However, Australia has obligations under international human rights law, and the existing regime does little to support such obligations. While it is incumbent upon Commonwealth and State and Territory lawmakers to fulfill these obligations, responsibility for compliance ultimately lies with the Commonwealth, and there is far more it can do to protect the religious freedoms of its citizens.

The recent interim report on the Legal Foundations of religious freedom in Australia highlighted the following important points:

- Australian human rights law should look to the International Covenant on Civil and Political Rights (ICCPR) and other instruments for guidance. The Sub-Committee notes that the ICCPR has not been adopted into Australian legislation. Some rights have been adopted in some jurisdictions, but the Commonwealth has failed to implement the range of ICCPR rights despite committing to do so;

- Although there is legislative protection for some ICCPR rights, notably the Article 26 right to non-discrimination, religious freedom has very little legislative protection and there is a risk of an imbalanced approach to resolving any conflict between the right to freedom of religion or belief and other rights;

- In addition to enumerating fundamental human rights, the various international instruments also provide guidance for applying these rights and balancing competing rights. The Siracusa Principles provide guidance on appropriate limitations on human rights. The UNESCO Principles on Tolerance could be helpful in guiding discussions about tolerance, including what tolerance does not require;

- The UN Human Rights Committee has established a broad scope of the right to freedom of religion or belief, which includes freedom of thought and conscience, non-theistic beliefs and no religious beliefs. It has also given helpful comments on the role of non-discrimination within a human rights framework, particularly in General Comment 18, which draws the distinction between unlawful discrimination and mere differentiation of treatment which is for a legitimate aim;

- Evidence suggests that these instruments and UN Human Rights Committee comments should provide guidance to how best to implement protection for freedom of religion or belief in Australian law.[1]

3. Freedom of religion

The concept of *freedom of religion* arises from the capacity of humans to order their lives by thought, belief and reason, rather than by instinct. Governments acknowledging the humanity of their citizens will recognise their inalienable right to freedom of thought, belief and opinion, including the right to change religion or belief. As Augusto Zimmermann, a senior law lecturer at Murdoch University has stated:

…religion is not an isolated component of life, because religion has broad, holistic implications for the lives of its adherents as a worldview that shapes the way individuals think and act.[2]

Princeton University Professor of Law Robert P. George has described the broad nature of religious freedom in this way:

> *The US Commission on International Religious Freedom has stood for religious freedom in its most robust sense. It has recognized that the right to religious freedom is far more than a mere*

> *"right to worship." It is a right that pertains not only to what the believer does in the synagogue, church, or mosque, or in the home at mealtimes or before bed; it is the right to express one's faith in the public as well as private sphere and to act on one's religiously informed convictions about justice and the common good in carrying out the duties of citizenship. Moreover, the right to religious freedom by its very nature includes the right to leave a religious community whose convictions one no longer shares and the right to join a different community of faith, if that is where one's conscience leads. And respect for the right strictly excludes the use of civil authority to punish or impose civic disabilities on those who leave a faith or change faiths.*[3]

3.1 Freedom of conduct and religious freedom

The High Court of Australia has confirmed in its judgement on the "Scientology case" that the legal definition of religion involves both belief and conduct.[4] Justices Mason and Brennan held that "for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief…"[5] Consequently, freedom of religion in Australia involves both freedom of belief and freedom of conduct giving effect to that belief.

The most pressing issues associated with freedom of religion in Australia today are the increasing denial of religious conscience and religious practice. The denial of religious freedom in these areas is often due to the application of anti-discrimination laws.

Many parts of anti-discrimination law represent a direct assault on religious freedom by prohibiting some conduct that may be required to give effect to religious beliefs. Religious beliefs generally make moral distinctions between right and wrong, between good and bad, whereas anti-discrimination laws may declare conduct giving effect to such moral distinctions to be unlawful.

The International Covenant on Civil and Political Rights recognises these rights in Article 18:

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 beliefs 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.*[6]

The Australian Constitution, section 116, enshrines the principle of non-interference by government in religious belief or practice:

*The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the **free exercise** of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*[7]

Consequently, the Commonwealth Parliament:

- Cannot establish a State church;[8]
- Cannot enforce religious observance;[9, 10, 11]
- Cannot prohibit religious observance;[12] and
- Cannot impose a religious test for public office.[13]

4. Commonwealth constraints on freedom of religion or belief

There are a number of pieces of Commonwealth anti-discrimination legislation that affect the free exercise of religious belief.

4.1 Sex Discrimination Act

Some of the grounds on which discrimination is prohibited in the *Sex Discrimination Act 1984* directly contradict moral values of the Christian faith and other faiths:

- In particular, sections 5A, 5B and 6 prohibit discrimination on the grounds of *sexual orientation*, *gender identity* and *marital or relationship status* respectively. Yet different sections of the community possess strongly held mutually contradictory beliefs about their moral acceptability or otherwise;

- The religious exemptions set out in sections 37 and 38 of the Act provide inadequate protection. Section 37 applies only to religious bodies on limited matters such as the selection, training or appointment of priests, ministers or members of religious orders. Section 38 applies only to educational institutions established for religious purposes on limited matters related to the employment of teachers or the provision of educational services.

- The exemptions generally apply only in relation to "an act or practice that conforms to the doctrines, tenets or beliefs of that religion". The consequence of this provision is that:

    1. Anti-discrimination tribunals and courts are required to determine the "religion" in question and its "doctrines, tenets or beliefs", which may be understood by adherents but not carefully defined in writing;

2. Exemptions are further restricted to actions done "in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed";

3. The "doctrines, tenets or beliefs" of a religion and the "susceptibilities of adherents" are matters more theological than judicial;

4. Courts, tribunals and judges are ill-equipped to determine such matters, as Justice Nettle observed in his *Catch the Fire* judgement: "In my view it was calculated to lead to error for a secular tribunal to attempt to assess the theological propriety of what was asserted at the Seminar."[14]

No exemptions are provided for other corporate bodies or natural persons who adhere to religious beliefs and practices. This is a flagrant failure to understand the nature of religious belief. Religious exemptions should be recognised for any legal person – natural or corporate – who holds a genuine and conscientious belief that some of the protected attributes are morally unacceptable.

The Act is commonly interpreted to give freedom from discrimination a wide scope but only a narrow scope to exemptions. The result is that freedom of association and other fundamental freedoms are suppressed.

4.2 Fair Work Act

The *Fair Work Act 2009* contains a number of provisions that interfere with freedom of religion:

- section 153, which states that a "modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's 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."[15]
- section 195(1), which details discriminatory terms in enterprise agreements "the employee's 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."[16]
- section 351(1), which states that an "employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's 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."[17]
- section 772(1)(f), which provides that a person's employment may not be terminated on the basis of "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."[18]

These provisions are as problematic as other anti-discrimination laws because they adversely affect the ability of religious organisations to engage staff who conform to the same beliefs. Each of these sections contains an almost identical religious exemption; however, each is too narrow and subjective. For example, the exemption in section 153 relating to awards states:

> *(2) A term of a modern award does not discriminate against an employee:*
>
> *(a) If the reason for the discrimination is the inherent requirements of the particular position held by the employee; or*
>
> *(b) Merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:*
>
> *(i) In good faith; and*
>
> *(ii) To avoid injury to the religious susceptibilities of adherents of that religion or creed.*

But what is a "doctrine, tenet or belief"? Do they need to be in writing? Is it enough that they are understood by some rather than all of the adherents of a religion? And what is a religious susceptibility? Courts are not in a position to make sound judgments about such matters.

5. ICCPR, discrimination and the Commonwealth

In the recent Commonwealth inquiry into Australian anti-discrimination law, Professors Patrick Parkinson and Nicholas Aroney drew attention to the importance of the International Covenant on Civil and Political Rights and associated international conventions, to which Australia is a signatory.[19] These offer, in their opinion, a principled basis for "determining an appropriate balance" between minority voices in the community, including ethnic, religious and cultural groups, and Australian values embodied in anti-discrimination law. These rights include:

- Protection from discrimination on the basis of various attributes including race, ethnic origin or religious belief (Article 26, ICCPR);

- Freedom of religion and conscience, alongside all other people of faith (Article 18, ICCPR; cf Article 5(d)(vii), CERD; Article 14, CRC);

- Freedom of association (Article 22, ICCPR; c.f. Article 5(d)(ix), CERD; Article 8, ICESCR; Article 15, CRC);

- The right to marry, to found a family and to educate their children in conformity with their religious and moral convictions, thus sharing in the common responsibility of men and women in the upbringing and development of their children (Articles 18(4) and 23, ICCPR; cf Articles 10, 11 and 13(3)-(4), ICESCR; Articles 3(2), 5, 8, 9, 10 and 18, CRC; Articles 5 and 16, CEDAW);

- The right to enjoy their own culture, to profess and practise their own religion, and to use their own language in community with the other members of their group (Article 27, ICCPR; c.f. Article 15, ICESCR). [1]

Two other leading legal theorists have called for the exercise "great care" in the drafting and amendment of legislation to ensure that the focus of freedom from discrimination does not diminish other important freedoms, such as freedom of religion, association and cultural expression and practice:

- Rewriting of laws must ensure that human rights that are in creative tension with one another are appropriately balanced;

- Australia may be non-compliant with its international obligations if this is not the case;

- The Federal Government recently reaffirmed its commitment to review legislation, policies and practices for compliance with the seven core UN human rights conventions to which Australia is a party;

- This is also necessary in view of Australia's increasingly diverse mix of ethnicities, cultures and religions.[2]

At a Federal level, because Australia is a party to the ICCPR and other conventions, it has "committed to comply with their provisions in good faith and to take the necessary steps to give effect to those treaties under domestic law … Australia has a duty to respect and apply its international human rights obligations to all individuals within its jurisdiction".[20]

Currently, Statements of Compatibility in relation to all government and non-government bills must contain an assessment of the bill or legislative instrument's compatibility with the rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. In relation to the ICCPR, a number of important points must be noted:

- The international religious freedom protections contained at Article 18 are not limited to religious corporations, but also extend to individuals within society, regardless of their affiliation with any religious institution;

- Retaining traditional views of marriage, sexuality, gender etc. does not breach the right to equality:

[1] International Convention on the Elimination of All Forms of Racial Discrimination (1965) (CERD); International Covenant on Civil and Political Rights (1966) (ICCPR); International Covenant on Civil and Political Rights (1966) (ICCPR); International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW); Convention on the Rights of the Child (1989) (CRC).

[2] *Australia's Human Rights Framework* (April 2010), p. 9.

- The UN HRC determined under Article 23(2) that the right to marry under the ICCPR is confined to a right of opposite-sex couples to marry due to the interpretation that the terms 'men and women' restricted marriage, by definition, to opposite sex couples.

- There is no international human right to same sex marriage. As Mark Fowler has demonstrated in his submission to the SSM inquiry both the UN Human Rights Committee in Joslin v New Zealand interpreting the ICCPR and the European Court of Human Rights in its decisions on the European Covenant on Human Rights establish that a state is not obliged by the equality rights in those instruments to introduce same sex marriage.

- Religious freedom rights therefore cannot be limited by certain 'protected attributes' that are not enshrined in international human rights law.

This however has very important ramifications for the protection of religious freedom:

- Religious freedom protection under Article 18 of the ICCPR can only be limited by other fundamental rights;

- Absence of a right to same sex marriage in international law has consequences for the ability to limit religious freedoms;

- Rights to Religious Freedom Can Only be Limited Where '***Necessary***', not where 'Reasonable';

- It is often assumed that to be compatible with human rights, any limitation on religious freedom must be 'reasonable, necessary and proportionate'. However, Article 18(3) of the ICCPR only permits limitations on religious freedom to the extent that they are ***'necessary'***.

Limitations clauses under the ICCPR, including religious freedom in Article 18(3) are required to be interpreted in accordance with The United Nations Economic and Social Council's ***Siracusa Principles*** on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights:

- These Principles provide that 'all limitation clauses shall be interpreted strictly and in favor of the rights at issue';
- 'Whenever a limitation is required in the terms of the Covenant to be "***necessary***," this term implies that the limitation:
    - Is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant;
    - Responds to a pressing public or social need;
    - Pursues a legitimate aim;
    - Is proportionate to that aim.

The Siracusa Principles also require that 'in applying a limitation, a state shall use no more restrictive means than are required'. This means that:

- Where consideration is being given to the implementation of a fundamental right that conflicts with the right to religious and conscientious freedom, consideration of alternative means for progressing that fundamental right must be undertaken;

- A weighing of the relative burden placed upon religious and conscientious freedom amongst the alternatives is then required in order to identify the means that are the least restrictive.

6. State and Territory legislation

Mark Fowler, an adjunct lecturer in Law at the University of Notre Dame, has highlighted the inadequacy of various forms of State and Territory anti-discrimination legislation in Australia to "acquit Australia's obligations to protect religious freedom under international law". These failures are seen in:

- Victorian and ACT charters of human rights, which have declined to enact the protections of religious freedom contained in the International Covenant on Civil and Political Rights;

- Some of these rights may be limited by state incursion, but the ICCPR permits only "necessary" limitations, imposed through "no more restrictive means than are required";

- The ACT and Victorian charters draw the boundary much further into the heartland of an individual's rights, permitting "reasonable" state incursion;

- A 2016 attempt by the Victorian government to roll back the freedoms of religious bodies in relation to discrimination in their employment decisions, where "adherence to the religious confession and ethos of an organisation were not judged by the State to be inherent to the performance of a particular role in the workplace";[21]

- The Tasmanian Anti-Discrimination Act 1998, which failed "to accord religious bodies their rights in respect of the protected attributes of marital or relationship status;" [22]

- Threats by the University of Sydney Union to deregister the Evangelical Union on the basis of its "discriminatory" requirement that new members affirm that "Jesus is Lord". Part of the problem here is that the Anti-Discrimination Act 1977 (NSW) does not designate religious belief as a protected attribute;

- The Northern Territory Government's 2017 discussion paper, proposing amendments to anti-discrimination laws that remove the current exemptions for religious bodies in the areas of religious educational institutions, accommodation under the direction or control of a body established for religious purposes and access to religious sites. Religious or cultural bodies would instead be required to apply for an exemption with the ADC and justify why their service requires a particular exemption.

The discussion paper proposed:

- Removal of exemptions in section 30(2) that permits religious schools to exclude prospective students who are not of that religion.

- Removal of section 37A that permits religious schools to discriminate against employees on the grounds of religious beliefs, activity or sexuality if done in good faith to avoid offending the religious sensitivities of people of the particular religion. For example, under this exemption a religious school could justify not employing a prospective employee on the basis that they identify as LGBTI, if the religious doctrine does not support LGBTI relationships.

For a society to be construed as open and democratic, it must allow both individuals and associations to publicly provide their notion of truth to wider society: "Any removal of the ability of faith-based entities to determine and espouse their beliefs would be a restriction on these historically hard-won liberties, which arguably are characteristic of the Western legal tradition. It behooves state and territory institutions to review their practices to ensure compliance with international law".[23]

6.1 Freedom of speech

A number of sections in the Tasmanian *Anti-Discrimination Act 1988* restrict freedom of speech, but particularly sections 17(1) & 19. Section 17(1) states:

> ***17. Prohibition of certain conduct and sexual harassment***
>
> *(1) A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.*

This section was used by transgender activist Martine Delaney to bring an action against Catholic Archbishop of Hobart Julian Porteous for distributing a booklet entitled *Don't Mess with Marriage*.

Same-sex marriage campaigner Rodney Croome had earlier encouraged people to use the law to stifle the Church's views when he said in a media release:

> *The booklet likely breaches the Anti-Discrimination Act and I urge everyone who finds it offensive and inappropriate, including teachers, parents and students, to complain to the Anti-Discrimination Commissioner, Robin Banks.*[24]

The law should not allow one side of a debate to censor their opponent. But that is exactly what such legislation does.

The Institute of Public Affairs rightly pointed out at the time that the action was an attack on freedom of speech:

> *"An anti-discrimination complaint against the Catholic Archbishop of Hobart shows that freedom of speech is under attack," says Simon Breheny, director of the Legal Rights Project at free market think tank the Institute of Public Affairs.*
>
> *Martine Delaney, Greens candidate for the federal seat of Franklin, has complained to the Tasmanian Anti-Discrimination Commission this week that pamphlets produced by Catholic Archbishop of Hobart Julian Porteous are offensive and breach the Anti-Discrimination Act 1998 (Tas). Following amendments passed in 2013, the act makes it a crime for a person to "engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person" on the basis of a range of attributes, including sexual orientation.*
>
> *If Archbishop Porteous is found by the Tasmanian Anti-Discrimination Commission to have breached the act, he may be ordered to apologise, to pay a $3080 fine or to pay compensation to the complainant.*
>
> *"This attack on free speech is facilitated by Tasmania's anti-discrimination laws, which are the most restrictive in the country," says Mr Breheny.*
>
> *"As I argued in an article for the Sunday Tasmanian in November 2012, the 2013 amendments would have 'a crippling effect' on freedom of expression and stifle public debate."*
>
> *"This confirms our worst fears about the law, and shows why the act should never have been amended."*
>
> *"Even if the complaint is rejected by the commission, the fact that the legislation contemplates such a complaint on a topic of genuine and significant public and political debate shows the overreach of the Tasmanian regime."*
>
> *"This complaint is a clear example of the chilling effect that legislation can have on speech," says Mr Breheny.*[25]

Criticising section 17(1), Campbell Markham wrote in *The Mercury:*

> *For the same words that may insult one person, may be simply laughed off by another. What may be felt as ridicule by one, may make another simply think again. What is perceived as intimidating by one person may be perceived as "robust debate" by another.*
>
> *So who draws the lines of what speech is right and what speech is wrong? And who decides what a "reasonable" person is?*
>
> *The answer is: whoever is loudest, cleverest, the one with most access to political power and media publicity, whoever has the dominant ideology on their side.*[26]

The complaint against Archbishop Porteous was eventually withdrawn but it should never have been entertained in the first place. Part of the punishment in such matters is the process – the time and money expended in defending oneself against any complaint received.

7. Problems with Exemptions

When religious freedoms and equality norms clash, Australian commentators and policy makers increasingly question the place of 'exceptions' for religious groups in anti-discrimination law. Professor Joel Harrison has argued that this captures a shift in our understanding of the purpose of such laws. Where we used to focus on access and distribution, anti-discrimination laws are now increasingly focused on self-identity. Indeed, it has been argued that identity politics has been the major driver of the growth of anti-discrimination law.[27] Harrison says:

The rise in this tension between equality norms and religious freedom in Australia has much to do with a transformed understanding of the purposes of anti-discrimination law. We contend that there has been a shift away from focusing on questions of access and participation towards a particular notion of dignity or identity. On this view, equality law should be increasingly universalised, that is applied to all groups, in order to protect individuals against 'status harms'. We argue that this shift underlies arguments, seen recently in Australia, to limit or remove religious exceptions to the reach of anti-discrimination law.

Anti-discrimination laws commonly include exceptions or exemptions for religious beliefs, practices or organisations. However such exemptions have often proved to be inadequate and have denied people the right to act according to their conscience informed by their beliefs.

An example is the case of Christian Youth Camps v Cobaw Community Health (Cobaw) in the Victorian Court of Appeal.[28] A brief summary of the case from the Queensland University of Technology follows:

> *This case involved a consideration of the interaction of the rights to freedom from discrimination and freedom of religion. The respondent (Cobaw) is an organisation concerned with the prevention of youth suicide. The appellant (CYC) had a camp facility established by the Christian Brethren Trust, connected with a church known as the Christian Brethren. The Christian Brethren are opposed to homosexual activity as being against biblical teaching. Cobaw wished to hire a camp facility from the appellants for the use of same sex attracted young people. CYC (by its camp manager) refused.*
>
> *It was held in the Victorian Civil and Administrative Tribunal (VCAT) that the refusal amounted to unlawful discrimination on the basis of the sexual orientation of those who would be attending the proposed camp. Before the Tribunal, CYC contended that if, contrary to their principal submission, the refusal would otherwise have constituted unlawful discrimination, the exemption provisions in the Equal Opportunity Act 1995 (Vic) (the EO Act) concerning religious freedom were applicable, such that there had been no contravention. These exemptions apply to conduct 'by a body established for religious purposes' (section 75(2)) and to discrimination by a person which is necessary for that person 'to comply with the person's genuine religious beliefs or principles' (section 77). The Tribunal held that neither exemption was applicable.*
>
> *On appeal to the Court of Appeal, CYC disputed the finding that its refusal was unlawful discrimination, maintaining that there was a fundamental distinction between an objection to 'the syllabus' to be taught at the proposed camp — that is, to beliefs or opinions which would*

> *be expressed by Cobaw to those attending the camp — and discrimination on the basis of the sexual orientation of those attending. The Tribunal's decision was upheld by a majority of the Court of Appeal in this judgment.*[29]

The Cobaw case, and other similar cases both in Australia and overseas, amount to a conflict between two systems of belief. The complainant, namely the person who initiated the discrimination complaint, considered certain behaviour morally acceptable. The respondent, against whom the complaint was made, believed that behaviour to be morally unacceptable. The effect of the Tribunal's decision, upheld by the Appeal Court, was to impose the complainant's belief system on the respondent, thereby denying the latter's freedom of conscience.

Since the Cobaw organisation was able to book an alternative venue for its camp, its freedom to act in accordance with its beliefs was not compromised by the decision of CYC camp manager to decline the Cobaw organisation's request.

The supposed exemptions for religious beliefs and religious organisations, in this case and most other similar cases, proved to be inadequate and ineffective. They failed to protect the freedom of conscience of the respondent. Instead, the law enabled the complainant to trample on the freedom of religion of the respondent.

How can mutually contradictory systems of belief be given equal respect in society? The solution is free and voluntary exchange. Former Nobel Prize winner Milton Friedman argued that:

> *Freedom of exchange … enables people to co-operate voluntarily in complex tasks without any individual being in a position to interfere with any other… It provides for co-operation without coercion; it prevents one person from interfering with another.*[30]

The current law, as interpreted by the Tribunal and the Appeal Court, empowers one person to interfere with another. It has the deleterious effect of enabling the buyer of a service to coerce the seller of the service. The outcome undermines cooperation, breeds disharmony and resentment, and is socially counterproductive.

7.1 Exceptions for religious organisations, especially in employment

Employment in religious schools

Religious schools exist, not only to educate students in their ABCs, but to also transmit faith to students. Their very existence is tied to religious instruction. These schools are not simply educational institutions with a religious flavour; rather, they are about providing religious education to the young.

However, this issue is not just about religious freedom; it is also about the fundamental right of parents to determine their children's education. As detailed earlier in this submission, article 18(4) of the ICCPR states:

> *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.*[31]

Section 34 of the South Australian *Equal Opportunity Act 1985* recognises this right in a limited way. It provides an exemption for religious educational institutions to discriminate in employment on the grounds of sex, chosen gender and sexuality provided certain criteria are met.[32] The wording of the section applies to an educational institution and not simply to teaching positions. The South Australian Law Reform Institute (SALRI) has bemoaned this fact:

> *This arguably goes beyond the intention of the exception to protect religious freedom, as the gender or sexuality of maintenance staff or the school's receptionist has little, if any, effect on the education of students.*[33]

It has also questioned the fact that it applies to teachers as well:

> *Where the exceptions extend to areas less related to the practice of religion, for example, the employment of teaching and non-teaching staff in religious schools, or the provision of aged or health care, the role of the exceptions in protecting religious freedom becomes less clear. In these cases, it is arguable that the balance should tip towards greater consideration of the rights of LGBTIQ people.*[34]

Comments such as these display ignorance about the nature of freedom of religion. As detailed earlier, freedom of religion includes both belief and conduct. Professor Robert P. George expresses it this way:

> *[Religious freedom] is a right that pertains not only to what the believer does in the synagogue, church, or mosque, or in the home at mealtimes or before bed; it is the right to express one's faith in the public as well as private sphere and to act on one's religiously informed convictions about justice and the common good in carrying out the duties of citizenship.*[35]

The Association of Independent Schools of SA (AISSA) has rightly pointed out that:

> *For adherents to a faith, matters of religious belief are of the highest personal significance. For many people, they rest at the very core of their existence, informing all of their conduct and decision-making.*[36]

AISSA has also stated that it will:

> *Strongly oppose any attempt by the State Government to remove the protections, for religious schools, under sections 34 (3) and 85 Z (2) of the Equal Opportunity Act 1984.* [37]

Restricting the right of parents to educate their children in accordance with their religious beliefs marginalises people of faith. As a diverse group of eminent leaders – Charles J. Chaput (Roman Catholic Archbishop of Philadelphia), William E. Lori (Roman Catholic Archbishop of Baltimore), Albert Mohler, Jr. (President of the Southern Baptist Theological Seminary), Russell Moore (President of the

Ethics and Religious Liberty Commission, Southern Baptist Convention) and Russell P. George (McCormick Professor of Jurisprudence, Princeton University) – have said:

> *When basic moral convictions and historic religious wisdom rooted in experience are deemed "discrimination," our ability to achieve civic harmony, or even to reason clearly, is impossible.*[38]

Section 50(1)(c) of the Equal Opportunity Act provides a religious exemption for "any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion."[39]

Again, this exemption is problematic. The consequence of this provision is that anti-discrimination tribunals and courts are required to determine "religious purposes", "precepts" of a religion and "religious susceptibilities" of adherents – matters which are more theological than judicial. Courts, tribunals and judges are ill-equipped to determine such matters, as Justice Nettle observed in his *Catch the Fire* judgement: "In my view it was calculated to lead to error for a secular tribunal to attempt to assess the theological propriety of what was asserted at the Seminar."[40]

Anti-discrimination tribunals have an appalling record when determining such things as "religion", "precepts" and "susceptibilities of adherents". In the *Catch the Fire* case in the Victorian Court of Appeal, Justice Nettle determined that the Victorian Civil and Administrative Tribunal had erred in nineteen findings.[41] In the *OV & OW v Wesley Mission* case, the NSW Supreme Court found that the NSW Anti-discrimination Tribunal had wrongly identified the "religion" (at 41), wrongly determined the question of "doctrinal conformity" (at 45) and was wrong about "religious susceptibilities" (at 46).[42] The huge costs incurred by respondents in seeking to defend their religious freedom are grossly unjust.

Courts and tribunals should not be asked to determine such things as the "precepts" or "injury to the religious susceptibilities of adherents" of a religion or creed.

The exemption does not apply to natural persons who adhere to religious beliefs and practices. This is a failure to take religious belief seriously. Religious exemptions should be recognised for any person who holds a genuine and conscientious belief that some of the protected attributes are morally unacceptable.

A Commonwealth example again highlights the inadequacy of such exemptions. In 1998 the Catholic Education Office (CEO) of the Archdiocese of Sydney refused an applicant's classification as a teacher because of her "'high profile as a co-convenor of the Gay and Lesbian Teachers and Students Association and her public statements on lesbian lifestyles".[43]

The CEO claimed a religious exemption under the *Sex Discrimination Act 1984* on the basis that homosexual behaviour ran contrary the "doctrines, tenets, beliefs and teachings of the Church", which a teacher would be required to uphold. The matter was decided by the Australian Human Rights Commission (at that time the Human Rights and Equal Opportunity Commission).

The AHRC found against the CEO, not only acting as arbiter of what constituted Catholic teaching, but ruling that Catholic beliefs ran in favour of the complainant, Jacqui Griffin. In its ruling, the AHRC went so far as to say:

> *If the employment of Ms Griffin would injure the religious susceptibilities of these students and their parents, the injury would be founded on a misconception. Indeed it would be not an injury to their religious susceptibilities but an injury to their prejudices.*[44]

Such arbitrary use of anti-discrimination provisions demonstrates how severely restricted freedom of religion can become.

A general religious exemption from provisions of the Act should be modelled on the provision in the *Defence Act* for exemption from military service:

> *(1) The following persons are exempt from service in the Defence Force in time of war…*
>
> *(h) persons whose conscientious beliefs do not allow them to participate in war or warlike operations;*
>
> *(i) persons whose conscientious beliefs do not allow them to participate in a particular war or particular warlike operations;*[45]

Relevant sections of the *EO Act* should be replaced by a simple provision for exemption from the Act for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act.

In the case of a complaint, the role of a tribunal or court would then be limited to determining whether the person held conscientious beliefs that did not allow them to comply with the Act.

7.2 Health care provision by religious institutions

In South Australia, though many may wish to portray the provision of health care as a secular, non-religious practice, the reality is that healthcare provision by religious organisations, like the provision of schools, is intrinsically tied to religion.

Christians are called by Jesus Christ to "love thy neighbour as thyself."[46] In this context it can be seen that health care – caring for the sick – is one of the ways Christians practise love and charity towards a neighbour.

In the health care section of its report into 'lawful discrimination', exceptions and the Equal Opportunity Act in 2015, SALRI recommended that the exemption in section 50 of the *EO Act* be amended to state that it "does not apply to the provision of services by any body established for religious services if the body receives State funding or any exemptions from, or reduction in, State rates and charges."[47] This was a sneaky manoeuvre by SALRI, as the exemption was general and did not simply apply to health care. Any government-imposed conditions on religious organisations, such

as this one proposed by SALRI, that prevent them from operating in accordance with their values, limit their freedom of conscience unjustifiably.

Cardinal George Pell put it this way:

> *Neither the government nor anyone else has the right to say to religious agencies "we like your work with vulnerable women; we just need you to offer them abortion as well" or "we really like your schools, but we can't allow you to teach that marriage between a man and a woman is better or truer than other expressions of love and sexuality." Our agencies are there for everyone without discrimination, but provide distinctive teachings and operations. In a wealthy, sophisticated country like Australia, leaving space for religious agencies should not be difficult.*[48]

Forcing a religious healthcare provider to operate at odds with its religious beliefs restricts its religious freedom. Furthermore, since other hospitals are available, people have the opportunity to obtain services elsewhere that the religious healthcare organisation does not wish to perform (for example, sexual reassignment surgery, abortion, etc.).

7.3 Conclusion to problems with exemptions

Australia is a multicultural society, and when it comes to issues around sexuality and marriage, as the recent same sex marriage postal vote demonstrated, a wide range of people possess deeply held beliefs and values that oppose those espoused by equality advocates. The Australian government needs to therefore ensure that different values and beliefs around personal "morality and religious faith are respected, while maintaining the most important aspect of the principle of non-discrimination — that in our shared communal life as a society, differences in race, gender, sexual orientation, and other personal attributes are not grounds for exclusion".[49] Therefore, the push to expunge religious exemptions for anti-discrimination law:

- Risks a failure to balance different human rights and to make room for different moral values and views on sex and family life in a multicultural society;
- Fails to demonstrate a respect for freedom of religion and association which allows voluntary groups, at least to a significant extent, to be governed by their own shared values and beliefs;
- Fails to identify where the commons are in the life of a community, and what lies outside of the commons. It is here that the balance between religious freedom and equality is to be found.[50]

However, as detailed in the section above, exemptions alone provide ***inadequate protection*** for religious freedom in the current cultural climate. Professor Neil Foster, who specializes in the intersection of law and religion in Australia, has suggested that at best, "patchwork protection" is all that's in place to protect religious freedom in Australia. He has singled out anti-discrimination law and the redefinition of marriage to include same sex couples as the two most likely issues to challenge religious freedom in Australia, particularly when considering how these have affected religious freedom in other parts of the Western world. He suggests that protection of religious freedom must

be provided through specific legislation at Commonwealth level, rather than just relying on exemptions, and that it would "be wise to increase the domestic protection for religious freedom by legislation that recognizes the strength of this important human right". Because the Commonwealth "has undertaken to provide serious religious freedom protection by acceding to the ICCPR and under art 18 in particular", the most logical next step is now to ensure that "this commitment be translated into law".[51]

8. General Conclusion

Religious freedom is a principle enshrined in the Australian Constitution's restriction on the government making laws which prohibit the free exercise of any religion (s 116).[52] The High Court decision in the "Scientology case" defines religion to include both belief and conduct – making clear that freedom of religion involves more than mere private worship.[53] Consequently, the only justifiable limitation on freedom of religion is to prevent serious harm to others, when this is ***necessary***. Various anti-discrimination laws directly interfere with freedom of religion by prohibiting conduct that is required to give effect to religious beliefs and need to be addressed. However, increasing trends toward the removal of exemptions within discrimination laws also endanger the very limited protections for religious freedoms that do exist. Therefore, FamilyVoice offers the following recommendations to positively enshrine protection for religious freedom within Australian law.

Recommendations:

- ***That anti-detriment clauses be inserted in relevant pieces of Commonwealth legislation, such as the Marriage Act, and also in sections of anti-discrimination legislation, similar to amendments proposed for the Marriage Act during the same sex marriage debate in Federal Parliament;***

- ***That exemptions in anti-discrimination laws be strengthened to provide for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with particular provisions of an Act; in the case of a complaint, the role of a tribunal or court would then be limited to determining whether the person held conscientious beliefs that did not allow them to comply with the Act.***

- ***That the Commonwealth Government move to enshrine Article 18 of the ICCPR in Australian law through implementing a Religious Freedoms Protection Act; this would also help to limit certain aspects of State and Territory legislation to ensure Australia meets its human rights obligations;***

- ***That statements of compatibility in relation to drafted legislation give deeper and more deliberate consideration to religious freedoms as part of review processes;***

- ***That a new religious freedom commissioner be established at a national level, as recommended in the Freedom for Faith submission, to help draw attention to religious freedom issues, provide advice on religious freedom in relation to the drafting of legislation, and to offer direction on public policy to both Federal and State governments.***

Endnotes

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[5] *Ibid*., para 17; their judgement was qualified by also holding that "though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion."

[6] International Covenant on Civil and Political Rights, Article 18: 1-4 http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

[7] *Commonwealth of Australia Constitution Act 1900*, s116

[8] Countries that have established a religion include: the Church of England in UK, the Lutheran Church in Denmark, the Eastern Orthodox Church in Greece and the Roman Catholic Church in Argentina

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[16] *Fair Work Act 2009*, s195

[17] *Fair Work Act 2009*, s351

[18] *Fair Work Act 2009*, s772

[19] Patrick Parkinson and Nicholas Aroney, submission to Commonwealth inquiry into consolidation of anti-discrimination law,

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