



PROTECTING DIVERSITY

TOWARDS A BETTER LEGAL FRAMEWORK FOR
RELIGIOUS FREEDOM IN AUSTRALIA



SUBMISSION OF FREEDOM FOR FAITH TO THE RELIGIOUS FREEDOM REVIEW, JANUARY 2018.



ABOUT FREEDOM FOR FAITH

Freedom for Faith is a Christian legal think tank that exists to see religious freedom protected and promoted in Australia and beyond.

It is led by people drawn from a range of denominational churches including the Australian Christian Churches, Australian Baptist Church Ministries, the Presbyterian Church of Australia, the Seventh-Day Adventist Church in Australia, and the Anglican Church Diocese of Sydney. It has strong links with, and works co-operatively with, a range of other Churches and Christian organisations in Australia, including the Barnabas Fund which supports Christians that face discrimination or persecution as a consequence of their faith globally.

This submission was prepared by Prof. Patrick Parkinson AM, with advice and comment from a range of religious freedom experts across the country, and in consultation with church leaders.

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Executive Summary

Chapter I Introduction

This submission addresses a range of important issues about how we all live together well in a multicultural society in which many have a strong religious faith while others do not profess a religion.

The review arose from the 2017 debate over marriage, but its terms of reference are much wider than marriage. The key issue is how can freedom of religion be better protected under Australian law – not just federal law, but state and territory law as well.

The fact that freedom of religion has been taken for granted in the past, and is currently not under serious and imminent threat in Australia as it is in many other parts of the world, is not a reason for saying that there is no need for improvements to the framework for protecting religious freedom in Australia today. We must look now to the future. Our society is changing: hostility towards people of faith is increasing, exemptions in anti-discrimination laws necessitated by religious beliefs are being increasingly challenged, and people of faith are experiencing increasing discrimination and attacks on their freedom of speech and association.

There is almost no legal protection for freedom of religion in Australia beyond a provision in the Constitution which applies only to Commonwealth law, a provision in the Tasmanian Constitution, and exceptions and exemptions in anti-discrimination laws. There is also little protection for the inter-related civic freedoms of conscience, speech, assembly and association. Freedoms are protected only to the extent that Parliaments do not encroach upon those freedoms; but there is very little to stop Parliaments doing so, and no remedies in domestic Australian law that citizens have if laws impact upon them in ways that violate international human rights standards. The human rights charters in the ACT and Victoria are advisory only, and in any event do not comply with Article 18.3 of the International Covenant on Civil and Political Rights (ICCPR).

With the rapid secularisation of Australian society, and the growing and overt hostility to people of faith which we illustrate in many ways in this submission, the absence of protection for fundamental freedoms is a serious deficiency which threatens the cohesion of Australian society. Protecting human rights through defences and exemptions is something less than a complete way of implementing Australia's international human rights obligations.

The responsibility for compliance with Australia's international human rights obligations is a shared one between the Commonwealth Government and the States and Territories; but ultimately it is the responsibility of the Commonwealth to ensure compliance. It can do much more to discharge its national responsibility for protecting religious freedom in Australia.

Principles

In making this submission, we have been guided by four principles:

1. Our proposals provide better support for diversity in Australian society. The term ‘diversity’ is often given a rather narrow meaning, with a focus on issues of sexuality and gender identity. Australia is a richly diverse multicultural society in which people hold a great range of beliefs and values about sexual conduct and family life. Diversity policies need to take account of the range of moral views and cultural values in a society in which more than a quarter of the population was born overseas.
2. Our proposals do not seek to wind back any legal rights of those who identify as LGBT, many of whom attend our churches and other faith communities. It is not the case that the protection of the legal rights of one segment of society must inevitably be at the expense of another. Most of the religious freedom issues with which the churches are concerned, and which this submission addresses, either have nothing to do with LGBT people specifically or involve no detriment whatsoever to people on the basis of their sexual orientation or gender identity.
3. Our proposals will not compromise public safety. In any proposals we make that may conceivably have community safety implications, we recommend that for the avoidance of doubt, such provisions should have no effect in relation to prescribed public safety legislation, including Crimes Act provisions and those concerned with the prevention of terrorism.
4. Our proposals do not seek special privileges for people of faith. We desire that people of faith be able to ‘live and let live’ with other members of the community, neither claiming privileges not open to the rest of society, nor accepting that their rights be subordinated to those of other members of the community.

Limitations on religious freedom

Of course, religious freedom has its limits, as have other freedoms. Our proposals are consistent with the limitations proposed in the ICCPR and the Siracusa Principles on limitations, which have been endorsed by the UN’s Economic and Social Council. Many of the limitations on religious freedom argued for by advocates of other rights go far beyond the limitations recognised in international human rights law. Of course, religious freedom rights must at times be balanced with other rights. However, when people talk about balancing rights, we ask who does the balancing, and using what weights?

Chapter II Why are religious freedoms threatened?

Australia has long enjoyed religious freedom without robust legal protections. Better protection for religious freedom is now needed because of changes in Australian law and society over the last twenty or so years.

First, anti-discrimination laws have expanded to include far more “protected attributes” than a few years ago. There is not a necessary conflict between religion and anti-discrimination laws. Christians were at the forefront of the civil rights movement in the United States, and support anti-discrimination laws in general. However, the protected attributes in many Australian jurisdictions now include those that are not inherent characteristics such as race or gender, or unchosen states, such as living with a disability. An example is ‘lawful sexual conduct’, which includes all kinds of lawful heterosexual conduct such as adultery which contravenes religious moral values. This has the potential to produce many more spheres of conflict between discrimination laws and the values of people of faith than a few years ago.

Secondly, there is now a persistent campaign to remove religious exemptions in anti-discrimination law. Some tensions between religious beliefs and anti-discrimination norms have always had to be addressed, and currently they are dealt with by providing exemptions to otherwise generally applicable laws. This is the main way in which Australia currently complies with its international human rights obligations in the area of religious freedom. However, there are those who would remove permanent exemptions entirely, replacing them with temporary exemptions if and only if granted by a state bureaucrat. This makes fundamental human rights depend upon a secular administrator’s willingness to acknowledge them, and is a serious derogation from internationally accepted human rights norms.

Many who argue for the removal of exemptions argue also for the removal of the protections in the law that those exemptions currently provide. This campaign to remove exemptions reflects a very much more expansive view of the State’s role in regulating community organisations than has ever been known in the past. Underlying this campaign against exemptions are two beliefs. One is that all limitations on who is eligible to apply for particular jobs should be abolished or severely restricted in the name of one conceptualisation of ‘equality’, even if 99.9% of all the other jobs in the community are open to that person. This position involves taking a very restrictive approach to ‘genuine occupational requirements’. The second belief is that the only human rights that should be given any real significance are individual ones, and not group rights. This can make advocates disregard the competing claims of groups which would justify a right of positive selection of staff in order to enhance the cohesion and identity of a religious or cultural organisation.

The third reason why religious freedom is threatened is that, culturally, it is no longer a shared Australian value. While it seems clear that in the population as a whole, religious freedom continues to have broad support, it is not necessarily supported by certain human rights organisations and some advocacy groups. In particular, there is a new tendency to confine religious freedom to be nothing more than freedom of belief and worship (which is not under threat). If religious freedom impacts upon anyone else’s rights, on this view, religious freedom must almost always give way. Balancing rights tends to mean that in practice the right to religious freedom is crushed under the weight of the demands of ‘equality’ - which is conceived

narrowly. Hostility to freedom of religion is mostly manifested in the campaigns to remove exemptions from anti-discrimination laws.

The fourth reason why religious freedom is threatened is because of hatred expressed towards people of faith in the three great monotheistic religions of the world – Christianity, Judaism and Islam. There is increasing evidence of such hatred against people of faith across the secular western world and that includes examples from Australia. It is experienced by Christians of all denominations who hold to traditional beliefs and values on sexual ethics, family life, and ethics concerning the beginning and end of life. It is experienced in a different way by those of the Jewish faith, in terms of a resurgence of anti-Semitism. It is experienced in a still different way by those in our Muslim communities arising out of fear and suspicion that members of those communities may be associated with terrorist activities. What we are increasingly seeing is complete intolerance of views and beliefs which dissent from what some people consider to be ‘progressive’ opinions. It is because of this level of hatred against people of faith, expressed covertly or overtly sometimes by people who hold positions of responsibility in the law, commerce, government, the education sector and elsewhere, that people of faith are now seeking greater protection in terms of anti-discrimination and anti-detriment laws.

Chapter III The Marriage Debates: The Unfinished Business

Various religious freedom concerns were raised in the parliamentary debates over marriage but effectively deferred for consideration by this Panel. This Chapter aims to explain further what, for many senior church leaders, were the major issues of concern about the inadequacies of the Smith Bill and the broader concerns about religious freedom and parental rights which were raised in those debates.

Parental rights in the educational context

State parties, including of course, the Australian government, have an obligation to guarantee the right of parents to educate their children in accordance with their religious and moral convictions. This is also identified in other Declarations and Covenants as a right of the child. Australian law does not give effect to these rights, beyond allowing those who can afford it to educate their children at faith-based schools.

For the reasons given in chapter II, it seems no longer to be accepted by many advocacy groups that people of faith should continue to have this right. One of the main issues is the right of faith-based schools to maintain staffing policies that allow them to preserve their religious character and ethos. The view that Christian, Jewish, Islamic or other such faith-based schools should have no right to select staff on the basis, inter alia, of religious belief or to give preference to staff who hold that religious belief, is grounded on a principle that organisations that receive public funding should not be allowed to ‘discriminate’. The right of positive selection (that is, the right to choose a staff member with characteristic *x*) is treated as discrimination against all other candidates who do not meet that criterion. This gives a very

broad meaning to the concept of non-discrimination.

Some of the arguments concern public funding provided to faith-based schools. Advocates often fail to distinguish between situations where governments are ‘purchasing’ services to be delivered through a selected non-government agency to the general community in a given locality, and situations where the government is providing funding support to a diverse range of bodies which are delivering services, or a range of different schools, giving the consumer some choice.

The second area where there is a potential conflict between the rights of parents to educate their children in accordance with their religious and moral convictions and State authorities is in terms of educational programs or policies in schools that conflict with parents’ values and beliefs. In particular, it seems clear that programs such as the controversial Safe Schools program, and other programs founded upon the same belief system concerning ‘gender fluidity’, are a cause of concern to a great many parents. The fact that some state education departments seem to be so vulnerable to ideological capture by minority groups with unorthodox beliefs, and so little concerned with the views of parents, has damaged the trust that parents typically place in governments to manage the education of their children. For that reason, there should be a discussion between the federal government and state education departments about how parents’ rights in relation to their children’s education in state schools can be better protected and respected. New Zealand legislation provides a useful model.

Use of religious facilities

Another issue concerns the use of facilities of religious institutions for the solemnisation of same sex marriages. The Smith Bill addressed most issues that could arise concerning the use of religious facilities for the solemnisation or celebration of a marriage contrary to the beliefs of that faith community. However, the drafters failed to acknowledge that certain bodies, which are not established for religious purposes, have buildings that are consecrated for, or intended for, religious purposes. Examples are many school chapels and chapels in aged care facilities. This problem can easily be rectified by an amendment to the *Marriage Act 1961* (Cth) to make clear that in the event of a conflict, the rules of the religious body with which the religious building is associated govern its use for the purposes of solemnising or celebrating a marriage.

Charities

The Smith Bill did not affirm and protect the right of religious institutions to establish and maintain faith-based charities in accordance with their convictions. In New Zealand, a faith-based group has recently lost its charitable status by reason only of its traditional religious views on marriage. This problem, in the Australian context, is easily remedied by adding a provision in the *Charities Act 2013* (Cth) clarifying the issue. While an argument was put in the Parliamentary debate that such an amendment was not necessary, it is also self-evident that such an amendment would not do any harm. It would simply affirm what members of

Parliament apparently agreed upon.

The right of religious institutions to express their beliefs

Freedom of speech is a right that inheres both in individuals and organisations - which typically speak through individual representatives. Of course, it has its limits; but the case of Archbishop Porteous in Tasmania, who was brought before an anti-discrimination body for issuing a booklet explaining Catholic teaching about marriage, shows why there is now concern about freedom of speech for religious leaders and institutions. Even if complaints are eventually withdrawn or rejected, they can be weapons of 'lawfare' which have a chilling effect on freedom of speech on matters concerning faith.

Marriage celebrants who are not ministers of religion

Over 500 marriage celebrants are actually pastors of independent churches or representatives of other faiths. In order to conduct weddings, they need to become marriage celebrants because they are not included in the lists provided to the Government by the major denominations and other religious groups.

Existing marriage celebrants are 'grandfathered' and will now be able to be listed as 'religious marriage celebrants'; but this category is closed to new entrants other than 'ministers of religion' as defined in the Act. There are religious leaders who are in full-time secular employment, and their role as the pastor of a congregation is a part-time role for which they have no formal qualification or accreditation. This is likely to be so especially in rural areas where the congregation is not large enough to sustain calling a paid minister. It is not clear how many of these would come within the definition of a minister of religion under the Marriage Act. There are also some churches which do not believe in having 'ministers of religion' as such.

The anomaly can easily be rectified by minor amendment to the legislation. Unless the anomaly is rectified, some people may not be able to have the religious marriage celebrant of their choice, and the law will discriminate against people of faith who do not belong to mainstream denominations. Often, it is very important indeed to people who get married in church that their pastor be the one to officiate.

A broader proposition, more respectful of religious freedom, would be to let anyone who wants to become a religious celebrant within the meaning of the Act to make that application. No-one is harmed by allowing them to do so.

Chapter IV Discrimination

Most of the arguments about religious freedom in Australia today are really about anti-discrimination law. The questions are how issues of religious freedom are balanced with the

protection of people from discrimination, and conversely whether and how discrimination law should be extended to provide better protection for people who hold and express religious faith. There are five major areas where religion may intersect with anti-discrimination law.

Exemptions and exceptions for religious organisations

As noted above, exemptions and exceptions have come under sustained attack by those who (wrongly) characterise them as a licence to discriminate. The most important issue for Christians is not the freedom to discriminate, but the freedom to select on the basis of religious belief and practice, and freedom to take adverse action against an employee if necessary, where issues of personal conduct are incompatible with the values of the employing organisation.

There have been various proposals to limit the right of religious organisations to select (or prefer to appoint) staff who fit with the mission of the organisation. Typically, this is by means of replacing long-established freedoms with a narrow ‘inherent requirements’ test. There are three particular problems with the inherent requirements test. The first is that it allows for freedom to select based upon religious belief as an essential characteristic of the position, but not simply to prefer someone who holds to a religious belief. Secondly, a claim that religious belief is an inherent requirement for a position is jeopardised if it is necessary to appoint a person who does not hold such a belief to fill a sudden, unexpected vacancy on a temporary basis. A third difficulty with the ‘inherent requirements’ test is that its application is to some extent dependent upon the values of the decision-maker.

The freedom to select is an existential issue for faith communities of all kinds. If a Christian school cannot advertise for staff with one criterion being their adherence to Christian beliefs, or even to give preference to staff who hold Christian beliefs, then within a fairly short period of time, the staff profile of the school will be indistinguishable from the state school next door. There really is no point in having a Christian school if the only staff who need to be Christians are the School Principal, the Chaplain and the religious studies teacher.

If Christian welfare organisations and aged care and health providers are not permitted to make adherence to the faith a selection requirement at any level of the organisation, they will quickly lose their character as faith-based organisations. If pastors of churches cannot insist upon their personal assistants or administrative staff being adherents to the faith, that could compromise the work of the Church.

Much heat could be taken out of the debate on anti-discrimination law if the Commonwealth Parliament enacted a law which protects the right of faith-based organisations to maintain their identity and ethos through the freedom to select staff appropriate to the mission of the organisation, or to give preference to the employment of such staff. This approach gains support from the Human Rights and Equal Opportunity Commission report on religion and belief (1999) and from the UN’s Special Rapporteur on freedom of religion and belief. If this

freedom to select were accepted, then the need for exemptions which permit discrimination *against* a person because he or she has a certain characteristic would be greatly diminished.

Definitions, limitations and exemptions

There remains a bigger question however, as to whether even the few provisions that are needed to allow for the moral and theological convictions of some people of faith are best included in the law by way of exemptions. There is very widespread support within the Christian community to move away from exceptions and exemptions. The preference is to clearly establish freedom of religion as a right, rather than as a grudging concession.

This can be achieved by a new definition of discrimination which helps to define what discrimination is and is not, and which addresses the issue of religious freedom specifically within that definition. This provides a balancing of different human rights, including rights under Articles 18 and 27 of the ICCPR, within a comprehensive definition which spells out with some specificity where that balance is to be found. It reflects the view of the UN Human Rights Committee that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant’. The approach is similar to that in s.153 of the *Fair Work Act 2009 (Cth)*.

Religion as a protected attribute

It is also recommended that religion should be a protected attribute within federal law, as it is in most, but not all state and territory laws. This could be done under a religious freedom Act. Such a law would go beyond the scope of ss.351 and 772 of the *Fair Work Act 2009 (Cth)* and be drafted within a broader context where freedom to select for religious organisations is established. This is not a new proposal. It was recommended nearly twenty years ago by the Human Rights and Equal Opportunity Commission.

Reasonable accommodation in the workplace

Employers should have a positive duty to offer reasonable accommodation of religious belief in the workplace provided it does not involve a disproportionate or undue burden for the employer. Examples might include minor adjustments to uniform requirements to facilitate those who have religious reasons to wear a hijab or a turban; and reasonable requests that can readily be accommodated to organise rosters so as to allow observant Jews and Seventh Day Adventists the freedom not to work on their Sabbath. Conscientious objections in the workplace could also be dealt with by reasonable accommodation laws.

Protection from discrimination of those with traditional beliefs about marriage

It is also proposed that laws be enacted protecting both individuals and organisations from discrimination or detriment on the basis of their beliefs about marriage. Although the marriage debate has now been resolved at the political level, ramifications will continue as circumstances

arise in which people's traditional beliefs and values about marriage come into conflict with the strongly held views of others. Specific protections are justified, going beyond 'religion' or 'religious beliefs' because an employer could discriminate against an individual because of his or her beliefs about marriage, irrespective of the religious beliefs that the person may also hold.

V Protection for Freedoms in the International Covenant of Civil and Political Rights

In this Chapter, we propose a religious freedom Act, drawing upon the recommendations made nearly twenty years ago by the Human Rights and Equal Opportunity Commission. The proposed federal law could helpfully provide a way of balancing rights and freedoms without having a Charter of Rights. The proposed legislation will be subject to clear limitations including reasons of public safety (including the prevention of terrorism) and the protection of children. The proposed religious freedom law does not confer rights; it only protects freedoms. It would not give a right to recognition of sharia law or any other such religious code.

Although the terms of reference of this Review are limited to freedom of religion, it is not possible to protect religious freedom sufficiently without at least addressing also the freedoms of speech, assembly, association and conscience which are intimately related to freedom of religion. The proposed legislation therefore has this wider reach.

The operation of the religious freedom Act in relation to State and Territory laws

Our proposal is entirely consistent with the recognition of the autonomy of State and Territory parliaments within a federal system, but will place constraints upon the operation of certain State and Territory laws where necessary to ensure that Australia is compliant with its international human rights obligations. This is achieved, where necessary, by the operation of s.109 of the Constitution which deals with inconsistencies between state and federal laws.

It is possible for a federal law which enacts freedoms to place certain boundaries around the application of State and Territory laws to the extent that they impermissibly encroach upon those freedoms, resulting in an inconsistency. It would be up to a court, interpreting and applying the state law, to determine whether its application so interfered with fundamental freedoms in any given situation that to the extent of the inconsistency with federal law it should be regarded as invalid, or alternatively, read down to avoid inconsistency.

In this way, federal legislation to protect freedoms could provide a balancing effect to state and territory laws, without improperly interfering with the legislative competence of the States and Territories or overriding State or Territory laws. That is, a state law might be entirely valid in nine out of ten of its applications, but in the tenth, be held to be so inconsistent with the fundamental freedom protected under international law, that to the extent of that inconsistency the state law cannot stand or must be read down.

This has been done before by the Commonwealth Parliament, in the *Human Rights (Sexual Conduct) Act 1994 (Cth)* which gave effect to the UN Human Rights Committee's Toonen decision. It had the effect of decriminalising homosexual conduct in Tasmania.

The operation of the religious freedom Act in relation to federal laws

An ordinary Act of the Commonwealth Parliament to protect freedoms cannot prevent the Commonwealth Parliament from subsequently enacting a law which is inconsistent with the freedoms thereby declared. Later Acts impliedly repeal earlier ones to the extent of any inconsistency. What can be done is to provide an interpretative provision that requires courts, insofar as possible, to interpret federal legislation consistently with the relevant freedoms. This is consistent with long-standing principles of statutory interpretation.

The legislation could also impose upon public servants an obligation to interpret and apply federal law in such a way that is, so far as possible, respectful of the freedoms that are contained in the relevant religious freedom Act.

The Parliamentary Joint Committee on Human Rights is another safeguard. It has a duty to scrutinise Bills before the Commonwealth Parliament from a human rights perspective.

Limitations

In any religious freedom Act, or an Act with a broader focus on the protection of fundamental freedoms, there must be limitations whether in application to Commonwealth, State or Territory laws. It is proposed that the Act should contain a provision that nothing in this legislation should apply to, or limit the effect of, federal, state, or territory laws that are necessary to protect public safety or prevent terrorism.

The law should also provide that nothing in this legislation should apply to, or limit the effect of federal, state, or territory laws for the protection of children from physical or sexual abuse or neglect, nor affect the power of a court to order medical treatment for a child against the religious objections of any person, where it is necessary to save the life of the child or to prevent serious damage to the health of that child.

Chapter VI A National Religious Freedom Commissioner

In this Chapter, we propose a National Religious Freedom Commissioner to give effect to Australia's obligations to protect freedom of religion and conscience under the International Covenant on Civil and Political Rights. The National Commissioner should have a role not only in relation to federal issues but also in monitoring the compliance of the States and Territories with Australia's international human rights obligations in these areas. Nowhere in Australia does any Commissioner have a specific brief to be concerned with freedom of religion and conscience, or discrimination against people of faith.

People of faith need a national voice in the public square to help governments, the media and the wider community understand issues from a religious perspective and how apparently neutral laws can in practice encroach improperly upon the freedom of people to manifest their beliefs.

The National Commissioner would have at least the following roles:

- To comment upon draft legislation both federally, and in the States and Territories, that might have impacts upon legitimate religious freedom concerns.
- To advocate for changes to State, Territory or Federal laws that improperly encroach upon freedom to manifest religious belief.
- To engage with State, Territory and Federal education authorities if issues arise concerning the legitimate freedoms of religious schools to maintain their identity and ethos.
- To engage with State, Territory and Federal education authorities if issues arise concerning the rights of parents to raise their children in accordance with their religious and moral values (Article 18.4, ICCPR).
- To engage with State, Territory and Federal education authorities about issues concerning religious education programs in state schools.
- To meet annually with such religious leaders, of all faith communities, as wish to meet, in order to listen to their concerns about religious freedom issues.
- To have a voice in relation to the balances to be found between religious freedom and community safety issues, particularly when considering legislation, policies and practices that aim to address the threat of terrorism.
- To advise the Australian Charities and Not-for-Profit Commission, if requested, in relation to issues that may arise concerning religious charities and organisations.
- To conduct research or hold public inquiries concerning issues where freedom of religion may be under threat.
- To intervene in significant court cases where religious freedom issues arise.
- To raise awareness in the community about issues concerning religious freedom through speeches, conference presentations, and commentary in the media.
- To support the protection of the right to religious freedom internationally, through liaison with the UN's Special Rapporteur on Freedom of Religion or Belief, the United States Commission on International Religious Freedom and other national, regional or international bodies concerned with human rights and freedoms.

One of the arguments against the appointment of a National Religious Freedom Commissioner is that there are already seven commissioners plus the President in the Australian Human Rights

Commission, and there has been a proposal to have a LGBT Commissioner as well. It is suggested that the Attorney-General establish a review of the roles and job descriptions of Commissioners within the AHRC, in conjunction with its consideration of the appointment of the National Religious Freedom Commissioner.

Chapter VII Putting it all Together

In this chapter, we bring together the discussion of all these issues and summarise a reform agenda. We suggest that there are eight areas of reform that the panel could recommend.

1. Reforms concerning marriage which were not addressed by the amendments passed in December 2017 and which were left to this Review to make recommendations about.
2. Issues concerning parental rights in the educational context
3. Freedom for religious organisations to have staffing policies consistent with the religious values and mission
4. Protection from discrimination on the basis of religious belief
5. Reasonable accommodation for faith in the workplace
6. Reforms concerning the way in which anti-discrimination laws are drafted and in particular, whether it is possible to move away from the language of exemptions and exceptions and to avoid any perception of special pleading or special concessions to people of faith.
7. Reforms to provide positive protections for freedom of religion and conscience, and the associated rights of freedom of speech and of association, subject to the limitations which are appropriate and necessary according to the ICCPR.
8. The appointment of a national religious freedom commissioner to ensure an ongoing focus on religious freedom in the national conversation on issues concerning public policy.

Chapter I

Introduction

How do we all live together well in a multicultural society in which many people have a strong religious faith, while others do not, and an increasing number define themselves as having no religion? Fifty-two per cent of the population, according to the 2016 Census, identify with a Christian faith, and 8% with another religion. 30% do not profess a religion.¹ The percentage of those indicating no religion has grown substantially over the past few years, reflecting an increasing secularisation of Australian society. The percentage of those professing no religion is highest among people between 18 and 34 years old.²

The growing secularisation of Australian society is creating new tensions. The fact that freedom of religion has been taken for granted in the past, and is currently not under serious and imminent threat in Australia as it is in many other parts of the world, is not a reason for saying that there is no need for improvements to the framework for protecting religious freedom in Australia today. We must look now to the future. Our society is changing: hostility towards people of faith is increasing, exemptions in anti-discrimination laws necessitated by religious beliefs are being increasingly challenged, and people of faith are experiencing increasing discrimination and attacks on their freedom of speech and association. This is the context in which the relationship between people of faith and those who are not religious, as expressed in Australian law, needs to be reconsidered. We need a better legal framework for freedom of religion in order to protect diversity, and to find a proper balance between different and sometimes conflicting human rights. A well-functioning secular state must welcome religious belief in the population and positively affirm the right of all people, whether they hold a religious belief or not, to participate equally in public life.

¹ Australian Bureau of Statistics, 2011.0 - Census of Population and Housing: *Reflecting Australia - Stories from the Census, 2016, Religion in Australia*. The question was optional. About 10% did not answer it.

² Ibid. 39% in this age group professed no religion. See also the McCrindle Research which describes this changing landscape of belief in Australia: "More than two in three Australians (68%) follow a religion or have spiritual beliefs. Of those that do, almost half (47%) remain committed to the religion of their upbringing. The number of Australians who do not identify with a religion or spiritual belief, however, is on the rise with almost one in three (32%) not identifying with a religion. This study replicated the ABS Census question, but added in an option for 'spiritual but not religious'. This had a response rate of 14% among Australians nationally, and the Christianity grouping was 45% (down from 61% in the 2011 Census)." McCrindle, *Faith and Belief in Australia*, May 10th 2017, available at <http://mccrindle.com.au>.

Christians believe that Jesus Christ is the Son of God and Saviour of the world. These beliefs are held as deep convictions by many Australians. They understand who they are and what they live for in relation to Jesus. These beliefs are not simply held by them in a realm of private belief. Rather, on the basis of these beliefs; they understand who they are, they meet with others, they form communities, they look to love their neighbour and hold out the love of Christ for the world. As Christians do these things they help shape our national identity. Christianity is thus a very public faith, one which is concerned for the neighbour, marked by civility, and committed to tolerance in a pluralistic society. Families, churches, schools, hospitals, aged care facilities and welfare agencies arise from Christian convictions that ‘make sense of the world’ and embed their members in lived communities.

Christian faith is committed to space in the public square for those with other beliefs or those holding no religious commitments. Healthy secularism should neither exclude nor privilege people on the basis of their beliefs. This tolerance is a mark of classical liberalism and democracy. It provides protection for citizens from the state that would enforce orthodoxy of a religious or secular form.

As Christians, our concern is not only to see the religious freedom of Christians protected. Australia is becoming more pluralised and secular in its beliefs. Freedom of religion must necessarily include people with very different beliefs. It provides the means by which people with diverse and deeply held beliefs are able to live together well. Freedom of religion and conscience necessarily interacts with other fundamental freedoms: freedom of association, freedom of speech, and freedom of assembly.

Freedom of religion is thus vital to building a diverse and pluralist Australia. This religious freedom we enjoy stands in marked contrast to the experience of religious persecution of Christians in Syria, Rohingya Muslims in Myanmar or Yazidis in Iraq. Australia should be a place where there is true freedom for people to hold and live out their deepest convictions.

The international instruments we discuss below rightly give recognition to the importance of protecting religious freedom.

The terms of reference for this Review call for an examination of whether freedom of religion is adequately protected, not only in federal law, but in state and territory law as well. This also involves consideration of how adequately the related rights of freedom of speech, conscience assembly and association are protected where issues arise concerning religious belief.

The catalyst for this Review

Although the scope of the Review is quite broad, this Review is a direct outcome of the debate about marriage, in which arguments about freedom of religion were front and centre of the ‘no’ case, and promises were made that in whatever Bill passed through the Parliament to amend

the *Marriage Act*, there would be robust protections for freedom of religion and conscience.

In the end, the *Marriage Amendment (Definition and Religious Freedoms) Bill 2017*, known as the “Smith Bill”, was passed through the Parliament without amendment (other than technical amendments proposed by the Attorney-General’s Department). Yet it was widely regarded by church leaders and other people of faith as having inadequate safeguards for the protection of the views of the 38% who voted against redefining marriage.

In this submission, we address the broader issues about religious freedom for which the debate about the redefinition of marriage was to some extent a proxy. We want to explain in some detail why it is that people of faith are so concerned, and what it is they are concerned about.

The submission includes a chapter on marriage, for many issues were left unresolved by the passage of the Smith Bill in the form that it was enacted. While for political reasons, the majority in both Houses of Parliament thought it best to push through the Smith Bill with only the technical amendments, there was an acceptance, evidenced for example, in parliamentary speeches by those opposed to amendments, that this Review should revisit issues raised in the course of those debates.

It is also worth reflecting briefly on the marriage debate for what it reveals about the wider issues. What was apparent was that people on different sides of the debate could not even agree on whether there was a problem in relation to religious freedom - beyond the few issues already dealt with in the Smith Bill. Claims that same-sex marriage would have some broader implications for freedom of speech or religion were met with incomprehension. In short, the argument was put that same-sex marriage has no implications for freedom of religion, beyond the matters already substantially dealt with. One could have freedom of religion and same-sex marriage, it was argued. For example, responding to such claims, the former Attorney-General, Senator Brandis, proposed an amendment to the effect that nothing in the Bill was intended to diminish the rights provided for in Article 18 of the International Covenant of Civil and Political Rights (ICCPR). This was suggested in order to provide some reassurance to people who had expressed such concerns.³ The amendment would have done no harm, but it would have had no practical beneficial effect either.

Yet other politicians, including a substantial majority of members of the Coalition partyroom, thought that much more robust protections were needed, including anti-discrimination and anti-detriment provisions. These views were shared privately by some on the Opposition benches as well.

³ The amendment did not pass.

The chasm in understanding

So why was there such a chasm in understanding between the two sides in the debate over how to enact the changes to the law to give effect to the result of the postal survey? Usually it is possible for politicians to agree on what the problems are, even if they give different solutions to those problems or prioritise the resolution of issues or allocation of resources, quite differently.

In many respects, the former Attorney-General, and other senior members of the government who expressed similar views, were correct. Although same-sex marriage created new issues of conscience for some people involved in the wedding industry which had not arisen before,⁴ by and large, the enactment of same-sex marriage, of itself, did not *take away* any rights that people who did not support that change to the law might have. Nothing in the Smith Bill, as now enacted, prevents people continuing to hold whatever beliefs they may hold, to express them privately or publicly, or to teach them in faith-based schools. Nothing in the new legislation permits discrimination against people who hold such views.

All that may be true. However, there are deep concerns amongst faith communities not only about the long-term consequences of same-sex marriage for their rights and freedoms, but more generally for freedom of religion in Australia. The amendments moved to the Smith Bill in Parliament attempted to address at least some of these concerns.

The wider concerns about religious freedom

In essence, the problem is that there is almost no protection for freedom of religion, conscience, speech and association anywhere in Australian law beyond exceptions and exemptions in anti-discrimination laws. Section 116 of the Constitution apart, freedoms are protected in Australia mainly by the absence of encroachment on those freedoms. With the rapid secularisation of Australian society, illustrated by the strong vote in favour of same-sex marriage, and with the growing and overt hostility to people of faith, the absence of protection for fundamental freedoms is a serious deficiency which threatens the cohesion of Australian society.

To draw an analogy, freedoms are like an open field near the edge of a city which has no fences, the ownership of which is not recorded in any system of registration, nor protected by any laws. People can look at that open field, see the wallabies hopping around at dawn and dusk, and say there is no problem with the protection of that field; but it will remain an open field only for as

⁴ For those in the wedding industry, the change meant that they could be asked to provide services in relation to same-sex marriages to which they have a conscientious objection. Anti-discrimination legislation which had been drafted when one view of marriage prevailed, now applies in a very different set of circumstances for those involved in this industry.

long as it takes for the ever-expanding city to reach it, and for developers to propose to the Council that it be subdivided for a new housing estate. The only protection for that field is that sufficient people on the Council or in other governmental positions may want to preserve it as a commons, for all to enjoy.

Yes, there is some protection in the Constitution (s.116) so far as the law of the Commonwealth is concerned. As the ALRC has explained, it “restrains the legislative power of the Commonwealth to enact laws that would establish a religion or prohibit the free exercise of religion, but does not explicitly create a personal or individual right to religious freedom.”⁵ It does not prevent the States from restricting religious freedom.⁶ Tasmania also has a constitutional provision which provides for the right of freedom of religion and belief,⁷ but it is the only State to do so, and the Tasmanian Constitution is an ordinary Act of Parliament that can be amended by a simple majority. By and large, freedoms are protected only to the extent that Parliaments do not encroach upon those freedoms; but there is very little to stop Parliaments doing so, and no remedies in domestic Australian law that citizens have if laws impact upon them in ways that violate international human rights standards.

Yes, the ACT and Victoria have human rights charters, but courts can only give advice that legislation contravenes the Charter.⁸ In any event, both these statutes authorise governments to override freedom of religion and conscience for reasons other than that such encroachments are “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others” (Article 18.3, ICCPR).⁹ They are therefore not consistent with Australia’s international human rights obligations insofar as the protection of religious freedom is concerned. For example, in contrast with the word ‘necessary’ in Article 18, s.7(2) of the Victorian *Charter of Rights and Responsibilities Act 2006* provides:

“A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and

⁵ Australian Law Reform Commission, Report no 129, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (2016), p.134, at 5.26.

⁶ *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376.

⁷ *Constitution Act 1934 (Tas.)* s.46.

⁸ See further, Joint Standing Committee on Foreign Affairs, Defence and Trade, Interim Report, *Legal Foundations of Religious Freedom in Australia* (2017) (hereafter, ‘the Andrews Committee’), Chapter 5.

⁹ Andrews Committee at viii.

- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.”

The failure of Australian law generally, to limit impacts upon the manifestation of religious freedom to those matters listed in Article 18.3 of the ICCPR is the source of most of our problems with freedom of religion in Australia. One of the major difficulties, as the Joint Standing Committee on Foreign Affairs, Defence and Trade noted in its recent interim report on religious freedom,¹⁰ is that 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.”

The common law provides no guarantee of religious freedom. At best, reliance might be placed upon the principle of legality as an interpretative principle where legislation is ambiguous.¹¹ Freedom of religion is not unique in the lack of protection that is provided in Australian law. The same is true for freedom of speech, freedom of association, freedom of assembly and freedom of conscience.

By way of contrast to the limited protections for religious freedom, there is extensive protection for other human rights, in particular through anti-discrimination and unfair dismissal laws and laws that restrict certain kinds of speech. Some of those rights necessarily encroach upon certain freedoms. One of the problems is that the ‘freedom rights’ tend to be protected only by defences and exemptions. So for example, it may be a defence to speech which offends somebody that it was made in good faith or for one of the purposes treated as being legitimate in the statute. A faith-based organisation may be able to rely on an exemption when it comes to discrimination on the grounds of gender, sexual orientation or marital status. Protecting human rights through defences and exemptions is something less than a complete way of implementing Australia’s international human rights obligations.

The Commonwealth’s national responsibility

What then is to be done? Undoubtedly, this is a matter of Commonwealth responsibility. Australia, through the federal government, is signatory to the International Covenant on Civil and Political Rights (ICCPR). It has made a commitment to protect a number of rights which are essential to a free society. These include the related freedoms of religion, conscience,

¹⁰ Andrews Committee at 2.33.

¹¹ *Coco v The Queen* (1994) 179 CLR 4; *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525.

speech and association. Article 27 of the ICCPR also protects the rights of minorities to enjoy their religion, language and culture.

The Australian government has also supported the adoption of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. This has been described by the Human Rights and Equal Opportunity Commission (as it was then known) as “the most comprehensive international statement of the right to freedom of religion and belief”.¹² It was adopted unanimously by the United Nations General Assembly in November 1981. In February 1993, following consultations with State and Territory governments, the Declaration was declared to be a ‘relevant international instrument’ for the purposes of what is now known as the *Australian Human Rights Commission Act 1986*.

The Declaration sets out what is involved in protecting religious belief and practice. Article 6 provides that, subject to relevant limitations, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

- (a) To worship or assemble in connexion with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

The federal Government has national responsibility for adherence to Australia’s international human rights obligations.

In this submission, we propose how the Commonwealth can give effect to that responsibility.

¹² Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief*, (1999), p.3.

To a certain extent, it is a responsibility shared with the States and Territories in their respective spheres of legislative competence; but ultimately, the federal Government has an obligation to ensure Australia's compliance. At times in the quite recent past, this has involved federal legislation to override State laws or policies, relying on the external affairs power. Examples include legislation to protect wilderness areas suitable for listing as World Heritage sites, overriding the Tasmanian and Queensland governments; and sexual privacy legislation that had the effect of decriminalising homosexual conduct in Tasmania after the UN Human Rights Committee's Toonen decision in the 1990s.¹³

Principles

In making our proposals to this Review, we have been guided by four principles:

1. We endorse policies that support diversity, but argue for a wider concept of 'diversity' than is sometimes used – a diversity which includes recognition of the substantial proportion of the population who hold religious beliefs, and which allows people of a range of beliefs, cultural backgrounds and moral values to live together harmoniously. We recognise that there is a certain proportion of the community which is particularly concerned with issues of sexual autonomy. The issue of same sex marriage has been particularly important to them. We also recognise that there are those who place a high value on sexual freedom who would like to see the State be involved in ensuring that faith-based communities and organisations do not impose their moral codes on others in a way that impairs that sexual freedom. These issues have been to the fore of public conversations around sexuality and family life, and the term 'diversity' has often been particularly associated with the recognition of sexual minorities. There are those who would consider that it is illegitimate to make arguments in the public square which question in any way the choices that others make with regard to sexual conduct and family life.

We also emphasise that those who campaign around issues concerning sexuality and sexual freedom are just one subset of a richly diverse multicultural society in which people hold a great range of beliefs and values about sexual conduct and family life. Governments need to allow for different and competing beliefs to be argued for in a liberal democracy. Diversity policies need to take account of the range of moral views and cultural values in a society in which more than a quarter of the population was born overseas and come from a variety of different cultures. Nearly twenty years ago, the Human Rights and Equal

¹³ *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). See further, Chapter V.

Opportunity Commission rightly observed:¹⁴

Australia is a diverse multicultural society. People from many different cultural and religious backgrounds live together in relative harmony and peace. As a nation, we Australians pride ourselves on our tolerance and easy-going acceptance of other cultures and beliefs. Australia is home to people who hold and practise a variety of beliefs and religions. However many of us fail to understand, appreciate and accept the diversity and values of the beliefs and religions of others.

Over the years since then, it seems that the tolerance and easy-going acceptance of other cultures and beliefs has diminished, and that Australian governments must address a relatively new-found hostility to religious beliefs. We consider that federal, state and territory parliaments all need to recommit to acknowledgement and acceptance of the real diversity of the Australian population. Diversity policies in the private sector must also recognise the range of differences within the one society which need to be equally respected, and policies to promote 'equality' must do so for all.

2. We propose no winding back of LGBT¹⁵ legal rights, no diminution in protections under anti-discrimination law. We recognise that in the debates about same-sex marriage, there were proposals to give commercial providers a defence under anti-discrimination law if they have a conscientious objection to the provision of services associated with the celebration of a marriage contrary to their beliefs. This is still an issue of concern for many religious people; however, we recognise that there is not sufficient public or Parliamentary support for such defences in the law, and in any event, the provision of a defence in federal law might well have no effect in relation to state anti-discrimination laws unless it was drafted in such a way as to render state laws inconsistent with it. Furthermore, we consider that if a commercial provider finds himself or herself in the position of having a conscientious objection to the provision of a service, then he or she may simply say so politely, and the vast majority of customers are likely to prefer to go elsewhere. It may be also that some commercial service providers could sub-contract the provision of the relevant service in order to avoid direct involvement.

We do not want this Review to be perceived through the lens that it involves a battle between LGBT groups and the Churches, and as if protection of the rights of one group must

¹⁴ Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief*, (1999), p.1.

¹⁵ There is a variety of acronyms used to describe people or groups that are concerned with sexual minority rights. Perhaps the longest is LGBTIQQN-B. Nonetheless, for convenience, and because it is widely used, we have adopted the LGBT acronym. The rights and needs of those with intersex conditions do not conflict with religious values. Churches and other faith communities are working through how to respond to the greatly increased number of those who identify as transgender or who are concerned about their sexual identity. These issues are primarily medical, scientific and pastoral.

inevitably be at the expense of another.¹⁶ Most of the religious freedom issues with which the churches are concerned, and which this submission addresses, either have nothing to do with LGBT people specifically or involve no detriment whatsoever to people on the basis of their sexual orientation or gender identity. We advocate better protection for the rights and freedoms of people of faith which have long since been taken for granted, and which do not diminish the rights of LGBT people – many of whom attend our churches and other faith communities.

3. We propose no compromise to public safety. There may well be public safety implications from vaguely worded provisions concerning freedom of religious belief, especially if they are constitutionally entrenched. We recognise that section 116 of the Constitution already provides some protection for religious freedom. In any proposals we make that may conceivably have public safety implications, we recommend that for the avoidance of doubt, such provisions should have no effect in relation to prescribed public safety legislation, including Crimes Act provisions and those concerned with the prevention of terrorism. Article 18.3 of the ICCPR recognises public safety as a reason for limiting freedom to manifest religious beliefs.
4. We do not seek special privileges for people of faith in terms of discrimination law. It is sometimes said that in seeking exemptions from discrimination laws, people of faith are seeking special treatment. We reject this analysis. People of faith simply ask for equal treatment, and equal respect for their human rights guaranteed, inter alia, under Articles 18 and 27 of the ICCPR. We desire that people of faith be able to ‘live and let live’ with other members of the community, neither claiming privileges not open to the rest of society, nor accepting that their rights be subordinated to those other members of the community.

Limitations on religious freedom

Of course, religious freedom has its limits, as have other freedoms. However, in discussing limitations on religious freedoms it is worth emphasising that under the ICCPR the right to religious freedom is one of the few non-derogable human rights which cannot be suspended even in a national emergency. In interpreting the limitations on religious freedom in international human rights law we have drawn upon General Comment 22 of the UN Human Rights Committee which has stated in regard to Article 18.3:¹⁷

¹⁶ See e.g. Katie Burgess, ‘Ruddock review next big battle for gay community, LGBTIQ council chair says’ *Canberra Times*, December 10th 2017.

¹⁷ Human Rights Committee, *General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion, Article 18*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (1993) at [8]. Hereafter, ‘General Comment 22’.

Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. ... Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.

We have also drawn upon the Siracusa principles, which were originally issued by the American Association for the International Commission of Jurists, but have since been endorsed by the UN's Economic and Social Council.¹⁸ We note that this interpretative framework has also been endorsed recently by the Joint Standing Committee on Foreign Affairs, Defence and Trade in its interim report on religious freedom.

The following Siracusa principles are particularly important:

- No limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself.
- The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.
- All limitation clauses shall be interpreted strictly and in favor of the rights at issue.

Siracusa Principle 10 states:

Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:

- (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
- (b) responds to a pressing public or social need,
- (c) pursues a legitimate aim, and
- (d) is proportionate to that aim.

We observe in passing that many of the limitations claimed on religious freedom by advocates for other rights go far beyond the limitations recognised in international human rights law. Indeed, sometimes it is argued that rights to freedom of religion and conscience should be subjugated to claimed rights that are not even recognised in international human rights covenants and declarations.¹⁹ While we accept that competing human rights need to be

¹⁸ United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985). For a history of the development and adoption of the Siracusa Principles, see Sara Abiola, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant For Civil And Political Rights (ICCPR): History And Interpretation In Public Health Context* (2011) at <http://health-rights.org>.

¹⁹ This can be seen for example, in the refusal of the Parliaments of Victoria and Tasmania to recognise that

balanced, we do not accept that the invariable outcome of that balancing should be, as it is so often declared to be, the subjugation of religious freedom rights to other rights. It is a complete misunderstanding of human rights to think that the freedom to manifest a religious belief must give way to any human right, real, imagined or invented, that someone else asserts. This must be emphasised, in particular, in relation to non-discrimination rights. General Comment 22 is clear on this (emphasis added).²⁰

States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and *must not be applied in a manner that would vitiate the rights guaranteed in article 18*. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant (emphasis added).

When people talk about balancing rights, we ask who does the balancing, and using what weights? We perceive the claimed balancing of rights often involves political answers to political questions, all masked in an apparent objectivity based upon cherry-picking of human rights norms.

doctors should have freedom of conscience in refusing to refer someone to another practitioner who will perform abortions, even if the planned abortion is for sex-selection purposes. There is no recognised international human right to be given information about abortion, still less the names of abortion practitioners, yet Victoria and Tasmania fail to give any concession to the Article 18 rights of doctors to freedom of conscience. Another example is a claimed right of same-sex couples to adopt or foster children. There is no right recognised in international human rights law for an adult or adults (regardless of gender or sexuality) to be able to adopt or foster. Adoption and foster care have always been understood as a service for the child, with the child's best interests at the centre of all considerations.

²⁰ General Comment 22, [8].

Chapter II

Why are Religious Freedoms Threatened?

Many people who have migrated to Australia over the last two centuries have done so, searching for a country in which they could practise their religious faith freely. For example, the South Australian wine industry was established by devout Lutherans who had to leave northern Germany because of religious persecution. Some died on the long sea voyage. Pastor Kavel, one of their leaders, wrote about Australia in 1839: “We have found what we have been seeking for many years – religious liberty – and with all our heart we are desirous of being faithful subjects and useful citizens.”²¹

Australia continues to welcome as migrants and refugees, people who become faithful and useful citizens. These include not only devout Christians, although there are many of those, but also committed adherents to other faiths, including Judaism, Islam, Hinduism and Buddhism. This Chapter seeks to explain why it is that so many people of faith now perceive their freedom of religion is being challenged.

As we sought to demonstrate in chapter I, the idea that religious freedoms were threatened by the enactment of same-sex marriage, once the protection of celebrants was assured, was met by incomprehension in many quarters. There is a gulf between those on the opposite sides of this debate; and arguably it is not because of different policy perspectives, since those who voted against these amendments typically are in favour of anti-discrimination laws. No-one gave any cogent reasons for opposing an amendment to safeguard the position of religious charities. The gulf may be explained to some extent by a desire to leave the issues to this Review; but perhaps the main reason is quite simply that people were not persuaded that any such protections were needed, the assumption being that because historically these freedoms have been assumed in Australia, there is no need for specific legislative action.

This chapter seeks to bridge that gulf, by explaining why religious freedom protections are needed, and why now, when no such protections have been regarded as necessary since the Constitution of the Commonwealth was enacted.²² There are four main reasons:

²¹ As recorded in the German Migration Museum, Hahndorf, South Australia.

²² Section 116 is a religious freedom provision, not only because it prevents the Commonwealth from making a law that prohibits the free exercise of any religion but also because it prohibits the establishment of a religion, in contrast with the way that the Church of England is the State Church.

1. The expansion of anti-discrimination laws over the last few years.
2. The persistent campaign to remove exemptions in anti-discrimination law.
3. Religious freedom is no longer a shared Australian value.
4. The hatred expressed by some towards Christians, Jews and Muslims.

The expansion of anti-discrimination laws

The first reason is that the scope of anti-discrimination law has expanded to produce many more spheres of conflict than a generation ago. The origin of anti-discrimination laws was in a movement to protect historically disadvantaged groups that had been ‘subject to widespread denigration and exclusion’.²³ The *Civil Rights Act 1964* in the United States is a prominent example. It followed a campaign for social and racial justice, with people of faith such as Dr Martin Luther King at the forefront. It provided a catalyst for the development of similar laws in other countries to prohibit discrimination on the basis of race and gender. Gradually, anti-discrimination law expanded to other fixed characteristics such as disability.²⁴ None of these, other than gender, created problems for people of faith. Gender was an issue for certain churches that had a theological commitment to a male priesthood or other position of religious leadership. Male leadership is also traditional in other faiths such as Orthodox Judaism and Islam. Sensibly, and in accordance with international human rights conventions, this problem was dealt with by providing an exemption for those faith communities that chose to rely on it.

However, as time has gone on, the scope of anti-discrimination law has expanded in Australia to cover an ever-increasing number of protected attributes, including those that are not inherent characteristics such as race or gender, or unchosen states, such as living with a disability. As the scope of anti-discrimination law has expanded further beyond this, there has been more opportunity for conflict between the requirements of such laws and freedom for faith communities.

For example, marital status was added as a ground of discrimination in many statutes. That creates an issue for the Catholic Church which has a theological commitment to a celibate male priesthood, and for the Orthodox Church, so far as Bishops are concerned.²⁵ Celibacy is also an issue in certain other faith traditions.²⁶ There was no opposition a generation ago, to managing this problem by way of exemptions.

²³ Thomas Scanlon, *Moral Dimensions* (Harvard University Press, 2008) 74.

²⁴ Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press, 2008) 16ff.

²⁵ Wesley Smith, ‘Of marriage and Orthodox priests’. *First Things*, October 2, 2015.

²⁶ Carl Olson, (ed.) *Celibacy and religious traditions* (Oxford University Press, 2007).

Others of these additional protected attributes are concerned with an individual's self-identity, which includes social and moral choices.²⁷ For example, among the twenty-two different grounds on which someone can make a complaint about discrimination in Tasmania is 'lawful sexual conduct'. Another is 'relationship status' which is in addition to 'marital status'.²⁸ The exemptions for religious organisations in Tasmanian law are quite limited and do not apply to these protected attributes.²⁹

The potential harm of this expansion of anti-discrimination law may be illustrated by asking whether a church could lawfully dismiss a paid youth worker performing religious and pastoral duties who, it has been discovered, was 'sleeping around' and had multiple sexual partners within a relatively short period of time. Such activity is lawful, but most faith communities would consider this behaviour to be inconsistent with their moral values. Indeed, this view would almost certainly be common to Christianity, Judaism and Islam, although there may be minorities within those faith traditions who would take a less clear moral stand on such matters. In Tasmania, it is difficult to see how dismissal of the youth worker would not constitute discrimination on the basis of 'lawful sexual conduct'.

The most obvious conflict between religious freedom and anti-discrimination laws, is, at least potentially, in relation to homosexual relationships, although the position of faith communities on this is often misunderstood. Apart from the marriage issue, most faith communities have not been opposed to equal treatment for the LGBT community or to anti-discrimination laws that protect them. For example, the Australian Christian Lobby supported the 2008 reforms to federal law to remove all discrimination against lesbian and gay people. The Catechism of the Catholic Church provides:³⁰

The number of men and women who have deep-seated homosexual tendencies is not negligible... They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided.

Faith communities have, nonetheless, been mostly opposed to changes in such a fundamental institution as marriage. This also has been misunderstood.³¹ There would have been similar

²⁷ See, e.g., Nicholas Hatzis, 'Personal Religious Beliefs in the Workplace: How Not to Define Indirect Discrimination' (2011) 74 *Modern Law Review* 287, 292. See also Christopher McCrudden, 'Multiculturalism, Freedom of Religion, Equality and the British Constitution: The JFS Case Considered' (2011) 9 *International Journal of Constitutional Law* 200.

²⁸ *Anti-Discrimination Act 1998 (Tas)* s. 16.

²⁹ *Anti-Discrimination Act 1998 (Tas)*, Part V, Division 8.

³⁰ The *Catechism of the Catholic Church* (2nd ed) para 2358.

³¹ On reasons for misunderstanding between those holding different values and beliefs on marriage, see Marc

opposition to the legalisation of heterosexual polygamy or, more generally, polyamorous relationships. Issues do nonetheless arise concerning the eligibility of those living in homosexual relationships for positions of leadership within religious communities. Some churches have sought to forge a compromise between different viewpoints. In other parts of the world, there have been serious conflicts and schisms over the issue.³²

The persistent campaign against exemptions in anti-discrimination law

The expansion of protected attributes in anti-discrimination law has been combined with another significant trend. There has been a sustained attack on the established ways of balancing anti-discrimination norms with religious freedom rights, through the use of exemptions.

An example is some of the work of the Human Rights and Equal Opportunity Commission, which has since been renamed the Australian Human Rights Commission. In the 1990s, it was supportive of religious freedom, proposing a religious freedom Act (which will be discussed further in Chapter V) and recommending in appropriate circumstances, the use of exemptions.

However, in 2008, it seems that the Commission took an entirely different view of religious freedom. In a published submission to a parliamentary inquiry, it questioned the exemption provided by s.37 of the *Sex Discrimination Act 1984* (Cth) for religious organisations and proposed a three-year sunset clause on its continued operation during which time further reform could be considered. It did so because “the permanent exemption does not provide support for women of faith who are promoting gender equality within their religious body.”³³ This view was taken even though the Commission recognised that Article 6 of the UN Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion (1981) specifically provides for the right to “train, appoint, elect or designate by succession appropriate leaders *called for by the requirements and standards of any religion or belief*”.³⁴

Stern, Thomas Berg, and Douglas Laycock, amicus brief for the American Jewish Committee in *Hollingsworth v Perry* and the United States and Windsor. Available at <https://www.glad.org/uploads/docs/cases/windsor-v-united-states/amicus-brief-of-american-jewish-committee.pdf>

³² See, e.g., Brian Schmalzbach, ‘Confusion and Coercion in Church Property Litigation’ (2010) 96 *Virginia Law Review* 443.

³³ Human Rights and Equal Opportunity Commission, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality, September 2008 available at https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2008-10/sex_discrim/submissions/sublist, submission 69, p.166.

³⁴ Our emphasis.

In effect, it was proposed that the Australian government should interfere in the life of autonomous and voluntary religious organisations, such as the Catholic Church, which operate across the world, in order to take sides on a theological question. Even those who have the greatest of sympathy with movements for female ordination might recognise the hubris and overreach of such a proposition. Similar traditions of male leadership also exist, of course, in other major world religions.

It is common for other human rights organisations to argue against exceptions and exemptions in anti-discrimination law as well. This was evident, for example, in the debates about the consolidation of federal anti-discrimination laws in 2012. Monash University's Castan Centre for Human Rights Law submitted to the Attorney-General's Department:³⁵

[W]e are concerned about sweeping, permanent exceptions for organisations such as religious and voluntary bodies. Temporary exemptions granted after a rigorous assessment by the AHRC are in a different category, as are special measures or 'positive discrimination'... These temporary kinds of exemptions must be applied for and justified by the organisation in question, and in granting them regard must be had to the purposes (and other relevant provisions) of the legislation. In our view, such requirements should apply to all exemptions/exceptions.

If taken at face value, the position seems to be that even rights specifically and unequivocally guaranteed in international human rights declarations, such as the right of religious organisations to appoint leaders in accordance with their own faith traditions, should be protected by temporary exemptions only, to be granted only after 'rigorous assessment' by public officials on whose decisions the fundamental rights of members of that community to freedom of religion should depend. That was, of course, the regime in Stalin's Soviet Union, Mao's China and a variety of other oppressive regimes which have insisted on the right of the State to control all aspects of the life of religious organisations.

Views of this kind were also expressed by human rights groups in relation to the subsequent exposure draft legislation.³⁶ For example, the Human Rights Council of Australia was among the bodies that argued strongly for the curtailment of religious exemptions.³⁷

Campaigns to reduce or even eliminate exemptions and exceptions to anti-discrimination laws are typically supported by numerous other organisations concerned with discrimination or LGBT issues. The Report of the Senate Committee on Legal and Constitutional Affairs report

³⁵ Castan Centre for Human Rights Law, *Consolidation of Anti-discrimination Laws Submission to Australian Government Attorney-General's Department*, January 2012 at [57].

³⁶ Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012* (Cth) available at www.ag.gov.au.

³⁷ Submission by the Human Rights Council of Australia on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012, Submission 475. This Council is a self-appointed body.

on the Exposure Draft to consolidate federal anti-discrimination laws has a good summary of the range of opinions expressed at that time.³⁸ The majority recommended that the exemptions in Commonwealth law should be greatly restricted, along the lines of Tasmanian law.³⁹ There was a strong dissenting report from Coalition senators. In the end, the Consolidation Bill did not proceed.

The arguments about exemptions have certainly not gone away. A Discussion Paper recently put out by the Department of the Attorney-General and Justice of the Northern Territory has proposed that various exemptions in anti-discrimination law be removed that apply to 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 and justify why their service requires a particular exemption.⁴⁰ A recent article by commentator Jane Caro also called for an end to blanket exemptions for religious schools, as well as other restrictions on their autonomy.⁴¹

This campaign to remove exemptions reflects a very much more expansive view of the State's role in regulating community organisations than has ever been known in the past. Michael McConnell, a former academic lawyer and US federal judge, explains that whereas in a previous era, state neutrality, tolerance and the guarantee of equality before the law meant, fundamentally, that the government would not take sides in religious and philosophical differences among the people, now "there is a widespread sense not only that the government should be neutral, tolerant and egalitarian, but so should all of us, and so should our private associations."⁴²

Underlying this campaign against exemptions are two beliefs that are stated with a dogmatism that is as powerful and rigid as any belief system of religious groups. The first is a belief that all limitations on who is eligible to apply for particular jobs should be abolished or severely

³⁸ Senate Legal and Constitutional Affairs Legislation Committee, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013), Chapter 5.

³⁹ Recommendation 11 (ibid) was as follows: "The committee recommends that the Draft Bill be amended to remove exceptions allowing religious organisations to discriminate against individuals in the provision of services, where that discrimination would otherwise be unlawful. The committee considers that the Australian Government should develop specific amendments to implement this recommendation, using the approach taken in the Tasmanian Anti-Discrimination Act 1998 as a model."

⁴⁰ Department of the Attorney-General and Justice, Northern Territory Discussion Paper, *Modernisation of the Anti-Discrimination Act* (September 2017), p.21.

⁴¹ Jane Caro, 'Religious Schools Discrimination' *The Saturday Paper*, December 23rd 2017.

⁴² Michael McConnell, 'Why is Religious Freedom the First Freedom?' (2000) 21 *Cardozo Law Review* 1243 at 1259.

restricted in the name of one conceptualisation of ‘equality’, even if 99.9% of all the other jobs in the community are open to that person. This position involves taking a very restrictive approach to ‘genuine occupational requirements’ as a ground for exceptions to general anti-discrimination provisions.⁴³ The second fundamentalist aspect of the campaign against exemptions arises from a belief that the only human rights that should be given any real significance are individual ones and not group rights. This can make advocates disregard the competing claims of groups which would justify a right of positive selection of staff in order to enhance the cohesion and identity of a religious or cultural organisation.⁴⁴

The problem, from the Churches’ point of view, with this campaign against exemptions, is not with the idea that exemptions should be replaced by a general limitations clause. As will be discussed in Chapter IV,⁴⁵ there is actually widespread support amongst Christian leaders for the replacement of exemptions because they are not the most appropriate way of recognising competing human rights. However, many others who argue for the removal of exemptions argue also for the removal of the protections in the law that those exemptions currently provide. In so doing, they argue for severe restrictions upon religious freedom.

Religious freedom is no longer a shared Australian value

It seems extraordinary that in one of the most successful multicultural societies in the world, there is no longer a consensus that religious freedom matters; but the evidence for that is extensive. It seems clear that in the population as a whole, religious freedom continues to have broad support as a value. Indeed, over 60% of the population identify with a religion.⁴⁶ Opinion polls in the course of the marriage debate demonstrated great support for the protection of religious freedom in any marriage amendment Bill. Both the Prime Minister and Leader of the Opposition publicly voiced their support for religious freedom, and have done so again since the result of the postal survey was announced. What is not clear is whether by religious freedom, some people mean anything more than freedom of worship. The latter is not under threat.

⁴³ For a discussion see Rex Ahdar & Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013), chapter 10.

⁴⁴ This is discussed in Patrick Parkinson, ‘Christian Concerns about an Australian Charter of Rights’ (2010) 15 *Australian Journal of Human Rights* 83.

⁴⁵ In Chapter IV below, we argue for the protection of religious freedom by recognising those rights as positive rights, on an equal basis with other rights, which are appropriately balanced in a definition of what is discrimination, and what is appropriate and legitimate differentiation in accordance with the principles established in the ICCPR.

⁴⁶ Australian Bureau of Statistics, 2011.0 - Census of Population and Housing: *Reflecting Australia - Stories from the Census, 2016, Religion in Australia*. See above, Chapter I.

However, freedom of religion is not confined to freedom to attend a church, synagogue, mosque or temple. Those freedoms existed even in the countries of the former Soviet Union. As the ICCPR makes clear, and countless other authoritative expositions of the right to freedom of religion have also explained, there is a human right not only to believe but to manifest that belief in teaching, observance and practice. As South African Constitutional Court Justice Albie Sachs observed: “For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe.”⁴⁷ Living a religiously committed life is not just about freedom to worship.

Religious freedom that goes beyond freedom of belief and worship is contested by some, especially if it impacts upon anyone else. Illustrative of the problem, again, is some of the work of the Australian Human Rights Commission (AHRC). For example, in 2009, a Commissioner and a senior executive of the Commission, who were responsible for an inquiry into religious freedom, began a conference paper with the following sentence:⁴⁸

“The compatibility of religious freedom with human rights is the subject of the most comprehensive study ever undertaken in Australia in this area.”

No doubt this contrast between freedom of religion and human rights, as if religious freedom is not a human right, was unintended and unconscious; but it was revealing.⁴⁹ Numerous other statements by Commissioner Tom Calma at that time caused alarm in Christian circles, as he seemed to want to impose restrictions on the freedom of speech of religious leaders on matters of public policy.⁵⁰ Significantly, he does not seem to have been contradicted publicly by the President or the other Commissioners.

The AHRC took on board the criticisms made of it at that time that it displayed hostility to people of faith. The last Human Rights Commissioner, Tim Wilson, was a strong advocate for religious freedom, which he maintained consistently with his advocacy for LGBT rights. The

⁴⁷ *Christian Education South Africa v. Minister of Education*, [2000] ZACC 11, 2000 (10) B. Const. L.R. 1051 at [36].

⁴⁸ Tom Calma & Conrad Gershevitch, ‘Freedom of religion and belief in a multicultural democracy: an inherent contradiction or an achievable human right?’ Paper given at the Unity in Diversity Conference, Townsville, August 2009, available at http://www.humanrights.gov.au/about/media/papers/freedom_religion20090803.html.

⁴⁹ The title of their paper did at least recognise that religious freedom is a human right. However, the implication within the question contained in that title was that perhaps freedom of religion cannot, or should not, survive in a multicultural democracy.

⁵⁰ These comments are further discussed in Patrick Parkinson, ‘Christian Concerns about an Australian Charter of Rights’ (2010) 15 *Australian Journal of Human Rights* 83.

current Human Rights Commissioner, Ed Santow, has also made an effort to listen to the concerns of people of faith.

However, the AHRC, in its recent published work, continues to adopt a restrictive understanding of Article 18 of the ICCPR. For example, early in 2017, the AHRC's submission to the Senate inquiry concerning same-sex marriage and religious freedom argued against substantial recognition of freedom of conscience.⁵¹ It gave that particular human right an extraordinarily narrow scope, even though it is protected by Article 18.1 of the ICCPR as a right which is not derogable even in a time of national emergency.⁵² With respect to the authors of that submission, freedom of conscience, in Article 18.1, does not come with an asterisk saying "only in extremely limited circumstances". In contrast to the AHRC, the UN Human Rights Committee has sought to draw to the attention of States parties "the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief".⁵³

Given changes to the law of abortion in various parts of Australia, and the emergence of euthanasia as an option in Victoria, proper respect for the freedom of conscience of all health professionals is of critical importance. The case of Dr Mark Hobart in Victoria is illustrative of the need for better protection of freedom of conscience. Dr Hobart, a GP, was requested by a couple to refer them to an abortion practitioner. The woman was 19 weeks' pregnant at the time. The reason for the request was that during a routine ultrasound, they had discovered that the baby was a girl. As Dr Hobart understood it, the requested abortion was purely for sex selection purposes. The doctor refused to refer, but the abortion was carried out one week later. The Medical Board of Victoria in 2013 decided to conduct an investigation into his refusal to refer, resulting in a formal caution after an investigation lasting 8 months.⁵⁴

In support of its argument for a minimalist view of freedom of conscience, the AHRC cited with approval the law in Victoria which led to the complaint about Dr Hobart. It requires doctors to refer patients inquiring for an abortion to another doctor, even if the doctor has a conscientious objection to making such a referral.⁵⁵ This provision, it should be noted, was

⁵¹ Australian Human Rights Commission Submission to the Select Committee on the Exposure Draft of The Marriage Amendment (Same-Sex Marriage) Bill, 18 January 2017 at pp.21ff.

⁵² Article 4(2), ICCPR.

⁵³ Human Rights Committee, *General Comment No. 22 (Art. 18)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (1993) at [1].

⁵⁴ Dr Hobart's own account is available at:
<https://www.parliament.qld.gov.au/documents/committees/HCDSDFVPC/2016/18-HealthAbortion/submissions/885.pdf>

⁵⁵ *Abortion Law Reform Act 2008* (Vic.).

passed in spite of the opposition of the Australian Medical Association.⁵⁶ In taking such a narrow approach, the Commission took little account of the long history of acceptance of freedom of conscience in Australian law, going beyond conscientious objection to military service, and including, for example, conscientious objections to membership of a trade union whether based upon religious belief or otherwise.⁵⁷ Freedom of conscience is also generally respected by political parties, which generally do not bind Members of Parliament to vote in a particular way on moral issues.

Hostility to freedom of religion and conscience is mostly manifested in the campaigns to remove exemptions from anti-discrimination laws, although some advocates have raised other issues as well, such as the place of voluntary religious education in state schools. The inquiry conducted by the Australian Law Reform Commission which reported in 2016, known as the Freedoms Inquiry, illustrates the persistence of the campaign against exemptions.⁵⁸ The terms of reference for this inquiry asked the Commission to consider to what extent, if at all, federal laws encroached upon any of the basic freedoms recognised at common law. In the chapters on freedom of religion, both in the Discussion Paper and the Final Report, the ALRC reported on various submissions that argued for the law to restrict freedom of religion more than it does now by extending the reach of anti-discrimination laws and reducing the autonomy of faith-based organisations. The Commission summarised these positions as follows:⁵⁹

Other stakeholders opposed the exemptions for religious organisations entirely, or argue that they should be wound back — considering that the general application of anti-discrimination law is considered to be a justifiable interference with religious freedom.

Many of the submissions came from committees of lawyers or community legal organisations.⁶⁰ What is noteworthy is that so many such submissions were received in the course of an inquiry which had not been asked by the Government to consider in what ways federal law might *restrict* freedom of religion. Even though their arguments were quite

⁵⁶ Frank Brennan, 'The place of the religious viewpoint in shaping law and policy in a pluralistic democratic society: a case study on rights and conscience'. Paper given at Values and Public Policy Conference: Fairness, Diversity and Social Change, Centre for Public Policy, University of Melbourne, 26 February 2009.

⁵⁷ *Industrial Relations Act* 1996 (NSW), s.212. For a review of the law across Australia on conscientious objection to union membership, see Phillipa Weeks, *Trade Union Security Law: A Study of Preference and Compulsory Unionism* 173-209 (1995).

⁵⁸ Australian Law Reform Commission, Report no 129, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (2016).

⁵⁹ *Ibid* at p.147, [5.97].

⁶⁰ The Commission (*ibid*) records these views as being expressed, inter alia, by the following groups and organisations: Law Society of NSW Young Lawyers, National Association of Community Legal Centres, Public Interest Advocacy Centre, NSW Gay and Lesbian Rights Lobby, Human Rights Law Centre and Kingsford Legal Centre.

irrelevant to the terms of reference of the inquiry, many of the organisations making submissions went to considerable trouble to make their views known to the ALRC. They argued that the Government should encroach much further on freedom of religion, in the name of promoting their particular understanding of ‘equality’.⁶¹

It should not be thought that these views are representative of the opinions of a large proportion of the Australian community. Many of the groups who make submissions to parliamentary inquiries or law reform commissions, and indeed many of the groups who may well make submissions to this Review, are quite small. Anyone can design a letterhead, adopt a logo and create a website, claiming to be representative of some part of the Australian community. Even the submissions from professional associations such as Law Societies, may reflect just the views of a few activist members on the relevant committees.

Whatever the recommendations of the Ruddock Review, they are likely to be criticised by the same very vocal minority of activists who reject any protection of religious freedom that may impact upon the rights or feelings of others, however minor and peripheral may be that impact. It will be urged that religious freedom needs to be ‘balanced’ by other rights, and in particular, by their particular understanding of what ‘equality’ requires. That balance, as they perceive it, will in practice mean that the right to religious freedom is crushed under the weight of the demands of ‘equality’. That would leave freedom of religion meaning very little more than freedom of belief or worship.

Both sides of politics will be faced in 2018 with a clear choice between giving in to the demands of these vocal activists to restrict freedom of religion, or maintaining a harmonious multicultural society in which diversity and difference on matters of faith, sexual conduct and family life are accepted within reasonable limits. These issues are of fundamental importance to the future of the country.

Hatred

A fourth issue needs frankly to be named. Across the secular western world, there is increasing evidence of hatred against people who adhere to any of the three great monotheistic faiths. It is experienced by Christians of all denominations who hold to traditional beliefs and values on sexual ethics, family life, and ethics concerning the beginning and end of life (e.g. euthanasia, cloning, assisted reproduction, experimentation on human embryos, and abortion). It is experienced in a different way by those of the Jewish faith, in terms of a resurgence of anti-

⁶¹ There are many different understandings of ‘equality’ and arguably a view that discounts the human rights of people of faith and the organisations to which they belong, does not treat them equally. On equality generally, Peter Westen, ‘The Empty Idea of Equality’ (1982) 95 *Harvard Law Review* 537.

Semitism (especially in Europe).⁶² It is experienced in a still different way by those in our Muslim communities arising out of fear and suspicion that members of those communities may be associated with terrorist activities. Former High Court judge Dyson Heydon recently observed:⁶³

Among the elites is developing a hostility to religion which has not been seen in the West since the worst excesses of the French Revolution, or at least the vengeful Premierships of Émile Combes in the early 20th century. The hostility is demonstrated least against Hindus and Buddhists – for they are neither numerous nor highly visible. It is also not much demonstrated against Muslims, despite the threat and actuality of terrorist outrages, perhaps because the Muslim vote is the key to winning and losing parliamentary seats. It is beginning to be demonstrated against Jews. Their numbers are low, but those parts of the elites which respond to electoral hatred for the State of Israel are drifting back into an anti-Semitism which one had thought had been purged from Western life by the horrors of the Second World War and the persecution of Jews in communist eastern Europe and Russia after 1945. No allowance is made for the appalling dilemmas facing Israeli leaders, surrounded as they are by a sea of Muslim hate. And hostility is increasing markedly against Catholics. One of the aphorisms of the great parliamentary leader of the German Centre Party, Ludwig Windthorst, is becoming true again: “Anti-Catholicism is the anti-Semitism of the intellectuals”. But no Christian denomination seems to be exempt from the new de-Christianisation campaign.

Freedom for Faith is a Christian organisation and so we can best speak from our own experience, while empathising with the experience of those of other faiths. What we are increasingly seeing is complete intolerance of views and beliefs which differ from what some people consider to be ‘progressive’ opinions. The Rev. Peter Kurti has summed up the position well:⁶⁴

Tolerance in the name of relativism has, indeed, become its own form of intolerance. We are commanded to respect all difference and anyone who disagrees can expect to be shouted down, silenced or, often, branded a racist. Everyone must be “tolerant”.

Tolerance seems to be a one-way street, for views incompatible with the advocacy groups’ agenda of the day are not tolerated. As Prof. Stanley Fish once put it, “tolerance is exercised in

⁶² See for example, Jeffrey Goldberg, ‘Is it Time for the Jews to Leave Europe?’ *The Atlantic*, April 2015, at <https://www.theatlantic.com/magazine/archive/2015/04/is-it-time-for-the-jews-to-leave-europe/386279/>; Johannes Enstad, *Antisemitic Violence in Europe, 2005-2015* (2017) at http://www.hlsenteret.no/publikasjoner/digitale-hefter/antisemittisk-vold-i-europa_engelsk_endelig-versjon.pdf.

⁶³ JD Heydon, ‘Religious ‘Toleration’ In Modern Australia: The Tyranny of Relativism’. Inaugural PM Glynn Lecture on Religion, Law and Public Life, Australian Catholic University, Adelaide, October 2017, pp. 8-9.

⁶⁴ Peter Kurti, *The Tyranny of Tolerance: Threats to Religious Liberty in Australia* (Connor Court Publishing, 2017), p 6.

an inverse proportion to there being anything at stake.”⁶⁵

This intolerance is expressed in terms of trying to drive people out of jobs or having them disqualified from professional occupations because of their beliefs about marriage or their opposition to some of the more extreme beliefs about ‘gender fluidity’.⁶⁶ Our consultations indicate that it is seen also in veiled or even outright discrimination against people because of their beliefs, and this, sometimes, by people who proclaim most loudly their commitment to non-discrimination and equality. It is seen in the regularity with which those who were opposed to the redefinition of marriage to include same-sex couples were vilified as ‘homophobes’ and ‘bigots’. It is seen in how acceptable it apparently was for people to engage in this repeated name-calling, and how little this was criticised by the political leaders of the day or by media commentators (some of whom were amongst the offenders).

This hatred towards people of faith has occasionally been expressed through criminal conduct. While we would not wish to exaggerate the problem, it is appropriate to give specific examples to show how many such incidents have occurred in the last three or four years. The Australian Christian Lobby has reported numerous death threats to its staff in recent years, and female staff have been sent pornographic material.⁶⁷ Suspicious packages containing white powder have been mailed to ACL, causing an Australia Post mail centre to be evacuated.⁶⁸ An explosion outside ACL’s offices, causing \$100,000 worth of damage, was in part motivated by antipathy towards the organisation, although it seems clear that the person responsible was mentally ill and was seeking to commit suicide.⁶⁹

Death threats have also been made against hotel staff to pressure the hotel into cancelling a private meeting organised by religious groups, including ACL, to discuss the same-sex marriage plebiscite.⁷⁰

Churches have also been subjected to arson attacks and other criminal damage. In Geelong, for

⁶⁵ Stanley Fish, ‘Almost Pragmatism: Richard Posner’s Jurisprudence’ (1990) 57 *U Chicago Law Review* 1447 at 1466.

⁶⁶ Denis Shanahan, ‘GetUp!-backed petition seeks to deregister doctor from No-case ad,’ *The Australian*, September 4th 2017.

⁶⁷ Lyle Shelton, ‘SSM leaders’ failure to condemn violence endangers everyone’s safety’ ACL, September 20, 2016.

⁶⁸ Clare Sibthorpe and Elise Pianegonda, ‘Suspicious packages addressed to Australian Christian Lobby cause mail centre evacuation’ ABC August 25, 2017.

⁶⁹ Sadly, he later succeeded in taking his own life. ‘Australian Christian Lobby explosion: Man charged with arson dies before trial’ ABC, September 25th 2017.

⁷⁰ ‘Marriage advocate groups met in secret after Mercure death threats’ *Catholic Weekly* Sept. 28th 2016.

example, five churches were burned down between 2015-16, belonging to different Christian denominations. One was being used as a mosque.⁷¹ The motivation for the arson attacks is unknown. In Waverley, a suburb of Melbourne, a Baptist Church and an Anglican church were both vandalised in October 2017. Graffiti was sprayed in white paint on the church walls, equating Christians with the Nazis, urging people to vote 'yes' in the same-sex marriage postal survey and to 'bash bigots'.⁷² Another message urged people to 'crucify' no voters.⁷³

While there may those who would argue that some of this violence, or the threat of it, is the result of the ill-feeling caused by the debate about same-sex marriage, what is notable is that this kind of violence against Christians is hitherto unknown in Australia – and what has been seen in the last three years has no parallel in the ten years before that.

Mosques and other Islamic institutions have also been attacked. In June 2016, the Thornlie Mosque and Australian Islamic College in Perth were firebombed, and an offensive anti-Islamic message painted on a nearby wall.⁷⁴ In July 2017, a pig's head was dumped outside the Islamic College of Brisbane. It was found inside a bag with a swastika label.⁷⁵ Similar incidents have occurred outside mosques.⁷⁶ Individual Muslims have also been the target of religiously motivated hate attacks.⁷⁷ Again, the intensity and extent of this hatred expressed towards Muslims is a relatively new phenomenon, with hostility growing ever since the terrorist attacks of September 2001 in the United States.

It is because of this hatred against people of faith, expressed covertly or sometimes overtly by people who hold positions of responsibility in the law, commerce, government, the education sector and elsewhere, that people of faith are now seeking greater protection in terms of anti-discrimination and anti-detriment laws.

⁷¹ Stephanie Juleff, 'Who is burning Geelong's churches?' ABC, May 18 2016.

⁷² Simone Fox Koob and Emily Ritchie, 'Church graffiti attack targets 'no' voters', *The Australian*, October 16, 2017.

⁷³ Ryan Tennison, 'Church vandalised after Vote Yes painted along church wall'. *Herald Sun*, October 16, 2017.

⁷⁴ David Weber and Nikki Roberts, 'Perth mosque attack: Car firebombed, anti-Islam graffiti sprayed in 'act of hate'', ABC, June 29 2016.

⁷⁵ Andree Withey, 'Pig's head dumped outside Islamic College of Brisbane', July 19, 2017.

⁷⁶ 'Pig's head left near University of Western Australia mosque' *Canberra Times*, December 7, 2015; Felicity Caldwell, 'Muslims invite person who left a pig's head outside mosque for a meal' *Sydney Morning Herald*, September 5, 2017; 'Pig head thrown at Adelaide mosque', ABC, December 23, 2017.

⁷⁷ Derya Iner (ed), *Islamophobia in Australia, 2014-16* (Charles Sturt University, 2017).

Chapter III

The Marriage Debates: The Unfinished Business

As is well known, several members of Parliament on the Coalition side of politics sought to move amendments to the Smith Bill either in the Senate or the House of Representatives, with a view to providing greater protection for freedom of religion and conscience. These were all voted down, even additions to the Marriage Bill which would simply protect people with traditional beliefs about marriage from discrimination.

Most of these amendments had the support of a substantial proportion of the Coalition partyroom, and indeed the great majority of Cabinet. Others, who did not vote for those amendments, abstained. Only a relatively small minority of Coalition members in either the Lower House or the Senate voted against those amendments.

The level of support for those amendments on the Labor side went untested, because of the decision to vote as a bloc against all but the technical amendments provided by the Attorney-General's Department; but it is clear from discussions with some Labor members of Parliament that there was support for at least some of these amendments, or amendments to similar effect.

So whether or not any of the amendments would have passed, had Labor allowed a free vote on them, the fact remains that a very substantial proportion of Coalition members considered the Bill that passed the Parliament to be unsatisfactory. A substantial amount of material is already in print and available which explains the amendments that were moved and other proposals which were made. In particular, the draft Bill released by Senator James Paterson had a comprehensive Explanatory Memorandum which sought to explain and justify the proposals in very great detail.

In this Chapter, we do not propose to revisit all of those amendments. No doubt the Panel will consider all of them carefully in the course of its deliberations, with the benefit of the Explanatory Memoranda which were provided at the time. Rather, this Chapter aims to explain further what, for many senior church leaders, were the major issues of concern about the inadequacies of the Smith Bill and the broader concerns about religious freedom and parental rights which were raised in those debates. These issues do not necessarily need to be addressed by amendments to the *Marriage Act 1961 (Cth)*. Indeed, most are better addressed by amendments to other legislation, or by new legislation; but somehow, they need to be addressed. Ways to do so will be proposed in the following Chapters.

What were the major concerns of religious leaders?

Following the defeat of the proposed amendments in the Senate, many of the country's most senior religious leaders wrote an open letter to the Prime Minister and the Leader of the Opposition, expressing their core concerns.⁷⁸ These were, to quote from the letter:

1. The right of parents to ensure the education of their children in accordance with their religious and moral convictions.
2. The right of religious institutions to ensure that their facilities are used in accordance with their beliefs is not assured. Examples include the use of reception halls operated by churches, and associated services (such as catering or relationship counselling) and the use of chapels, halls or similar facilities within religious schools.
3. The internationally recognised rights of religious institutions to establish and maintain faith-based charities in accordance with their convictions is not assured.
4. The concern that charities that express a traditional view of marriage will lose their charitable status at law, as has occurred in other common law jurisdictions, is not addressed.
5. The rights of religious institutions to express their beliefs, provided that they do so in a way that respectfully engages with the wider community, is not protected.
6. The Bill before the House only provides transitional rights for existing celebrants, who are not ministers of religion, to act in accordance with their genuinely held religious or conscientious convictions. We believe new celebrants should be able to apply to be a traditional marriage celebrant into the future.

The first five of these are really quite fundamental issues of rights and freedoms. The sixth exposes a deficiency in the Smith Bill of which its sponsors were made aware, and that is that the sections as enacted do not operate in accordance with the sponsors' intentions. These problems can be rectified by minor amendments now.

The letter from the Church leaders went on to commend to the Prime Minister and Leader of the Opposition the amendments which were moved in the Senate by Senators Paterson and Fawcett as representing balanced and reasonable measures that responded to such concerns, while also fulfilling Australia's international obligations.

While the letter from religious leaders does not cover comprehensively all the issues of religious freedom raised by the marriage debate, it provides a convenient framework for discussing many of the most important issues of concern. Other issues – particularly the rights of individual believers to protection from discrimination because of their beliefs about marriage

⁷⁸ Letter 5th December, 2017.

– are further addressed in the next Chapter.

The right of parents to ensure the education of their children in accordance with their religious and moral convictions

This argument was presented, in the context of the religious leaders' letter, as being to preserve the rights of parents to educate their children about the religious, moral and cultural institution of marriage as it has traditionally been understood within their faith traditions. However, it is a much broader right and raises more profound and far-reaching issues about the relationship between Australia's very sizeable communities of faith and the wider community of which they are a large part.

Parental rights are guaranteed by Article 18.4 of the ICCPR which provides:

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.

The rights are also expressed as belonging to children. So for example, Article 5.2 of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief provides:⁷⁹

Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.

Dr Paul Taylor, an expert on religious freedom in international human rights law, has observed that there is no discernible protection in Australian law giving effect to these rights of parents and children.⁸⁰

Parents' rights to educate their children in faith-based schools

In Australia, there is a very long tradition of giving effect to parents' Article 18.4 right by allowing parents the right to send their children to schools within a religious tradition. In addition to the State schools, across the country there is a substantial network of Catholic

⁷⁹ See also Article 14 of the UN Convention on the Rights of the Child which protects a child's right to freedom of thought, conscience and religion. Article 14(2) requires that "States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child." It is also a general principle of that Convention is that it is the right of parents and guardians to "provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child" (Article 5).

⁸⁰ Submission to the Andrews Committee as cited in the Andrews Committee report at 3.36.

schools. There are also many schools which are associated with other Christian faith traditions. In addition, there are Jewish and Islamic schools and schools associated with other faiths. While many parents are quite satisfied with the public education system or send their children to private schools that do not have a strong religious or cultural identity, for others, the religious or cultural identity of the school, and its inculcation of religiously-based moral values, is of critical importance to them.⁸¹

Why is the right under threat? For the reasons given in chapter II, it seems no longer to be accepted by many in the irreligious sections of the community that people of faith, as fellow members of the one country, should have the right to raise their children in accordance with their religious and moral convictions in the manner that they have done for countless generations.

One zone of conflict is that of staffing of schools which have a religious tradition. The view that Christian, Jewish, Islamic or other such faith-based schools should have no right to select staff on the basis, *inter alia*, of religious belief or to give preference to staff who hold that religious belief, is grounded on a moral principle that organisations that receive public funding should not be allowed to 'discriminate'. The right of positive selection (that is, the right to choose a staff member with characteristic *x*) is treated as discrimination against all other candidates who do not meet that criterion (or in other words those who do not have characteristic *x*).

This gives a very broad meaning to the concept of non-discrimination. It is one thing to say that an organisation cannot discriminate against someone who is Jewish. It is another thing to say that a Jewish organisation cannot choose to employ just Jewish people, or to prefer to employ Jewish people where possible.

There are some who hold so strongly to this position that they do not think that religious schools should be given any public funding, because they are opposed in principle to the idea of faith-based schools. So, for example, one prominent group of academic experts on anti-discrimination law has argued:⁸²

[A]s a matter of principle...public funding should not be spent on *any* activities that are discriminatory. Allowing religious-based discrimination in publicly funded schools has the potential to undermine community harmony by allowing children to be isolated from the experiences of other groups in society, and confined to a narrower range of experiences. This is

⁸¹ Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society' (2014) 40 *Monash University Law Review* 413 at 438.

⁸² Submission 207 to the Senate Standing Committee on Legal and Constitutional Affairs Committee, *Inquiry into Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, December 2012 at pp.28-29.

not an effective way for a society to prepare the next generation to work together harmoniously with people who have different customs and beliefs. A religious group that operates an organisation or school with public funding should not be excused from complying with a basic human rights guarantee of non-discrimination.

This issue of public funding is often raised, but it rests upon a failure to distinguish between different purposes for public funding. Harrison and Parkinson have explained it in this way:⁸³

The distinction that needs to be made is between situations where governments are 'purchasing' services to be delivered through non-government agencies to the general community in a given locality, and situations where the government is providing funding support to a diverse range of bodies which are delivering services, giving the consumer some choice or reflecting the existing different communities. In the first situation, for government to permit discrimination would be an abdication of its duties to provide services to the whole community in that area. In the second situation, there is room for diversity on contested moral and social issues provided that everyone can access a service.

They went on to apply this to the issue of schools:

[S]upport for a range of different schools, on a non-discriminatory basis, is a way in which the government can help support religious and cultural diversity in a multicultural society. Accepting the freedom to teach the tenets of the faith through educational institutions run by faith-based communities is one way of giving effect to the government's international commitments. Of course, the Government could withdraw all funding from religious schools if they choose to give preference to employing staff who are adherents of the faith or give preference in admission to children from religious families. However, if all funding were withdrawn from religious schools that discriminated, the government would effectively be depriving the less well-off members of the community of the right to educate their children in conformity with their own convictions. Funding schools with no religious commitment while refusing to fund schools that retained a strong religious identity arguably would be discriminatory.

The large percentage of taxpayers who hold to religious beliefs and values are as much entitled to taxpayer funding to support their schools and community organisations as the irreligious who accept funding for non-religious schools and secular organisations.

While the religious leaders raised this issue in the context of marriage, this was really a proxy for the wider concerns about the Article 18.4 right of parents and the corresponding right of children.

⁸³ Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society' (2014) 40 *Monash University Law Review* 413.

Parents' rights in relation to beliefs about gender fluidity

Another area where there is a potential conflict between the rights of parents to educate their children in accordance with their religious and moral convictions and State authorities is in terms of educational programs or policies in schools that conflict with parents' values and beliefs. If the conflict is sufficiently serious, then parents can always remove the children from the school and place them in a school which teaches the children in conformity with those values. However, less well-off parents may not have that option. Their human rights are not diminished by their inability to afford other options, and nor is the Australian government's obligations to them to protect their human rights any the less because they cannot provide a private education for their children.

In the course of the marriage debate, much was said by the 'no' case about issues concerning children who experience gender confusion, which may include a belief that they have been 'born into the wrong body'. Arguments were made that the acceptance of same-sex marriage was connected with beliefs that gender is 'fluid'. Whether or not there is, or could be, such connection, it seems clear that programs such as the controversial Safe Schools program, and other programs founded upon the same belief system,⁸⁴ are a cause of concern to a great many parents.

It is important to be clear what this argument is all about, and what it is *not* about. It is not about bullying. The Safe Schools program was defended as being to prevent bullying, and if this is all that it was about, then it is extremely unlikely that the program would have attracted any controversy. Furthermore, the argument is not about whether children, adolescents and adults experience gender dysphoria. It is clear that there have always been individuals who have struggled with such issues. Nor is the argument about whether some children are born with ambiguous genitalia, known as intersex conditions or disorders of sex development. While such conditions are quite rare, they have always been known.

The argument is about none of these things. It is about the imposition on children in schools of a belief system informed by unscientific theories, based upon dubious statistics and drawing upon alternative facts.⁸⁵ These ideas include the belief that there are multiple genders or that

⁸⁴ Concern was, for example, expressed about some of the teaching materials associated with the Crossroads program in NSW.

⁸⁵ On the dubious statistics, see Patrick Parkinson, 'The Controversy over the Safe Schools Program – Finding the Sensible Centre' (September 14, 2016). Sydney Law School Research Paper No. 16/83. Available at SSRN: <https://ssrn.com/abstract=2839084>. As Kenneth Zucker explains, estimates of the numbers of those who are transgender in any given population depends upon how a 'case' is defined; and how in particular to define and identify 'gender diversity' as distinct from those who meet the DSM clinical criteria for a diagnosis of gender dysphoria. Kenneth Zucker, 'Epidemiology of Gender Dysphoria and Transgender Identity' (2017) 14 *Sexual Health* 404. There are wide variations across time and cultures in reported figures and in sex ratios. The etiology

gender is ‘fluid’. The alleged scientific basis for these beliefs rests upon a claim that the prevalence of intersex conditions is a figure that is almost 100 times greater than as understood in conventional medical science.⁸⁶ From this, novel theories, ideas and beliefs have been developed.⁸⁷ Those who believe these ideas are entitled to do so, but not to inculcate the population in them through compulsory education. The Safe Schools program, and school policies generated from it, also raise concerns about parental rights in relation to their children’s gender identity, insofar as schools have been encouraged to let children ‘transition’ at school without parental knowledge and consent, and without an expert clinical assessment of gender dysphoria.⁸⁸ Mainstream parents, imbued with abundant common sense, worry that these programs could actually cause great harm to their children or their friends’ children.

While several State governments have now abandoned the Safe Schools program, and even in Victoria, schools are given discretion as to its implementation, the controversy about the program raises broader issues about parental rights in education in state schools. The fact that some state education departments seem to be so vulnerable to ideological capture by minority groups with unorthodox beliefs, and so little concerned with the views of parents, has damaged the trust that parents typically place in governments to manage the education of their children.

For that reason, we recommend that there be a discussion between the federal government and State Education Departments about how parents’ rights in relation to their children’s education

of gender dysphoria also remains poorly understood, with some evidence pointing to social factors rather than genetic factors or hormonal influences in utero: A. Korte et al, ‘Gender identity disorders in childhood and adolescence: currently debated concepts and treatment strategies’, (2008) 105 *Deutsches Ärzteblatt International*, 834; Zucker, *ibid.* Children with autism spectrum disorder are also greatly overrepresented among those experiencing gender confusion. The data is summarized in John Whitehall, ‘Gender dysphoria and the fashion in child surgical abuse’ (2016) 60(12) *Quadrant* 23.

⁸⁶ The claim is made that children have intersex conditions in 1.73% of live births. This is based on M. Blackless, A. Charuvastra, A. Derrtyck, A. Fausto-Sterling, K. Lauzanne, & E. Lee, ‘How Sexually Dimorphic Are We? Review and Synthesis’ (2000) 12 *American Journal of Human Biology* 151. That figure relies on a wide definition including all who “deviate from a Platonic ideal of sexual dimorphism” at the chromosomal, genital, gonadal, or hormonal levels. While the figure of 1.7% is widely quoted as giving the prevalence of those who are ‘intersex’, in fact the definition used is much wider than as understood for intersex conditions in the medical literature. See L. Saks, ‘How Common is Intersex? A Response to Anne Fausto Sterling’ (2002) 39 *Journal of Sex Research* 174.

⁸⁷ On the basis of the claim that intersex conditions are quite common, and that some people identify as non-binary, it is argued that the ordinary human condition should be classified as just one gender variant, that gender is ‘fluid’ rather than innate, and that a child’s gender is simply what happens to be ‘assigned’ to that child at birth. Together with these beliefs come practices such that on meeting a person for the first time, one must inquire what their chosen pronouns are.

⁸⁸ Patrick Parkinson, ‘Gender Dysphoria and the Controversy over the Safe Schools Program’ (2017) 14 *Sexual Health* 417.

in state schools can be better protected and respected, with the federal government taking a lead role to ensure that parents' rights are accorded their proper status. As a judge of the Court of Appeal in Ontario has recently observed:⁸⁹

Education of the young is bound to be formative; if the state educates the young, it also forms them, at least in part, and perhaps the major part. However, the right of parents to care for their children and make decisions for their well-being, including decisions about education, is primary, and the state's authority is secondary to that parental right... The law is clear that the authority of the state to educate children is a delegated authority: "Parents delegate their parental authority to teachers and entrust them with the responsibility of instilling in their children a large part of the store of learning they will acquire during their development".

The question arises for the governments of the Commonwealth, States and Territories, how to respect the rights of parents in state schools who do not want their children inculcated in unscientific beliefs or which do not appropriately recognise and respect the diversity of beliefs and values about sexual conduct and family life in multicultural Australia. The federal Government could insist on such respect for parents' rights through legislation or funding conditions for state schools. Parents' concerns about educational materials in state schools are not limited to issues concerning gender fluidity. They also concern the normalisation of a particular, boundary-free attitude to consensual sexual conduct that conflicts with the moral values of a great many Australian parents. One way forward would be to ensure, as far as possible, that content which may conflict with the religious or moral sensibilities of a substantial number of parents is separated out in the curriculum. In this way, controversial material may more clearly be identified, and parents' concerns about such content can be more readily dealt with by exemption from attendance at a particular lesson, if need be.

A model for new Australian legislation might be s.25A of the *Education Act 1989* in New Zealand. This provides parents with a right to withdraw their children under 16 from tuition in a particular class or subject because of sincerely held religious or cultural views. A young person of 16 years or older may make his or her own request. Section 25AA provides a specific right to parents to withdraw their children from tuition in relation to sexuality education.

These issues may seem remote from the marriage debate, but they are addressed in this submission because they were raised in that debate quite extensively during the period of the postal survey. They clearly give rise to issues under Article 18.4 of the ICCPR.

⁸⁹ *E.T. v. Hamilton-Wentworth District School Board*, 2017 ONCA 893 (24th November 2017), at [65], [67] per Lauwers JA, citing *La Forest J*, with whom L'Heureux-Dubé, Gonthier, Cory and McLachlin JJ concurred, in *R v Aude* [1996] 2 SCR 171 at [41].

The facilities of religious institutions

A second issue coming out of the marriage debate concerns the use of the facilities of religious institutions for the solemnisation of same-sex marriages. The Smith Bill intended to protect the right of religious institutions to refuse to make their facilities available for this purpose. Section 47B of the *Marriage Act* now provides:

Bodies established for religious purposes may refuse to make facilities available or provide goods or services

(1) A body established for religious purposes may refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage, if the refusal:

- (a) conforms to the doctrines, tenets or beliefs of the religion of the body; or
- (b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

(2) Subsection (1) applies to facilities made available, and goods and services provided, whether for payment or not.

(3) This section does not limit the grounds on which a body established for religious purposes may refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage.

(4) To avoid doubt, a reference to a body established for religious purposes has the same meaning in this section as it has in section 37 of the *Sex Discrimination Act 1984*.

(5) For the purposes of subsection (1), a purpose is reasonably incidental to the solemnisation of marriage if it is intrinsic to, or directly associated with, the solemnisation of the marriage.

This addresses most issues that could arise concerning the use of religious facilities for the solemnisation or celebration of a marriage contrary to the beliefs of that faith community. It provides a defence in federal anti-discrimination law. Probably, by operation of s.109 of the Constitution, it provides a defence in relation to state and territory anti-discrimination laws as well.

In the debates about the Bill in Parliament, Michael Sukkar MP moved an amendment to add a note to this section as follows:

Note: Examples include:

- (a) the provision of services by relationship counsellors;
- (b) hire of reception halls;
- (c) catering for receptions;
- (d) the provision of chapels, receptions halls, other like facilities or services by educational institutions to which section 38 of the *Sex Discrimination Act 1984* applies.

This would have given a broad interpretation to the terms ‘facility’ ‘goods’ or ‘services’, but it was still a quite limited and modest amendment. The defence would still have applied only to bodies established for religious purposes, not to organisations established for commercial purposes.

Another of the issues concerns chapels. As noted, s. 47B only applies to organisations “established for religious purposes”. Certain bodies that are not established for religious purposes within the meaning of s.47B have buildings that are consecrated for, or intended for, religious purposes. An example is a school associated with a particular religious denomination which has a chapel.

Suppose, for example, that a denomination has a clear policy against same-sex marriages being solemnised in its church buildings. A denominational school has a chapel, the use of which is under the control of the school. It may even have a long-standing policy that former students have a right to get married in the chapel. The Principal of the school is prepared to allow the same-sex wedding to take place in the chapel as long as the chaplain is not going to officiate, but this is contrary to the beliefs of the denomination of which that school is a part. How should these disputes be resolved? Because of the risk of major disputes about such issues needing to be resolved by the courts in the face of uncertainty about the law, it would be better to clarify the issue and to allow each denomination or other religious body be able to determine the rules for the use of religious buildings that are associated with it.

This problem could be rectified by adding a provision along the following lines, as s.47C of the *Marriage Act 1961*:

47C Buildings intended for religious purposes

A building, whether or not controlled by a body established for religious purposes, and which has been consecrated for religious purposes or which is otherwise intended to be used primarily for such purposes, must not be used:

- (a) to solemnise a marriage or
- (b) otherwise for the celebration of such a marriage

unless the rules of the religious body with which the religious building is associated permit such use.

Such an amendment would be entirely consistent with the spirit and intent of the Smith Bill and its purpose to protect religious freedoms. For this reason, it seems very unlikely that an amendment along the lines of the addition of s.47C would now attract opposition, given it is consistent with the intentions of the sponsors of the Bill that religious bodies should have control over their consecrated buildings when it comes to issues concerning same-sex marriage.

The rights of religious institutions to establish and maintain faith-based charities in accordance with their convictions

These are the third and fourth issues raised by the religious leaders in their letter to the Prime Minister and Leader of the Opposition. Article 6 of the UN Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion (1981) specifically provides for the right to “establish and maintain appropriate charitable or humanitarian institutions”. However, charitable status is one of the issues that has arisen as a direct consequence of changes to the definition of marriage in our close neighbour, New Zealand.

The issue arose in relation to Family First NZ. This is a group informed by a religious perspective which seeks to educate the public, and also to lobby, on issues concerning families. It holds a traditional view of marriage. In 2013, the Charities Board decided it should be stripped of its charitable status because its main purpose was to promote points of view about family life which included the defence of traditional marriage. This was seen to be a non-charitable political purpose that did not have a public benefit.

The Charities Board was ordered by the High Court to reconsider its decision to deregister Family First in the light of a judicial decision about Greenpeace with which it appeared to be inconsistent.⁹⁰ The Board announced its remade decision on August 21st 2017. The decision was that the organisation be deregistered. The reason given in the Board’s statement is as follows:⁹¹

The Board considers that Family First has a purpose to promote its own particular views about marriage and the traditional family that cannot be determined to be for the public benefit in a way previously accepted as charitable. Family First has the freedom to continue to communicate its views and influence policy and legislation but the Board has found that Family First’s pursuit of those activities do not qualify as being for the public benefit in a charitable sense.

In other words, the change in the law concerning marriage was the explicit reason for saying that the organisation’s purposes were no longer charitable.

This problem, in the Australian context, is easily remedied by adding a provision in the *Charities Act 2013 (Cth)* to the effect that an organisation that promotes a belief about marriage as being between a man and a woman does not for this reason fail to satisfy the public benefit requirement in the *Charities Act 2013* and does not have a disqualifying purpose within the meaning of s.11 of that Act.

⁹⁰ *In re Families First New Zealand* [2015] NZHC 1493.

⁹¹ Available at <https://charities.govt.nz/news-and-events/hot-topics/update-on-family-first-new-zealand-from-the-independent-charities-registration-board-2/>

While an argument was put in the Parliamentary debate that such an amendment was not necessary, it is also self-evident that such an amendment would not do any harm. Given the New Zealand decision, it would provide reassurance to Australian charities that their freedom of belief will be respected and that Australia would continue to comply with the UN Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion. It would put the matter beyond doubt and simply affirm what members of Parliament apparently agreed upon – that the redefinition of marriage should have no implications for charitable status.

The rights of religious institutions to express their beliefs

Freedom of speech really is a very fundamental value that inheres both in individuals and organisations. Organisations typically speak through individual representatives. Freedom of speech of course has its limits. This is well understood, and debates about those limits have occurred in other contexts, particularly when consideration was given to amendment of s.18C of the *Racial Discrimination Act 1975 (Cth)*.

Around the world, there have been many cases of people losing their jobs and otherwise suffering discrimination simply because they have expressed views about same-sex marriage. These issues will be considered in Chapter IV in the context of the need for new anti-discrimination provisions.

However, there are also wider concerns about freedom of speech for religious leaders and institutions. The most well-known example, of course, is the Archbishop Porteous case. He was summoned before a Tasmanian anti-discrimination body for distributing a booklet put out by the Australian Catholic Bishops Conference defending its traditional view of marriage. The Australian Catholic Bishops Conference was required to answer the complaint along with Archbishop Porteous.

Yes, the complaint was eventually dropped, but the problem is that such laws can be weapons of ‘lawfare’. Anti-discrimination law is now not only a bulwark against adverse actions and denial of services based upon unacceptable prejudice, but can be used as a weapon against others on the basis only that the claimant has been offended, or believes that others would be offended, by some public comment. The defendant is typically put to a lot of effort and expense in responding to such complaints, even if they are eventually discontinued. This may have a chilling effect on freedom of speech. It ought to be entirely uncontroversial that Catholic Bishops should be allowed to explain Catholic doctrine without fearing legal repercussions. These are foundational freedoms in any democratic society.

Another case is currently running in Tasmania concerning a complaint against a Presbyterian pastor and a street preacher which give rise to similar issues concerning freedom of religion

and speech.⁹² The case is currently before the Supreme Court of Tasmania, on a constitutional law point.

Because of the concerns that have already arisen in Australia, it is not only necessary to protect individuals and organisations from discrimination because of their beliefs about marriage; it is also necessary to override state laws which restrict freedom of speech about marriage. The justification for overriding inconsistent state laws is that Australia is a signatory to the ICCPR and has a legal obligation to override laws, such as exist in Tasmania, that impair freedom of speech and religion. The Northern Territory is also now proposing laws that make it unlawful to say things which are reasonably likely to offend or insult someone on various grounds, including sexual orientation, gender identity and intersex status.⁹³ In the definition inflation characteristic of such law reform, causing offence to someone is regarded as ‘vilification’.⁹⁴ These issues are considered further in Chapters IV and V.

Marriage celebrants who are not ministers of religion

As a consequence of the amendments to the *Marriage Act* made by the Smith Bill, people may not be able to have the religious marriage celebrant of their choice in churches which do not have a “minister of religion” as defined by the Act.

Prior to the commencement of the amending Act in December 2017, over 500 marriage celebrants were actually religious celebrants.⁹⁵ Many of them are pastors of independent evangelical churches which are not part of any denomination. Others identify with non-Christian faith communities. In order to conduct weddings, they need to become marriage celebrants because they are not included in the lists provided to the Government by the major denominations and other faith communities.

Probably, most of them would come within the definition of ministers of religion, but some will not. The reason why some will not is that there are religious leaders who are in full-time secular employment, and their role as the pastor of a congregation is a part-time role for which they have no formal qualification or accreditation. This is likely to be so especially in rural

⁹² Patrick Billings, ‘Anti-Discrimination Commission to hear complaint over Hobart preacher Campbell Markham’s blogs’ *The Mercury*, August 7th 2017. For examination of the Tasmanian anti-discrimination cases see Mark Powell, ‘18C weaponised’, *The Spectator Australia*, 18th October 2017.

⁹³ Department of the Attorney-General and Justice, Northern Territory Discussion Paper, *Modernisation of the Anti-Discrimination Act* (September 2017), p.11.

⁹⁴ *Ibid.*

⁹⁵ The list, one separate from the general list of marriage celebrants, was published on the Attorney-General’s Department website.

areas where the congregation is not large enough to sustain calling a minister. The definition of ‘minister of religion’ in the *Marriage Act 1961(Cth)* is less than clear. It is by no means obvious that it covers such lay leadership.

There are also some churches which do not believe in having ‘ministers of religion’ as such. Typically, in such churches there is a team of elders. Some evangelical churches adopt this model. The Society of Friends is an example of another religious denomination that does not have ministers.

The Smith Bill recognised this problem by creating a new category of ‘religious marriage celebrant’, who may decline to solemnise same-sex marriages; but the right to be listed as a religious marriage celebrant is confined to ‘ministers of religion’ as defined in the *Marriage Act*.⁹⁶ For the reasons given, the definition may not cover people in secular employment who lead independent churches or other religious communities.

This is not a difficulty for those who were on the list of marriage celebrants prior to December 2017. They are grandfathered. The Smith Bill provided that people who are *currently* on the register may elect to be classified as religious marriage celebrants irrespective of whether they are ministers of religion. However, no new entrant will be able to be registered as a religious marriage celebrant after the commencement of the same-sex marriage amendments unless he or she is a minister of religion as defined in the Act.

Often, it is very important indeed to people who get married in church that their pastor be the one to officiate. Without amendment, the *Marriage Act* will prevent people who are pastors of independent churches (and who are in secular employment) from applying to become religious marriage celebrants in future.

This can easily be rectified by adding an additional ground of qualification to be a marriage celebrant. Section 39DA could be amended as follows (changes underlined):

A person is entitled to be identified as a religious marriage celebrant on the register of marriage celebrants if:

- (a) the person is registered as a marriage celebrant under Subdivision C of this Division; and
- (b) the person is a minister of religion or otherwise a person in a position of pastoral leadership

⁹⁶ Section 39DA of the *Marriage Act* 1961 provides: “A person is entitled to be identified as a religious marriage celebrant on the register of marriage celebrants if:

- (a) the person is registered as a marriage celebrant under Subdivision C of this Division; and
- (b) the person is a minister of religion.”

in a religious congregation, body or organisation and who is authorised by that congregation,
body or organisation to solemnise marriages.

This is the most minimal amendment that would address the religious freedom problem for religious leaders outside of the established large denominations or faith communities. A broader proposition, more respectful of religious freedom and libertarian values, would be to let anyone who wants to become a religious celebrant within the meaning of the Act, and who is otherwise qualified, to make that application. No-one is harmed by allowing them to do so.

Chapter IV

Discrimination

Most of the arguments about religious freedom in Australia at the present time are really about anti-discrimination law. Yes, there are other issues, including for example recent recommendations by the Royal Commission on Institutional Responses to Child Sexual Abuse. Freedom of speech is also an issue. As discussed in Chapter III, there are particular issues around same-sex marriage and its impact upon faith communities which were left unresolved by the passing of the marriage amendment legislation at the end of 2017.

All these issues being noted, by far the most important questions concern how issues of religious freedom are balanced with the protection of people from discrimination, and conversely whether and how anti-discrimination law should be extended to provide better protection for people who hold and express religious faith.

Essentially there are five issues to be considered. The first is the future of exemptions for people of faith in both state and federal anti-discrimination laws. As was discussed in chapter II, these exemptions have come under sustained attack as there are those who believe that there should be no exemptions at all which allow for the preservation of religious traditions and doctrines having a discriminatory effect.

The second issue is whether there is a need for religion to be a protected attribute in federal law, and/or in those States or Territories which do not yet include religion within the scope of anti-discrimination laws in a comprehensive way.

The third issue is whether there should be an obligation upon employers to make reasonable accommodations for people of faith in the workplace. So for example, organising rostering arrangements so that staff with a religious difficulty about working on a Saturday will not need to do so, provided that this does not place an undue burden on the employer or other staff.

The fourth issue concerns protection from discrimination for those with traditional beliefs about marriage. This may seem like it could be subsumed in protecting the expression of a religious belief. However, it should be noted that in many communities and cultures where there was quite strong opposition to same-sex marriage, that opposition was reflective of deeply held cultural values concerning family life, which may or may not have a clear origin in beliefs of a religious nature. Taking a broad view of the terms of reference of the Panel, this issue needs to be considered. It would be anomalous if a person of deep religious faith were able to complain about discrimination because of her traditional beliefs concerning marriage, while her next door neighbour could not, the only difference being that the neighbour could not source her values from a particular religious context. All the world's great cultures, and the values that

they inculcate, have a religious origin, even if it is to some extent forgotten.

The fifth issue concerns the protection of organisations from discrimination. Ordinarily, it is individuals who need to be protected from discrimination. However, major issues have arisen concerning discrimination against organisations based upon their religious beliefs or values, not least in the context of same-sex marriage. In order to distinguish this from the scope of traditional discrimination provisions, we will refer to these as anti-detriment provisions.

Exemptions and exceptions for religious organisations

In the rather heated debate concerning exemptions for religious organisations in anti-discrimination law, it is sometimes said that Christians and others want ‘a licence to discriminate’. Although there are some examples where the claims that religious believers make can be characterised in such terms, it is for the most part a gross distortion of the issue. The most important issue for Christians, and, we understand, for most other faith groups, is not the freedom to discriminate, but the freedom to select on the basis of religious belief and practice, and freedom to take adverse action against an employee if necessary, where issues of personal conduct are incompatible with the values of the employing organisation.

Freedom in relation to employment of staff

The threat to freedom to select on the basis of religious belief and practice comes from a view that ‘discrimination’ should never be lawful unless a particular attribute is an inherent occupational requirement for the job. There have been various attempts over the years, some successful, to limit the scope for religious organisations to select staff on the basis of their religious faith to jobs for which that faith is clearly necessary to perform that work. For example, as long ago as 1999, the New South Wales Law Reform Commission recommended that exceptions in employment under the *Anti-Discrimination Act 1977 (NSW)* be narrowed so that discrimination on the grounds of religion, inter alia, would only be permitted if this was a genuine occupational requirement.⁹⁷ The government of the day did not accept this recommendation.

In Victoria, the *Equal Opportunity Act 2010* narrowed the exemptions for religious bodies by inserting an ‘inherent requirement’ test for employment. The test was stated as follows:

Nothing in Part 4 applies to anything done in relation to the employment of a person by a religious body where –

- (a) conformity with the doctrines, beliefs or principles of the religion is an inherent requirement

⁹⁷ NSW Law Reform Commission Report 92, *Review of the Anti-Discrimination Act 1977 (NSW)* (1999) at [4.128] and [6.433].

of the particular position; and

- (b) the person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity means that he or she does not meet that inherent requirement.

Section 82(4) went on to provide:

- (c) The nature of the religious body and the religious doctrines, beliefs or principles in accordance with which it is conducted must be taken into account in determining what is an inherent requirement of the purposes of subsection (3).

Sections 83(3) and 83(4) of the original 2010 Act imposed the same inherent requirement test for employment in religious schools.

The effect of the legislation was that religious organisations which wanted to select staff who share in the religious beliefs and values of the organisation had to meet a very high legal threshold. Religious bodies and schools were required to show that conforming with the doctrines, beliefs or principles of the religion is an inherent requirement of the job and that the person discriminated against does not meet the inherent requirement because of a relevant attribute.⁹⁸ That had serious effects for the right of independent schools to select staff that share the faith and values of the school. The term 'inherent requirement' has been narrowly interpreted by the courts to refer only to those functions that are a necessary part of the job.⁹⁹ Take for example, the protected ground of religious belief. A Christian school would have to show that it is an inherent requirement of being a history teacher to hold to the tenets of the Christian faith, in order to justify not selecting a history teacher for employment who would not be supportive of the religious ethos of the school.

The conduct of employees may also be an issue. An example is 'lawful sexual activity' which is a protected attribute in certain state laws. Almost all forms of consensual sexual activity are lawful between those over the minimum age for consent. Adultery is lawful. So too is casual sex. However, religious faiths have long taught that not all that is lawful is good. If a teacher is known to be engaging in sexual behaviour which is incompatible with the values of the school to which he or she has agreed to adhere, should it have a right to ask him or her to leave?

The debate in Victoria

Following a change of government later in 2010, the *Equal Opportunity Act 2010* was amended to address these concerns. However, in 2016, the current government of Victoria introduced a

⁹⁸ *Equal Opportunity Amendment Bill 2010* (Vic) Amended Explanatory Memorandum, p.43.

⁹⁹ See for example *Qantas Airways Limited v Christie* (1998) 193 CLR 280 and *X v Commonwealth* (1999) 200 CLR 177.

Bill to restore the original version of the Act. Mark Sneddon, Executive Director of the Institute of Civil Society, explained some of the difficulties this would create:¹⁰⁰

[T]he bill undermines the freedom of association of citizens to establish and maintain voluntary associations which express and promote particular views of what is good and right. Those views may be based on ethnic, cultural, religious or political values. Under the proposed bill the law would effectively require religious voluntary associations to accept and accommodate the views and conduct of some employees and, in the case of schools, any students whose expressed beliefs and conduct relating to gender and sexuality do not conform to the values which the religious association is designed to promote and model.

The Bill was narrowly defeated in the Upper House.

The problems with an inherent requirements test

There are three particular problems with the inherent requirements test. The first is that it allows for freedom to select based upon religious belief as an essential characteristic of the position, but not simply to prefer someone who holds to a religious belief. Christian schools and other organisations vary a great deal in their staffing policies in this respect. There are many Christian schools in which it is an essential requirement that all members of staff adhere to the faith. Part of the ethos in many such schools is that they are Christian communities. It may be as important that the school secretary or nurse is a Christian as that the teachers are. Even gardeners and other such staff who interact with students and parents may be seen as part of a Christian community. All staff are regarded as having a part to play in the mission of the school, with no distinction being drawn between ‘professional’ and ‘administrative’ staff.

Schools with this staffing policy probably would satisfy an inherent requirements test if that test were sympathetically construed by an anti-discrimination commission or a court. However, such schools are in the minority among independent schools. The majority of faith-based schools simply *prefer* to employ teachers who practice the relevant faith, and require others to uphold the school’s values. This is typically because they cannot always find suitably qualified staff in each subject area who practise the relevant faith. These schools could not defend their employment policies based upon an ‘inherent requirements test’ if faced with an anti-discrimination suit from a disappointed applicant whose lack of the relevant religious belief was material to the employment decision.

Like faith-based schools, Christian welfare and aged care organisations also have a preference for employing staff who adhere to the faith and values with which the organisation is

¹⁰⁰ Mark Sneddon, ‘Victoria’s Equal Opportunity Act: Inherent Requirements and the Problem of Discrimination’ *ABC Religion and Ethics*, 22 September 2016 at <http://www.abc.net.au/religion/articles/2016/09/22/4543686.htm>

associated, but without making it a requirement except at senior levels. Most Christian organisations operating these services are clearly motivated by their understanding of the inherent, dignity and worth of all people as being made in God's image.

A Christian organisation which is given appropriate autonomy to manage its affairs should not have to justify why, for example, levels 1 to 8 in the employment hierarchy of an organisation do not require a person to be a committed believer, while levels 9 and 10, the most senior management positions, do. For if levels 9 and 10 are equally open to people who have no religious faith, then there may be little or nothing which characterises the organisation as having a faith-inspired leadership or a faith-informed ethos.

A second difficulty with the 'inherent requirements' test concerns sudden vacancies. Consider, for example, the situation where a school that has been established to be a faith community in which all members of staff, both teaching and administrative, are meant to share the beliefs and values of the school. What if it has a sudden vacancy in the middle of the school year because the Geography teacher takes ill, and the school cannot find a replacement teacher at short notice who adheres to the beliefs and values of the school? The concern is that if the school employs a teacher, as a temporary measure, who does not adhere to the beliefs of the school then this demonstrates that faith cannot be an inherent requirement.

A third difficulty with the 'inherent requirements' test is that its application is to some extent dependent upon the values of the decision-maker. In reviewing submissions from organisations on this subject, there seems to be ready acceptance that a Christian school should be allowed to insist upon having a Principal who is a committed Christian, and if the school has a particular denominational affiliation, there seems no objection to insistence that the person be a practising member of that denomination if that policy has been consistently applied in the past.¹⁰¹ No one seems seriously to argue with the proposition that religious criteria should be included in decisions about employment of a religious studies teacher. However, there is, it appears, a widely held view that there is no need for a Maths or English teacher to have a religious commitment in order to teach his or her subject. For example, in evidence before a Victorian Parliamentary Committee in 2009, the Chair of Victoria's Equal Opportunity and Human Rights Commission argued in relation to faith-based schools:¹⁰²

"We do not see a need for a religious school to be able to discriminate in relation to the choice of a cleaner or for a religious school to discriminate in relation to the choice of a mathematics teacher who has no contact with the practice of the religion or the profession of faith in that

¹⁰¹ The case of *Walsh v St Vincent de Paul Society Queensland (No 2)* [2008] QADT 32 demonstrates the difficulties if an organisation does not apply its criteria consistently.

¹⁰² Scrutiny of Acts and Regulations Committee, Victorian Parliament, *Inquiry into exceptions and exemptions in the Equal Opportunity Act*, 4 August 2009, transcript p. 5 available at: <http://www.parliament.vic.gov.au>.

school.”

That reflects a very narrow understanding of how faith relates to teaching. It follows that if a school needs permission from an anti-discrimination Commissioner to include religious criteria in an advertisement for employment, it might find that the organisation interprets the exemption very narrowly, and through an irreligious lens.

Constraints upon freedom to select do not only impact upon religious schools and welfare organisations. Unless the position of faith-based communities is properly protected in legislation, it may be unlawful for the pastor of a church to advertise for a Christian executive assistant, or for the church to insist that its administrator be a person of faith. Yet church pastoral and administrative teams work very closely together. There seems no reason why a voluntary organisation such as a church should not rely upon selection criteria which are relevant to its mission, purpose and identity. Surely this is what freedom of association means. Most people would think it quite absurd that a local Church is prohibited by law from advertising for a Christian staff member, just as it would be quite absurd for an environmental organisation not be able to insist that prospective staff believe in climate change, and are committed to the protection of the environment.

An existential issue

The freedom to select is an existential issue for faith communities of all kinds. If a Christian school cannot advertise for staff with one criterion being their adherence to Christian beliefs, or even to give preference to staff who hold Christian beliefs, then within a fairly short period of time, the staff profile of the school will be indistinguishable from the state school next door. There really is no point in having a Christian school if the only staff who need to be Christians are the School Principal, the Chaplain and the religious studies teacher. There might be a more clearly defined Christian element to the curriculum in such a Christian school, for example by the inclusion of a compulsory Christian studies class and chapel services from time to time, but these are relatively peripheral nods to the importance of faith. Many parents and teachers would say that a school is a Christian school because it has a Christian ethos and believing staff, not merely because its constitution contains provisions that reflect its Christian heritage, or because elements of Christianity are included in its syllabus and school life.

If Christian welfare organisations and health and aged care providers are not permitted to make adherence to the faith a selection requirement at any level of the organisation, they will quickly lose their character as faith-based organisations. If pastors of churches cannot insist upon their personal assistants or administrative staff being adherents to the faith that could compromise the work of the Church. It is also a huge incursion into freedoms which have long been taken for granted.

Because Freedom for Faith is an explicitly Christian organisation, we do not purport to speak for other faiths, but we would imagine that organisations associated with other faiths would

hold the same view concerning the importance of having a legal right to select staff on the basis of their adherence to the faith.

Further difficulties arise if exemptions are removed and anti-discrimination laws apply to voluntary organisations. Consider a volunteer organisation which seeks to promote the improvement of people's lives and in which the members are brought together by a shared commitment to the Christian faith. Shared religious belief might not be necessary to help clean the gutters of elderly people or to provide support to needy families; but the shared belief may be what brings the people together and inspires their commitment to community service. Part of the life and work of the organisation might be Bible study and prayer. If such organisations would be breaching the law to insist on a shared religious belief as the basis for membership, then this could only operate to discourage such organisations, with no positive benefit resulting to the community.

A simple reform

The argument about anti-discrimination exemptions is intense and fraught, mainly because there are many in our community, understandably, who want to limit to the greatest extent possible any exemptions from the operation of laws that prohibit discrimination on the grounds of sexual orientation or gender, these being the two major issues. While there are certainly those who would like to deprive all public funding from faith-based schools, and turn faith-based welfare and aged care organisations into entirely secular bodies, these are not views voiced by politicians in the mainstream. Few are seriously opposed to the idea that faith-based schools should be entitled to retain their identity and ethos through their staffing policies, or that Christian welfare and aged care organisations should have a right to maintain their ethos by insisting that the most senior leadership positions in the organisation be held by those who share the same faith inspiration as its founders. This is so whether or not such organisations are in receipt of public funding. Typically governments fund a range of schools, welfare organisations and aged care services, for which people of faith, as taxpayers, contribute as much as non-religious taxpayers.

Much heat could be taken out of the debate on anti-discrimination law if the Commonwealth Parliament enacted a law which protects the right of faith-based organisations to maintain their identity and ethos through the freedom to select staff appropriate to the mission of the organisation, or to give preference to the employment of such staff. This approach gains support from the Human Rights and Equal Opportunity Commission report on religion and belief which commented in 1999 that "special provision for religious institutions is appropriate. It is reasonable for employees of these institutions to be expected to have a degree of commitment to and identification with the beliefs, values and teachings of the particular religion...Accommodating the distinct identity of religious organisations is an important

element in any society which respects and values diversity in all its forms.”¹⁰³

Similarly, it is supported by the UN’s Special Rapporteur on freedom of religion and belief. In 2014, Heiner Bielefeldt, the Special Rapporteur at that time, wrote an important report on religious freedom in the workplace. He argued that discrimination on the basis of religious belief in the workplace should be unlawful, but “religious institutions constitute a special case. As their *raison d’être* and corporate identity are religiously defined, employment policies of religious institutions may fall within the scope of freedom of religion or belief, which also includes a corporate dimension.”¹⁰⁴

Such a law would confer what Hohfeld called a liberty right¹⁰⁵ for a faith-based organisation to select staff on the basis of religious belief should it choose to do so. This is an appropriate application of the rights of freedom of religion and association. As noted in chapter III, Article 6 of the UN Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion (1981) specifically provides for the right to “establish and maintain appropriate charitable or humanitarian institutions” and Article 18.4 of the ICCPR supports the right of parents to educate their children in faith-based schools.

Exemptions that respect diversity of belief

For the most part, the way exemptions are drafted in anti-discrimination legislation permits freedom to discriminate on the grounds of a particular characteristic such as gender, marital status or being involved in a same-sex relationship.

These are, understandably, contentious issues. Even still, beyond the occasional suggestions that all limitations should be temporary and subject to permission from an anti-discrimination body,¹⁰⁶ few politicians in the mainstream really believe that the State should interfere in how religious organisations choose their personnel, however discordant may be their beliefs and practices with contemporary secular values. No one, after all, is forced to belong to a church or any other religious group. These are voluntary associations.

If freedom for religious organisations and schools to have staffing policies consistent with the organisation’s mission, beliefs and values is both accepted and guaranteed, then the need for exemptions which permit discrimination *against* a person because he or she has a certain

¹⁰³ Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief*, (1999) p.109.

¹⁰⁴ Interim Report of the Special Rapporteur on Freedom of Religion or Belief, 5 August 2014 at [68].

¹⁰⁵ Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Essays* (WW Cook, ed, Yale UP, 1923).

¹⁰⁶ See for example, the HREOC proposal in 2008 discussed in Chapter II.

characteristic is very greatly diminished. The main issues where there may be a tension between competing human rights are discrimination on the basis of sexual orientation and lawful sexual conduct. Gender and marital status are also issues for some religious organisations, but primarily in terms of qualifications for the priesthood. There is no reason at all why religious organisations should need an exemption to discriminate against someone on the basis of race (other than for certain religious organisations to select on the basis of ethno-religious identity). Nor is there any reason to discriminate on the basis of disability. It is difficult to think of examples where an age-based restriction arises from the doctrines of a particular religious faith. It follows that in States and Territories where the exemptions for religious freedom are quite broad, they could be narrowed, provided the freedom to select believing staff for believing organisations, and to require staff to adhere to codes of conduct required by the faith, is accepted.

Definitions, limitations and exemptions

There remains a bigger question however, as to whether even the few provisions that are needed to allow for the moral and theological convictions of some people of faith are best included in the law by way of exemptions. There is very widespread support within the Christian community to move away from exceptions and exemptions. The preference is to clearly establish freedom of religion as a right, rather than as a grudging concession. The case against dealing with religious freedom issues only through exemptions was put well by the Australian Christian Lobby in a submission to the Australian Law Reform Commission's *Freedom Inquiry*.¹⁰⁷

The language of exemptions sends a message of 'special pleading' or preferential treatment towards religious bodies. Rather than being the rule, or the assumption, freedom of religion is relegated to being the exception, or the special accommodation. This is a reversal of the place of fundamental freedoms in a free society such as Australia. If the narrative promoted by the relevant legislation clearly articulated the limits of discrimination law and the assumption of freedom, such resentment or confusion could be ameliorated.

Our consultations over some years with church leaders from a range of denominations would seem to indicate strong support for such an approach. This offers a way forward, both to modernise the law and to find an acceptable compromise between competing religious and secular values. The Commission, in its report, suggested that "further consideration should be given to whether freedom of religion should be protected through a general limitations clause rather than exemptions".¹⁰⁸ Whether this would represent a suitable approach depends to a great extent on how such a limitations clause were to be drafted.

¹⁰⁷ Cited in the ALRC report, *ibid*, at [5.110].

¹⁰⁸ Australian Law Reform Commission, Report no 129, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (2016) at [5.154].

Redefining discrimination

In a submission responding to a Discussion Paper about the consolidation of federal anti-discrimination laws in 2012, Professors Parkinson and Aroney recommended that there be a new definition of discrimination which helps to define what discrimination is and is not.¹⁰⁹ Since then, their definition seems to have attracted a lot of support within churches and other faith organisations.¹¹⁰ It was quoted in part by the Australian Law Reform Commission in its Freedoms Inquiry report (although the impression may have been given inadvertently that the Commission was quoting it in full).¹¹¹ The complete definition is as follows:

(1) Discrimination means any distinction, exclusion, preference, restriction or condition made or proposed to be made which has the purpose of disadvantaging a person with a protected attribute or which has, or is likely to have, the effect of disadvantaging a person with a protected attribute by comparison with a person who does not have the protected attribute, subject to the following subsections.

(2) A distinction, exclusion, preference, restriction or condition does not constitute discrimination if:

(a) it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or

(b) it is made because of the inherent requirements of the particular position concerned; or

(c) it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or

(d) it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.

(3) The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate objective within the meaning of subsection (2)(a).

(4) Without limiting the generality of subsection (2), a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of freedom of religion if it is made by a religious body, or by an organisation that either provides, or controls or administers an entity that provides, educational, health, counselling, aged care or

¹⁰⁹ Patrick Parkinson and Nicholas Aroney, Submission to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, January 2012.

¹¹⁰ See for example, Christian Schools Australia, 'ALRC provides further support for CSA approach to discrimination law' (2016) at <https://csa.edu.au>; George Pell, 'Religious Freedom in an Age of Militant Secularism' (2013) 57 *Quadrant* 28 (October 2013).

¹¹¹ Australian Law Reform Commission, Report no 129, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (2016) at [5.111].

other such services, and either:

(a) it is reasonably necessary in order to comply with religious doctrines, tenets, beliefs or teachings adhered to by the religious body or organisation; or

(b) it is reasonably necessary to avoid injury to the religious sensitivities of adherents of that religion or creed; or

(c) in the case of decisions concerning employment, it is reasonable in order to maintain the religious character of the body or organisation, or to fulfil its religious purpose.

(5) Without limiting the generality of subsection (2), a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of ethnic minorities to enjoy their own culture, or to use their own language in community with the other members of their group, if it is made by an ethnic minority organisation or association intended to fulfil that purpose and has the effect of preferring a person who belongs to that ethnic minority over a person who does not belong to that ethnic minority.

The importance of this approach is that it provides a balancing of different human rights, including rights under Articles 18 and 27 of the ICCPR, within a comprehensive definition. The language used deliberately reflects that of the UN Human Rights Committee in paragraph 13 of the Human Rights Committee's General Comment 18 (Non-Discrimination), which states that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'. The way in which differentiation of treatment is legitimate is spelled out.

The approach taken is in some respects similar to s.153 of the *Fair Work Act 2009 (Cth)*. Like the Parkinson/Aroney definition this provision defines differentiation based upon a religious ground to be not discrimination at all. Section 153(2) provides:

Certain terms are not discriminatory

(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.

Although religious freedom is not defined here in terms of a competing human right, religious freedom is at least not defined by way of exemption.

If a new definition of discrimination along the lines of the Parkinson/Aroney definition were

adopted in the *Sex Discrimination Act 1984*, it would be possible to remove the religious exemptions from that Act. Consideration could also be given to the removal of the exemption contained in s.35 of the Commonwealth's *Age Discrimination Act*. The removal of exemptions would need to be subject to consultation with stakeholders on any unintended consequences that might result therefrom.

Such a revision to federal anti-discrimination laws may also provide a helpful model for the States and Territories in reviewing their own anti-discrimination laws.

The case against vague limitation clauses

In the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012* (Cth), there was a general limitation clause in section 23(3) as follows:

- (3) ...conduct of a person (the first person) is justifiable if: (a) the first person engaged in the conduct, in good faith, for the purpose of achieving a particular aim; and
 - (a) that aim is a legitimate aim; and
 - (b) the first person considered, and a reasonable person in the circumstances of the first person would have considered, that engaging in the conduct would achieve that aim; and
 - (c) the conduct is a proportionate means of achieving that aim.
- (4) In determining whether subsection (3) is satisfied in relation to conduct, the following matters must be taken into account:
 - (a) the objects of this Act;
 - (b) the nature and extent of the discriminatory effect of the conduct;
 - (c) whether the first person could instead have engaged in other conduct that would have had no, or a lesser, discriminatory effect;
 - (d) the cost and feasibility of engaging in other conduct as mentioned in paragraph (c).
- (5) Any other matter that it is reasonable to take into account may also be taken into account.

While this kind of clause might be appropriate if supported by specific provisions concerning religious freedom, there would be little or no support within the Christian community for such a vague general limitations clause otherwise. We do not think it is satisfactory to leave it up to the decision-maker (be it a Commissioner or a judge) to decide how to balance competing rights without the kind of guidance proposed in the full Parkinson/Aroney definition. While lawyers within the common law tradition often support the gradual evolution of principle through a “case by case approach”, organisations typically prefer clear guidance on their rights and obligations in advance of making decisions. This is particularly important for voluntary associations with limited funds to apply towards obtaining legal advice.

If the principle concerning how different rights are balanced can be stated in legislation, it

should be, for the balancing of rights is a political decision requiring political choices.

Religion as a protected attribute

The second area where religion may intersect with anti-discrimination law is in terms of religion as a protected attribute, making it unlawful to discriminate on the basis of religious belief.

For the most part, this is already the case across Australia, although the level of protection is limited in federal law. Section 351 of the *Fair Work Act 2009 (Cth)* provides that an employer may not take adverse action against an employee or prospective employee, on the basis, inter alia, of religion. Furthermore, an award must not contain a term that discriminates on the basis of religion, amongst other protected attributes.¹¹² Section 772(1)(f) of the *Fair Work Act* makes termination of an employee on the basis of religion unlawful. The President of the Australian Human Rights Commission also has the power to inquire into and conciliate certain complaints of religious discrimination.¹¹³

The law in the States and Territories is conveniently summarised by the Attorney-General's Department in its submission to the Parliamentary inquiry into religious freedom.¹¹⁴ Most states include religion as a protected attribute, but in New South Wales only ethno-religious origin is covered (as an aspect of race).¹¹⁵ In South Australia, discrimination is prohibited on the basis of "religious appearance or dress".¹¹⁶ In the ACT, the law covers "religious conviction".¹¹⁷

In itself, it does not really matter whether the Commonwealth Parliament enacts a law prohibiting discrimination on the basis of religious belief if all the states and territories have appropriate legislation. There is already a lot of duplication between the Commonwealth and the states and territories. However, given the patchy state of the law across the country, it would seem sensible to consider the possibility of federal legislation in this area.

There has not been a significant demand from churches for religion to be made a protected

¹¹² *Fair Work Act 2009 (Cth)*, s. 153(1).

¹¹³ *Australian Human Rights Commission Act 1986*, s. 3(1).

¹¹⁴ Attorney-General's Department Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Status of the Human Right to Freedom of Religion or Belief. Submission 193, attachment A (April 2017).

¹¹⁵ *Anti-Discrimination Act 1977 (NSW)*, s. 4.

¹¹⁶ *Equal Opportunity Act 1984 (SA)*, s. 85T(1)(f).

¹¹⁷ *Discrimination Act 1991 (ACT)* s.7.

attribute in the past. This is for two reasons. First, churches have been concerned to protect their freedom to select staff on religious grounds in Christian schools and organisations, for the reasons given in the earlier part of this chapter. They would not want to be subject to a discrimination complaint for not appointing an applicant of another faith. Furthermore, typically the inclusion of religion as a protected attribute includes the absence of religious belief as well as the presence of such a belief.¹¹⁸ Thus a poorly drafted anti-discrimination statute that makes religion a protected attribute may have adverse consequences for the freedom of faith-based organisations to select staff appropriate to their mission and purpose.

Secondly, there has not been a strong sense that protection from discrimination was necessary in the past for mainstream Christian believers, at least in recent decades where sectarian discrimination by Protestants against Catholics, and vice-versa, has all but disappeared.

If freedom to select for religious organisations is guaranteed, the first objection falls away. As for the second reason, the situation has changed quite rapidly in recent years. As noted in chapter I, there are now significant concerns about the level of hostility to people of faith in some sectors of the community, and the degree of discrimination which is already being experienced by people of faith. The following are illustrations:

- In Newcastle, a few months ago, a young man was sacked from his casual job at a coffee shop for no other reason than that his employer overheard conversations he had with customers who attended his church. The employer told him: “We don’t tolerate Christianity in our café”.
- Also in 2017, complaints were made about a university lecturer both to the university in which she taught and to her professional association. The complaints were that as a health professional, she was teaching about Christian sexual ethics. In so doing, it was alleged, she was in breach of her professional codes of conduct, even though she was speaking to Christian audiences. The University investigated and took no disciplinary action; but the professional association upheld the complaint and invited her to resign her honorary life membership or agree to comply with its code.
- In a suburb of northern Sydney, the Jewish community recently went through an 8 year long legal and political battle to see an eruv established around their synagogue. An eruv is an urban area enclosed by a wire boundary which symbolically extends the private domain of Jewish households into public areas, permitting activities within it that are normally forbidden in public on the Sabbath. Though no harm could be shown to fall on local residents, pamphlets were distributed claiming the area would become a ‘Jewish Ghetto’. At a local council meeting a representative of a local residents’

¹¹⁸ This may not be the case in the ACT, since ‘religious conviction’ seems to suggest only the presence of a belief, not the absence of such conviction.

group said they did not want more Jews in the area. Some said that Jews did not mix with others and did not contribute in the same way to the local community. An anonymous letter sent to residents warned the real purpose of the eruv was to “establish a modern version of the ghetto under Rabbinical control”. It said the “consequences of an eruv establishment is the division of the community and eventual expulsion of secular people”. In January 2018 a number of local cars in St Ives were spray painted with swastikas.

For these reasons, we support the inclusion of religion as a protected attribute within federal law (going beyond the scope of ss.351 and 772 of the *Fair Work Act 2009*), and within a broader context where freedom to select for religious organisations is established. Particular attention ought to be paid to the protection of casual employees and those quasi-employees who can be classified, for employment law purposes, as ‘independent contractors’.

This is not a new proposal. Nearly twenty years ago, the Human Rights and Equal Opportunity Commission, as it then was, recommended the enactment of a federal religious freedom Act, which inter alia, would include new anti-discrimination provisions.¹¹⁹ Recommendation 4.1 of its report was as follows:

The proposed Religious Freedom Act should make unlawful direct and indirect discrimination on the ground of religion and belief in all areas of public life, in accordance with ICCPR articles 2 and 18 and Religion Declaration article 4, subject to two exemptions.

1. A distinction, exclusion or preference in respect of a particular job based on the inherent requirements of the job should not be unlawful. Preference in employment for a person holding a particular religious or other belief will not amount to discrimination if established to be a genuine occupational qualification.

2. A distinction, exclusion or preference in connection with employment 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, being a distinction, exclusion or preference required by those doctrines, tenets, beliefs or teachings made in good faith and necessary to avoid injury to the religious susceptibilities of adherents of that particular religion or that creed should not be unlawful provided that it is not arbitrary and is consistently applied.

The freedom of faith-based schools and organisations to select staff who fit with the mission of the organisation is broader than the exemption specified in this recommendation.¹²⁰ Nonetheless, there is some continuity between our proposals and those of the Human Rights and Equal Opportunity Commission all those years ago.

¹¹⁹ Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief*, (1999).

¹²⁰ We argue that protection of this freedom is fundamental both to freedom of religion and association. Furthermore, for the reasons given, we propose that the language of exemptions be avoided as far as possible.

Reasonable accommodation for religious belief in the workplace

A further issue for consideration is whether state, territory and federal anti-discrimination statutes should impose upon employers a positive duty to offer reasonable accommodation for the manifestation of religious belief in the workplace. This was previously considered and recommended by the Human Rights and Equal Opportunity Commission report on freedom of religion and belief in 1999.¹²¹

This could be seen as a separate issue from discrimination on the basis of religion, or it could be seen as just one aspect of the law prohibiting such discrimination, because refusal to accommodate a person's reasonable requests to manifest his or her religious beliefs in the workplace context could be seen as a form of indirect discrimination.

The UN's Special Rapporteur on freedom of religion and belief, Heiner Bielefeldt, argued in 2014 for laws to impose an obligation on employers to make reasonable accommodations, drawing upon the example of the law concerning people with disabilities. He noted that reasonable accommodations are already worked out successfully in many workplaces.¹²²

In many institutions, a more or less appropriate infrastructure already exists or is in the process of development. Accommodating religious or belief-related diversity in the workplace has become a standard practice in many public institutions and private companies. One example is respect for specific dietary needs originating from religious prescripts or other conscience-based reasons. Workplace canteens frequently provide halal or kosher food and offer vegetarian meals, and in many cases this is appreciated even by employees who have not requested such options for religious reasons. Public and private employers have successfully negotiated pragmatic ways of accommodating diverse religious holidays, for instance, by permitting employees to use parts of their annual vacation for this purpose. Trade unions and staff representatives often participate in such negotiations. There are also examples of employees performing their prayer rituals in the workplace without any negative implications on professional operations. Moreover, the wearing of religious garments is considered part of normal life in many public institutions or private companies and is largely respected by colleagues and customers. In short: provided there is goodwill on all sides, practical solutions can be found in most cases.

The Special Rapporteur goes on to deal with objections to an obligation to provide for reasonable accommodation. He notes that the definition in the Convention on the Rights of Persons with Disabilities makes it clear that obligations to accommodate should not amount to a "disproportionate or undue burden" for the respective institution. Thus, far-reaching requests for accommodation can legitimately be rejected if they are likely to cause disproportionate

¹²¹ Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief*, (1999), p.96.

¹²² Interim Report of the Special Rapporteur on Freedom of Religion or Belief, 5 August 2014 at [52].

economic or other costs.¹²³

What might be the applications of an obligation of reasonable accommodation in the workplace in the Australian context? Manifesting a religion for some, involves forms of dress or symbols that are significant to an adherent for religious reasons. That may not be easy to accommodate in relation to school uniforms,¹²⁴ workplace uniforms or business attire. There are limitations on freedom to dress as one may wish that are necessary or appropriate in a workplace environment whether choice of dress is a matter of religion, culture or mere personal preference. An employee may be expected to wear a business suit at work even if he or she would be more comfortable with casual clothes. Thus, reasonable accommodation for religious dress does not mean that an employee or prospective employee could have grounds for a discrimination complaint if she were not permitted to wear a burqa in the workplace. However, within reasonable limits, it will often require only minor adjustment to a dress code to allow a Muslim woman to wear a hijab, and it is well understood that Sikh men have a religious obligation to wear turbans. These religious and cultural traditions concerning dress have generally not created problems for employers.

Manifesting a religion may also involve observing certain days as holy, when no work should be done. Article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) specifically refers to the right to “observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one’s religion or belief.” For the observant Jew or the Seventh-day Adventist, Friday at sundown through to Saturday is special. Universities that schedule examinations on Saturday are used to making special arrangements for students who have a religious objection to sitting on that day. The Human Rights and Equal Opportunity Commission report on freedom of religion and belief in 1999 recorded examples of discrimination on this ground, including in the Defence Forces. One long-serving soldier, who became a Seventh-Day Adventist, recorded the discrimination he experienced:¹²⁵

I explained my religious convictions and stressed my inability to work on the Sabbath and therefore, could not work shiftwork. He simply laughed at me and told me it was my problem and ordered me to commence shiftwork on 18 January 1995. Daily, from this time on, other senior colleagues ... threatened and informed me that I would be arrested, imprisoned and charged if I refused to work on Sabbaths. I felt harassed, discriminated against as though my religious liberty rights were violated.

All his proposals to swap shifts, work on Sundays or make other similar arrangements were

¹²³ Ibid at [59].

¹²⁴ See e.g. *Arora v Melton Christian College* [2017] VCAT 1507.

¹²⁵ Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief*, (1999), p.95.

rejected. He noted, however, that the officers manage to make reasonable accommodations for his colleagues' sporting commitments. Much more recently, a medical specialist association in Victoria categorically refused to make concessions to a student who had religious objections to a Saturday examination. The case was eventually resolved only after litigation had been commenced under Victorian anti-discrimination law.

Cases of this kind demonstrate the need for legislative support for reasonable accommodation of religious requirements in employment and education, even if, for most employers and educational institutions, this is a matter of common sense and basic respect for diversity.

Rostering to avoid Saturday or Sunday commitments for people with Sabbatarian beliefs may well be a more difficult issue for some employers. Much depends upon the nature of the industry or other workplace environment, and whether there is a difficulty in getting other staff to work on that day.

Reasonable accommodation is one way in which employees can deal with conscientious objections in the workplace context.¹²⁶ This includes issues for employees in the wedding industry who have a conscientious objection to being involved in the celebration of same-sex marriages. By and large, the well-known conflicts that have occurred in other countries between religious objections to same-sex marriage and employer requirements could have been dealt with much more sensibly and sensitively by allowing back-office accommodations for staff, without compromise to public services.

The case of *Ladele v London Borough of Islington*,¹²⁷ which ended up before the European Court of Human Rights,¹²⁸ was one dispute that need not have become such a bitter conflict.¹²⁹ Ms Lillian Ladele, a committed Christian of black African ethnicity, was dismissed after more than 15 years of service with the London Borough of Islington, as a result of refusing to conduct civil partnership ceremonies for same-sex couples, in breach of the Council's 'Dignity for All' policy. She had been employed by the London Borough of Islington since 1992 and became a Registrar of Births, Deaths and Marriages in 2002. Registrars, in Britain, conduct civil marriage ceremonies for those who do not want a wedding celebrated in accordance with a religious

¹²⁶ The question of accommodation of conscientious objection in the workplace has been a matter of some academic consideration also. For a range of national perspectives, see the special issue in vol 31 of the *Comparative Labor Law & Policy Journal* (2010).

¹²⁷ [2010] IRLR 211, [2010] 1 WLR 955 (CA).

¹²⁸ This was heard with other cases in *Eweida v United Kingdom* [2013] ECHR 37. The doctrine of margin of appreciation was applied and the case dismissed.

¹²⁹ This case is discussed more fully in Patrick Parkinson, 'Accommodating Religious Belief in a Secular Age: The Issue of Conscientious Objection in the Workplace' (2011) 34 *Univ. of NSW Law Journal* 281.

tradition.¹³⁰

The *Civil Partnerships Act 2004* provided for same-sex couples a status equivalent to marriage. The legislation provided that registrars would conduct ceremonies to mark the registration of civil partnerships but did not automatically authorise all existing registrars to perform such functions. Instead, it was necessary for local authorities specifically to designate a registrar as a civil partnership registrar. Ms Ladele made it clear that because she saw a civil partnership as akin to marriage, she would have difficulty performing such ceremonies. There was no evidence that she discriminated against gays and lesbians in any other respect. She had no problem providing other services for LGBT clients. There were two other registrars who also objected to carrying out these duties. Despite knowing the genuinely held religious objections of these individuals, Islington decided to designate all the existing registrars as registrars of civil partnerships, and to require them to perform these functions as part of their normal duties.

Ms Ladele was warned that continuing to refuse to perform functions associated with civil partnerships could be treated as gross misconduct. She asked the council to try to accommodate her concerns so that she could combine her work with her Christian commitments. She also asked for sympathetic treatment as a member of a minority. This was refused. Eventually, Ms Ladele was held to have been guilty of ‘gross misconduct’ in a disciplinary hearing.

It was a problem that could easily have been dealt with by not designating people with religious objections as able to conduct civil partnership ceremonies, or by back-office rostering arrangements which meant that they would not be required to do so. There was no shortage of registrars in the office who were more than willing to conduct such ceremonies - indeed two were themselves gay. Similar issues could arise in Australia where state registries are likely to have staff who began their work in solemnising weddings long before same-sex marriage was on the horizon. The *Marriage Act*, as amended in December 2017, gives them no right of conscientious objection.

Respecting freedom of religion means accommodating faith-based observances and conscientious objections, as far as possible but within reasonable limits. Usually, as the Special Rapporteur notes, reasonable accommodations can be found with little effort. Employers have managed to do this successfully not only for people with disabilities, but also in helping working parents balance work and family responsibilities. For example, Part 4B of the *Anti-Discrimination Act 1977 (NSW)* prohibits discrimination on the basis of a person’s responsibilities as a carer. However, s.49V provides that it is not discriminatory to refuse to offer working arrangements that are not required by persons without responsibilities as a carer,

¹³⁰ The facts of this case are taken from the judgment of the Employment Appeals Tribunal: *London Borough of Islington v Ladele* [2009] IRLR 154.

and the making of which would impose an unjustifiable hardship on the employer. Similar language could be adopted in terms of discrimination, or refusal of requests for accommodation, on the basis of religion.

Protection from discrimination for those with traditional beliefs about marriage

Although the marriage debate has now been resolved at the political level, ramifications will continue as circumstances arise in which people's traditional belief and values about marriage come into conflict with the strongly held views of others that to hold such beliefs is a form of bigotry or even amounts to homophobia.

For the reasons given in the introduction to this chapter, protection from discrimination for those with traditional beliefs about marriage cannot merely be subsumed within a protected attribute of religious belief. Objections to same-sex marriage may be cultural for those from many parts of the world, including Asia, the Middle East, the Indian subcontinent and Africa (other than South Africa). These cultural values may or may not have an identifiable religious base.

It could also readily be argued that if an employer discriminates against an individual because of her beliefs about marriage, the discrimination is not because of her religion but because of a set of values which is inconsistent with the employer's understanding of "diversity", irrespective of the religious beliefs that the woman may also hold. Diversity policies have been the justification for taking adverse action against employees who hold traditional views about marriage on the basis that the expression of such beliefs constitutes gross misconduct. It is doubtful that discrimination because of beliefs about marriage would be unlawful by reason of section 351 of the *Fair Work Act* 2009. That section provides:

- (1) 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 preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Discrimination against someone because of their view about marriage does not easily fall within any of these categories. Perhaps, during the postal survey, it might have been possible to characterise the adverse action as being on the basis of political opinion, but this is difficult to argue, now that the political debate is over.

Examples of flagrant discrimination abound. For example, in Canberra, a teenager lost her casual job for no other reason than that she posted on her Facebook page that it was ok to vote

no in the postal survey.¹³¹ She was an ‘independent contractor’ – a classification for the convenience of employers which carries few protections under traditional unfair dismissal and anti-discrimination laws.

Another example is the case of Adrian Smith from Manchester in England. Mr Smith was a middle-level manager in a housing association. Back in 2011, he placed on his Facebook page a comment that he did not think that churches should be compelled to marry same-sex couples, although he did not object to same-sex marriage. This was before England allowed same-sex marriage. His was hardly a radical view. It is accepted on all sides in Australia. Yet he was accused by his employer, the housing association, of “gross misconduct” and threatened with dismissal. Because of his long service, he was only demoted; but he lost 40% of his salary. The case went to the English High Court which upheld his claim for damages.¹³² At no stage did his employer ever back down from its position. It is one thing for a non-religious company or not-for-profit organisation to hold an opinion on a social issue unconnected to its business or sphere of operation. It is another thing to require staff to adhere to those beliefs, or at least to be required, in their private lives, to be silent about their beliefs.

Beyond specific examples of employees suffering adverse action for no other reason than their expression of a point of view, there have also been numerous instances of campaigns to drive people out of positions, or to force them to resign from organisations, associated with traditional beliefs about marriage. For example, calls were made for Macquarie University to require Dr Stephen Chavura, an outstanding early career academic, to resign from another organisation that was perceived to be opposed to same-sex marriage.¹³³ Mark Allaby, who has held very senior management positions in major companies, has come under the same pressures.¹³⁴ As a consequence of these attacks, two Christian organisations were given permission by the Australian Charities and Not-for-profits Commission to keep the names of their board members secret.¹³⁵

Margaret Court is amongst the prominent Australians who have been publicly vilified for their beliefs about marriage, with campaigns to rename the Margaret Court Arena in Melbourne. Coopers Brewery came under attack just for associating with the Bible Society and supporting

¹³¹ *The Australian*, September 20th 2017 p.1.

¹³² *Smith v Trafford Housing Trust* [2012] EWHC 3221.

¹³³ Ean Higgins, ‘Gay rights activist slams Christian academic,’ *The Australian*, March 29, 2017.

¹³⁴ Rebecca Urban, ‘Gay rights activists target IBM executive’ *The Australian*, March 21, 2017.

¹³⁵ John Sandeman, ‘Gay activist targets high-profile Christians’ *Eternity*, March 31, 2017.

an attempt to have a rational and friendly debate on the issue.¹³⁶

It may be that some of these attacks will die down, now that the debate about same-sex marriage has been resolved in favour of amendment to the *Marriage Act*. People are not debating marriage any more. What is important is that these campaigns were not unambiguously denounced by the political leaders of the day as violations of the fundamental right to freedom of belief and expression, and that some corporations gave in to such campaigns.

The law can have an educative effect in preventing people being shouted down or silenced by the threat of losing their jobs, just because of their beliefs about marriage. It ought to be unlawful to discriminate against someone because of his or her beliefs about marriage just as it is currently unlawful to discriminate against a person on a variety of other grounds, including sexual orientation. If the issue is equality, then it must be equality for all, and that means protecting the rights of people with whom we may disagree on moral and political questions.

Protecting organisations from detriment on the basis of religion or beliefs about marriage

Typically, anti-discrimination laws are concerned with individual rights and provide remedies for complaints of discrimination by individuals. However, faith-based organisations may also suffer detriments because of their beliefs and values. Examples in other countries have included the closure of adoption agencies which have not supported adoption by same-sex couples.¹³⁷

The potential for discrimination against faith-based charities was one of the major issues in the same-sex marriage debate. Faith-based organisations associated with churches and other religious groups that oppose same-sex marriage may well be concerned that there will be discrimination against them in terms of funding for marriage education and relationship counselling,¹³⁸ even if they offer marriage education and counselling programs which are inclusive of same-sex relationships.

People and organisations have been targeted elsewhere simply because of their positions on

¹³⁶ Renata Costello, 'South Australia's Coopers Brewery's special release beer for Bible Society of Australia incites social media rage', *Adelaide Now*, March 13, 2017.

¹³⁷ In the English context, see *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales* 2009 UKFTT 376 (GRC) (01 June 2009) available at <http://www.charity.tribunals.gov.uk/decisions.htm>. A judge ordered the matter to be reconsidered, but the tribunal reached the same result. See 'Catholic adoption agency loses gay adoption fight', *The Guardian*, April 26, 2011. In NSW, religious exemptions in the anti-discrimination legislation provided a defence when a similar issue arose: *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293.

¹³⁸ See *Marriage Act 1961 (Cth)*, s.9B.

the same-sex marriage question. The most serious problems have occurred in Canada. Trinity Western University, a private Christian university in British Columbia, wants to set up a law school.¹³⁹ Students who wish to enrol in the University are required to make a voluntary commitment, while students, to “abstain from sexual intimacy that violates the sacredness of marriage between a man and a woman.” (This sits alongside a number of other commitments to Christian living in what is called the Community Covenant). Both heterosexual and same-sex attracted students thereby make pledges of celibacy prior to marriage, but the university clearly would not support students marrying a person of the same sex. Yet attendance at this university is a choice freely made by students; and the requirement reflects the sexual morality of the Western world only a couple of generations ago (albeit often honoured in the breach).

The Law Societies of British Columbia and Ontario, and their equivalent in Nova Scotia, decided that because of that covenant, the law school should not be accredited. The university was discriminating against LGBT students by requiring them to sign that commitment. The Canadian courts have divided on the Trinity Western issue (notwithstanding that Canada has a Charter of Rights and Freedoms which is meant to protect freedom of religion). The Supreme Court of Canada has heard the case and reserved its decision.

Given this experience in a jurisdiction close to our own, legislation should prohibit discrimination against organisations in terms of issues such as access to government funding or accreditation, based upon their religious beliefs or because the organisation is associated with a religion and:

- i) acts or refuses or omits to do any act in accordance with its doctrines, tenets, beliefs or teachings about marriage or
- ii) expresses an opinion that accords with its doctrines, tenets, beliefs or teachings about marriage.

Gender identity – the new frontier

The same-sex marriage debate is now over in Australia, but the issues concerning freedom of speech and freedom for faith-based organisations to teach and practice what they believe, are not confined to marriage. The new frontier is gender identity. For the most part, and as discussed in Chapter III, the care and support of children, young people and adults with gender identity issues is a pastoral matter for churches and other faith-based organisations. Yet there are legitimate social, medical and scientific questions that should not be swept under the carpet just because gender identity is a new and popular ‘progressive’ cause.

¹³⁹ The story is told in some detail in Barry Bussey, ‘Rights Inflation: Attempts to Redefine Marriage and the Freedom of Religion: The Case of Trinity Western University School of Law’ (2017) 29 *Regent University Law Review* 197.

In Canada, concern has been expressed about legislation passed in 2017 which makes discrimination on the basis of gender identity unlawful.¹⁴⁰ There ought to be no objection in principle to such legislation if it is carefully drafted to protect those who have gone through, or are going through, a gender transition. Such legislation exists in Australia. However, difficulties may arise from overreach by anti-discrimination bodies which place an interpretation on the legislation that requires other people to adopt a particular form of language requested by a person with gender identity issues, or to accept all subjective claims concerning gender identity, however strange.

These issues will no doubt be played out in the next few years across the western world. As the widespread concern about the Safe Schools program demonstrates, it is unlikely that only people of faith will be concerned about societal changes imposed from above which upend hitherto universal understandings about sex and gender. In considering the balancing of different rights in this area, care must be taken to avoid new forms of coercion that have the effect of chilling or denying freedom of speech on such matters or which seek to require organisations to adopt new policies which conflict with the organisation's beliefs and ethos.

An illustration of the problem is the recent case of a faith-based school which was the respondent to an anti-discrimination complaint. Some years after he left the school which he had attended for only a few months, the student brought the complaint because he had asked to wear a girl's uniform. The request was denied. In mediation, the school was presented with a model policy that it was required to adopt to resolve the matter. The former student also made other demands. The school took the view that it was being coerced to adopt the proposed policy in a way which surrendered its right to set the policies and procedures of the school in a manner informed by its faith tradition. Whatever the merits of the proposed policy, there is a need for more discussion and consideration of how to deal with the pastoral issues (affecting not only the individual child but the whole school community) without threat of litigation to enforce a particular approach which may be ill-considered.

¹⁴⁰ This article is illustrative of the concerns: Bruce Parry, 'Meet the new 'human rights' — where you are forced by law to use 'reasonable' pronouns', *The National Post*, June 19, 2017.

Chapter V

Protection for Freedoms in the International Covenant of Civil and Political Rights

In this Chapter, we propose a religious freedom Act, as previously recommended by the Human Rights and Equal Opportunities Commission. However, and as we will explain, it would be preferable for the Commonwealth Parliament to consider legislation protecting various freedoms rather than only freedom of religion. At the very least, the legislation ought to refer to freedom of speech, conscience, assembly and association to the extent that issues arise in the context of freedom of religion and belief.

We do not suggest a mini-human rights Act nor a Charter of Rights by the back door. Rather, the role of the proposed legislation is to provide a means to address encroachments upon freedoms which would place Australia in breach of its international human rights obligations. The proposed federal law could helpfully provide a way of balancing rights and freedoms without invading the legislative domain of the States and Territories. That is, the proposal we make is entirely consistent with the recognition of the autonomy of state and territory parliaments within a federal system.

The proposed legislation will be subject to clear limitations. Issues such as public safety (including the prevention of terrorism), the protection of children and other reasons for limiting various freedoms need to be considered.

First, however, it is necessary to consider briefly whether the Commonwealth should seek to protect religious freedom within a broader context of a Charter of Rights of some kind. Many lawyers see such a Charter as an indispensable feature of a modern democracy.

A human rights charter?

There are undoubtedly advantages of having such a Charter even if it is merely advisory, as in Victoria and the ACT, since sometimes rights need to be balanced with other rights and compromises found. Having a Charter allows the courts to consider the different rights involved and to examine issues of proportionality.

However, Australia has only recently had this debate. The decision was taken by a federal Labor government not to proceed with the implementation of the recommendations of the

Brennan Committee¹⁴¹ for such a federal Human Rights Act as recently as 2010.¹⁴² The idea of a Charter of Rights also has little support on the conservative side of politics.

At that time, many churches expressed concerns about how a Charter of Rights, even of an advisory kind, transfers a lot of responsibility for balancing rights from parliaments to courts. That in turn may involve a much narrower consideration of the relevant issues than in a well-constructed democratic process. It also gives to lawyers a disproportionate voice in determining public policy. There were other concerns as well.¹⁴³ Our consultations indicate that views of churches on the efficacy of a Charter of Rights as a front-line strategy to protect religious freedom, as well as to balance different rights, have not changed significantly.

The experience in Canada with the Trinity Western University case, discussed at the end of Chapter IV, has done nothing to increase enthusiasm for a Charter of Rights. Members of the representative bodies for lawyers in British Columbia, Nova Scotia and Ontario, despite many years of experience with the Canadian Charter, evidently failed to give the religious freedom considerations any significant weight. The Deans of Canadian law schools were also very strong in their opposition to the new law school.¹⁴⁴ This was a rather clear case where students who have a particular faith, and adhere to a particular code of sexual ethics, were being denied the opportunity to enrol in a law school of their choice which met accreditation standards in all other respects. The only objection to the law school's accreditation was that other lawyers disagreed with the University's code of sexual ethics and beliefs about marriage. Given that provincial courts have split on the application of the Canadian Charter of Rights and Freedoms to these circumstances, it seems clear that a Charter drafted in a similar way to the Canadian one is not a panacea for religious freedom concerns. The experience in Europe with the way in which religious freedom rights have been balanced with equality rights in the interpretation of the European Convention on Human Rights has also not given cause for optimism about the benefits of a Charter as a way of protecting religious freedom.¹⁴⁵

¹⁴¹ National Human Rights Consultation Committee, *Report on the National Human Rights Consultation* (2009).

¹⁴² It did enact the establishment of a joint parliamentary committee by the *Human Rights (Parliamentary Scrutiny) Act 2011*.

¹⁴³ See generally, Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15 *Australian Journal of Human Rights* 83.

¹⁴⁴ Iain Benson, 'Law Deans, Legal Coercion and the Freedoms of Religion and Association in Canada' (2013) 71(5) *The Advocate* 671.

¹⁴⁵ See generally, Carolyn Evans, *Freedom of Religion Under the European Convention on Human Rights* (Oxford University Press, 2001); Nicolas Bratza, 'The 'Precious Asset': Freedom of Religion Under the European Convention on Human Rights' (2012) 14 *Ecclesiastical Law Journal* 256; Mark Hill, 'Religious Symbolism and Conscientious Objection in the Workplace: An Evaluation of Strasbourg's Judgment in *Eweida and others v United Kingdom*' (2012) 15 *Ecclesiastical Law Journal* 191.

Since the Brennan Committee reported, the High Court has considered the constitutionality of Charters of Rights in *Momcilovic v The Queen*.¹⁴⁶ While they are valid at state level, it appears from the judgments of French CJ, and Gummow, Hayne, Heydon and Bell JJ, that such a provision could not be introduced at the federal level, as it would represent a grant to the court of a non-judicial power contrary to Chapter III of the Constitution.¹⁴⁷ While these comments were obiter, they represent carefully considered dicta.

It is, of course, entirely a matter for the Panel what it recommends to the federal Government, or indeed to the governments of Australia collectively. The Panel has considerable expertise on the merits and feasibility of protecting religious freedom through a Charter of Rights approach. If every State and Territory were to enact such a Charter in similar terms, then there would be significant coverage for religious freedom at the level of state and territory laws. However, there would still be an issue about federal law unless the constitutional problems could somehow be overcome. It should be recognised that, in the light of the 1988 experience, it is extremely unlikely that a constitutionally entrenched Bill of Rights would be supported by the electorate in a referendum.

While leaving this matter to the Panel, and making no formal submission in this regard, we make four observations. First, given the strongly held views as a matter of principle on this issue, it cannot be expected that in response to the recommendations of this Review, all the States and Territories will enact charters of rights and freedoms in the foreseeable future. Secondly, were this to be the main recommendation of the Review Panel, there is a very real danger that the recommendation will not be well received by the federal government or by the governments of certain States. Nailing its colours to the mast of a human rights charter may therefore result in its major recommendation being rejected. Thirdly, the existing charters in the ACT and Victoria are not compliant with Article 18.3 of the ICCPR. The federal government would therefore not have fulfilled its responsibilities as a state party to the Covenant by supporting charters on a similar model to those in the ACT and Victoria, even if it were constitutionally possible for such a Charter to be enacted at the federal level. Fourthly, the enactment of a Charter approach would have wide-ranging ramifications for Australian law, going far beyond the protection of religious freedom and the associated freedoms. The issues that we raise in this submission can be addressed by specific legislation without needing to go with the potential overreach of having Charters of Rights across the country.

¹⁴⁶ (2011) 245 CLR 1.

¹⁴⁷ Will Bateman and James Stellios, 'Chapter III of The Constitution, Federal Jurisdiction and Dialogue Charters Of Human Rights' (2012) 36 *Melbourne University Law Review* 1. See also Helen Irving, 'The Dilemmas in Dialogue: A Constitutional Analysis of the NHRC's Proposed Human Rights Act' (2010) 33 *University of New South Wales Law Journal* 60.

We propose another way of achieving a similar result, at least as far as state and territory law is concerned. This may leave some gap in terms of the protection of freedoms in federal law, but s.116 of the Constitution already provides some protection in relation to Commonwealth law, and the Australian Law Reform Commission, in the Freedoms Inquiry, found that in practice there were few, if any, encroachments on religious freedom by federal laws at the present time.¹⁴⁸ The Parliamentary Joint Committee on Human Rights does provide another way in which attention can be given to the human rights' implications of Bills before the Commonwealth Parliament. Furthermore, there could be an interpretative provision requiring the courts to construe federal law in conformity with the relevant freedoms to the extent it is possible to do so.

A religious freedom Act

In 1999, the Human Rights and Equal Opportunity Commission recommended that the Commonwealth Parliament should enact a religious freedom Act which, among other things, recognises and gives effect to the right to freedom of religion and belief.¹⁴⁹

Its recommendations went on to spell out the content of that Act in some detail. It should “affirm the right of all religions and organised beliefs as defined to exist and to organise and determine their own affairs within the law and according to their tenets.”¹⁵⁰ It should “cover the full range of rights and freedoms recognised in ICCPR article 18 and Religion Declaration articles 1, 5 and 6”.¹⁵¹ In accordance with Article 18.3 of the ICCPR it should permit only those limitations on the right to manifest a religion or belief which are prescribed by law and necessary to protect public safety, health or morals or the fundamental rights and freedoms of others.¹⁵² Other recommendations concerned how religion and belief should be defined. The Commission considered that the definition “should not apply to all beliefs but only to those that clearly involve issues of personal conviction, conscience or faith”.¹⁵³ The Commission also recommended that the statutory obligations should apply to individuals, corporations, public and private bodies and all other legal persons who may be subject to Commonwealth

¹⁴⁸ Australian Law Reform Commission, Report no 129, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (2016).

¹⁴⁹ Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief*, (1999), Recommendation 2.1, p.24.

¹⁵⁰ Recommendation 2.2.

¹⁵¹ Recommendation 2.3.

¹⁵² Recommendation 2.4.

¹⁵³ Recommendation 2.5.

legislation.¹⁵⁴

The Commission went on to make various recommendations concerning the prohibition of discrimination against people on the basis of religion and concerning vilification of those who hold religious beliefs. However, beyond such specific recommendations, it did not spell out what, if any, would be the effect of having general clauses in legislation that, in effect, enact Article 18 (including the limitations in Article 18.3) in broad and general terms. General statements to the effect that the Commonwealth Parliament affirms “the right of all religions and organised beliefs ... to exist and to organise and determine their own affairs within the law and according to their tenets” subject to prescribed limitations, are declaratory only. They are mere statements of policy, not provisions conferring rights or providing defences.

The nature of an ordinary enactment in our Parliamentary system is that it can be amended or repealed by a later enactment. Indeed, where there is a clear inconsistency between an earlier enactment and a later one, the later one prevails to the extent of the inconsistency. It follows that a statutory provision which essentially enacts the general provisions of Article 18 of the ICCPR may be impliedly repealed, at least to the extent of any inconsistency, by the very next Act that receives the Royal Assent.

The impact of the federal law on inconsistent State and Territory laws

However, it is possible for a federal religious freedom Act, or more broadly, any constitutionally valid federal legislation that protects freedoms, to have an impact on the laws of the States and Territories. This is a consequence of section 109 of the Constitution that provides:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

It follows that, without encroaching upon the legitimate legislative competence of any State or Territory, it would be possible for a federal law protecting religious freedom, or freedoms more generally, to place certain constraints upon the scope of and application of State and Territory laws, but only to the extent that their application in any given situation would be in breach of Australia’s international human rights obligations. That is, a federal law which enacts freedoms could place boundaries around the application of State and Territory laws to the extent that they impermissibly encroach upon those freedoms, resulting in an inconsistency. It would be up to a court, interpreting and applying the state law, to determine whether its application so interfered with fundamental freedoms in any given situation that to the extent of the inconsistency with federal law it should be regarded as invalid, or alternatively, read down to

¹⁵⁴ Recommendation 2.6.

avoid inconsistency.

In this way, federal legislation to protect freedoms could provide a balancing effect to state and territory laws, without improperly interfering with the legislative competence of the States and Territories or overriding State or Territory laws. That is, a state law might be entirely valid in nine out of ten of its applications, but in the tenth, be held to be so inconsistent with the fundamental freedom protected under international law, that to the extent of that inconsistency the state law cannot stand or must be read down.

An illustration of how this might work is the Archbishop Porteous case, discussed in Chapter III. Section 17 of the *Anti-Discrimination Act 1998 (Tas.)* makes it unlawful for a person to “engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person” on the basis of various protected attributes, which include race, age, sexual orientation, lawful sexual activity, gender, gender identity, intersex, marital status, relationship status, pregnancy, breastfeeding, parental status or family responsibilities. This is subject to the qualification that the conduct (which includes speech) must have occurred 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 provision, in certain of its applications, is likely to be inconsistent with Article 19 of the ICCPR. Article 19.2 and 19.3 provide:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

To the extent that it affects speech or conduct of a religious character, the Tasmanian provision may be inconsistent with Article 18 as well.

Equally, section 17(1) of the Tasmanian *Anti-discrimination Act*, in its application to certain forms of speech or conduct, could be consistent with these Articles, and with Article 20.2 which prohibits “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”. It all depends on the circumstances. For example, speech or conduct which intimidates other people and causes them to be afraid for their safety, is likely to constitute threatening behaviour that goes beyond protected freedom of speech and may

indeed be regarded as a form of violence.¹⁵⁵

If there were a federal religious freedom law, or one which protected a wider range of freedoms, then Archbishop Porteous would have been able to rely on this as a defence in the event that the complaint against the Catholic Bishops Conference booklet on marriage went to court. The complainant would argue, no doubt, that she was offended by passages of the booklet. The response would be that freedom of speech is a fundamental human right protected in international law subject to limitations and that there is no right not to be offended that can legitimately place constraints upon another person's freedom of speech. The permissible limitations are expressed, *inter alia*, in Article 19.3 and Article 20.2. It would then be up to the court to determine whether section 17(1) of the Tasmanian *Anti-discrimination Act* should be read down in such a way as to be consistent with federal law and with Australia's international human rights obligations, or rendered invalid, to the extent of the inconsistency. In many decisions of this kind, principles of balancing and proportionality would thereby be engaged, and be able to be considered by the court.

The effect of a federal law protecting freedoms would not be to override the will of the Tasmanian Parliament, nor in the great majority of cases to render a State or Territory Act wholly invalid. Rather it would place limitations on the scope of application of the State or Territory law so as not to violate fundamental freedoms nor to place Australia in breach of its international human rights obligations.

An Australian precedent

This has been done before by the Commonwealth Parliament. Coincidentally, the example also involves Tasmania, but many years ago. Prior to May 1977, Tasmanian law made it unlawful to engage in acts of homosexual intercourse.¹⁵⁶ Nicholas Toonen took a complaint, known as a "communication", to the UN Human Rights Committee under the First Optional Protocol to the ICCPR. The Human Rights Committee found unanimously that the legislation breached Mr Toonen's right of privacy under Article 17 of the ICCPR. It was a conclusion that was supported by the Commonwealth government of the day.¹⁵⁷

The Tasmanian government resisted repeal of the relevant provisions of the Criminal Code that criminalised homosexual conduct. Respecting the Toonen decision, the Commonwealth Parliament addressed the issue by enacting a law with which necessarily the provisions of the

¹⁵⁵ *Family Law Act 1975 (Cth)* s.4AB.

¹⁵⁶ *Tasmanian Criminal Code Act 1924*, ss.122 and 123, as they then stood.

¹⁵⁷ This account is taken from Alexandra Purvis and Joseph Castellino, 'A History of Homosexual Law Reform in Tasmania' (1997) 16 *University of Tasmania Law Review* 12.

Tasmanian Criminal Code would be inconsistent. The *Human Rights (Sexual Conduct) Act 1994 (Cth)*, s.4, provided as follows:

(1) Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.

(2) For the purposes of this section, an adult is a person who is 18 years old or more.

Litigation occurred in the High Court concerning the question of inconsistency, given some uncertainty about what may constitute an “arbitrary interference with privacy”. Tasmania initially applied to the High Court to dismiss the case, arguing that it was not a justiciable matter because the applicants had not been charged with a criminal offence. The High Court rejected this argument.¹⁵⁸ Tasmania’s defence to the case was eventually withdrawn. Amending legislation passed through the Tasmanian Parliament to decriminalise homosexual conduct.

This provides a useful model for how the Commonwealth can, reliant upon the external affairs power, give effect to its international human rights obligations by enacting a law to protect a freedom with which a state law is inconsistent. The religious freedom Act could provide, for example, that no law of the Commonwealth, a State or a Territory, or action by a government body or official, should interfere with freedom of religion or conscience, and subject to certain important limitations that will be discussed below. Such an enactment, so far as it applies to the Commonwealth, would of course be entirely consistent with s.116 of the Constitution.

The religious freedom Act and religious laws

The proposed religious freedom law would not give a right to recognition of sharia law or any other such religious code. Currently people have the freedom to organise their lives in accordance with religious codes of conduct to a considerable extent, without contravening the law of the land. So for example, a Muslim couple may get married in accordance with the cultural and religious norms of the community while also having their marriage recognised in civil law. Similarly, they may, if the marriage breaks down, divorce in accordance with their cultural and religious norms, as well as through the civil law. Religious codes and the civil law need not be in opposition to each other and frequently, even usually, are not.¹⁵⁹

Because the proposed religious freedom Act is concerned with protecting freedoms from

¹⁵⁸ *Croome v Tasmania* (1997) 191 CLR 119.

¹⁵⁹ See generally, Ghena Krayem, *Islamic Family Law in Australia: To Recognise or Not to Recognise* (Melbourne University Press, 2014).

encroachment, rather than conferring rights, any concerns that people may have about religious codes becoming part of the law the land are misplaced.

Can freedom of religion be dealt with on its own?

Although the terms of reference of this Review are limited to freedom of religion, it is not possible to protect religious freedom sufficiently without at least addressing also the freedoms of speech, assembly, association and conscience which are intimately related to freedom of religion. Article 27 of the ICCPR is also relevant.¹⁶⁰ These are interrelated rights. As Michael Sexton SC observed, some of the issues raised as being about freedom of religion in the marriage debate are really about freedom of speech.¹⁶¹

A number of the most significant issues concerning religious freedom are also about freedom of association. Article 22 relevantly provides:

Everyone shall have the right to freedom of association with others...No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

As has been pointed out, churches and other faith communities are voluntary associations. No one is forced to join a church, nor to remain as an active member of one. Religious organisations and schools are also forms of voluntary association. The freedom to select staff who fit with the mission of the organisation is as much an aspect of freedom of association as freedom of religion.

The right of freedom of association also has application to non-religious organisations such as those concerned with the protection of the environment, political parties, or ethnic and cultural groups. If discrimination law were to prevent an environmental organisation from rejecting an applicant for a job who does not believe in climate change, or a Labor party organisation from rejecting an applicant who is a member of a right-wing political party, there would understandably be outrage. This is a matter of freedom of association. Similarly, where

¹⁶⁰ It provides: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

¹⁶¹ Michael Sexton SC, ‘Bigotry is one thing, but let’s not tread on the toes of free speech’. *The Australian*, December 19, 2017. He wrote: “The debate about religious freedom in the wake of the enactment of legislation for same-sex marriage is in many ways misconceived. The real issue is freedom of speech and this arises whether or not the statements made have a religious basis, even though the problem is likely to be largely one for religious bodies.”

discrimination law impedes the right of voluntary organisations to declare who is and who is not entitled to be a member of the group, there is an issue about freedom of association. Where discrimination law impedes the right of ethnic minorities to prefer to employ staff in their social clubs or cultural organisations who belong to the ethnic minority for which the club or cultural association exists, there is an issue about freedom of association.

For these reasons, we prefer to see Commonwealth legislation which protects freedoms to apply to freedom of religion, conscience, speech, assembly and association. It may well be that the terms of reference of the Review preclude it from making such a broad-ranging recommendation. At least, it would be within the bounds of those terms of reference to include freedom of conscience, speech, assembly and association to the extent they are relevant to the protection of the manifestation of religious belief. It may well be that this would provide a useful trial of broader legislation to protect freedoms. It could be extended to other freedoms, outside of the context of religious belief, in a few years' time if experience with more limited provisions proves positive.

Is this a mini Human Rights Act?

No. It is different in character and much more limited than some human rights charters. The proposed legislation creates no new rights. Unlike, for example, the South African Bill of Rights,¹⁶² it allows for no new causes of action or hitherto unknown applications of the law. It merely provides an interpretative provision in federal law which essentially restates fundamental principles of statutory interpretation, and it could provide a defence to actions under State or Territory laws to the extent that their application, in the circumstances of a particular case, is inconsistent with the religious freedom Act. In appropriate cases, no doubt, these issues would be determined by the High Court.

Put differently, and to draw upon the analogy given in chapter I, the proposed legislation puts a fence around the open field of freedoms, and creates a zoning law which puts restraints upon the encroachment of the spreading city upon that land. It gives a limited power to the courts to adjudicate between the operation of State and Territory laws and the balancing effect of freedom provisions in federal law. It is always open to the Commonwealth Parliament to amend its legislation if it is considered that the balance between the operation of State and Territory laws and freedoms protected under federal law has in some way been inappropriately struck by a court.

¹⁶² Chapter 2 of the Constitution of South Africa provides that the state “must respect, protect, promote and fulfil the rights in the Bill of Rights (s.7). The Bill of Rights “applies to all law, and binds the legislature, the executive, the judiciary and all organs of state” (s.8). It requires courts to develop the common law to give effect to these rights (s.8).

What limitations would there be on the operation of federal legislation to protect religious freedom?

There is one inherent limitation in what is proposed; and others would need to be included in the text of any such enactment.

The inherent limitation

As explained above, an ordinary Act of the Commonwealth Parliament to protect freedoms may impose limitations on the application of state and territory laws to the extent of any inconsistency, but it cannot prevent the Commonwealth Parliament from subsequently enacting a law which is inconsistent with the freedoms thereby declared. For example, if the Commonwealth Parliament were to enact a law which was clearly inconsistent with the *Human Rights (Sexual Conduct) Act 1994 (Cth)*, the later law would prevail, notwithstanding that s.4 of that Act purports to apply to “any” law of the Commonwealth.

Interpretative provisions

What can be done is to provide an interpretative provision that requires courts, insofar as possible, to interpret federal legislation consistently with the relevant freedoms. This is consistent with long-standing principles of statutory interpretation. Courts already are supposed to interpret legislation on the assumption that Parliament did not intend to interfere with fundamental rights and freedoms.¹⁶³ It follows from this that courts will interpret a statute as far as possible in a way that does not affect those fundamental rights, unless it is compelled to the opposite conclusion by the use of “unmistakable and unambiguous language”.¹⁶⁴ The legislation could also impose upon public servants an obligation to interpret and apply federal law in such a way that is, so far as possible, respectful of the freedoms that are contained in the relevant religious freedom Act.

Parliamentary scrutiny

The Parliamentary Joint Committee on Human Rights has also proved effective in scrutinising Bills before the Commonwealth Parliament from a human rights’ perspective. The enactment of legislation to protect fundamental freedoms would no doubt reinforce the focus of the committee on such issues, where there are potential encroachments by proposed legislation.

¹⁶³ See, eg, *Potter v Minahan* (1908) 7 CLR 277 at 304; *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

¹⁶⁴ *Coco v the Queen* (1994) 179 CLR 427 at 437. See also *Momcilovic v The Queen* (2011) 245 CLR 1.

Other limitations

In any religious freedom Act, or an Act with a broader focus on the protection of fundamental freedoms, there must be limitations whether in application to Commonwealth, State or Territory laws. The ICCPR provides appropriate guidance. Article 18.3 for example provides:

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.

These general words need to be given greater specificity in the context of the proposed religious freedom Act so that the application of the law is clear and not subject to definition inflation. For example, some might argue that 'public safety' includes preventing 'unsafe speech' which offends people or with which they happen to disagree. The Siracusa principles are clear that 'public safety' means "protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property."¹⁶⁵ Similarly, people might argue that 'public order' requires that people should not be free to assemble and engage in peaceful protest within 500 metres of a facility in which terminations of pregnancy or euthanasia are performed. The Siracusa principles are clear that the scope of a limitation referred to in the Covenant should not be interpreted so as to jeopardize the essence of the right concerned.¹⁶⁶ To similar effect, General Comment 22 of the UN Human Rights Committee makes it clear that limitations must not be applied in a manner that would vitiate the rights guaranteed in Article 18.¹⁶⁷

General Comment 22 is helpful in other respects. The Committee explains that the protection of 'morals' cannot involve reference only to one moral code:¹⁶⁸

The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.

The prohibition on seeking to protect just one moral code would include a particular version of secular morality.

The Siracusa Principles also offer a definition of the meaning of 'health' in the context of

¹⁶⁵ United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985) at [33].

¹⁶⁶ *Ibid* at [2].

¹⁶⁷ *General Comment No. 22* at [8].

¹⁶⁸ *Ibid*.

ICCPR limitations:¹⁶⁹

Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

As far as possible, limitations in the religious freedom Act should be defined with specificity and having regard to the principle that all limitation clauses shall be interpreted strictly and in favor of the rights at issue.¹⁷⁰

Limitations relating to public safety and the protection of children

It is proposed that any religious freedom Act should contain a provision that nothing in this legislation should apply to, or limit the effect of, federal, state, or territory laws, including provisions in Crimes Acts, that are necessary to protect public safety, prevent terrorism or preserve public order. A list of such legislation could be provided in the Act, as is done in other enactments.¹⁷¹ An alternative approach is to prescribe relevant enactments, whether federal, state or territory, in Regulations.¹⁷²

The law should also provide that nothing in this legislation should apply to, or limit the effect of federal, state, or territory laws for the protection of children from physical or sexual abuse or neglect, nor affect the power of a court to order medical treatment for a child against the religious objections of any person, where it is necessary to save the life of the child or to prevent serious damage to the health of that child. These provisions are necessary to preserve the existing legal position in relation to such issues as female genital mutilation or the provision of a blood transfusion to a child whose parents are Jehovah's Witnesses.

Beyond these specific 'carve-outs', we propose that any other limitations be consistent with Article 18.3 and the Siracusa principles, and must be directly related and proportionate to the specific need on which they are predicated.

¹⁶⁹ United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985) at [25].

¹⁷⁰ Ibid at [3].

¹⁷¹ See for example, *Fair Work Act 2009* (Cth) s.351(3).

¹⁷² See for example, *Family Law Act 1975* (Cth) s.60H.

Chapter VI

A National Religious Freedom Commissioner

In this Chapter, we propose a National Religious Freedom Commissioner to give effect to Australia's obligations to protect freedom of religion and conscience under the International Covenant on Civil and Political Rights. The National Commissioner should have a role not only in relation to federal issues but also in monitoring the compliance of the States and Territories with Australia's international human rights obligations in these areas.

Why is there a need for another Commissioner?

Australia already has a number of commissioners with specific anti-discrimination or human rights portfolios. The President of the Australian Human Rights Commission (AHRC) and the Human Rights Commissioner both have generic responsibilities in the area of human rights. In addition, there are commissioners for race, sex, disability and age discrimination, an Aboriginal and Torres Strait Islander Social Justice Commissioner, and a Children's Commissioner. In addition, there have been proposals for a Commissioner dealing with LGBT issues.¹⁷³ There is also, as a separate office, an Australian Information Commissioner. In addition to these commissioners at federal level, certain states and territories have personnel performing equivalent or similar functions in some of these areas. For example, the ACT has a President of the ACT Human Rights Commission who also has the title of Human Rights Commissioner. There are three other commissioners with a variety of specific portfolios.¹⁷⁴

There are legitimate issues about proliferating the number of commissioners across Australia who have discrimination, advocacy or watchdog functions. There are also issues about how well-defined their roles are and whether there is a need in all cases for such appointees to be full-time. While these issues are beyond the scope of this submission, and indeed this Review, they are addressed below as reasonable objections to the proposal we make.

We first set out why it is that a National Religious Freedom Commissioner is needed, what he or she would do, and why, at least for the first few years, this role requires a full-time appointment.

¹⁷³ Nicole Hasham, 'Labor pledges gay and lesbian rights watchdog if it wins office', *Sydney Morning Herald*, May 21, 2016.

¹⁷⁴ <http://hrc.act.gov.au/about-act-human-rights-commission/presidents-welcome>.

The case for a National Religious Freedom Commissioner

Nowhere in Australia does any Commissioner have a specific brief to be concerned with freedom of religion and conscience, or discrimination against people of faith.

Within the current structure of the Australian Human Rights Commission, the Human Rights Commissioner takes responsibility for issues of religious freedom as well as many other issues, in particular LGBT rights. This is a diverse portfolio defined not by a coherent agenda, but rather by having responsibility for all those matters which are not allocated specifically to other commissioners. The AHRC website¹⁷⁵ indicates that the current office-holder is meant to lead the Commission's work on detention, torture, refugees and migration, LGBTI issues, counter-terrorism, national security, modern slavery, freedom of expression and freedom of religion. It is perhaps notable that this list is not in alphabetical order on the website, and freedom of religion is the very last matter listed. By way of contrast, members of the High Court have said that "freedom of religion, the paradigm freedom of conscience, is of the essence of a free society."¹⁷⁶

People of faith need a national voice in the public square to help governments, the media and the wider community understand issues from a religious perspective and how apparently neutral laws can in practice encroach improperly upon the freedom of people to manifest their beliefs in "observance, practice and teaching" (Article 18.1, ICCPR). If governments demonstrate their respect and concern for religious freedom, this promotes civil peace and minimises alienation among minority communities.

It is proposed that the Commissioner would represent people of all faiths, addressing not only the concerns of the largest faith communities, but also helping address the religious freedom concerns of our smaller ethnic minorities and minority religious groups who have little voice within Government.

As noted in the previous chapter, it must be recognised that religious freedom is not an absolute; and that limitations are justified, inter alia, for reasons of community safety (including the prevention of terrorism), child protection and public health. Nonetheless, to have a proper balance between different rights and conflicting public policy objectives, it is important that there is an expert voice at a national level, able to advocate for the legitimate concerns of people of faith, so that their concerns are heard alongside the often much louder voices in the public square of those advocating for other causes or perspectives.

¹⁷⁵ <http://www.humanrights.gov.au/about/commissioners/human-rights-commissioner-mr-edward-santow>.

¹⁷⁶ Mason ACJ and Brennan J in *The Church of the New Faith v The Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120 at 130.

It is not intended, nor proposed, that the National Commissioner should be an advocate for all claims to freedom of religion, nor that he or she should necessarily take the side of people of faith in an argument about the proper balance to be found in terms of public policy between competing rights and interests. However, it is expected that the National Commissioner should be a person who understands the perspective of those who hold religious beliefs and who is sympathetic to their interests and concerns. The National Commissioner should be able to explain those concerns to others involved in public policy debates who may have different concerns, and who may have difficulty understanding the faith perspective.

What would the National Commissioner do?

The National Commissioner would have at least the following roles:

- To comment upon draft legislation both federally, and in the States and Territories, that might have impacts upon legitimate religious freedom concerns.
- To advocate for changes to State, Territory or Federal laws that improperly encroach upon freedom to manifest religious belief.
- To engage with State, Territory and Federal education authorities if issues arise concerning the legitimate freedoms of religious schools to maintain their identity and ethos.
- To engage with State, Territory and Federal education authorities if issues arise concerning the rights of parents to raise their children in accordance with their religious and moral values (Article 18.4, ICCPR).
- To engage with State, Territory and Federal education authorities about issues concerning religious education programs in state schools.
- To meet annually with such religious leaders, of all faith communities, as wish to meet, in order to listen to their concerns about religious freedom issues.
- To have a voice in relation to the balances to be found between religious freedom and community safety issues, particularly when considering legislation, policies and practices that aim to address the threat of terrorism.
- To advise the Australian Charities and Not-for-Profit Commission, if requested, in relation to issues that may arise concerning religious charities and organisations.
- To conduct research or hold public inquiries concerning issues where freedom of religion may be under threat.
- To intervene in significant court cases where religious freedom issues arise.
- To raise awareness in the community about issues concerning religious freedom through speeches, conference presentations, and commentary in the media.

- To support the protection of the right to religious freedom internationally, through liaison with the UN's Special Rapporteur on Freedom of Religion or Belief, the United States Commission on International Religious Freedom and other national, regional or international bodies concerned with human rights and freedoms.

These functions give the National Religious Freedom Commissioner a very clear brief, and one which justifies a full-time appointment at least for the foreseeable future. It may be that after a full-time appointment of 5 to 6 years, the demands of the role and necessity for a full-time appointment could be reviewed.

Should the Commissioner be attached to the Australian Human Rights Commission?

It may seem obvious that the office should be established by appointing a religious freedom commissioner to the AHRC. This may well be the best option, but at least other options should be considered. The Office of the Australian Information Commissioner is an independent statutory agency within the Attorney General's portfolio, and this Commissioner has responsibility for privacy rights, which could equally be subsumed within a human rights portfolio.

The alternative to incorporation in the AHRC is that the National Commissioner have a stand-alone position with back-office support either from the AHRC or from the Attorney-General's Department. The case for a stand-alone position is that the National Commissioner will have, as the name implies, a national role, not merely a federal role. By way of contrast, the AHRC is a federal body concerned mainly with federal issues. The Children's Commissioner has a national role, but there are also equivalent children's commissioners in the States, the ACT and the Northern Territory.

If the National Commissioner is given a role within the structure of the AHRC, it will be important that the Churches and other faith communities have confidence that he or she will be given a lead role when the Commission is making submissions on religious freedom issues. Where other issues have religious freedom implications, the Churches and other faith communities will need to have confidence that the Commissioner's voice will be heard and his or her perspectives appropriately reflected in whatever submission is made on behalf of the Commission as a whole.

The reason for concern is that while at times in the past the AHRC, or the Human Rights and Equal Opportunity Commission as it was previously known, has been supportive of religious freedom, there have been other periods where it has been perceived as quite hostile to religious freedom, at least to the extent that religious doctrines and beliefs are in conflict with 'progressive' values. The Commission has taken positions on issues which have not been sympathetic to freedom of religion and conscience, and has at times shown little understanding of the concerns of faith communities. Because of this history, there may remain a perception

within faith communities that, notwithstanding the efforts of individual Presidents or Human Rights Commissioners, the AHRC has an institutional mindset that places freedom of religion and conscience at the bottom of an implicit hierarchy of human rights.

If the National Commissioner was only one voice within the AHRC, and he or she felt bound by a form of cabinet solidarity, it might undermine public confidence in the Commissioner's capacity to perform his or her functions properly. The converse proposition is that the appointment of a National Religious Freedom Commissioner to the AHRC may help correct the perception of imbalance within the Commission.

If the National Religious Freedom Commissioner is established as a stand-alone office, it ought to be expected that he or she would have some kind of relationship with the AHRC, involving consultation on issues of mutual interest and concern. This could be established by requiring the President of the AHRC to consult the National Commissioner on AHRC submissions that involve issues of religious freedom, and conversely, for the National Commissioner to consult the President on submissions where religious freedom rights need to be balanced with other human rights.

A religious test for office?

Section 116 of the Constitution does not allow there to be a religious test for office. It follows that the position of National Religious Freedom Commissioner could probably not be advertised as only to be filled by a person of faith.

We do not see this as a difficulty. From its inception, the position of Sex Discrimination Commissioner has been held by a woman. Where there has been a dedicated appointment to the role of Disability Discrimination Commissioner it has gone to a person living with a disability. Other dedicated appointments to commissioner roles have been to persons who are appropriately qualified and experienced to represent the concerns of those for whom they advocate.

While it is obviously desirable that the person appointed to be Commissioner has a strong religious faith – and therefore has an understanding of others who seek to live their lives in accordance with codes of conduct derived from their faith – there are examples in both Australia and the United States of influential advocates for religious freedom who identify as atheist or agnostic. The most important criteria for appointment are that he or she should be committed to freedom of religion, understand the concerns of those who hold a religious faith, and enjoy the confidence of religious leaders.

Is legislation needed to establish the Office of National Religious Freedom Commissioner?

All government expenditure must be authorised by Parliament and be capable of being justified by one or more heads of federal power under the Constitution. The expenditure is supported, under the external affairs power, by Australia's obligations under the International Covenant on Civil and Political Rights and its commitment to the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. As this Declaration demonstrates, religious freedom is a matter of international concern. Expenditure on the position may also be justified by the defence power, to the extent that the Commissioner has a role to play in promoting community harmony and preventing alienation and radicalisation of ethnic and religious minorities.

The Office of the National Commissioner requires a budgetary allocation, but the only role listed above that requires legislation is the power to intervene in court cases. A legislative basis would also give the National Commissioner more authority in engaging with State and Territory governments.

What would it cost?

Resourcing is, of course, a matter for the Government. It is suggested that the budget for the Commissioner should include at least three professional support staff and an executive assistant. It would be intended that at least one of those support staff would have particular responsibility for engagement with religious communities other than a faith with which the Commissioner identifies, and would be expected to have or acquire knowledge of their particular beliefs and concerns about religious freedom.

Excluding the cost of back-office functions, a reasonable budget for the Commissioner and staff, including such additional office rental costs as may be necessary (whether or not the Commissioner is appointed to the AHRC), would be \$1.25-\$1.5 million per annum. The Commissioner would need a significant travel budget and level of assistance to take account of his or her important role in relation to the governments of the States and Territories.

Review of the role of Commissioners

As noted above, one of the arguments against the appointment of a National Religious Freedom Commissioner is that there are already seven commissioners plus the President in the AHRC, and there has been a proposal to have a LGBT Commissioner as well. There may well be calls in the future for commissioners for other distinct groups or other purposes.

It was not always so. In the quite recent past, there have been far fewer commissioners, as they have had more than one portfolio. For example, the President has also been the Human Rights

Commissioner.

It would be quite inappropriate for us to suggest whether the current number of Commissioners is justified and whether or not there could be some rationalisation, as and when current appointments expire. However, as part of any consideration of the appointment of a National Human Rights Commissioner, it may be appropriate for the Attorney-General to establish a comprehensive review of the roles and job descriptions of Commissioners within the AHRC. When the Commission was first established, commissioners had a substantive role in adjudicating upon discrimination complaints. However, as a consequence of the High Court's decision in *Brandy v Human Rights and Equal Opportunity Commission*,¹⁷⁷ the Commission's role is limited to conciliation of these discrimination complaints, leaving at least some commissioners without a clear statutory brief or detailed job description.

Our detailed proposal for a National Religious Freedom Commissioner may offer a helpful blueprint for working out the roles and functions of other commissioners.

¹⁷⁷ (1995) 183 CLR 245.

Chapter VII

Putting It All Together

In this chapter, we bring together the discussion of all these issues and summarise a reform agenda. We emphasise again that while the catalyst for this Review may have been the same-sex marriage debate, marriage is only one of many issues. Furthermore, the Review should not be seen through a narrow lens as some sort of contest that involves balancing LGBT rights with religious freedom. That is a completely false dichotomy. Most religious freedom issues are not about sexual orientation or gender identity, and many people who identify as part of the LGBT community are also people of faith.

The Review Panel has broad-ranging terms of reference and a limited timeframe. To assist it, we suggest that there are eight main areas of reform that it could recommend. These are given in the order in which they are discussed in this submission (rather than in any order of importance).

- Reforms concerning marriage which were not addressed by the amendments passed in December 2017 and which were left to this Review to make recommendations about.
- Issues concerning parental rights in the educational context.
- Freedom for religious organisations to have staffing policies consistent with their religious values and mission.
- Protection from discrimination on the basis of religious belief.
- Reasonable accommodation for faith in the workplace.
- Reforms concerning the way in which anti-discrimination laws are drafted, moving away from the language of exemptions and exceptions to avoid any perception of special pleading or special concessions to people of faith.
- Reforms to provide positive protections for freedom of religion and conscience, and the associated rights of freedom of speech, assembly and association, subject to the limitations which are appropriate and necessary according to the ICCPR.
- The appointment of a religious freedom commissioner to ensure an ongoing focus on religious freedom issues.

Reforms concerning marriage

Anomalies not dealt with by the Smith Bill

Perhaps the most uncontroversial recommendations that could be made are those necessary to address deficiencies in the Smith Bill which have the effect of undermining the intentions of the drafters. The Smith Bill was intended to ensure that no minister of religion, no pastor of a

religious congregation, and no other faith leader should be compelled to marry a couple against that person's religious beliefs. The drafters also intended that in the future any faith leader who is not part of an established denomination or religious community, and who is therefore not nominated to the Government as a minister of religion by some regional or national religious organisation, should be able to apply to become a religious marriage celebrant.

For the most part that was achieved. Ministers of religion continue to have the right to refuse to solemnise a wedding for any couple, as they have always had under section 47 of the *Marriage Act 1961* (Cth). However, there are deficiencies in the way in which the Smith Bill dealt with the next generation of religious marriage celebrants. A person will only be able to apply to become a religious marriage celebrant if he or she is a minister of religion as defined in the Act. This is likely to exclude pastors and other leaders of religious congregations and communities who are not qualified as ministers of religion and who have full-time secular jobs but who have a part-time role in pastoring a church or other faith community.

Failure to rectify this anomaly will mean that some people will not be able to have their pastor or other religious leader solemnise their marriage because such a person would be prohibited from applying to become a religious marriage celebrant. Yes, he or she could apply to be a general marriage celebrant, but might be concerned that he or she has no right to decline to solemnise same-sex marriages. Failure to address this issue will have a disproportionate impact upon regional and rural Australia, for many of the churches outside of the major urban centres are quite small and cannot afford to appoint a full-time minister of religion.

In Chapter III, specific amendments are suggested to deal with these issues, although of course the text of legislation is best left to Parliamentary Counsel to settle.

More generally, the Panel may wish to consider whether Australian law should provide greater respect for freedom of conscience in this area. What is the harm, after all, in allowing anybody to apply to become a religious marriage celebrant in the future? Who would be harmed? If someone wants to apply to become a marriage celebrant who has a devout religious faith and would rather limit his or her practice to heterosexual couples, no one is discriminated against; for the great majority of same-sex couples (and across Australia there are not all that many) would have an extensive choice of celebrants who have no conscientious objection to marrying couples of the same-sex.

The Smith Bill also purported to ensure that faith communities would not be compelled to make their facilities available for a marriage where this would be contrary to their beliefs. Again, for the most part this was achieved, but the issue of chapels in bodies that have not been established for religious purposes (discussed in Chapter III), was not addressed and represents another anomaly. It ought to be uncontroversial that a denomination that has consecrated a chapel within a particular Christian tradition should be able to ensure that the beliefs of that tradition are respected in how that chapel is used.

Charities

Reforms to clarify the position of charities which hold traditional beliefs about marriage, or indeed traditional beliefs on other matters concerned with sex and family life, ought to be entirely uncontroversial. Clarifying the law in this way will undoubtedly be within the spirit of the Smith Bill, although the issue was not specifically addressed in that Bill. No one is harmed by clarifying the right of charitable organisations to adhere to their beliefs and values about family life, as long as they do not in any way promote or support criminal behaviour. This is a matter specifically within the scope of the rights declared by Article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

Anti-discrimination and anti-detriment provisions

In the Parliamentary debate about the Smith Bill, amendments were moved to make it unlawful to discriminate against a person because of a relevant belief about marriage. Other amendments would have enacted anti-detriment provisions for organisations. Some of these amendments were very detailed, and there may have been members of Parliament who supported the principle but who had concern about the particular drafting of these amendments.

Be that as it may, this is another issue which was left to the Panel to consider, and about which we make recommendations in Chapter IV. We propose that there be specific protection for both individuals and organisations based upon their beliefs about marriage. The conferral of a right to be protected from discrimination does not take away the rights of any other person to be protected from discrimination.

Issues concerning parental rights in the educational context

In the course of the marriage debate, several issues were raised concerning the rights of parents in relation to the education of their children. Long before this, the Safe Schools program was a matter of particular controversy and public concern, not because it is an anti-bullying program, but because it is perceived as being very much more than this. It does not matter now whether these issues have any connection to the question of same-sex marriage. The same-sex marriage issue has been resolved.

Clearly, faith-based schools ought to have the freedom to teach and apply what they believe about issues concerning marriage and family life, subject to the normal requirements of teaching the curriculum as laid down by the relevant educational authority. Parents' concerns about other matters remain. Some, but not all of these concerns, may arise from a parent's religious beliefs.

Parents' rights to raise their children in accordance with their religious and moral values is protected by Article 18.4 of the ICCPR. The recommendations in Chapter IV concerning preservation of the religious character of faith-based schools through, for example, freedom to

select staff who adhere to the religion with which the schools associated, are one way of giving positive protection to Article 18.4 rights. However, not all parents can afford to send their child to a faith-based school, and many would want to send their children to the state school for other reasons. The way in which parents' rights to raise their children in accordance with their religious and moral values are given effect as positive rights in Australian law needs to be considered. Naturally, there are, or should be, constraints upon the right of parents in this regard. It is simply not possible or appropriate to give parents in advance information about every matter to be taught in the classroom which might be controversial or which may raise concerns for a small number of parents. However, where it can be anticipated that a non-negligible proportion of parents may have a concern about the content of a particular lesson, advance information about it should be provided. As identified in Chapter III, ss.25A and 25AA of the Education Act 1989 (NZ) offer a legislative model.

One of the roles proposed for the National Religious Freedom Commissioner is to engage with State and Territory education authorities on these issues. We recommend also that the federal Minister of Education raise these matters with the appropriate consultative body for ministers of education across the country, and with other stakeholders and that action be taken at federal level if need be. The paucity of rights that parents have in relation to the moral education of their children in the school environment, beyond choice of school for those who can afford it, is one of the gaps in national laws that needs further examination.

Freedom for religious organisations to have staffing policies consistent with their religious values and mission

Chapter IV deals with the freedom of faith-based schools and other religious organisations to select staff using faith as one of the criteria and to require adherence to codes of conduct which accord with their beliefs and values. This is an issue of fundamental importance to many faith-based organisations as it goes to the heart of why such organisations exist. We recommend a simple reform of enacting a freedom for religious organisations to select, or prefer, staff who adhere to, or are supportive of, the beliefs and values of the organisation. We have no difficulty in extending the same freedom to other organisations such as environmental groups or political parties - indeed some have such an exemption in legislation.¹⁷⁸

This freedom could be one of the issues dealt with specifically in the religious freedom Act discussed in Chapter V. This is the preferable option. Alternatively, an amendment might be

¹⁷⁸ See for example, s.27 of the *Equal Opportunity Act 2010 (Vic.)* which provides: "An employer may discriminate on the basis of political belief or activity in the offering of employment to another person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment". See also the general exemption for voluntary bodies in the *Anti-Discrimination Act 1977 (NSW)* s.57, which allows them to determine who may become members and to whom services are provided.

made to section 351 of the *Fair Work Act 2009* along the following lines:

Amend subsection (2) and add new subsection (4) as follows (amendments underlined):

Sec. 351 Discrimination

(1) 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 preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Note: This subsection is a civil remedy provision (see Part 4-1).

(2) However, subsection (1) does not apply to action that is:

(a) not unlawful under any anti-discrimination law in force in the place where the action is taken; or

(b) taken because of the inherent requirements of the particular position concerned; or

(c) required by the doctrines, tenets, beliefs or teachings of a particular religion or creed or

(d) permitted under subsection (4).

(3) Each of the following is an *anti-discrimination law*:

(aa) the Age Discrimination Act 2004;

(ab) the Disability Discrimination Act 1992;

(ac) the Racial Discrimination Act 1975;

(ad) the Sex Discrimination Act 1984;

(a) the Anti-Discrimination Act 1977 of New South Wales;

(b) the Equal Opportunity Act 2010 of Victoria;

(c) the Anti-Discrimination Act 1991 of Queensland;

(d) the *Equal Opportunity Act 1984* of Western Australia;

(e) the *Equal Opportunity Act 1984* of South Australia;

(f) the Anti-Discrimination Act 1998 of Tasmania;

(g) the *Discrimination Act 1991* of the Australian Capital Territory;

(h) the *Anti-Discrimination Act* of the Northern Territory.

(4) Notwithstanding subsection (1) and any provision in an anti-discrimination law, or any other law of the Commonwealth, a State or a Territory, where an employer establishes, directs, controls or administers an entity that provides educational, health, counselling, aged care or other such services, and that is intended by the employer to be conducted in accordance with religious doctrines, tenets, beliefs or teachings, the employer may:

(a) prefer a person who adheres to particular religious doctrines, tenets, beliefs or teachings for

a position that is likely to involve interaction with those to whom the service is provided or with members of the public;

(b) require an employee to abide by a code of conduct that is reasonably required of someone who adheres to those doctrines, tenets, beliefs or teachings; and

(c) take adverse action against an employee who no longer adheres to those doctrines, tenets, beliefs or teachings or breaches that code of conduct.

Protection from discrimination on the basis of religious belief

In Chapter IV, we note that most States and Territories already have prohibitions on discrimination based upon religious belief, and there are provisions in the *Fair Work Act* 2009 (Cth) to protect employees or applicants for employment. However, the coverage is far from comprehensive, and with discrimination against people of faith on the increase, consideration needs to be given to a greater level of protection.

This does not stand in tension with the freedom to select staff for religious organisations who fit with the beliefs, values and mission of the organisation. As the UN's Special Rapporteur on freedom of religion and belief has explained, the *raison d'être* and corporate identity of religious organisations are religiously defined, and therefore fall within the protection for freedom of religion and belief.¹⁷⁹ In this limited context therefore, the freedom to select those with a particular characteristic (adherence to a particular faith) is not inconsistent with prohibition of discrimination on the basis of religious belief generally.

Reasonable accommodation for faith in the workplace

In Chapter IV, we also propose laws allowing for reasonable accommodation for freedom to manifest a religious faith and freedom of conscience in the workplace, where this does not involve a disproportionate or undue burden for the employer. This proposed reform builds on the success of legislation which requires reasonable accommodation for people with disabilities and those with caring responsibilities.

As was noted in that Chapter, there are many forms of accommodation which are very simple and do not impose much of a burden on employers or other institutions. Many employers and educational institutions already make adjustments for people of faith readily. For example, universities make alternative arrangements for students who have a religious objection to sitting for examinations on Saturdays.

¹⁷⁹ Interim Report of the Special Rapporteur on Freedom of Religion or Belief, 5 August 2014 at [68].

If we are to ensure workplaces are appropriately diverse and that the best talent is recruited and retained in different spheres of employment, then we need to ensure as far as possible, that workplace circumstances do not unnecessarily or improperly create difficulties for those who have a religious faith.

Reforms concerning the way in which anti-discrimination laws are drafted

This is dealt with in some detail in Chapter IV. There are compelling reasons to move away from protecting religious freedom mainly by exemptions from generally applicable laws, although there may be some matters for which this is the only feasible solution. Another approach is proposed in that Chapter, which relies upon much clearer definition of what discrimination is, and is not. While a vague and general limitations clause would not be adequate, a general limitations clause which also has specific provisions about how religious freedom rights should be balanced with other rights, along the lines of the definition as drafted in that Chapter, would represent a great improvement on the existing law. It could be introduced as an amendment to the *Sex Discrimination Act 1984 (Cth)* and become a model for reform of the law in the States and Territories.

Reforms to provide positive protections for freedom of religion and conscience

Chapter V goes beyond specific issues of concern, to show how a federal religious freedom Act, that gives effect to Article 18 of the ICCPR and related rights, could helpfully provide positive protection for freedom of religion and belief in Australia without interfering with the legislative competence of the states and territories.

Such legislation should follow in general terms the proposals made by the Human Rights and Equal Opportunity Commission in 1999. The legislation should affirm the right of all religions to exist and to organise and determine their own affairs according to their tenets. This should include the freedom to have staffing policies consistent with the mission and purpose of the organisation. The legislation should provide in general terms that freedom of religion and conscience, and the associated rights of freedom of speech, assembly and association, are not to be subject, by or under any law of the Commonwealth, a State or a Territory, to restrictions other than as permitted by the Act. The legislation should also specifically protect the freedoms recognised in Article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Courts should seek to interpret legislation so as not to be inconsistent with those freedoms, and public servants should have an obligation to interpret and apply federal law in such a way that is, so far as possible, respectful of those freedoms.

There must, of course, be limitations on the scope and application of the legislation. In particular, the law should not apply to restrict the operation of specific legislation concerned with the protection of the public from danger or damage to their property. It should also not

apply to the operation of laws to protect children from physical or sexual abuse, or neglect, or to prevent interventions to protect the life of a child or serious damage to his or her health.

The National Religious Freedom Commissioner

The appointment of a Commissioner of this kind, as discussed in Chapter VI, will allow for a sustained focus upon religious freedom issues as part of the national conversation on public policy concerning diversity and multiculturalism. The Commissioner will bring the voices of often neglected minorities into that national conversation where appropriate, and offer a faith perspective on policies or proposed reforms which will impact upon faith communities particularly.

Conclusion

This submission has sought to deal quite broadly with the major issues of concern of people of faith, but in particular the Christian churches. We recognise that we may not have captured all the concerns of people of faith, and we certainly do not purport to speak for those of other faiths. Nonetheless, any reforms to federal, State or Territory law to protect religious freedoms must apply to all faiths, and as far as possible address the concerns of all faiths.

We hope this submission will be useful to the Panel, in helping us all to ‘live and let live’ more harmoniously, and to protect diversity within the Australian community.