



AUSTRALIAN  
LAWYERS  
FOR  
HUMAN RIGHTS

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PO Box A147  
Sydney South  
NSW 1235  
DX 585 Sydney

[alhr@alhr.asn.au](mailto:alhr@alhr.asn.au)  
[www.alhr.asn.au](http://www.alhr.asn.au)

Committee Secretary  
Human Rights Sub-Committee  
Joint Standing Committee on Foreign Affairs, Defence and Trade  
PO Box 6021  
Parliament House  
Canberra ACT 2600

By email: [religionorbelief@aph.gov.au](mailto:religionorbelief@aph.gov.au).

Dear Committee Secretary

## Status of Freedom of Religion or Belief

Australian Lawyers for Human Rights (ALHR) thanks you for the opportunity to provide this submission in relation to the Committee's current **Inquiry into the status of the human right to freedom of religion or belief**.

### ALHR

ALHR was established in 1993 and is a national network of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and a secretariat at La Trobe University Law School in Melbourne. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

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## 1. Terms of Reference and relevant material

- 1.1 Our submission focuses on the **third item** in the Committee's Terms of Reference, being:
- *the relationship between the freedom of religion or belief and other human rights, and*
  - *the implications of constraints on the freedom of religion or belief for the enjoyment of other universal human rights.*
- 1.2 In regard to the first two paragraphs of the terms of reference, we refer the Committee to the Interim Report of the then United Nations Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, *The broad range of violations of freedom of religion or belief, their root causes and variables* (2016) submitted in accordance with General Assembly resolution 70/158<sup>1</sup> on which this submission draws and which we endorse, and to the UN *Rapporteur's Digest on Freedom of Religion or Belief: Excerpts of the Reports from 1986 to 2011 by the Special Rapporteur on Freedom of Religion or Belief Arranged by Topics of the Framework for Communications*.<sup>2</sup>
- 1.3 We also endorse many of the points made in the paper *The right to freedom of religion or belief and its intersection with other rights* by Dr Alice Donald and Dr Erica Howard, Middlesex University, for ILGA Europe<sup>3</sup>.

## 2. ALHR's Concerns

- 2.1 ALHR's primary concern is that Australian legislation and judicial decisions should adhere to international human rights law and standards.
- 2.2 Many religions attempt to restrict and/or compel the behaviour of persons both:
- within that religion in ways inconsistent with the human rights of those persons; and
  - externally by not extending tolerance to, or actively discriminating against, adherents of other religions (or of no religion) and other categories of people chosen on a discriminatory basis.
- 2.3 Indeed, as one writer says, "some of the most spectacular expressions of religious fervor come from groups that promote violence, intolerance, misogyny and homophobia ... Whether it is the American religious right that demonizes LGBT and other people, the Buddhist groups in Burma who kill Muslims, or the Muslim Brotherhood in Egypt that used state power to attack democracy, the harm done by organizations in the name of religion is often horrific."<sup>4</sup>
- 2.4 We believe that the promotion of other human rights in addition to the right to freedom of 'religion', and a more nuanced view of the accommodations that need to be made between competing human rights, can assist Australian society. This more complex viewpoint teaches people how and why to challenge those aspects of their own religions which do not accord with

<sup>1</sup> Available at: [http://www.ohchr.org/Documents/Issues/Religion/A-71-269\\_en.pdf](http://www.ohchr.org/Documents/Issues/Religion/A-71-269_en.pdf), accessed 2 January 2017.

<sup>2</sup> Accessed 2 January 2017, available at: <http://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf>.

<sup>3</sup> *The right to freedom of religion or belief and its intersection with other rights* (2015) Dr Alice Donald and Dr Erica Howard, Middlesex University, ILGA Europe website at [http://www.ilga-europe.org/sites/default/files/Attachments/the\\_right\\_to\\_freedom\\_of\\_religion\\_or\\_belief\\_and\\_its\\_intersection\\_with\\_other\\_rights\\_.pdf](http://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights_.pdf), accessed 2 January 2017

<sup>4</sup> Larry Cox, "Human rights must get religion," 14 April 2014, accessed 1/1/17, available at: <https://www.opendemocracy.net/openglobalrights/larry-cox/human-rights-must-get-religion>

human rights, and fosters pluralism and tolerance as a means of promoting and preserving democracy.

- 2.5 We endorse the views of the Parliamentary Joint Committee on Human Rights (PJCHR) expressed in Guidance Note 1 of December 2014<sup>5</sup> as to the nature of Australia’s human, civil and political rights obligations, and agree that the inclusion of human rights ‘safeguards’ in Commonwealth legislation is directly relevant to Australia’s compliance with those obligations.
- 2.6 Generally, behaviour should not be protected by Australian law where that behaviour itself infringes other human rights. There is no hierarchy of human rights – they are all interrelated, interdependent and indivisible. The right to express one’s religious beliefs does not ‘trump’ other rights, such as the right to be free from discrimination, but must be considered in context. A secular democratic government should not privilege the right to act on ‘religious’ views above other human rights. **Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.**
- 2.7 Human rights also entail **both rights and obligations**. Hence in so far as we are ourselves entitled to the protection of human rights, we must also respect the human rights of others.<sup>6</sup>

### 3. Submissions

- 3.1 Freedom of ‘religion’ or belief does not mean ‘freedom’ to follow only the majority religion or belief. It means freedom to choose between different religions and beliefs or to hold no religion or belief. In that sense, religious freedom is underpinned by the concept of human rights, because without that other standard provided by human rights, society would be likely to support only the dominant religion and would suppress other religions and secularism, as has historically occurred in societies not based on human rights.
- 3.2 The human right of freedom of religion or belief is thus not limited to traditional religions. It also encompasses agnosticism, atheism, secularism and other systems of belief which hold to a set of values and principles but would not traditionally be thought of as religions. This interpretation of the human right stems both from its full title: “**freedom of thought, conscience, religion or belief**” and from interpretations made by human rights courts internationally and particularly in Europe. The interpretation also follows on from the logical argument that to have freedom of something you must also be able to be free from that thing or not have that thing.
- 3.3 Thus any discussions of protections for the adherents of traditional religions will apply also to adherents of other religions and other belief systems as well.
- 3.4 We use inverted commas in this submission to remind readers that we are not talking about freedom of ‘religion’ in the narrow traditional sense of established religions but in the wider sense of a diversity of beliefs including secularism.
- 3.5 ‘Religious’ freedom includes the right **to hold** or change a belief or no belief (which is unlimited, being personal and having no impact on others), and the right **to manifest** one’s beliefs (which,

<sup>5</sup> Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility*, December 2014, available at <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)> accessed 16 January 2015, see also previous *Practice Note 1* which was replaced by the Guidance Note, available at <<https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>>, accessed 16 January 2015.

<sup>6</sup> See generally, United Nations Human Rights Office of the High Commissioner, “What are Human Rights?” available at <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>>, accessed 9 February 2017.

because of potential impact upon others, must be balanced against other rights). This distinction is often blurred, but it is a vital one.

- 3.6 In general terms, no human right ‘trumps’ any other right – all are equally valuable (the principle of indivisibility) and all should be protected together (the principle of interdependence). Some rights are expressed as absolutes: the right to be free from slavery, torture, cruel or inhuman or degrading punishment or treatment, or arbitrary deprivation of life, and the right to recognition as a person in law. The protection of one’s internal beliefs is also expressed to be an absolute right as an aspect of both freedom of speech and freedom of religion. Subject to those absolutes (which are not in question here), all rights must be **balanced** where they conflict and provide **reasonable accommodation** to other rights.<sup>7</sup> This is commonly understood in international law and in jurisdictions where human rights are enshrined in national constitutions, such as Canada and all European countries. **In Australia, being alone amongst first world countries in not having constitutionally protected human rights, there is not a common understanding of this well established point.**
- 3.7 But how could it be otherwise? Human rights are not ends in themselves. Think of them rather as a process, a means of testing the desirability of particular results, whether those results or outcomes are the adoption of particular legislation or the play of market forces.
- 3.8 Where manifestations of different religions conflict – where both parties involved wish to exercise competing ‘religious’ rights - a balance must also be sought by reference to other values and considerations (such as reasonableness) and other rights such as the right to freedom of speech or the right not to be discriminated against.
- 3.9 Freedom of ‘religion’ has been termed a “gateway” to other freedoms, including freedom of expression and freedom of peaceful assembly and association. There can be no free religious community life without respect for those other freedoms, which are closely intertwined with the right to freedom of religion or belief itself.<sup>8</sup>
- 3.10 Being one amongst many human rights, the right to ‘religious’ freedom must be subject to, and balanced against, other human rights, just as the right to free speech must be subject to, and balanced against, other human rights such as the right to be free from racism (in the form of racist hate speech). There are many parallels between the treatment of free speech and the treatment of religion which in many cases support and reinforce each other (and are not in opposition, contrary to popular misconceptions), including in terms of protection of a person’s inner realm of thinking and believing. At the same time in both cases it may be necessary to limit or constrain the ‘freedom’ if it is mis-used or abused so as to limit others’ rights and thereby harm a section of society.<sup>9</sup>
- 3.11 In balancing the competing claims of human rights against each other, it is important to minimise any negative impact; to impinge as little as possible upon other rights. Therefore it will be very important to consider whether a particular expression of a human right by one person or group respects the rights of others or, conversely, causes harm or unreasonably impacts upon others. Where harm or unreasonable impact results from any behaviour claiming to involve ‘religious freedom’, it is generally undesirable for the State to protect such behaviour by law.
- 3.12 Proponents of intolerant religions which in practice restrict human rights cannot, therefore, expect tolerance for the expression of their beliefs nor State protection for their actions. Their right to hold whatever belief system they wish to hold in private can be respected. **Their ‘right’ to act on that belief system depends, however, upon the impact it has on others.** Donald and

<sup>7</sup> Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief* (2015) A/HRC/31/18 pursuant to the UN Human Rights Council Resolution 22/20 (cited as Bielefeldt (2015)) par 19ff.

<sup>8</sup> Bielefeldt, op cit, par 33.

<sup>9</sup> Bielefeldt (2015) generally.

Howard describe this principle as ‘respecting the believer rather than the belief.’<sup>10</sup> Similarly, Bielefeldt notes that ‘freedom of religion or belief protects believers rather than religion or belief.’<sup>11</sup>

- 3.13 Freedom of ‘religion’ should not involve State protection of the various truth claims, teachings, rituals and practices of all religions or belief systems (or no belief systems), both because of the distinction that needs to be made between personal belief (which can be respected) and ‘religious’ practices (which must be subject to the ‘harms’ or ‘impact’ test) but also because to do so would be impossible in practice. Even amongst traditional religions, the messages and behavioural requirements are not just different but often irreconcilable.<sup>12</sup>
- 3.14 **Turning to the potential harms caused by religious practices we find, unfortunately, that ‘religious’ practices often involve breaches of human rights of the group’s adherents. Often ‘religious’ practitioners also seek to restrict the human rights of persons outside their group.** Discriminatory treatment of women, LGBTQI persons and religious and ethnic minorities are obvious examples. There can be no truly free religious community life without respect for the freedoms and human rights of others.<sup>13</sup>
- 3.15 **It is only through holding all behaviours up to the standard of international human rights that one can help improve and reform discriminatory practices.**
- 3.16 For the State to constrain some manifestations of the freedom of ‘religion’ or belief in order to protect the enjoyment of the human rights of others (including those other persons’ own ‘religious’ freedom rights), as the Terms of Reference contemplate, may therefore in many cases provide the best ‘balanced’ outcome which minimises the impact upon all involved.

#### 4 What does ‘freedom of religion or belief’ mean?

- 4.1 The international instruments do not themselves define “freedom of religion” nor “freedom of belief.” However it is generally agreed that “freedom of religion and belief”:
- (a) includes the freedom to hold secular or atheistic beliefs; and
  - (b) is further divided into the right to hold or change a belief or no belief (which is unlimited, having no impact on others), and the right to manifest one’s beliefs (which, because of potential impact upon others, must be balanced against other rights).<sup>14</sup>
- 4.2 In relation to the freedom to hold secular or atheistic beliefs, the United Nations Human Rights Committee has stated that Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief and is not limited to traditional religions.<sup>15</sup> The European Court of Human Rights has also given a wide interpretation to the meaning of religious beliefs as including non-religious beliefs such as pacifism, veganism and atheism<sup>16</sup> and religious or philosophical convictions or beliefs

if they attain a certain level of cogency, seriousness, cohesion and importance; are worthy

<sup>10</sup> Donald and Howard, op cit, p 17.

<sup>11</sup> Bielefeldt (2015), op cit, par 13.

<sup>12</sup> Bielefeldt, op cit, par 11.

<sup>13</sup> Bielefeldt, op cit, par 33.

<sup>14</sup> Donald and Howard, op cit, p 2. Note that there is no absolute right to ‘freedom of conscience’ because this is used as a justification for various manifestations of religious behaviour, such as refusal to enlist in the military, or provide abortions, and has thus been held by European courts (though not by the Human Rights Committee of the United Nations) to be related rather to manifestation of religious belief, not to the simple holding of religious belief: see Donald and Howard, op cit, p 10 and following.

<sup>15</sup> Human Rights Committee, *Comment 22: The right to freedom of thought, conscience and religion (Article 18)*, par 2

<sup>16</sup> Donald and Howard, op cit, p 2.

of respect in a democratic society; are not incompatible with human dignity; do not conflict with fundamental rights; and, relate to a weighty and substantial aspect of human life and behaviour.<sup>17</sup>

- 4.3 As Bielefeldt notes, no one can be genuinely free to do something unless they are also free **not** to do it, and vice versa. That is why, he says, freedom of religion or belief necessarily also covers the freedom **not** to profess a religion or belief, not to attend acts of worship and not to participate in community life.<sup>18</sup> He also comments that “the scope of the right to freedom of religion or belief is often underestimated, with negative implications for its conceptualization and implementation”.<sup>19</sup>
- 4.4 References in this submission to ‘religious’ beliefs therefore include references to non-theistic and atheistic beliefs and philosophical convictions within the meanings given by the European Court of Human Rights.
- 4.5 It must also be remembered that there is a great range of differentiation within traditional religious beliefs and organisations and that it can be erroneous to attribute any specific views to religious communities as a whole.

## 5 Relevant international law<sup>20</sup>

- 5.1 The right to freedom of religion or belief is reflected in:

- Article 18 of the *Universal Declaration of Human Rights* 1948 (UDHR),
- Article 18(1) of the *International Covenant on Civil and Political Rights* 1966 (ICCPR),
- Article 1 of the United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief* of 1981 (the ‘Declaration on Religion or Belief’)

which include freedom to change one’s religion or belief and freedom, either alone or in community with others and in public or in private, to manifest one’s religion or belief, in worship, teaching, practice and observance.

- 5.2 Within the EU, the right to freedom of religion or belief is reflected in:

- Article 9(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950 (ECHR), and
- Article 10 of the *Charter of Fundamental Rights of the European Union* (EUCFR).

- 5.3 Also relevant is Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) under which “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”. Article 26 is a ‘stand-alone’ right which forbids discrimination in *any law* and in *any field regulated by public authorities*, even if those laws do not relate to a right specifically mentioned in the ICCPR.<sup>21</sup>

- 5.4 It is provided in article 2 (1) of the 1981 Declaration that “no one shall be subject to discrimination by any State, institution, group of persons or person on the grounds of religion or belief”, and article 3 of the 1981 Declaration, states that: “Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations.”

<sup>17</sup> Donald and Howard, op cit, p 2.

<sup>18</sup> Bielefeldt, op cit, par 15

<sup>19</sup> Bielefeldt, op cit, par 10.

<sup>20</sup> See Donald and Howard, op cit, pp 1 to 2.

<sup>21</sup> Australian Human Rights Commission (AHRC), *Position Paper on Marriage Equality: Marriage equality in a changing World*, September 2012, available at: < <https://www.humanrights.gov.au/lesbian-gay-bisexual-trans-and-intersex-equality-0> >, accessed 10 January 2017.

## 6 Other relevant human rights which might be affected by expressions of 'religious' belief

- 6.1 Many 'religious' practices often promote or require breaches of human rights, in particular the right to be free from discrimination. In Australia, traditional religions commonly seek exclusion from anti-discrimination laws to allow themselves to discriminate in employment situations. Discrimination on the grounds of (a different) religion – or no religion – is common, as is discrimination on the grounds of sexual orientation or gender identity. Article 2 of the UDHR enshrines the right to non-discrimination (that is, to be free of discrimination on grounds including sex and status), and Articles 2(2) and 26 (as mentioned) of the ICCPR have been held to include sexual orientation,<sup>22</sup> as well as Articles 2(2) and 3 of the ICESCR.<sup>23</sup>
- 6.2 No 'freedom' can be truly experienced in the absence of safety. If one feels unsafe, for example because of racist or religious hate speech against one's group, one's own freedoms are being unreasonably restricted and, conversely, it is justifiable to restrict the behaviour which is unreasonably impinging upon one's own freedoms.
- 6.3 Also relevant are the right to be treated with dignity (UDHR Preamble and Article 1) and to equal protection of the law without discrimination (UDHR Article 7) and the right to freedom from arbitrary interference with family matters (UDHR Article 12). The right to marry and to found a family expressed in Article 16 of UNHR is clearly breached by the Catholic Church in relation to its own priests, and is sought to be breached in relation to same-sex couples.
- 6.4 ALHR recently submitted, in relation to the Commonwealth Government's exposure draft of the *Marriage Amendment (Same-Sex Marriage) Bill*, that the 'religious' exemptions in the legislation were too widely drafted and effectively removed any protection from discrimination at all in the context of marriage services. Lesbian, gay, bisexual, transgender, intersex and queer partnerships deserve equal status to heterosexual couples under the *Marriage Act 1961*. We submitted that the scope of 'religious' exemptions reflect a disproportionate response which favours members of every religion which is against same-sex marriage above the 'religions' of those persons wishing to have the freedom to marry whoever they wish. We submitted that such exemptions should not be given because the behaviour to be protected or exempted (refusal to marry or provide related services to LGBTI persons) does not reflect respect for the rights of the persons wishing to be married. On the contrary, the mere knowledge that the law permits 'religious' individuals to discriminate (for example on the basis of sexual orientation or gender identity) is itself an affront to those individuals and perpetuates negative stereotyping.<sup>24</sup>

## 7 Problems with the ways in which governments address freedom of 'religion'

- 7.1 Because of the general lack of appreciation of the scope of the human right of freedom of 'religion'/belief, Bielefeldt comments, governments commonly and incorrectly:
- privilege private expressions of religion while ignoring rights related to communal and institutional religions, or vice versa, and/or

<sup>22</sup> The United Nations Human Rights Committee has considered two cases from Australia, in which it has expressed the view that one or the other of the categories of 'sex' or 'other status' protect people from discrimination on the basis of sexual orientation under the ICCPR - see *Toonen v Australia* (488/1992) CCPR/C/50/488/1992, 1-3 IHRR 97 (1994), par 8.7.

<sup>23</sup> Donald and Howard, *op cit*, p 4, footnotes 8 and 9.

<sup>24</sup> See Donald and Howard, *op cit*, p 13, citing R. Wintemute, 'Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to serve others,' (2014) 77 (2) *Modern Law Review*, 223 and M. Malik, 'Religious Freedom in the 21<sup>st</sup> Century,' *Westminster Faith Debates*, 18 April 2012: <http://faithdebates.org.uk/debates/2012-debates/religion-and-public-life/what-limits-to-religious-freedom/> accessed 15 January 2017.

- privilege one particular type of religion as part of the national heritage, ignoring the principle of equality amongst religions.<sup>25</sup>
- 7.2 Various limitations upon religion may also be justified by governments as a matter of competing interests on the basis that no human right can be absolute. But Bielefeldt notes that the limitations are often excessive and not proportionate, with governments often referring to ‘broad and unspecified “security”, “order” or “morality” interests in order to curb religious criticism, discriminate against minorities, tighten control over independent religious community life or otherwise restrict freedom of religion or belief, often in excessive ways’.<sup>26</sup>
- 7.3 In Australia, judicial failure to appreciate that freedom of ‘religion’ also includes the freedom to have no religion has resulted in breaches of human rights. In the case of *Hickin v Carroll* [2014] NSWSC 1059 the New South Wales Supreme Court held that a testamentary requirement that the testator’s children convert to Catholicism within three months in order to be entitled to inherit under the Will was a valid condition precedent, rather than striking down the requirement as contrary to public policy. Given that Article 18(2) of the ICCPR provides that ‘no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice’, we submit that the ‘condition precedent’ was effectively a coercion, a breach of the childrens’ right to ‘religious’ freedom and against public policy.

## 8 How should governments address freedom of ‘religion’?

- 8.1 The right to manifest one’s religion or belief can validly be restricted, according to Articles 9(2) of the ECHR and 18(3) of the ICCPR, if the restriction is prescribed by law and is necessary<sup>27</sup> for the protection of public safety, public health or morals or for the protection of the rights and freedoms of others.<sup>28</sup>
- 8.2 Legislation should thus represent an **appropriate and proportionate response** to the harms being dealt with by the legislation, and adherence to international human rights law and standards is an important indicator of proportionality.<sup>29</sup> Legislation should not privilege the followers of one religion or belief against another, or discriminate between ‘religions’ or beliefs. Any protection or restriction should be ‘generic’.<sup>30</sup>
- 8.3 In applying human rights law, Donald and Howard point out that European case law establishes the principle that **there is no hierarchy of rights amongst human rights**, “meaning that in each instance, an attempt [must be] made to maximise each of the rights engaged and to ensure that none is inappropriately sacrificed.”<sup>31</sup> We submit that this is a principle that should be followed in the analysis undertaken by this Inquiry.

<sup>25</sup> Bielefeldt, op cit, par 10.

<sup>26</sup> Bielefeldt, op cit par 16.

<sup>27</sup> Article 9(2) adds: ‘in a democratic society.’ The European Court of Human Rights has held that ‘necessary in a democratic society’ means that the interference must fulfill a pressing social need and must be proportionate to the legitimate aim pursued. This means that there must be a reasonable relationship between the aim of the restriction and the means used to achieve that aim – see Donald and Howard, op cit, p 2.

<sup>28</sup> Similar provisions allow restrictions to the freedom of expression: Article 19(3) ICCPR and see Bielefeldt (2015) par 25 ff.

<sup>29</sup> See generally Law Council of Australia, “Anti-Terrorism Reform Project” October 2013, <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Oct%202013%20Update%20-%20Anti-Terrorism%20Reform%20Project.pdf>> accessed 2 October 2014.

<sup>30</sup> See Donald and Howard, p 17.

<sup>31</sup> Donald and Howard, op cit, p I and see the text on page 7 relating to footnotes 27 and 28.

8.4 The logical conclusion from the principles mentioned above is that constraints upon manifestations of religious freedom, and constraints sought upon other freedoms by those wishing to manifest their own 'religions' or beliefs, should in both cases be proportional to the harm identified. Donald and Howard note that:

in determining whether an interference with the right to manifest one's religion is justified ... the restriction must have a legitimate aim and the means used to achieve that aim must be proportionate and necessary. This means that a fair balance needs to be struck between the rights of the individual and the rights of others.<sup>32</sup>

8.5 They note also that in European case law:

The proportionality analysis – the balancing act - is highly contextual and fact-specific and precludes making abstract determinations about competing rights or the outcome of any specific case.<sup>33</sup>

8.6 It is therefore theoretically possible that other rights can validly be restricted to allow or accommodate appropriate and proportional manifestations of 'religious' belief. This is the principle of 'reasonable accommodation'. However, in accordance with the contextual principles mentioned above, it is relevant whether the 'religious' manifestation itself amounts to a beneficial or a harmful activity. As the Special Rapporteur on Freedom of Religion or Belief has said, 'the purpose of reasonable accommodation is not to 'privilege' religious or belief-related minorities, at the expense of the principle of equality.'<sup>34</sup>

8.7 Thus it has been held that although teaching of the particular faith is seen as a primary duty for members of many religions, there are many contexts in which that teaching would not be appropriate and can validly be restricted. One such valid restriction is where the recipient is in a vulnerable position, for example due to poor health, or the teaching involves violence or brainwashing.<sup>35</sup> The right to manifest one's 'religion' or belief must be balanced with the right of others to be free from interference with one's own 'religion' or belief or to be free from any 'religion' or belief.

8.8 Similarly, it may be necessary to limit 'religious' protests and vigils in the vicinity of abortion clinics in the interests of protecting the rights of clinic patients and staff, and to avoid public disorder.<sup>36</sup>

8.9 **We reject the suggestions that anti-discrimination law conflicts directly with the right to freedom of 'religion' or that anti-discrimination law itself involves religious persecution** (the argument being that anti-discrimination law is somehow unfair in that it requires persons holding religious views not to discriminate against others in the name of manifesting their own religion).<sup>37</sup> **There is no 'right of conscientious objection' for persons holding discriminatory 'religious' beliefs to:**

- **refuse to provide goods or services to persons because of those persons' sexual orientation or gender identity, or**
- **vilify persons because of those persons' sexual orientation or gender identity.**

<sup>32</sup> Donald and Howard, op cit, p i.

<sup>33</sup> Donald and Howard, op cit, p i.

<sup>34</sup> Interim Report of the Special Rapporteur on Freedom of Religion or Belief (2014) cited in Donald and Howard, op cit, pp 15-16, accessed 10 January 2017 at <<http://www.ohchr.org/Documents/Issues/Religion/A.69.261.pdf>>.

<sup>35</sup> Donald and Howard, op cit, pp 8-9.

<sup>36</sup> See Donald and Howard, op cit, p 10.

<sup>37</sup> Donald and Howard, op cit, p1.

Thus (for example) it is not valid for Christians to have exemptions from Australian laws so as to be able to 'live out their public faith' free from legal responsibilities to others.<sup>38</sup>

- 8.10 We also reject the tendency of many countries to agree to accommodate refugees only from religious backgrounds close to their own predominant religious traditions. As Bielefeldt says, such fostering of religiously homogeneous territories would clearly be at variance with the protection of human beings in their diverse convictions and practices.<sup>39</sup>

## Conclusion

As the former UN Special Rapporteur on Freedom of Religion or Belief has recommended,<sup>40</sup> governments attempting to combat intolerance and incitement to violence based on religion should take account of the rights to freedom of expression and to freedom of 'religion' in conjunction. The widespread misunderstanding that these two rights are necessarily in opposition is based on the misconception that freedom of 'religion' protects religions or belief systems *per se* when rather what it protects are the human beings who have those beliefs. Their rights to their thoughts are absolute, but their rights to manifest their beliefs in actions must be balanced against the rights of others to themselves be free from harm.

Any legislation which impinges upon human rights or provides any exemptions from human rights must be narrowly framed, proportionate to the relevant harm, and provide an appropriate contextual response which minimises the overall impact upon all human rights.

Some constraints on the external expression of religious beliefs may from time to time be appropriate in order to protect others from discrimination or breach of their own human rights.

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If you would like to discuss any aspect of this submission, please email me at: [president@alhr.org.au](mailto:president@alhr.org.au).

Yours faithfully



Benedict Coyne  
President  
Australian Lawyers for Human Rights

*Contributer: Dr Tamsin Clarke*

<sup>38</sup> As Human Rights Law Alliance, one of the business names of the public company and registered charity known as the Australian Christian Lobby ABN 40 075 120 517, has claimed should be the case: email correspondence to author, 9 February 2017, seeking funding for legal costs to represent "ordinary people who are in trouble with the law simply for living out their faith". "From street preachers, to university students, public servants, teachers and medical professionals, Christians are being targeted by aggressive laws and need our help" reads the email. It is not explained in what sense Christians are being 'targeted' nor how 'living out their faith' requires them to breach Australian laws.

<sup>39</sup> Bielefeldt, op cit par 72.

<sup>40</sup> Bielefeldt (2015), op cit, par 69ff.