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Dear Committee Secretary

Discrimination by faith-based educational institutions

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the Committee's current Inquiry as to the desirability (or otherwise) of

legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff, including on the basis of sexual orientation and gender identity and other attributes covered by the Sex Discrimination Act 1984, with particular reference to proposals for amendments to current legislation, and any related matters.

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Executive Summary

1. **Faith-based educational institutions should not be permitted to discriminate against staff or students. There is no theoretical or practical justification for such an exemption from Australian anti-discrimination legislation.**
2. **Lack of practical justification:** Discrimination is rightly made illegal because it is harmful. Discrimination is still harmful even if carried out by a faith-based institution. The harm is not diminished.
3. **Discrimination against children is reprehensible. It is also inconsistent with the UN *Convention on the Rights of the Child*.** Children are particularly vulnerable to faith-based discrimination, not only because of their comparative defencelessness but also because children are not usually free to pick their own religion (or non-religion) but are subject to the religious choices, including their schooling, that their parents make for them.
4. LGBTI children are particularly vulnerable children due to the risk of homophobic or transphobic bullying in schools. **Homophobic and transphobic bullying is perpetuated where permissible discrimination is able to exist in faith based institutions.**
5. Even if children who are students are not directly discriminated against by the faith-based institution in which they have been placed, they are **effectively taught (where discrimination by such institutions is permitted) that faith-based discrimination is legally and socially acceptable.** They may observe discrimination against other students or against staff. Discriminatory teachings and behaviour on the part of the institution foster an atmosphere of fear, inequality and division, not of safety, equality and inclusion. Discriminatory teachings set a path for both those discriminating and those discriminated against as to the way they may conduct themselves and see themselves as adults.
6. **Lack of theoretical justification:** There is no theoretical justification for such proposed exemptions. The right to express one's religious beliefs is a limited right which must be balanced against other types of rights and other peoples' rights. It does not 'trump' other rights, such as the right to be free from discrimination. **True freedom of religion is incompatible with discrimination. 'Religious freedom' does not mean freedom to visit harm upon others in the name of one's own religion.** A religion which does not respect the human rights of others does not reflect true religious freedom.¹
7. **The role of Government should be to remain neutral in religious matters and foster pluralism and tolerance as a means of promoting and preserving democracy.** A secular Australian democratic government should not privilege the right to act on 'religious' views which are discriminatory. It should remain neutral in religious matters, and should not support harmful religious behaviour. Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others. Discrimination - by definition - does not respect the rights of others. Faith-based exemptions undermine diversity and detract from an inclusive democracy.
8. **Exemptions discourage theological reform:** Privileging the right to religiously-based discrimination encourages such harmful discrimination to continue and to become entrenched in a religion rather than encouraging beneficial theological reform.
9. **Human rights provide an appropriate standard and framework which should be applied:** Without the support of a human rights framework which provides the principles and procedures for the balancing of competing interests, religious freedom for everyone in Australia in every religious community is effectively impossible (because of the conflicts in tenets of different religions). Human rights entail **both rights and obligations.** Hence in so far as we are ourselves entitled to the

¹ Heiner Bielefeldt, *A/71/269 Interim Report: Elimination of all forms of religious intolerance - The broad range of violations of freedom of religion or belief, their root causes and variables* (2016), par 33, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/244/98/PDF/N1624498.pdf>.

protection of human rights, we must also respect the human rights of others.² An extrinsic standard is also required so that society does not support only the dominant religion and does not suppress secularism, atheism or other religions. A human rights framework can provide that standard.³

In the words of the current UN Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed⁴

all believers — whether theistic, non-theistic, atheistic or other — should join hands and hearts in articulating ways in which “faith” can stand up for “rights” more effectively, so that each enhances the other. Rejecting expressions of hatred within one’s own community and extending solidarity and support across faith or belief boundaries are honourable and meaningful actions.

10. In ALHR’s view, laws which allow faith-based educational institutions to discriminate against staff or students are counter to the human rights framework established by the rules-based international legal order and have no practical nor theoretical justification.

1. Introduction

- 1.1 This document focuses on the lack of theoretical justification for faith-based exemptions from anti-discrimination legislation. **The lack of practical justification is so clear that, in ALHR’s view, it does not need to be discussed in any detail.** We refer to some relevant statistics in section 9 below (see paragraphs 9.8 and 9.9).

- 1.2 Religious activities may themselves give rise to breaches of other human rights. ‘Religious’ practices often involve:

- breaches of human rights of the group’s adherents; and
- attempts to restrict the human rights of persons outside the religious group.

Discriminatory treatment of children, women, LGBTIQ persons and other religious and ethnic minorities on the part of religious groups are obvious examples.

- 1.3 It is submitted that the balancing of competing rights through a human rights-based process involving ‘reasonable accommodation’ is the best method of managing the practical problems resulting from these issues. There can be no truly free religious life without respect for the freedoms and human rights of others.⁵
- 1.4 Adopting a human rights-based framework will also assist religions to develop, to progress towards a situation where they respect both the rights of their own members and the rights of those outside their religion.
- 1.5 While the ‘right to believe’ is a personal right which is exercised internally, the right to manifest or act upon one’s religious belief externally so as to impact upon others is never absolute. Religious freedom does not mean freedom to visit harm upon others in the name of one’s own religion.
- 1.6 When considering ‘religious’ freedom in the context of human rights, it needs to be stressed that manifestations of religious belief need to be considered both within the religion as well as outside the religion. That is, the infringements upon human rights which a religion places on its

² 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 10 February 2018.

³ Bielefeldt (2016), op cit, pars 28 to 30 and Shaheed, op cit, par 46.

⁴ A/72/365 Interim Report: Elimination of all forms of religious intolerance (2017), par 78, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/270/09/PDF/N1727009.pdf>.

⁵ Bielefeld (2016), par 33.

adherents need to be considered just as much as the infringements upon human rights which a religion seeks to place on non-believers.

- 1.7 Freedom of/from religion also involves the principle of equality amongst religions. No religion should be legally privileged above any other religion, nor above secularism, as that would result in inequality, and hence lack of freedom, of religion.⁶ This principle is particularly important in multicultural Australia.
- 1.8 There is a great range of differentiation within traditional religious beliefs and organisations and it can be erroneous to attribute any specific views to religious communities as a whole. Even amongst traditional religions, the messages and behavioural requirements are not just different but often irreconcilable.⁷ In Australia the Private Schools Directory website <http://www.privateschoolsdirectory.com.au> lists roughly twenty possible choices of religious school in addition to Catholic, Quaker, government, and non-denominational or multi-faith schools, being: Anglican, Anglican Uniting Church, Armenian Orthodox, Assemblies of God, Assyrian, Baptist, Brethren, Church of Christ, Church of England, Coptic Orthodox, Dutch Reform, Ecumenical, Free Reformed, Greek Orthodox, Hare Krishna, Islamic, Jewish, Lutheran, Pentecostal, Presbyterian, Seventh Day Adventist and Uniting Church.
- 1.9 Thus Bielefeldt notes that when States are designing policies against harmful religious practices, it should be borne in mind that such practices “are usually contested between and within religious communities”. “Awareness of such internal diversity” he notes, “is important, to avoid stigmatizing overgeneralizations and [to] muster support from within religious communities.”⁸
- 1.10 Shaheed notes that legislation may be required to protect against discrimination and vilification which is purportedly justified on the basis of religion, in order to allow all groups a ‘free’ space in which to practice their own religion, or to not practice any religion at all.⁹

2. International Instruments

- 2.1 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 1.1 of the International Labour Organisation *Discrimination (Employment and Occupation) Convention* 1958, and
 - 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 1981 Declaration).
- 2.2 The *Convention on the Rights of the Child* also prescribes that States parties shall “respect the right of the child to freedom of thought, conscience and religion”, (article 14.1) and that the State 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 (article 14.2). Australia’s obligations under the Convention and other international instruments to protect the rights of children are discussed in more detail in Section 9.
- 2.3 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.”

⁶ See Dieter Grimm, ‘Conflicts between General Laws and Religious Norms’, (2009) 30(6) *Cardozo Law Review* 2369, at 2374, <http://cardozolawreview.com/joomla1.5/content/30-6/GRIMM.30-6.pdf>

⁷ Bielefeldt (2016), op cit, par 11.

⁸ Bielefeldt (2015), op cit., par 14.

⁹ Shaheed, op cit, par 34.

2.4 Article 2(1) of the ICCPR sets out the principal of non-discrimination as follows:

Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status.

2.5 Also relevant is Article 26 of the 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 similarly states that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” 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.¹⁰

2.6 In *Toonen v Australia*, the Human Rights Committee held that the reference to ‘sex’ in Articles 2 and 26 of the ICCPR includes sexual orientation.¹¹ Whilst the ICCPR does not reference gender identity specifically, it is the opinion of many (including the Law Council of Australia) that the ICCPR would encompass gender identity under its ‘other status’ grounds.¹²

2.7 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).

2.8 The *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981)* prohibits unintentional and intentional acts of discrimination and defines discrimination in article 3 as:

Any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

2.9 Article 6 of the 1981 Declaration stipulates that the religious community's joint or shared expression of its beliefs is protected equally with the individual's right and protects manifestation of religion or belief including, but not limited to:

- worshipping and assembling, and maintaining places for this purpose
- establishing and maintaining charitable or humanitarian institutions
- practising religious rites and customs
- writing and disseminating religious publications
- teaching of religion and belief
- soliciting voluntary financial support
- training and appointment of religious leaders in accordance with the requirements and standards of the religion or belief
- observing religious holidays and ceremonies

¹⁰ 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>> .

¹¹ *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/92

¹² Law Council of Australia, Comment 132 (being a submission to the Australian Human Rights Commission *Consultation on the Protection from Discrimination on the Basis of Sexual Orientation and Sex and/or Gender Identity*, 2010), available at: <<https://www.humanrights.gov.au/publications/comments-consultation-protection-discrimination-basis-sexual-orientation-sex-andor>>

- communicating with individuals and communities on matters of religion and belief.

3. Is religious freedom possible without human rights?

- 3.1 In discussing the intersections of religious freedom with other human rights, it is important to distinguish between personal belief and religious community membership, in that “an individual has a personal sphere of religious liberty, whereas the very existence of religious communities is a public matter and has an external dimension, which means that some sort of relationship with the State is needed.”¹³
- 3.2 Religious freedom for everyone in every religious community is effectively impossible without the support of a human rights framework, because without the existence of a 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.¹⁴
- 3.3 Religious freedom for everyone, whether part of a religious community or of a non-religious community, is similarly impossible without the existence of a secular constitutional state or government, as Professor Grimm notes, saying that:

*The more multireligious a society, the more important it is that the state remain neutral in religious matters. A state that would take sides in religious matters would lose its capability to guarantee liberty for all religious faiths.*¹⁵

4 Freedom of/from religion supports other human rights

- 4.1 Freedom of/from religion has been termed a “gateway” to other freedoms, including freedom of expression and freedom of peaceful assembly and association. That is, 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. To quote the current UN Special Rapporteur on Freedom of Religion and Belief:

*Freedom of religion or belief is interwoven with the core principles of equality, non-discrimination and non-coercion and overlaps with other rights, including the rights to freedom of opinion and expression, peaceful assembly and association, and education. It must, therefore, be understood in the context of articles 18 to 20 and be read together with core principles enunciated by articles 2 and 5 of the International Covenant on Civil and Political Rights. An abuse of one right can be an obstacle to the enjoyment of all the others.*¹⁶

- 4.2 There are also 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 (see par 5.2.1 (c)).
- 4.3 Freedom of religion also supports theological reform. While it might be argued that believers ‘sign up’ to all the restrictions of a religion and willingly accept religiously-based restrictions on their human rights, such an argument ignores the possibility and importance of theological and practical reforms. Most major religions are aware of the need for theological reform, which may in some cases even be essential for the religion’s survival. Theological reform affects power

¹³ Sylvie Langlaude, “Indoctrination, Secularism, Religious Liberty and the ECHR” (2006) *International and Comparative Law Quarterly*, 55(4), 929 at 941-942.

<https://pure.qub.ac.uk/portal/files/675413/Article%20ICLQ%20by%20Sylvie%20Langlaude.pdf>

¹⁴ Bielefeldt (2016), op cit, pars 28 to 30 and Shaheed, op cit, par 46.

¹⁵ Grimm, op cit, at 2371 and 2373.

¹⁶ Shaheed, op cit, par 46.

structures within religions, sometimes with progressive outcomes, sometimes with retrogressive outcomes.

- 4.4 ALHR believes that viewing religiously-based restrictions both upon believers and non-believers through a human rights lens, and restricting faith-based exemptions from discrimination law, will assist theological reform and reform of religious practices and procedures in a positive way.

5. The balancing of indivisible and interdependent human rights

- 5.1 What happens where manifestations of different religions conflict and parties wish to exercise competing 'religious' rights or to be free from the religious practices of others? Human rights law has developed a process or set of principles by which such conflicts can be managed.

Rights must be balanced where they conflict

- 5.2 In general terms, no human right 'trumps' any other right – all are equally valuable (the principle of indivisibility) and should be protected together (the principle of interdependence).
- 5.3 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 (see par 5.2.1 (c)).
- 5.4 Subject to those absolutes, all rights must be **balanced** where they conflict so as to maximise the practice of other rights to the greatest possible extent, in 'an atmosphere of mutual consideration'¹⁷ and so as to 'ensure that none is inappropriately sacrificed'.¹⁸ This is sometimes described as a process of providing **reasonable accommodation** to other rights and other persons: 'a fair balance needs to be struck between the rights of the individual and the rights of others.'¹⁹ This is similar to the test of proportionate response to the harm in question which is generally used to assess whether or not legislation is too wide in its scope.

Taking account of context and other values

- 5.5 The balancing and reasonable accommodation tests are very much dependent upon context and cannot be used in the abstract. They may also need to call upon other rights and other values.
- 5.6 For example, 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 rights such as the right to freedom of speech or the right not to be discriminated against, and to other values and considerations (such as reasonableness or proportionality).
- 5.7 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 for the protection of public safety, public health or morals or for the protection of the rights and freedoms of others.

The good faith of those seeking State protection

- 5.8 Human rights entail **both rights and obligations**. Hence in so far as we wish the State to protect our own human rights, we must also act with *good faith* and respect the human rights of others. **Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others** Generally, behaviour should not be protected by Australian law where that behaviour itself infringes other human rights.
- 5.9 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. As the Special

¹⁷ Grimm, op cit, 2382.

¹⁸ Donald and Howard, op cit, p i.

¹⁹ Donald and Howard, op cit, p i.

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.’²⁰ 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.

- 5.10 That is, where there is a conflict between different human rights it may be necessary to limit or constrain one ‘freedom’ or right if it is misused or abused in a way that limits the free exercise of any human rights by other people. 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. As Shaheed says:

*It is also clear that the right to freedom of religion or belief does not give the individual — as a rights holder — the power to marginalize, suppress or carry out violent acts against other individuals.*²¹

- 5.11 This brings us again to the distinction between the right to hold or change a belief or have 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). Thus it has been held that although public and private 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.²² 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.

6. Protecting and respecting the believer not the belief

- 6.1 Following from the principles above, 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 Howard describe this principle as ‘**respecting the believer rather than the belief**’.²³
- 6.2 Freedom of/ from 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 can be irreconcilable.²⁴
- 6.3 Similarly, it is important to note that freedom of/from religion does not restrict the free speech rights of people to criticise the tenets of a religion. “[C]riticism of religion, religious leaders or doctrine is not a violation of the right to freedom of religion or belief” notes Shaheed.²⁵ This is one of the reasons that the offence of blasphemy is inconsistent with the human right of freedom of/from religion.

²⁰ Interim Report of the Special Rapporteur on Freedom of Religion or Belief A/69/261 (2014) cited in Donald and Howard, op cit, pp 15-16, at <<http://www.ohchr.org/Documents/Issues/Religion/A.69.261.pdf>>.

²¹ Shaheed, op cit, par 46.

²² Donald and Howard, op cit, pp 8-9.

²³ Donald and Howard, op cit, p 17.

²⁴ Bielefeldt (2016), op cit, par 11.

²⁵ Shaheed, op cit, par 46.

6.4 **Lastly, freedom of/ from religion does not give any person or organisation the right to be exempt from anti-discrimination law. Rather, freedom from discrimination and freedom of/from religion (as fully understood in a human rights framework) support each other.**

7. Religious practices which discriminate

- 7.1 Many religions restrict and/or attempt to compel the behaviour of persons by not extending tolerance to, or actively discriminating or inciting violence against, adherents of other religions (or of no religion) and against other categories of people chosen on a discriminatory basis (such as women and LGBTIQ persons) ‘under the guise of manifesting their religion or protecting the “moral high ground.”’²⁶
- 7.2 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.”*²⁷
- 7.3 Exclusionary behaviour on the part of religious organisations is legislatively protected throughout many countries by inclusion of exemptions for religious organisations in anti-discrimination legislation. The International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* recognises two exemptions from its religious anti-discrimination provisions in the employment context: the first where a particular religion is an inherent requirement of the job, and the second where having a particular religion for a particular job is required by the tenets and doctrines of the religion, and the requirement is not arbitrary and is consistently applied (article 1.2).
- 7.4 Another common employment exemption is where having a particular religion is not an inherent requirement of the job (for example, an administrative role within a church rather than a religious role) but is regarded as necessary so as to avoid injury to the religious susceptibilities of members of that religion.
- 7.5 **ALHR believes that exclusionary behaviour would be discouraged and theological reform encouraged if religiously-based exemptions were removed from anti-discrimination legislation. That the law permits ‘religious’ individuals to discriminate against others (for example on the basis of sexual orientation or gender identity) is an affront to the victims and perpetuates negative stereotyping.**²⁸
- 7.6 ALHR rejects the suggestions that were made in the context of the Marriage Equality ‘debate’ that anti-discrimination law conflicts directly with the right to freedom of/from religion or that anti-discrimination law itself involves religious persecution (the argument being that anti-discrimination law is somehow unfair in that it restricts persons holding religious views from discriminating against others in the name of manifesting their own religion).²⁹
- 7.7 There is no ‘right of conscientious objection’ under human rights law for persons holding discriminatory ‘religious’ beliefs. In particular, adherence to a discriminatory religion should not give one the legal right to refuse to interact with others because of those persons’ sexual

²⁶ Shaheed, op cit, par 46.

²⁷ Larry Cox, “Human rights must get religion,” 14 April 2014, <<https://www.opendemocracy.net/openglobalrights/larry-cox/human-rights-must-get-religion>> accessed 10 February 2018.

²⁸ 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 21st Century,’ Westminster Faith Debates, 18 April 2012: <http://faithdebates.org.uk/debates/2012-debates/religion-and-public-life/what-limits-to-religious-freedom/> accessed 10 February 2018.

²⁹ Donald and Howard, op cit, p 1.

orientation or gender identity, nor to vilify persons because of those persons' sexual orientation or gender identity.

- 7.8 Legislation should not privilege the followers of one religion or belief against another, or discriminate between 'religions' or beliefs. And a secular democratic government should not privilege the right to act on 'religious' views above other human rights. As Professor Grimm explains:

"... self-determination of religious communities as to the content and requirements of their religion does not mean that the state has to tolerate every behavior that is religiously motivated. Freedom of religion is not an absolute right, and religious communities are not extraterritorial. Like all fundamental rights, religious freedom may be limited by the state. The need for limitations follows, firstly, from the fact that freedom of religion is equal freedom for all individuals and all religious groups. Since the transcendent truths or divine revelations that religious groups claim to practice mutually exclude each other, the state must respect a group's creed, but prevent the group from making it binding for society as a whole.

*This requires a distinction between the internal and the external sphere. Claims based on an allegedly absolute truth may be raised within the religious group only. They may not be imposed on the external world."*³⁰

8. Children, discrimination and religious education

- 8.1 All children, irrespective of their actual or perceived sexual orientation or gender identity, have a right to a safe and healthy childhood that is free from discrimination.³¹ Each exposure of a child to discrimination by faith-based educational institutions inter-relates with and reinforces each other incident. Children are taught through observation, and perhaps also through classroom education, that it is legal and socially acceptable to discriminate against others if your religion so allows, even if the discrimination is on the basis of an inherent personal characteristic over which the victim has no control. They may see teachers and other children being harmed through discrimination, and they may experience harm themselves.

- 8.2 In the context of children's rights to freedom of/from religion, Bielefeldt recommends that:

Religious communities should discuss the issue of how to better ensure respect for the freedom of religion or belief of children within their teaching and community practices, bearing in mind the status of the child as a rights holder and the need to respect the evolving capacities of each child; [and]

*... Religious community leaders should support the elimination of harmful practices inflicted on children, including by publicly challenging problematic religious justifications for such practices whenever they occur.*³²

- 8.3 The situation of minor children in relation to religious discrimination needs to be considered as an important human rights issue, not least because children are not usually free to pick their own religion (or non-religion) but are subject to the religious choices that their parents make for them and are thus particularly vulnerable where a faith-based educational organisation is permitted to discriminate against its own students.
- 8.4 Protection for children is particularly important in that, as the former Special Rapporteur on Religious Freedom has pointed out, "attitudes, customs, norms and practices ... are unfortunately still widespread, whereby children are treated as if they were the property of

³⁰ Grimm, op cit, p 2374.

³¹ *Eliminating Discrimination Against Children and Parents Based on Sexual Orientation and/or Gender Identity*, UNICEF Current Issues Vol 9 November 2014 p.1

³² Bielefeldt (2015), op cit., p22.

their parents, families or communities, without having rights in their own capacity.”³³

- 8.5 “Given the child’s dependency on an enabling family environment, albeit with recognition of the variety of family forms,” says Bielefeldt, “parents have the primary responsibility for supporting the child in the exercise of his or her human rights” and should provide “appropriate guidance and direction.”³⁴ He continues:

23. ... the need of the child for an enabling environment must not lead to the wrong conclusion that parents or other family members can simply override, ignore or marginalize the rights of the child. The status of the child as rights holder must always be respected and should, inter alia, be reflected in the manner in which parents provide guidance and direction to the child. The decisive term employed in the Convention on the Rights of the Child is “the evolving capacities of the child” ...

25. Adequate consideration of “the evolving capacities of the child” presupposes that the child, once capable of forming personal views, can express such views freely, with a chance of being heard and taken seriously. Article 12, paragraph 1, of the Convention confirms that right, while furthermore requiring that the views of the child be “given due weight in accordance with the age and maturity of the child”. Thus, the child should in the course of time assume a more and more active position in the exercise of his or her rights.³⁵

- 8.6 Bielefeldt concludes that “parents cannot be obliged by the State to remain religiously “neutral” when raising their children” because that would be an unjustifiable infringement of parental rights.³⁶ However in the area of education, he notes that pressure should not be exerted on children to conform to the socially dominant religion;³⁷ identifying a number of appropriate restrictions which would avoid violations of children’s freedom of/from religion and are particularly relevant to Australian public schools:

48. When religious ceremonies, such as public prayers, are performed in school, specific safeguards are needed to ensure that no child is forced to participate against his or her will, or the will of his or her parents. The same principle applies to religious instruction in schools, ... given on the tenets of a particular religion or belief. Such instruction must not be a mandatory requirement and it should always be connected with the option of receiving a low-threshold exemption (see, for example, [CCPR/C/82/D/1155/2003](http://www.osce.org/odihr/29154)). Requests for an exemption must not lead to any punitive consequences and must not influence the assessment of the general performance of students in school. ...

49. “Religious instruction” given in school differs conceptually from “information about religions and beliefs”. While religious instruction aims to familiarize students with a particular faith, information about religions and beliefs serves the purpose of broadening children’s knowledge and understanding of the diversity of faith systems and practices. Unlike religious instruction, which should never be given against the will of the child or his or her parents, information about religions and beliefs can become part of the mandatory curriculum, provided it is taught in a spirit of fairness and neutrality.³⁸

- 8.7 These principles are very similar to those espoused by the Victorian and NSW *Religions in School* organisation.³⁹ Bielefeldt adds, following the *Toledo Principles*, that education about religions

³³ Bielefeldt (2015), op cit, par 16.

³⁴ Bielefeldt (2015), op cit, par 22, discussing the Convention on the Rights of the Child.

³⁵ Bielefeldt (2015), op cit, pars 23 and 25,

³⁶ Bielefeldt (2015), op cit, pars 36 and 37.

³⁷ Bielefeldt (2015), op cit, par 13. This is relevant to the school chaplaincy programme referred to below at 8.7.3.

³⁸ Bielefeldt (2015), op cit, pars 48 and 49, recommending the *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools* (<http://www.osce.org/odihr/29154>) as a useful instrument for assessing and improving the quality of religious education teaching.

³⁹ <http://religionsinschool.com>

and beliefs should be of high quality, based on solid research, and take into account internal diversity within various religions.⁴⁰ As the first of the *Principles* states: “students should learn about religions and beliefs in an environment respectful of human rights, fundamental freedoms and civic values.”⁴¹

9. Australia’s international obligations in relation to the rights of children

9.1 Australia is a party to the *UN Convention on the Rights of the Child (CRC)* and will appear before the United Nations Committee on the Rights of the Child in August 2019. The four core principles which guide the interpretation and implementation of all CRC rights are the principles of:

- non-discrimination,
- devotion to the best interests of the child;
- the right to life, survival and development; and
- respect for the views of the child.

9.2 The principle of non-discrimination has been identified by the UN Committee on the Rights of the Child (UNCRC) as a general principle of fundamental importance to the implementation of the whole CRC. The UNCRC, when considering the right to health has also stated:

“In order to fully realize the right to health for all children, States parties have an obligation to ensure that children’s health is not undermined as a result of discrimination, which is a significant factor contributing to vulnerability. A number of grounds on which discrimination is proscribed are outlined in article 2 of the Convention, including the child’s, parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. These also include sexual orientation, gender identity and health status.”⁴²

9.3 Any law which heightens the risk of harm to children is therefore clearly counter to the principles established in the CRC⁴³ and consequently inconsistent with Australia’s international legal obligations.

9.4 Further, as mentioned in Section 2, Australia’s international obligations under the *Universal Declaration of Human Rights (UDHR)*, the *International Covenant on Civil and Political Rights (ICCPR)*, the *International Covenant on Economic, Social, and Cultural Rights (ICESCR)*, and the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* apply to Australia’s children. These instruments establish that all students have:

- the right to protection from mental or physical harm;
- the right to freedom from discrimination based on their sexual orientation or gender identity;
- the right to an education; and
- the right to freedom of expression.

9.5 Article 29 of the CRC firmly establishes Australia’s obligation to ensure that Australian schools promote, support and protect the core value of the CRC: the human dignity innate in every child and his or her equal and inalienable rights, taking into account the child’s special developmental needs and diverse evolving capacities.

⁴⁰ Bielefeldt (2015), op cit, par (i), page 21.

⁴¹ First Key Principle, *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools* (<http://www.osce.org/odihr/29154>, p 16.

⁴² UN Committee on the Rights of the Child (CRC), *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, 17 April 2013, CRC/C/GC/15, available at: <http://www.refworld.org/docid/51ef9e134.html>.

⁴³ UNICEF op cit.

- 9.6 The ICCPR and the CRC guarantee children and adolescents the right to freedom of expression - a right which encompasses the "freedom to seek, receive, and impart information and ideas of all kinds."⁴⁴ The United Nations Human Rights Committee (**UNHRC**) has confirmed that States may not show less respect for this right on the basis of a person's status as a child or adolescent.⁴⁵
- 9.7 Australia has therefore committed to taking all appropriate measures to ensure children are protected against all forms of discrimination, irrespective of their gender or sexuality. In ALHR's submission, laws which allow faith-based educational institutions to discriminate against staff or students are counter to the human rights framework established by the rules based international legal order.
- 9.8 Australia has also agreed to be bound by the *International Labour Organization Convention No. 111* (ILO 111). This international agreement prohibits discrimination in employment on the grounds of race, colour, sex, religion, political opinion, national extraction and social origin. Parties to this convention can include additional grounds for domestic purposes, and in 1989 Australia added several grounds including 'sexual preference.'⁴⁶
- 9.9 LGBTI youth remain amongst some of our most vulnerable to abuse, harassment and violence. A La Trobe University study of 3,134 same-sex-attracted and gender questioning young people, *Writing Themselves In 3*, found that:
- 10% of young people reported that their school did not provide any form of Sexuality Education at all;
 - 40% attended a school with no social or structural support features for sexual difference;
 - only 19% of young people attended a school that was supportive of their sexuality; and
 - over a third described their school as homophobic.⁴⁷
- 9.10 A survey of 564 LGBTI individuals in 2015 by the Bully Zero Australia Foundation reported that:
- over 50% of same-sex-attracted or gender diverse young people in Australia have experienced verbal abuse;
 - over 15% of same-sex-attracted or gender diverse young people in Australia have experienced physical abuse; and
 - over 70% of these homophobic and transphobic incidents take place in schools.⁴⁸
- 9.11 In ALHR's submission, laws which allow faith-based educational institutions to discriminate against staff or students will only serve to perpetuate these kind of statistics.

⁴⁴ ICCPR, art. 19(2); Convention on the Rights of the Child, art. 13(1).

⁴⁵ *General Comment 17, Rights of the Child (Article 24)*, para. 2, Human Rights Committee, 35th sess., 1989, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1, p. 23 (1994).

⁴⁶ *Australian Human Rights Commission Act 1986* (Cth), Schedule 1 and see <https://www.humanrights.gov.au/publications/section-4-human-rights-and-discrimination-basis-sexual-orientation-or-gender-identity>

⁴⁷ Hillier, L., Jones, T., Monagle, M., Overton, N., Gahan, L., Blackman, J., & Mitchell, A. 2010. *Writing themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, 79.

⁴⁸ Bully Zero Australia Foundation. 2017. "What is Homophobic Bullying?" <http://bzaf.org.au/homophobic-bullying/>

10. Conclusion

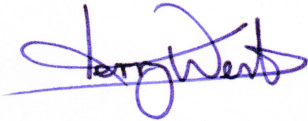
We submit that there is no practical justification for faith-based exemptions to Australian anti-discrimination legislation, but much practical justification for the removal of all existing exemptions.

Similarly there is no convincing theoretical justification for faith-based discrimination, but persuasive theoretical justification for the Australian government to remain neutral in this debate and adopt a human-rights-based framework for analysing and assessing competing 'freedoms' claims with a view to minimising potential harm.

In accordance with that framework, in relation to children, no faith-based exemptions should be permitted to anti-discrimination legislation and in relation to adults, only the narrowest of employment exemptions from anti-discrimination legislation should be permitted in cases where adherence to a particular faith is essential to the performance of the relevant duties, and not merely desirable.

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

Yours faithfully



Kerry Weste
President
Australian Lawyers for Human Rights

About ALHR

ALHR was established in 1993 and is a national association 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 specialist thematic committees. 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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