



PO Box A147
Sydney South
NSW 1235
DX 585 Sydney
www.alhr.org.au

21 December 2021

Committee Chair
Parliamentary Joint Committee on
Human Rights
Parliament House
Canberra ACT 2600

By email: religionbills@aph.gov.au

Dear Committee

Religious Discrimination Legislative Package 2021

Australian Lawyers for Human Rights (**ALHR**) thanks the Committee for the opportunity to provide this submission in relation to the the *Religious Discrimination Bill 2021 (the 2021 RDB)*, *Religious Discrimination (Consequential Amendments) Bill 2021* and the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2021*, which we note together are referred to as the “religious discrimination legislative package”. The focus of this submission will be on the 2021 RDB.

ALHR has made previous substantive submissions in relation to the first exposure draft of the *Religious Discrimination Bill 2019* in October 2019 and ‘religious freedoms’ issues in 2018 which form Annexures A, B, C and D to this submission, and on which this submission is also based, as follows:

- Annexure A: Submission dated 31 January 2020 to the Human Rights Unit, Integrity Law Branch on the Second Exposure Draft Religious Discrimination Bill 2019 (RDB), Religious Discrimination (Consequential Amendments) Bill 2019 (RDCAB) and the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (HRLAB).
- Annexure B: Submission dated 2 October 2019 to Human Rights Unit, Integrity Law Branch on First Exposure Draft Religious Discrimination Bill 2019 (RDB), Religious *Discrimination (Consequential Amendments) Bill 2019 (RDCAB)* and the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (HRLAB)*

- Annexure C: Submission dated 12 February 2018 to the Expert Panel on Religious Freedom as to *whether Australian law (Commonwealth, State and Territory laws) adequately protects the human right to freedom of religion.*
- Annexure D: Submission dated 19 November 2018 to the Senate Legal and Constitutional Affairs References Committee with reference to the desirability (or otherwise) of *legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff.*

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.

Executive Summary - Problems with the legislative package

ALHR would support a Religious Discrimination Act that provides protections against religious discrimination in areas of public life including employment, education, and membership of sporting clubs, in a manner consistent with international human rights law standards and principles.

However, as currently drafted, the focus of the 2021 RDB is the creation of significant rights to discriminate as opposed to enshrining protection against discrimination. The 2021 RDB remains seriously flawed and is significantly inconsistent with Australia's international human rights law obligations and creates an anti-human rights situation whereby all Australians can potentially be harmed by permissible discrimination on the basis of religious faith.

The 2021 RDB does not remedy the significant concerns raised by ALHR in our prior submissions on the first and second exposure drafts. Nor does it address the overarching concerns raised in our 2018 submissions regarding 'religious freedom' issues.

ALHR submits that the religious discrimination legislative package should be rejected in its entirety.

The following elements of the **2021 RDB continue** to be of serious concern:

1. Clause 12: "statements of belief";
2. Clauses 7-9: Faith-Based Organisations, especially when considered with s 40(2)-(6);
3. Clause 11: The power of the Attorney-General to override certain State and Territory laws;
4. Clause 12: Preventing action to address serious misconduct;
5. Clauses 5(3), 16(3) and 70: Unprecedented provisions of particular concern;

due to unprecedented provisions that would see the 2021 RDB override other Commonwealth, state and territory anti-discrimination legislation leading to subjugation of rights of vulnerable groups.

ALHR does not believe that Australian society should tolerate every behaviour that is religiously motivated, just by reason of that motivation, and strongly believes that our laws should not protect behaviour that is discriminatory and is likely to most heavily impact already vulnerable groups.

The 'right to believe' is an absolute personal right exercised internally, but there is no absolute right either in international human rights law or as a matter of principle to manifest or act upon one's religious belief externally so as to negatively impact upon others.

Religious freedom does not mean freedom to visit harm upon others in the name of one's own religion.

While ALHR welcomes the scaling back of provisions of concern from the first and second exposure drafts, including the the so-called 'Folau clause' and provisions that would have allowed healthcare workers to refuse treatment to people on religious grounds, we remain very concerned by the retention of provisions that will:

- privilege religiously-based discrimination over the rights of others to be free from discrimination;
- **build a fundamental imbalance into our existing anti-discrimination legal system by privileging the rights of one group within society at the expense of everyone else;**¹
- create unprecedented Commonwealth exemptions in favour of so-called 'religious' statements which will override concurrent and more protective Commonwealth, State and territory anti-discrimination legislation, setting an undesirable precedent;

and

- undermine, *inter alia*, Section 18C of the Racial Discrimination Act.

Nor is it clear how the proposed legislation would work in relation to conflicts between, or within, different religions, unlike the situation under a balanced human rights regime. Indeed it may encourage such conflicts by suggesting the existence of absolute rights which formerly would have been seen as needing to be balanced against the rights of others. That necessary restraint has now been removed.

ALHR's primary concern is that Australian legislation and judicial decisions should adhere to international human rights standards. Human rights laws cannot be selectively applied, they are not divisible nor hierarchical. All human rights are of equal importance and human rights laws can only achieve their objectives if they are applied completely to all human rights. That is not what would occur under the 2021 RDB and religious discrimination legislative package, if passed. The singling out of select human rights for protection with an elevated status above other human rights does not reflect Australia's international legal obligations to protect all human rights equally and fails to take account of the necessary interrelation between all human rights.

Where State anti-discrimination legislation aligns more closely with international human rights law than the 2021 RDB legislation does, it is particularly objectionable for the Commonwealth legislation to override State human rights protections. This is especially concerning given that the laws being overridden exist to protect some of the most vulnerable and marginalised groups in Australia.

Australia is the only Western liberal democracy without a federal Human Rights Act or Bill of Rights. Australia is bound by the seven core international human rights conventions yet our citizens and residents continue to live without the human rights protections enjoyed by other people in comparable countries across the Western world.

ALHR submits that the human right to freedom of religion would best be protected by a comprehensive Federal Human Rights Act or Bill of Rights that creates a legislative framework consistent with Australia's international human rights law obligations to protect and respect all human rights equally and balance rights proportionately.

The present religious discrimination legislative package should not be passed.

1. International Human Rights Law Principles

General principles

1.1 ALHR recognises and calls the Committee's attention to the following fundamental principles of international human rights law:

- All rights are equally valuable - there is no hierarchy of rights (**the principle of indivisibility**).
- All rights should be protected together (**the principle of interdependence**).
- Any interference with a right must have a legitimate aim - the interference or restriction must be proportionate and necessary (**the principle of proportionality**).

1.2 ALHR supports legislative reform to improve human rights protections in Australia insofar as legislative reform offers protections to all in Australia (or under Australia's protection) who may themselves face discrimination on the basis of their religion. However, the currently proposed legislation is more about giving a right to discriminate than enshrining protection against discrimination.

1.3 It is a core principle of international law that there is no hierarchy of human rights – all human rights are universal, indivisible, interdependent and interrelated. The right to express one's religious beliefs does not "trump" other rights, such as the right to be free from discrimination, but rather must be considered in context. **A secular democratic government should not privilege the right to act on religious views above other human rights.**

1.4 In this regard, where protection is desired for a particular group, it will be relevant to consider the extent to which protection for that group negatively impacts on the rights of others or, conversely, reflects respect for the rights of others.

1.5 Human rights entail **both rights and obligations**. Hence, insofar as any person is entitled to the protection of 'human rights', that person must also respect the human rights of others. A secular democratic government should not privilege the right to act on 'religious' views above other human rights.

1.6 Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.

1.7 Protection against behaviour that is inconsistent with our society's norms – and we submit discrimination on the basis of religious beliefs is inconsistent with Australian social norms - must only be granted where the protection also ensures respect for the rights of others. That is not the case with the proposed legislation.

1.8 **ALHR does not support the subjugation of rights of other Australians, especially vulnerable groups in Australia**, including LGBTI Australians, Australian women and Australians with a disability, to the rights of religious Australians.

1.9 The full title of the internationally-recognised right 'to religious freedom' is the right to **"freedom of thought, conscience, religion or belief."** This does not mean 'freedom' to follow only the majority religion or belief, and the right importantly **includes freedom 'from' religion**. This interpretation is confirmed by human rights courts internationally and particularly in Europe. The right means freedom to:

- choose between different religions and beliefs,
- convert between religions and beliefs,
- leave a religion or belief, and

- hold no religion or belief - following 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 (as any other situation would amount to compulsory religion).
- 1.10 Freedom of religion or belief is not limited to traditional religions. It also encompasses agnosticism, atheism, secularism, humanism and other systems of belief which hold to a set of values and principles but would not traditionally be thought of as religions (see paragraph 5.2.7 in Annexure C).
 - 1.11 It must also be recognised that while the right to believe is an absolute 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. (This is discussed at paragraphs 6.48 and following, 6.5, 8.4 and 8.5 in Annexure C).
 - 1.12 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.**
 - 1.13 We refer the Committee to the various resources relating to the international human rights concept of religion referred to at paragraph 3.2 of Annexure C, to the discussion in Section 5 of Annexure C of the relevant international instruments enshrining the right to freedom of religion or belief, and to the discussion in Section 6 of Annexure C of how the human right to freedom of religion intersects with other rights, and indeed should support other rights, not restrict them.

Practical problems with privileging religious 'rights'

- 1.14 In practice, the beliefs and hence the activities of those of different religions will often conflict, because "each person's religious freedom is dependent on and coextensive with everyone else's religious freedom."¹
- 1.15 It is unclear how the proposed legislation would work in relation to conflicts between different religions, or conflicts within a particular religion. Indeed the legislation may encourage such conflicts by suggesting the existence of absolute rights which formerly would have been seen as needing to be balanced against the rights of others. That necessary restraint has now been removed.
- 1.16 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 religion². This principle is particularly important in multicultural Australia.
- 1.17 **ALHR urges the Committee to recommend amendments to the 2021 RDB to avoid the subjugation of the human rights of other groups, particularly including those currently protected under State anti-discrimination laws.**

¹ Dr Luke Beck in *Committee Hansard*, Joint Standing Committee on Foreign Affairs, Defence and Trade, Public Hearing in Sydney, 6 June 2017, p 13, at http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/toc_pdf/Joint%20Standing%20Committee%20on%20Foreign%20Affairs,%20Defence%20and%20Trade_2017_06_06_5146_Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/0003%22

² 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>

- 1.18 It must be remembered that many religions have discriminatory aspects, both in relation to adherents of other religions and in relation to the religion's own adherents. See the discussion on this point in Section 7 of Annexure D. Adherence to a discriminatory religion should not give one the legal right to refuse to interact with others because of those persons' sexual orientation or gender identity, nor to vilify persons because of those persons' sexual orientation or gender identity. Legislation should not privilege the followers of one religion or belief against another, or discriminate between 'religions' or beliefs.
- 1.19 Nor should a secular democratic government 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 behaviour that is religiously motivated. 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."*³

- 1.20 In the view of ALHR, 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 better assist Australian society. **A federal Human Rights Act is the appropriate legislative vehicle to achieve this result.**

2. Groups Affected by the 2021 RDB

- 2.1 Every Australian is potentially affected by the **2021 RDB**, however ALHR has significant concerns regarding its direct adverse impact upon children, women, people with disabilities, LGBTIQ+ people, racial, culturally and linguistically diverse people, single parents, de facto couples, divorced people, and people without any religious beliefs.
- 2.2 **Not only does the 2021 RDB seek to override state and territory protections against discrimination on the grounds of disability, gender, sexual orientation, gender identity, intersex variations of sex characteristics, race, age and all other protected characteristics or attributes, clause 12(1)(b) is drafted to specifically override a Tasmanian law (s 17(1)(a)-(s) of the *Anti-Discrimination Act 1998 (Tas)*) that prohibits offensive, humiliating, intimidating, insulting or ridiculing conduct on the basis of an attribute protected by s 16 of that Act.**
- 2.3 Given that the rights of so many Australians, including vulnerable Australians, are adversely affected by this proposed law, the Committee is asked to consider the relevant international instruments and principles that apply to each of the above groups and also to the protection of all human rights, noting that (as discussed in more detail in Section 8 of Annexure C) there is no 'right of conscientious objection' under human rights law for persons holding discriminatory 'religious' beliefs.

³ Ibid

3. The 2021 RDB: Protections and Problems

Key Concerns

- 3.1 ALHR would strongly support a law that sought to protect the right of all in Australia (and under Australia's protection) to freedom of thought, conscience, religion or belief while also protecting and respecting other human rights.
- 3.2 However, ALHR is very concerned that the 2021 RDB continues to fail to adhere to the principles of indivisibility, interdependence and proportionality of human rights including by:
 - privileging religious expression ("**statements of belief**") more broadly, where that expression has the potential to cause harm to other vulnerable groups
 - removing human rights protections previously provided under state and territory law
 - allowing and encouraging discrimination on the basis of characteristics or attributes that are otherwise recognised under international law as deserving of equal protection, and which but for the 2021 RDB would be protected under state and territory law, to instead prefer the religious beliefs and 'published policies' of the discriminator, including in education and employment.

"Statements of Belief"

- 3.3 Pursuant to clause 12 of the 2021 RDB every Australian, whether at work, school, or accessing goods and services such as healthcare or public transport may be legally subjected to offensive, uninformed, insulting, demeaning or damaging 'statements of belief' as long as those statements are based on or in religion and made in 'good faith'.
- 3.4 **The "good faith" test established under 2021 RDB is more extreme than in the previous exposure drafts. It is now entirely subjective.** Previously, it was a requirement of the test that statements of belief made in "good faith" must be reasonably regarded as being in accordance with the doctrines, tenets, beliefs or teachings of their particular religion. This objective element of the test has been removed.
- 3.5 If the 2021 RDB is passed, it will be legally permissible for a person to say harmful things, which may have previously been determined to amount to discrimination on the basis of race, sex, age, disability or other status under existing Commonwealth, state and territory laws, provided their statement is made in 'good faith'. ALHR is concerned that this will create a landscape in Australia where, for example, comments from a manager to a female employee that "women should not hold leadership positions" or comments from a doctor to a patient that "HIV is a punishment for sin" or comments to a student that "disability is the work of the devil" may be legally protected 'statements of belief'.
- 3.6 Human rights groups and individuals in Australia have long fought to have the principle of non-discrimination in Article 26 of the **ICCPR** enshrined in law. Pursuant to Article 26, the law of Australia, as a signatory state, is to *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*. Pursuant to Article 2(1) of the **ICCPR**, all individuals within the territory of Australia, as a State Party to the ICCPR, undertake to recognise and ensure all individuals are afforded the rights recognised in the ICCPR 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*. ALHR submits that clause 12 of the 2021 RDB flies in the face of these key pillars of international human rights law.

- 3.7 Where state anti-discrimination legislation aligns more closely with international human rights law than does the proposed Commonwealth legislation, ALHR submits it is particularly objectionable for the Commonwealth legislation to override State human rights protections. This is unprecedented in Australian legal history.
- 3.8 In Tasmania, the parliament, informed by international human rights principles, passed laws offering the widest protection in the country against conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of a range of attributes set out in s 17(1) of the *Anti-Discrimination Act (Tas) 1998*. Included amongst the attributes protected are race, sexual orientation, gender, gender identity, disability, religious belief or affiliation and religious activity.
- 3.9 However under the 2021 RDB, protections against conduct which offends, humiliates, insults or ridicules will no longer be afforded to those formerly protected groups where that conduct is a 'statement of belief' and where that statement is made in good faith and the maker genuinely considers it to be in accordance with the doctrines, tenets, beliefs or teachings of his, her or their religion.
- 3.10 Moreover, the 2021 RDB will override existing Commonwealth anti-discrimination protections such as the Commonwealth *Racial Discrimination Act 1975*. Clause 12 of the 2021 RDB expressly provides that 'a statement of belief, in and of itself' does not constitute discrimination for the purposes of...the *Racial Discrimination Act 1975*'.
- 3.11 **The broad and radical way in which the 'statement of belief' provisions have been drafted would therefore create a law that protects at least some religiously-motivated racist comments.** Therefore 2021 RDB is designed to permit comments that would otherwise be in breach of the *Racial Discrimination Act 1975*, as long as those comments are religiously-motivated. Religious beliefs do not justify racism. This again reflects the 2021 RDB's extreme elevation in status of so-called religious freedoms, subjugating all other human rights.
- 3.12 Clause 12 of the 2021 RDB would also override the *Disability Discrimination Act 1992*, meaning religiously-motivated ableist 'statements of belief' will also be protected, including:
- denigration of people with disabilities;
 - declaring that disability is a sign of demonic possession;
 - declaring that disability is the wages of sin or deserved disfavour;
 - incitement to others to discriminate against people with disabilities;
 - incitement to others to exclude people with disabilities from religious observance or participation;
 - incitement to others to commit summary offences (offences for which a monetary penalty or less than two years imprisonment is prescribed) against people with disabilities.
- 3.13 This creates a situation where some of the most vulnerable people in our Australian community including racial minorities, LGBTIQ+ people, women, people with disability or chronic illness, single parents, people of minority faiths or of no faith will have less protection from harmful discrimination.
- 3.14 While clause 12(2) specifies that 'statements of belief' which are malicious, that harass, threaten, intimidate or vilify, or which encourage serious offences will not be protected under the 2021 RDB, ALHR is very concerned that this subsection lacks clarity in its application. The extent to which a 'statement of belief' is or is not malicious or would be considered to harass, vilify or incite hatred, violence or incite a serious crime against a

person or another group of persons will only be known after costly litigation is brought in the Federal Court to test the interpretation of the provisions. Further, the 2021 RDB will create a significant barrier to access to justice for vulnerable people who will be forced into such expensive litigation if they wish to pursue a complaint regarding discriminatory 'statements of belief'.

- 3.15 The limited protection afforded by clause 12(2)(c) seems to give licence to religious (or anti-religious) bigots to incite criminal conduct as long as it does not constitute a serious offence. For example, clause 12 may read as protecting a 'statement of belief' that urged or encouraged others to deface a shrine or public monument or damage a grave, which offences are summary offences carrying a fine of 40 penalty units under s 8 *Summary Offences Act 1988* (NSW) and therefore not within the 2021 RDB definition of serious offences.
- 3.16 It is also unclear how such a national law would work when local laws about criminal penalties for harmful conduct may differ. Is a statement not protected because it would incite conduct that is a serious offence in one state but not others? Is a statement protected until it is read by one person in that state ?
- 3.17 ALHR submits that this is a totally unsatisfactory situation. Purported 'good faith' is no reason to permit the expression of harmful discriminatory statements or to incite criminal conduct. The 2021 RDB will make it easier to make comments that "offend, humiliate, insult, ridicule or demean" minorities with impunity and incite criminal conduct against them.

Faith-Based Organisations

- 3.18 Pursuant to clauses 7-9 of the Bill, faith-based hospitals, aged care facilities, accommodation providers and disability service providers will be able to discriminate in incredibly broad and unjustified ways against people with different or no religious beliefs in employment. The combined impact of sections 7-8 and 40(2)-(6) means that for schools, charities and non-commercial bodies this protection will extend beyond employment to also permit discrimination in education and the delivery of certain services.
- 3.19 The 2021 RDB allows religious schools to prescribe their positions on religious matters in policies and prefer people for employment on that basis, overriding protections in state and territory laws.
- 3.20 Clause 11 of the 2021 RDB will empower the Commonwealth Attorney General to make regulations that override state and territory regulations that seek to narrow the above mentioned new *freedoms to discriminate* that this Bill would establish. ALHR submits that measures which override human rights protections (which we deplore) should go before the parliament, if they are to happen at all.
- 3.21 In establishing such broad exemptions the Bill elevates the right of faith-based organisations to discriminate above other rights to non-discrimination even where:
 - the services provided by such an organisation are taxpayer-funded, for example, providing domestic violence, mental health or homelessness services;
 - the services provided are a substitute for service delivery by the government, which has out-sourced its responsibilities;
 - the organisation is a large or major employer in the service area;
 - an individual is a member of the same faith but differs in their interpretation of doctrine, such as believing in divorce or same sex marriage; and
 - religious beliefs have no direct relevance to the service.

- 3.22 ALHR submits that this is entirely unacceptable. **Faith-based organisations should abide by the same laws as everyone else in Australia and should not be immune from state, territory and Commonwealth laws of general application.**

Preventing action to address serious misconduct

- 3.23 Clause 15 of the 2021 RDB would significantly inhibit employers and bodies that confer professional qualifications in sectors such as law or medicine, from responding reasonably to members who make offensive, uninformed, insulting, demeaning or damaging statements based in religion outside of work contexts, even if such statements might be considered disgraceful conduct by peer professionals.
- 3.24 Pursuant to clause 15, qualifying bodies may only take disciplinary action against members where the statement of belief is malicious or likely to threaten, harass or vilify a person. This section ignores the reality that offensive, uninformed, insulting, demeaning or damaging statements based in or about religion made outside work contexts may still significantly undermine public confidence in the profession or harm colleagues and clients within that profession, and be particularly harmful to vulnerable communities.
- 3.25 ALHR echoes the concern expressed by other legal interest groups, that this section has the potential, in particular, to undermine the paramount duty of legal practitioners to the administration of justice (see: rule 3.1 of the Australian Solicitors Conduct Rules and rule 4(a) of the Australian Barristers Conduct Rules). For example, public confidence in the administration of justice may be undermined where a member of the legal profession makes personal and public statements of belief that are contrary to and critical of a judicial decision in terms that exceed legitimate professional discussion.
- 3.26 Legal practitioners agree to be bound by conduct rules on their admission to the profession and it is entirely appropriate that qualifying bodies be able to properly investigate and impose disciplinary sanctions for breaches of those rules.

Unprecedented provisions of particular concern

- 3.27 In addition to the unprecedented way in which the 2021 RDB will override existing Commonwealth, state and territory anti-discrimination laws, there are several further measures within the Bill that are unusual and without precedent.
- 3.28 Clause 5(3) of the 2021 RDB protects religious activities that contravene local government by-laws. Again illustrating the Bill's unprecedented preferencing of religious rights over other laws and by-laws.
- 3.29 Clause 16 protects 'persons', including corporations and body corporates, associated with individuals who hold or engage in a religious belief or activity.
- 3.30 The operational effect of section 16(3) is of particular concern to ALHR as it will allow corporations to sue if they suffer detriment, such refusal of goods or services like facilities or accommodation, because of a close association with a person who holds or does not hold a religious belief. ALHR notes here that section 70 extends liability under the Bill to anyone who is directly or indirectly 'knowingly concerned' in religious discrimination.
- 3.31 The limited exception in s 35(1)(b) would prevent a person from refusing goods or services to a person, for example, if the person expressed a religious belief that might reasonably be considered counselling or urging the commission of a summary offence against the provider of the goods or services or other vulnerable persons. For example:
- a conference venue could be sued for refusing to lease a speaking venue to a religious leader or group that promoted the commission of summary offences

against First Nations or people of colour as tenets of their religion;

- a local newspaper could be sued for refusing to accept advertisements for a rally of religious adherents that promoted the desecration of war memorials in NSW as a demonstration of faith;
- an internet publisher could be sued for blocking or refusing to permit online publication of religious views that promoted summary offences against women as punishment for wearing clothing or engaging in work or social activities deemed by the religion to be inappropriate.

ALHR submits that this section is another example of the 2021 RDB prioritising religious rights over other rights and laws. It should not be unlawful that in circumstances where a person closely affiliated with a corporation makes a statement of belief that is hateful, disparaging, offensive or bigotted, that other individuals and businesses that do not share the same beliefs may seek to distance themselves or otherwise demonstrate their disagreement in support of those persons and groups impacted by the statement. Section 16, in its current form, would expose those individuals or businesses to complaints of direct discrimination for acting in support of marginalised and vulnerable groups.

4. Where Rights Compete: What Should Prevail?

The balancing of indivisible and interdependent human rights

4.1 International human rights law has developed a process or set of principles by which conflicts between different rights can be managed, both within the realm of human rights alone and in relation to external issues. As mentioned, when it comes to the right to religious belief and the right to participate in religious activity as might be protected by the 2021 RDB, it is important to differentiate between:

- The internal **right to hold a belief** (the right to freedom of thought, conscience and religion); and
- The external **right to manifest that belief**.

4.2 The internal right to a belief is absolute – the right to hold a personal belief cannot be restricted in any circumstances. The right to manifest one’s religious belief externally within society can however be restricted if the restriction is necessary for the protection of public safety, public health or morals or for the protection of rights and freedoms of others and must be balanced against those other rights, including the right to be free from discrimination. 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.*⁴

⁴ Shaheed A/72/365 Interim Report: Elimination of all forms of religious intolerance (2017) par 46
<https://digitallibrary.un.org/record/1305380?ln=fr>

Rights must be balanced where they conflict

- 4.3 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).
- 4.4 Some rights are expressed as absolutes, such as 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.⁵
- 4.5 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’⁶ and so as to ‘ensure that none is inappropriately sacrificed’.⁷ 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.’⁸ This is similar to the test of proportionate response to the harm in question which is generally used to assess whether or not legislation or policy is too wide in its scope.

Taking account of context and other values

- 4.6 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 (such as reasonableness or proportionality).
- 4.7 Human rights can validly be restricted 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 protection

- 4.8 Human rights entail both rights and obligations. 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, nor advocated by policy, where that behaviour itself infringes other human rights.
- 4.9 In balancing the competing claims, it is important to minimise any negative impact; to impinge as little as possible upon other rights.
- 4.10 That is, where there is a conflict between human rights and other interests it may be necessary to limit or constrain the other interests if they are to be implemented in a way that limits the free exercise of human rights.

⁵ See generally Attorney-General’s Department Public Sector Guidance Sheet: Absolute rights at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx>

⁶ Grimm, *op cit*, 2382.

⁷ Alice Donald and Erica Howard, The right to freedom of religion or belief and its intersection with other rights, ILGA-Europe Research Paper, 2015, p i available at: <https://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights_0.pdf>.

⁸ *Ibid*, p i.

5. Conclusion

- 5.1 Any legislation which impinges upon 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, democracy and the rule of law. The 2021 RDB still fails this test. The religious discrimination legislative package remains seriously flawed and is inconsistent with Australia's international human rights law obligations. ALHR submits that the religious discrimination legislative package should be rejected in its entirety.
- 5.2 Australia's international human rights treaty obligations should be enshrined in Commonwealth legislation. ALHR submits that this cannot be done on a piecemeal basis and we are concerned that the proposed legislative framework which singles out only select human rights for protection does not reflect Australia's international legal obligations to protect other human rights equally. The rights contained in Article 18 of ICCPR which establish the right to freedom of thought, conscience and religion, are not superior to other human rights and freedom of religion is only one aspect of that right.
- 5.3 There is no hierarchy of human rights. Human rights laws cannot be selectively applied. As noted earlier in this submission, fundamental principles of international law clearly establish that human rights are indivisible, interdependent and interrelated. They come as a package. All human rights are of equal importance and human rights laws can only achieve their objectives if they are applied completely to everyone and with interconnection.
- 5.4 It is ALHR's submission that the appropriate balance between freedom of/from religion or belief and other freedoms would best be served by adoption at the federal level of a Bill of Rights or Human Rights Act that was consistent with international human rights law.
- 5.5 In 2008, the National Human Rights Consultation Committee recommended the Federal Parliament adopt a Human Rights Act similar to legislation in place in Victoria and the ACT. In 2019, Queensland passed a Human Rights Act. Thirteen Years later, Australia continues to lag behind the rest of the world at a federal level.
- 5.6 **We would be happy to provide further submissions and oral evidence on the form that this legislation should take.**



Kerry Weste

President

[Australian Lawyers for Human Rights](#)

president@alhr.org.au

Annexure A

Submission dated 31 January 2020 to the Human Rights Unit, Integrity Law Branch on the Second Exposure Draft Religious Discrimination Bill 2019 (RDB), Religious Discrimination (Consequential Amendments) Bill 2019 (RDCAB) and the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (HRLAB)



31 January 2020

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney
www.alhr.org.au

Human Rights Unit, Integrity Law Branch
Integrity and Security Division
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600
By email: ForConsultation@ag.gov.au

Dear Human Rights Unit

Second Exposure Draft of the Religious Discrimination Bills 2019

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the second exposure drafts of the *Religious Discrimination Bill 2019 (RDB)*, *Religious Discrimination (Consequential Amendments) Bill 2019 (RDCAB)* and the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (HRLAB)*, noting that as the latter two Bills have not changed materially since the first exposure drafts, the focus of this submission will be on the RDB.

ALHR has made previous substantive submissions in relation to the first exposure draft of the *Religious Discrimination Bill 2019* in October 2019 and 'religious freedoms' issues in 2018 which form Annexures A, B and C to this submission, and on which this submission is also based, as follows:

Annexure A: Submission dated 2 October 2019 to Human Rights Unit, Integrity Law Branch on First Exposure Draft *Religious Discrimination Bill 2019 (RDB)*, *Religious Discrimination (Consequential Amendments) Bill 2019 (RDCAB)* and the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (HRLAB)*

Annexure B: Submission dated 12 February 2018 to the Expert Panel on Religious Freedom as to *whether Australian law (Commonwealth, State and Territory laws) adequately protects the human right to freedom of religion.*

Annexure C: Submission dated 19 November 2018 to the Senate Legal and Constitutional Affairs References Committee with reference to the desirability (or otherwise) of *legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff.*

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

Executive Summary - Problems with the legislative package

ALHR supports a Religious Discrimination Act which provides protections against religious discrimination in areas of public life including employment, education, and membership of sporting clubs.

However, the second exposure draft of the RDB does not does not remedy the significant concerns raised by ALHR in our prior submission on the first exposure draft. Nor does it address the overarching concerns raised in our 2018 submissions regarding 'religious freedom' issues. The Bill remains seriously flawed and is inconsistent with Australia's international human rights law obligations.

ALHR submits that the RDB Bills should be rejected in their entirety.

The following elements of the RDB continue to be of serious concern (due to the risk of subjugation of rights of vulnerable groups likely to be affected):

- Removal of existing discrimination protections and prioritisation of Statements of Belief – ss 42 and 5
- 'No Consequences for Conduct Clauses' - ss 8(3) –(5)
- Conscientious Objections by the Health Profession - ss 8(6) - (7) and 32(7)
- Exemptions for faith-based charities, schools and other organisations ss 11, 32(8)-(11) and 32(2)-(5)
- Religious doctrine, tenet, belief or teaching: protection of extreme beliefs via the establishment of a broad, uncertain and subjective legal test with no precedent - ss 5, 11, 32(2) and 32(8)
- Entirely new provisions protecting corporations against discrimination – s9
- Entirely new provisions overriding laws protecting public order and safety – s5(2)
- A Freedom of Religion Commissioner is still proposed but there is still no LGBTI Commissioner, which would leave LGBTI Australians as the only group protected by federal anti-discrimination legislation but without a dedicated Commissioner at the Australian Human Rights Commission. Given the disproportionate impact that the RDB package is likely to have on LGBTIQ+ people this omission further compounds the likely impact of the subjugation of other rights to so-called 'religious' rights under the present Bill.

ALHR does not believe that Australian society should tolerate every behaviour that is religiously motivated, just by reason of that motivation, and strongly believes that our laws should not protect behaviour that is discriminatory and is likely to most heavily impact already vulnerable groups.

The 'right to believe' is an absolute personal right exercised internally, but there is no absolute right either in international human rights law or as a matter of principle to manifest or act upon one's religious belief externally so as to negatively impact upon others.

Religious freedom does not mean freedom to visit harm upon others in the name of one's own religion.

The second exposure draft of the RDB legislative package is not consistent with international human rights law, and indeed creates the anti-human rights situation whereby discrimination will be permitted on the basis of religious faith. It will:

- privilege religiously-based discrimination over the rights of others to be free from discrimination;
- **build a fundamental imbalance into our existing anti-discrimination legal system by privileging the rights of one group within society at the expense of everyone else;**¹
- create Commonwealth exemptions in favour of so-called 'religious' statements which will override concurrent and more protective State anti-discrimination legislation, setting an undesirable precedent; and
- undermine, *inter alia*, Section 18C of the Racial Discrimination Act.

Nor is it clear how the proposed legislation would work in relation to conflicts between, or within, different religions, unlike the situation under a balanced human rights regime. Indeed it may encourage such conflicts by suggesting the existence of absolute rights which formerly would have been seen as needing to be balanced against the rights of others. That necessary restraint has now been removed.

ALHR's primary concern is that Australian legislation and judicial decisions should adhere to **international human rights standards**. Human rights laws cannot be selectively applied, they are not divisible nor hierarchical. All human rights are of equal importance and human rights laws can only achieve their objectives if they are applied completely to all human rights. That is not what would occur under the RDB legislative package, if passed. The proposed piecemeal legislative framework which singles out only select human rights for protection does not reflect Australia's international legal obligations to protect all human rights equally and fails to take account of the necessary interrelation between all human rights.

Where State anti-discrimination legislation aligns more closely with international human rights law than does the proposed Commonwealth legislation (being the RDB and associated amending legislation) it is particularly objectionable for the Commonwealth legislation to override State human rights protections.

Australia is the only Western liberal democracy without a federal Human Rights Act or Bill of Rights. Australia is bound by the seven core international human rights conventions and has been elected to the UN Human Rights Council, yet our citizens and residents continue to live without the human rights protections enjoyed by others in comparable countries across the Western world.

ALHR submits that the human right to freedom of religion would best be protected by a Federal Human Rights Act or Bill of Rights that was consistent with international human rights law and that the RDB legislative package should not be passed.

*Anti-discrimination legislation should reduce discrimination, not increase it. It should unite us, rather than divide us. The Religious Discrimination Bill fails on those most fundamental criteria.*²

¹ Alastair Lawrie, at <https://alastairlawrie.net/2019/09/15/the-growing-list-of-problems-with-the-religious-discrimination-bills/>

² Alastair Lawrie at <https://alastairlawrie.net/2020/01/27/the-bad-faith-religious-discrimination-bill-must-be-blocked/?blogsub=confirming&blogsub=confirming#subscribe-blog>

1. International Human Rights Law Principles

General principles

1.1 ALHR recognises and calls the Department's attention to the following fundamental principles of international human rights law:

- All rights are equally valuable - there is no hierarchy of rights (**the principle of indivisibility**).
- All rights should be protected together (**the principle of interdependence**).
- Any interference with a right must have a legitimate aim - the interference or restriction must be proportionate and necessary (**the principle of proportionality**).

1.2 ALHR supports legislative reform to improve human rights protections in Australia insofar as legislative reform offers protections to all citizens who may themselves face discrimination on the basis of their religion. However the proposed legislation here is more about giving a right to discriminate than enshrining protection against discrimination.

1.3 It is a core principle of international law that there is no hierarchy of human rights – all human rights are universal, indivisible, interdependent and interrelated. The right to express one's religious beliefs does not “trump” other rights, such as the right to be free from discrimination, but rather must be considered in context. **A secular democratic government should not privilege the right to act on religious views above other human rights.**

1.4 In this regard, where protection is desired for a particular group, it will be relevant to consider the extent to which protection for that group negatively impacts on the rights of others or, conversely, reflects respect for the rights of others.

1.5 Human rights entail **both rights and obligations**. Hence in so far as any person is entitled to the protection of ‘human rights’, that person must also respect the human rights of others. A secular democratic government should not privilege the right to act on ‘religious’ views above other human rights.

1.6 Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.

1.7 Protection against behaviour that is inconsistent with our society's norms – as, we submit, discrimination on the basis of religious beliefs is inconsistent with Australian social norms - must only be granted where the protection ensures respect for the rights of others. That is not the case with the proposed legislation.

1.8 **ALHR does not support the subjugation of rights of other vulnerable groups in Australia**, including LGBTI Australians, Australian women and Australians with a disability, to the rights of religious Australians.

1.9 The full title of the right ‘to religious freedom’ is the right to “**freedom of thought, conscience, religion or belief.**” This does not mean ‘freedom’ to follow only the majority religion or belief, and the right **includes freedom ‘from’ religion**. This interpretation is confirmed by human rights courts internationally and particularly in Europe. The right means freedom to:

- choose between different religions and beliefs,
- convert between religions and beliefs,
- leave a religion or belief, and

- hold no religion or belief - following 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 (as any other situation would amount to compulsory religion).
- 1.10 Freedom of religion or belief is 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 (see paragraph 5.2.7 in Annexure B).
 - 1.11 It must also be recognised that while the right to believe is an absolute 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. (This is discussed at paragraphs 6.48 and following, 6.5, 8.4 and 8.5 in Annexure B).
 - 1.12 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.**
 - 1.13 We refer the Department to the various resources relating to the international human rights concept of religion referred to at paragraph 3.2 of Annexure B, to the discussion in Section 5 of Annexure B of the relevant international instruments enshrining the right to freedom of religion or belief, and to the discussion in Section 6 of Annexure B of how the human right to freedom of religion intersects with other rights, and indeed should support other rights, not restrict them.

Practical problems with privileging religious 'rights'

- 1.14 In practice, the beliefs and hence the activities of those of different religions will often conflict, because "each person's religious freedom is dependent on and coextensive with everyone else's religious freedom."³
- 1.15 It is unclear how the proposed legislation would work in relation to conflicts between different religions, or conflicts within a particular religion. Indeed the legislation may encourage such conflicts by suggesting the existence of absolute rights which formerly would have been seen as needing to be balanced against the rights of others. That necessary restraint has now been removed.
- 1.16 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 religion⁴. This principle is particularly important in multicultural Australia.
- 1.17 **ALHR urges the Australian Government to amend the RDB to avoid the subjugation of the human rights of other groups, particularly including those currently protected under State anti-discrimination laws.**

³ Dr Luke Beck in *Committee Hansard*, Joint Standing Committee on Foreign Affairs, Defence and Trade, Public Hearing in Sydney, 6 June 2017, p 13, at http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/toc_pdf/Joint%20Standing%20Committee%20on%20Foreign%20Affairs,%20Defence%20and%20Trade_2017_06_06_5146_Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/0003%22

⁴ 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>

- 1.18 It must be remembered that many religions have discriminatory aspects, both in relation to adherents of other religions and in relation to the religion's own adherents. See the discussion on this point in Section 7 of Annexure C. Adherence to a discriminatory religion should not give one the legal right to refuse to interact with others because of those persons' sexual orientation or gender identity, nor to vilify persons because of those persons' sexual orientation or gender identity. Legislation should not privilege the followers of one religion or belief against another, or discriminate between 'religions' or beliefs.
- 1.19 Nor should a secular democratic government 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 behaviour that is religiously motivated. 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."*⁵

- 1.20 In the view of ALHR 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 better assist Australian society. **A federal Human Rights Act is the appropriate legislative vehicle to achieve this result.**

2. Groups Affected by the RDB

- 2.1 All Australians are potentially impacted by this Bill, however ALHR has significant concerns regarding the Bill's direct impact upon children, women,, people with disabilities, LGBTIQ+ people, single parents, de facto couples, divorced people, and people without any religious beliefs. Members of one or more of the following groups will also be affected by the proposed RDB changes to existing legislation:
- Employees;
 - Employers;
 - Health practitioners; and
 - Patients.
- 2.2 Within the above groups, ALHR believes that LGBTIQ+ Australians and Australian women and children will be the subgroups who will be most affected if the proposed legislation is enacted.
- 2.3 Further, the RDB particularly affects any Tasmanian coming within any category under s 17(1)(a)-(s) of the *Anti-Discrimination Act 1991 (Tas)*, including but not limited to:
- LGBTI and gender diverse Tasmanians;
 - Tasmanian woman; and
 - Disabled Tasmanians.

Given that the rights of these groups are affected, the Government must consider the relevant international instruments and principles which apply to each of the above groups and also to all groups generally, noting that (as discussed in more detail in Section 8 of Annexure B) there is no 'right of conscientious objection' under human rights law for

⁵ ibid

persons holding discriminatory ‘religious’ beliefs. Relevant international instruments and principles are discussed in more detail in Section 4.

3. The RDB: Protections and Problems

Key Concerns

- 3.1 ALHR supports the RDB insofar as it seeks to protect Australians of all religions from direct discrimination as defined in the RDB.
- 3.2 **However, ALHR is very concerned that the second exposure draft of RDB continues to fail to adhere to the principles of indivisibility, interdependence and proportionality of human rights including by:**
- Preventing employers from imposing ‘reasonable’ **conduct rules** which promote non-discrimination against other groups, for example LGBTI Australians and women.
 - Allowing health practitioners to **conscientiously object** to treatment, for example of LGBTI Australians and women seeking to terminate a pregnancy.
 - Privileging religious expression (“**statements of belief**”) more broadly, where that expression has the potential to cause harm to other vulnerable groups and where, as a result of the RDB, human rights protections previously afforded to those groups are no longer available to them, for example under s 17(1) of the *Anti-Discrimination Act 1998 (Tas)*.

Employer Conduct Rules and ‘No consequences for conduct’ clauses - ss 8(3) - 8(5) and 32(6)

The proposed sections have the effect that:	Preventing businesses with revenue of over \$50 million per year and professional qualifying bodies from imposing standards of dress, appearance, or behaviour (such as statements on social media) which limit religious expression unless that business can provide that compliance with the condition is “necessary to avoid unjustifiable financial hardship” to the business.
Example of consequence:	<p>An employer of a business with revenue of over \$50 million per year cannot impose rules on their employees which eliminate discrimination in that workplace.</p> <p>A medical board may be unable to take action on a complaint about the fitness of a doctor who Tweets at night that prayer can cure disability or that gay people are ‘sinners’</p>

- 3.3 Thus, the RDB makes it unlawful for a private sector employer with revenues of at least \$50 million in the current or previous financial year to restrict or prevent an employee from making a ‘statement of belief’ outside work hours unless compliance with that rule is necessary to avoid ‘unjustifiable financial hardship’ to the employer. There is an exception where that statement is malicious, or would likely harass, vilify or incite hatred or violence against another person. Employer conduct rules imposed by private sector employers with revenues of less than \$50 million per financial year, or in relation to conduct during work hours, are subject only to general indirect discrimination provisions.
- 3.4 ALHR understands this provision to have been introduced in response to the high profile case of Israel Folau. Mr Folau has taken Federal Court action against his employer Rugby Australia seeking to protect his ability to post content on social media which is deemed

offensive to LGBTI Australians in what Ruby Australia say was a violation of his contract. ALHR urges the Parliament to make laws only based on relevant legal principles including fundamental human rights principles, not in response to individual high profile matters evoking an emotional public response.

- 3.5 The second exposure draft of the RBD fails to remedy the concerns raised by ALHR (see Annexure A) and numerous other organisations in relation to the employer conduct rules within the Bill.
- 3.6 **Indeed rather than improve the flawed provisions, the second exposure draft extends the 'no consequence for conduct' provisions to professional qualifying bodies in addition to large private sector employers.**
- 3.7 Bodies that confer professional qualifications necessary to practice medicine, law and other jobs (for example medical boards, legal admission boards, TAFE, universities) will now also be unable to deal reasonably with members who make such statements outside work contexts, even where that behaviour arguably brings the organisation into disrepute, unless they can prove their requirements are '*essential*' to the profession, trade or occupation.⁶
- 3.8 While s8(5) establishes that there is no protection for statements which are malicious, likely to harass, threaten, seriously intimidate or vilify, or which encourage serious offences, ALHR submits that it is far from sufficient protection so as to remedy the significant removal of rights from people currently protected under anti-discrimination laws.
- 3.9 These provisions establish unworkable rules for employers and professional bodies. Private sector employers with revenues of at least \$50 million, and bodies conferring professional qualifications, will find it harder to enforce standards that make their organisations and professions inclusive and safe places for everyone.⁷
- 3.10 ALHR is concerned that, despite amendments to the Bill s 42 of the RDB continues to fail to reflect the protections offered by Article 18(3) of the ICCPR which states that "*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*" or Article 2(1) of the ICCPR which states that "*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.*"
- 3.11 ALHR is also particularly concerned by the concept of balancing human rights by reference to financial consequences. ALHR submits that such a concept is quite inappropriate.
- 3.12 ALHR requests that the Australian government consider its obligations under the **ILO convention** to pursue *a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.*

⁶ Equality Australia Religious Discrimination Bill and Employment Fact Sheet p.2

⁷ Ibid

Conscientious Objections by the Health Profession - ss 8(5) and 8(6)

The proposed sections have the effect that:	If there is not otherwise State and Territory law providing for a doctor's ability to conscientiously object, that doctor could refuse to undertake a health treatment if it would not impact on their employer's ability (e.g. a hospital) to provide a health service OR compromise the health of the person accessing the service.
Example of consequence:	<p>A woman has been admitted to hospital after a sexual assault. She asks a nurse where she can get the morning after pill. The nurse refuses to answer because her Catholic faith forbids contraception. Under the proposed laws, the right of women to have access to adequate health care facilities, including information, counselling and services in family planning is compromised, even if she is able to obtain that treatment from someone else or elsewhere.</p> <p>A GP refuses to provide referrals to or information about IVF treatment due to his religious beliefs about when life begins.</p> <p>An oncologist employed in a public hospital refuses to provide information about new stem-cell treatments to cancer patients due to a religious belief that it is immoral to destroy embryos at any stage to harvest stem cells.</p>

3.13 In Australia, State and Territory laws currently balance the health needs of patients with the right of health professionals to object to the provision of certain, limited health services on religious grounds, for example assisted dying and the termination of pregnancy, and subject to conditions which ensure the rights of a patient are not subjugated. For example, under current State and Territory legislation a health practitioner can conscientiously object to assisting assist in:

- abortion subject to a duty to refer and to assist when necessary to preserve life or in an emergency;
- abortion subject to a duty to assist when necessary to preserve life of, or prevent grave injury to physical or mental health (or serious injury) to, a pregnant women;
- Abortion subject to a duty to inform and to assist when necessary to preserve life;
- Using excess assisted reproductive technology embryos;
- Refusal to act in accordance with advance care directive on conscientious grounds; and
- Voluntary assisted dying, subject to duty to inform.

3.14 **ALHR submits that these State and Territory protections appropriately balance the right to manifest religion and the rights of patients who require the type of care in relation to which a health practitioner might conscientiously object. ALHR specifically notes the internationally recognised human rights of all Australians to accessible, safe and legal abortion services⁸ and to freely determine the number and spacing of their children.⁹**

⁸ Convention for the Elimination of Discrimination Against Women [CEDAW], Art 16; CEDAW Art 2(f) and 5(a); see also Convention on the Rights of the Child, Art 24(3); Committee on the Elimination of Discrimination against Women, General Recommendation 24: Women and Health, A/54/38/Rev 1 (1999) [11]; concluding Observations on Peru, CEDAW/C/PER/CO/7-8 (2014), para. 36; Statement on sexual and reproductive health and rights: Beyond 2014 ICPD Review (2014); UN Secretary-General, Right of everyone to the enjoyment of the highest attainable standard of physical and

- 3.15 **Sections 8(6)-(7) and 32(7) (originally ss8(5)-(6) and 31(7)) continue to** extend the ability to conscientiously object on religious grounds beyond those circumstances allowed by States and Territories. ALHR submits that the major flaws in the first Bill have not been sufficiently addressed by applying the relevant provisions to a more restricted range of health professionals. Indeed, the amendments do little to nothing to address the negative human rights impact of the proposed provisions. The reality is that the conscientious objection provisions continue to apply to doctors, nurses, midwives, psychologists and pharmacists- a group which clearly comprises the professionals in Australia who are responsible for the delivery of **most** essential healthcare to **all** Australians.
- 3.16 ALHR remains concerned that the provisions are not limited to any particular type of health service in which a conscientious objection might be considered appropriate.
- 3.17 Furthermore, the provisions now extend not only to services provided by these professionals themselves but to the health services they participate in, giving rise to the possibility that practitioners with a conscientious objection could refuse to refer a patient on to another person who can treat that patient or provide information in relation to the treatment they object to.
- 3.18 The clarifying note now provided in the provisions suggests that health professionals cannot refuse treatment to particular types of people (such as women, trans people or divorced people) only refuse to supply 'particular types of services'. However, as noted by Equality Australia it is not clear what a 'particular type of health service' means. For example, is a pharmacist dispensing hormones to a trans person the same health service as a pharmacist dispensing hormones to a menopausal woman?
- 3.19 Any additional protection offered by the clarifying note to the 'particular types of people' whose right to health is threatened by these provisions is likely to be avoided by health professionals simply refusing to provide services such as fertility or reproductive health care to everyone because they object to providing it to certain types of people. ALHR therefore remains significantly concerned that these provisions of the RDB continue to raise the potential for the right to health to be subjugated to the right to manifest religion in circumstances such as for example: (non-exhaustive):
- Seeking an emergency contraceptive following a rape;
 - Seeking hormones from a pharmacist;
 - Seeking to be prescribed PREP, the HIV preventative medication;
 - Seeking to be prescribed the contraceptive pill;
 - Seeking IVF treatment; or
 - Seeking information about stem-cell based treatments for serious illness.

It is insufficient to suggest that people might gain access to the treatment they need from an alternate practitioner who does not uphold the same conscientious objection,

mental health, A/66/254 (2011), para. 21; General Comment 14 (2000) on the right to the highest attainable standard of health, paras. 8, 12. 27; General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health, para. 70; Mr Peter Arnaudo, Attorney-General's Department, Hansard - Joint Standing Committee on Treaties Reference: Treaties tabled on 14 May and 4 June 2008 16 June 2008, p.7.
<http://www.aph.gov.au/hansard/joint/commttee/J10940.pdf>.

United Nations Economic and Social Council, 'General comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)', E/C.12/GC22, 2nd May 2016, 2.; General Comment No 22, above n 4, 4-6

particularly given the new extension of the provisions to the health services in which practitioners participate. Further, the lawful conduct of the first health practitioner may be the cause of the patient being fearful of seeking that treatment at all. **This does not uphold Article 12 of the ICESR, which is the *right of everyone to the enjoyment of the highest attainable standard of physical and mental health.***

- 3.20 **ALHR submits that when considering the limits of a health practitioner's right to manifest their belief by conscientiously objecting, legislators must keep at the forefront of their minds Article 18(3) of the ICCPR which states that: *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.***
- 3.21 In terms of enforcement, ALHR also share the concern of other human rights advocates, including Equality Australia, in relation to the potential for conflicting claims being brought before the AHRC. It is foreseen that the conscientious objection provisions under the RDB may give rise to concurrent complaints of discrimination from patients who have been denied treatment and employees who have been required to provide health services which contradict their religious beliefs.
- 3.22 The overall impact of subsections 8(6) and (7) is the establishment of a mechanism that encourages practitioners to refuse to provide vital health care services to some of the most vulnerable members of the Australian community.¹⁰

Prioritising Statements of Belief - s 42

- 3.23 Section 42 replaces the original section 41 and provides that 'statements of belief' do not constitute discrimination for the purposes of *any* anti-discrimination law, whether State, Territorial or Commonwealth. Thus a 'statement of belief' is exempt from all anti-discrimination legislation including each of the Racial, Sex, Disability and Age Discrimination Acts at Commonwealth level, and from *all* equivalent State and Territory laws.
- 3.24 This means that a person can legally say something which may have previously been determined to amount to discrimination on the basis of race, sex, age disability or other status - so long as their statement is in 'good faith' and may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of their particular religion, unless the victim can show the perpetrator is malicious, or their statement is likely to harass, vilify, or incite hatred or violence.
- 3.25 **This is a totally unsatisfactory situation. Purported 'good faith' is no reason to permit the expression of harmful discriminatory statements. The RDB will make it easier to make comments that 'offend, humiliate, intimidate, insult or ridicule' minorities with impunity.**
- 3.26 The purported protections offered by ss42(2) are not adequate and lack clarity in their application. The extent to which a statement of belief is or is not "malicious" or "would or is likely to harass, vilify or incite hatred or violence against another person or group of persons" will only be known after litigation is brought to test the interpretation of those provisions.
- 3.27 Section 42 includes amendments to clarify that only written and spoken statements are captured and not refusal of service. As Equality Australia have noted, this potentially leads to the "provision of services "with a discriminatory comment on the side"¹¹.

¹⁰ Alastair Lawrie, op cit.

- 3.28 ALHR reiterates our further concern that it is contemplated that the Commonwealth Attorney-General be allowed to override additional laws by future regulation, without needing the further approval of federal Parliament.¹²
- 3.29 Human rights groups and individuals in Australia have long fought to have the principle of non-discrimination in Article 26 of the **ICCPR** enshrined in law. Pursuant to Article 26, the law of Australia, as a signatory state, is to *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*. Pursuant to Article 2(1) of the **ICCPR**, all individuals within the territory of Australia, as a State Party to the ICCPR, undertakes to recognise and ensure all individuals are afforded the rights recognised in the ICCPR 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*.
- 3.30 In Tasmania the parliament, informed by international human rights principles, passed laws offering the widest protection in the country against conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of a range of attributes set out in s 17(1) of the *Anti-Discrimination Act (Tas) 1998*. Included amongst the attributes protected are sexual orientation, gender, gender identity, disability, religious belief or affiliation and religious activity.
- 3.31 However under the RDB, protections against conduct which offends, humiliates, intimidates, insults or ridicules will no longer be afforded to those formerly protected groups where that conduct is a “statement of religious belief” and where that statement is made in good faith and is of a belief that may reasonably be regarded as being in accordance with the doctrines, tenants, beliefs or teachings of the religion.
- 3.32 When considering the rights of LGBTI Australians in particular, ALHR is concerned that the protections hard fought for this group and grounded in international human rights principles will be eroded and give rise to harmful comments without recourse.
- 3.33 Without the protection of s 17(1) of the *Anti-Discrimination Act 1998 (Tas)* the right of that person *to the enjoyment of just and favourable conditions of work which ensure safe and healthy working conditions* will be subjugated to the right of the religious person to state their belief no matter the consequence on the rights and wellbeing on another. Were the religious person not offered the protection of the RDB, the religious person can still hold that belief. They are only restricted from manifesting it, which is proportionate to the harm caused to the gay employee.
- 3.34 ALHR continues to be concerned that s 42 of the RDB is still drafted in response to the case brought before Anti-Discrimination Commission against Tasmanian Archbishop Julian Porteous following the distribution of a pamphlet during the 2015 Tasmanian state same-sex marriage campaign titled “Don’t Mess with Marriage”, rather than in consideration of the **indivisibility** of human rights.
- 3.35 **Again, ALHR submits that legislation should be made in accordance with proper international human rights law principles rather than as a response to high profile cases.**

¹¹ Equality Australia at file:///Users/Angus/Downloads/Submission-toolkit-for-submissions-on-the-Religious-Discrimination-Bill%20(1).pdf

¹² Alexander Lawrie, op cit.

Exemptions for faith-based organisations, schools and other charities

- 3.36 The second exposure draft's sections s11 (formerly s10), and entirely new ss 32(8)-(11) and 32(2)-(5) establish exemptions which allow faith-based organisations to discriminate against others with different or no beliefs. This includes discrimination against people with different or no beliefs by faith-based:
- schools, universities and colleges both against students and in employment;
 - hospitals or aged care facilities in employment;
 - charities and other primary non-commercial bodies in both the delivery of goods and services and in employment; and
 - providers of camps or conference sites in accommodation.¹³
- 3.37 **ALHR is concerned by the expansion of exemptions privileging faith-based organisations in the second exposure draft of the Bill.**
- 3.38 Faith-based charities will now be able to discriminate against people on the basis of their beliefs in the delivery of goods and services, even where these services are publicly funded. This includes for example government funded domestic violence services, homeless services and services for people with disabilities. As a secular nation that is bound by the seven core international human rights treaties, ALHR submits that publicly funded services in Australia should not be able to discriminate against individuals on the basis of their having different or no religious beliefs.
- 3.39 Faith-based aged care facilities and hospitals will now be able to discriminate in employment and the providers of camps and conferences will be able to discriminate in respect of the provision of accommodation.
- 3.40 The provisions fail to adequately protect individuals with different or no religious beliefs who are, for example, already employed or enrolled with such faith-based organisations, as well as those who are currently relying on government funded services delivered by these categories of faith-based organisations.
- 3.41 Further, the test for determining whether an organisation can invoke these privileges is now much easier to satisfy in the Second Exposure Draft:

In fact, there are now two alternative tests, and the organisation need only satisfy one:

- *Clause 11(3) is already a lower standard than the existing religious exception in the Sex Discrimination Act 1984 (Cth), because the organisation can simply act, 'in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of the same religion' – unlike section 37(1)(d) of the SDA, these acts do not need to be 'necessary'.*
- *Clause 11(1) sets an even lower standard again. It provides that a 'religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.'¹⁴*

¹³ See Equality Australia, op cit.

¹⁴ Alastair Lawrie op cit

- 3.42 ALHR shares Equality Australia's concerns that sections 5, 11, 32(2) and 32(8) create a legal test for establishing what constitutes a religious doctrine, tenet, belief or teaching that is broad, uncertain and subjective with no precedent. The provisions will provide immunity from anti-discrimination legislation in instances where merely two people reasonably consider that doctrines, tenets, beliefs or teachings are part of a particular brand of faith. This risks creating a mechanism that protects discriminatory statements and practices with far too low a bar, particularly given that as a whole the RBD legislative package subjugates the human rights of other vulnerable groups.

Protecting corporations against discrimination

- 3.43 The new section 9 provisions extend discrimination protections to 'persons' associated with individuals holding or engaging in religious activities. As Equality Australia have noted, while the definition of a person, which includes legal entities, has been removed, legal entities may still receive legal protection under the Bill under the ordinary principles of statutory interpretation.¹⁵ The result is that the Bill may enable "corporations to sue goods, services, facilities and accommodation providers, owners of premises used by the public and clubs and sporting bodies who deny them things based on their association with individuals."¹⁶ ALHR notes that 'associates' are not, for example, currently protected under the *Sex Discrimination Act 1984* (Cth). These provisions effectively subjugate Australians' right to protest via the ability to boycott, and prioritise the rights of companies. Examples of the types of outcomes this may lead to have been suggested by Equality Australia as:

- A company may be able to sue a printer who refuses to print brochures saying 'abortion is murder' which are authorised by the company's managing director;
- A sporting code could sue a sponsor who refused to supply goods and services while the sporting code continued to employ a sports star who expresses discriminatory views based on their religious beliefs;
- A conference provider could sue a hotel if the hotel refused to accommodate a person speaking at the conference who held views in favour of racial segregation based on religion;
- A charity could sue the Commonwealth for cancelling a funding contract because the charity's CEO made public comments (on the basis of that CEO's religion) that women must cover themselves in order to avoid unwanted sexual advances.¹⁷

In ALHR's submission such outcomes are clearly at odds with community expectations and standards.

Overriding laws protecting public order and safety

- 3.44 The new subsection 5(2) is problematic. Street preachers and religious organisations that are denied permits by local government due to by- laws that apply to everyone, regardless of whether the activity is religious or not, may be able to sue for religious discrimination.

¹⁵ See Section 2C of the *Act Interpretation Act 1901* (Cth)

¹⁶ Equality Australia op cit

¹⁷ Equality Australia op cit

4. Relevant International Instruments

- 4.1 International instruments relating to freedom of religion are reviewed generally in Annexure B. We consider here the instruments relating to the rights to health and employment as well as to non-discrimination.

Right related to Health¹⁸

The following instruments deal with the subject of health:

Generally <i>International Covenant on Economic, Social and Cultural rights</i> (ICESR)	Article 12: <i>States recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.</i>
Women <i>Covenant on the Elimination of All Forms of Discrimination Against Women 1979</i>	Art 11(f): <i>The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.</i> Art 12: <i>States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.</i> Art 14(2)(b): <i>States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right To have access to adequate health care facilities, including information, counselling and services in family planning.</i>

- 4.2 “While the right to health is sometimes understood to focus only on positive guarantees for the progressive realization of the availability, accessibility, acceptability, and quality of health care for all,” say Cohen and Ezer, “it also incorporates negative guarantees for the assurance of freedom from abuse and discrimination by the state and third parties within health care service delivery.” That is, the right to health (which Australia has agreed to uphold) also includes the right to “a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.”¹⁹

- 4.3 Many rights relating to health issues in the context of patient treatment are implicit rights. Cohen and Ezer note that:

The provisions of these treaties have been interpreted by human rights bodies to prohibit numerous forms of abuse in health settings. For example, the right to liberty and security of the person has been held to prohibit institutionalization without due process of people with mental illness; the right to privacy has been

¹⁸ OHCHR, The Right to Health, Fact Sheet No. 31,
<https://www.ohchr.org/Documents/Publications/Factsheet31.pdf>

¹⁹ CESCR General Comment No. 14, par 8.

*held to prohibit unauthorized disclosure of personal health data; the rights to bodily integrity and security of the person have been held to prohibit the administration of medicine to a child against parents' wishes; and the right to freedom from cruel, inhuman, or degrading treatment or punishment has been held to oblige governments to secure the adequate health and well-being of prisoners.*²⁰

- 4.4 The CESCR, in paragraph 12 of its *General Comment No. 14*, describes a number of rights and implicit rights that it sees as integral to the rights to health and to bodily integrity (as does the European Charter of Patients' Rights, discussed below). These rights include:
- Availability (par 12(a)) of health treatment and the underlying determinants of health, without discrimination;
 - Accessibility (par 12(b)) including the right to seek, receive and impart information and ideas concerning health issues;
 - Acceptability (par 12(c)): meaning that health services must be "respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, [and] sensitive to gender and life-cycle requirements";
 - Quality (par 12(d)): to the observance of quality standards, with services being scientifically and medically appropriate.
- 4.5 The European Charter of Patients' Rights²¹ drafted by the Active Citizenship Network puts the implicit right to health information as key to the health rights of patients, saying that every individual:
- "has the right to access to all kind of information regarding their state of health, the health services and how to use them, and all that scientific research and technological innovation makes available,"²²
 - "has the right of access to all information that might enable him or her to actively participate in the decisions regarding his or her health,"²³
 - "has the right to freely choose from among different treatment procedures and providers on the basis of adequate information,"²⁴ and
 - "has the right of access to innovative procedures, including diagnostic procedures, according to international standards and independently of economic or financial considerations."²⁵

However it should be noted that this Charter, although influential in the European human rights context according to Cohen and Ezer, is written from the paradigm of patients as

²⁰ Jonathan Cohen and Tamar Ezer, "Human rights in patient care: A theoretical and practical framework" (2013) 15 (2) *Health and Human Rights Journal*, available at <https://www.hhrjournal.org/2013/12/human-rights-in-patient-care-a-theoretical-and-practical-framework/>

²¹ http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf

²² Op cit, p 4.

²³ Op cit, p 5.

²⁴ Op cit, p 5.

²⁵ Op cit, p 7. See also ICESCR (see note 13), Art. 15 as to the right to the benefits of scientific progress.

consumers, which is a different viewpoint from the broader (and in our view preferred) concept of patients as holders of human rights and as entitled to be treated with dignity.

- 4.6 The Committee notes²⁶ that inappropriate resource allocation can lead to “discrimination that may not be overt. For example, investments should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population.” In addition, the Committee comments that “indigenous peoples have the right to specific measures to improve their access to health services and care,” saying that such health services “should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines.”²⁷
- 4.7 A human-rights-based framework for patient care is increasingly being seen as a desirable alternative to consumer or contract-based ‘patient rights’ frameworks. A human rights framework considers the rights (and obligations) of both patient and provider, as well as wider social interests. As Cohen and Ezer say,

*the human rights in patient care concept refers not just to entitlements for actual patients, but also to human rights standards in the provision of care that concern health providers and the entire community. It calls for a pervasive human rights frame to govern the delivery of care to patients in all its aspects, which also highlights equality, participation, transparency, and accountability concerns.*²⁸

Rights related to Employment

The following instruments deal with the subject of employment:

ICESCR	<p>Article 6: The right to work, which includes the right of everyone to the opportunity to gain a living by work they freely choose to accept, with appropriate safeguards to be taken to protect that right.</p> <p>Article 7(b): The right of everyone to the enjoyment of just and favourable conditions of work which ensure safe and healthy working conditions.</p> <p>Article 7(c): The right of everyone to the enjoyment of just and favourable conditions of work which ensure equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no consideration other than those of seniority and competence.</p>
International Labour Organisation Discrimination (Employment and Occupation) Convention,	Article 2: Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to

²⁶ CESCR, op cit, par 19.

²⁷ Op cit, par 27. However Mpinga et al comment (text prior to footnote 56) that the CESCR “takes a reductionist view by framing the question of [non-conventional medicines] as a matter of interest and concern only for native people”, noting that “[i]n doing this, the Committee misses what current data show, namely that everybody (including urban populations) resorts to non-conventional and complementary medicines.”

²⁸ Op cit.

<p>1958</p> <p>(ILO Convention)</p>	<p>eliminating any discrimination in respect thereof.</p> <p>For the purpose of the ILO convention-</p> <p>The term discrimination includes:</p> <p>(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;</p> <p>(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.</p> <p>Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.</p> <p>For the purpose of this Convention the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.</p>
-------------------------------------	---

- 4.8 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).

Principle of non-discrimination

The following instruments deal with the subject of non-discrimination:

<p>Generally</p> <p>ICCPR</p> <p>Article 26 is a 'stand-alone' right which forbids discrimination in <i>any law</i> and in <i>any field regulated by public authorities</i>, even if those laws do not relate to a right specifically mentioned in the ICCPR.</p>	<p>Article 2(1):</p> <p><i>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.</i></p> <p>Article 26:</p> <p><i>All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.</i></p> <p><i>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.</i></p>
--	--

Health and work	ICESCR Art 2(2): <i>The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</i>
Sexual orientation	In <i>Toonen v Australia</i> , the Human Rights Committee held that the reference to 'sex' in Articles 2 and 26 of the ICCPR includes sexual orientation. 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. Similarly the ICEPSR.

5. Where Rights Compete: What Should Prevail?

The balancing of indivisible and interdependent human rights

5.1 International human rights law has developed a process or set of principles by which conflicts between different rights can be managed, both within the realm of human rights alone and in relation to external issues. As mentioned, when it comes to the right to religious belief and the right to participate in religious activity as might be protected by the RDB, it is important to differentiate between:

- The internal **right hold a belief** (the right to freedom, conscience and religion); and
- The external **right to manifest that belief**.

5.2 The internal right to a belief is absolute – the right to hold a personal belief cannot be restricted in any circumstances. The right to manifest one's religious belief externally within society can however be restricted if the restriction is necessary for the protection of public safety, public health or morals or for the protection of rights and freedoms of others and must be balanced against those other rights, including the right to be free from discrimination. 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 others²⁹

Rights must be balanced where they conflict

5.3 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).

²⁹ Shaheed, op cit, par 46.

- 5.4 Some rights are expressed as absolutes, such as 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.³⁰
- 5.5 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’³¹ and so as to ‘ensure that none is inappropriately sacrificed’.³² 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.’³³ This is similar to the test of proportionate response to the harm in question which is generally used to assess whether or not legislation or policy is too wide in its scope.

Taking account of context and other values

- 5.6 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 (such as reasonableness or proportionality).
- 5.7 Human rights can validly be restricted 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 protection

- 5.8 Human rights entail **both rights and obligations**. **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, nor advocated by policy, where that behaviour itself infringes other human rights.
- 5.9 In balancing the competing claims, it is important to minimise any negative impact; to impinge as little as possible upon other rights.
- 5.10 That is, where there is a conflict between human rights and other interests it may be necessary to limit or constrain the other interests if they are to be implemented in a way that limits the free exercise of human rights.

³⁰ See generally Attorney-General’s Department Public Sector Guidance Sheet: *Absolute rights* at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx>

³¹ Grimm, op cit, 2382.

³² Alice Donald and Erica Howard, *The right to freedom of religion or belief and its intersection with other rights*, ILGA-Europe Research Paper, 2015, p i available at: <https://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights__0.pdf>.

³³ Ibid, p i.

6. Conclusion

- 6.1 Any legislation which impinges upon 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, democracy and the rule of law. The second exposure draft of the RBD still fails this test. The RBD legislative package remains seriously flawed and is inconsistent with Australia's international human rights law obligations. ALHR submits that the RDB Bills should be rejected in their entirety.**
- 6.2 Australia's international human rights treaty obligations should be enshrined in Commonwealth legislation. ALHR submits that this cannot be done on a piecemeal basis and we are concerned that the proposed legislative framework which singles out only select human rights for protection does not reflect Australia's international legal obligations to protect other human rights equally. The rights contained in Article 18 of ICCPR which establish the right to freedom of thought, conscience and religion, are not superior to other human rights.
- 6.3 There is no hierarchy of human rights. Human rights laws cannot be selectively applied. As noted earlier in this submission, fundamental principles of international law clearly establish that human rights are indivisible, interdependent and interrelated. They come as a package. All human rights are of equal importance and human rights laws can only achieve their objectives if they are applied completely to everyone and with interconnection.
- 6.4 It is ALHR's submission that the appropriate balance between freedom of /from religion or belief and other freedoms would best be served by adoption at the federal level of a Bill of Rights or Human Rights Act that was consistent with international human rights law.**
- 6.5 In 2008, the National Human Rights Consultation Committee recommended the Federal Parliament adopt a *Human Rights Act* similar to legislation in place in Victoria and the ACT. Last year, Queensland passed a *Human Rights Act*. Eleven years later, Australia continues to lag behind the rest of the world at a federal level.
- 6.6 We would be happy to provide further submissions and oral evidence on the form that this legislation should take.

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

Contributors: Dr Tamsin Clarke, Kerry Weste.

Annexure B

Submission dated 2 October 2019 to Human Rights Unit, Integrity Law Branch on First Exposure Draft Religious Discrimination Bill 2019 (RDB), Religious *Discrimination (Consequential Amendments) Bill 2019 (RDCAB)* and the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (HRLAB)



2 October 2019

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney
www.alhr.org.au

Human Rights Unit, Integrity Law Branch
Integrity and Security Division
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

By email: ForConsultation@ag.gov.au

Dear Human Rights Unit

The Religious Freedom Bills

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the Exposure Drafts of the *Religious Discrimination Bill 2019 (RDB)*, *Religious Discrimination (Consequential Amendments) Bill 2019 (RDCAB)* and the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (HRLAB)*, noting that the focus of this submission will be on the RDB.

ALHR has made previous substantive submissions in relation to 'religious freedoms' issues in 2018 which form Annexures A and B to this submission, and on which this submission is also based, as follows:

- Annexure A: Submission dated 12 February 2018 to the Expert Panel on Religious Freedom as to *whether Australian law (Commonwealth, State and Territory laws) adequately protects the human right to freedom of religion.*
- Annexure B: Submission dated 19 November 2018 to the Senate Legal and Constitutional Affairs References Committee with reference to the desirability (or otherwise) of *legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff.*

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.

Table of Contents

Executive Summary - Problems	3
1. International Human Rights Law Principles	4
General principles	4
Practical problems with privileging religious 'rights'	5
2. Groups Affected by the RDB	6
3. The RDB: Protections and Problems	7
Key Concerns	7
Employer Conduct Rules - ss 8(3) and 8(4)	7
Conscientious Objections by the Health Profession - ss 8(5) and 8(6)	8
Prioritising Statements of Belief - s 41	9
4. Relevant International Instruments	11
Right related to Health	11
Rights related to Employment	13
Principle of non-discrimination	14
5. Where Rights Compete: What Should Prevail?	15
The balancing of indivisible and interdependent human rights	15
Rights must be balanced where they conflict	15
Taking account of context and other values	16
The good faith of those seeking protection	16
6. Conclusion	16

Executive Summary - Problems

1. ALHR supports a Religious Discrimination Act which provides protections against religious discrimination in areas of public life including employment, education, membership of sporting clubs and other areas of public life.
2. **However, ALHR does not support the following provisions in the RDB (due to the risk of subjugation of rights of vulnerable groups likely to be affected):**
 - **Employer Conduct Rules - ss 8(3) and 8(4)**
 - **Conscientious Objections by the Health Profession - ss 8(5) and 8(6)**
 - **Prioritising Statements of Belief - s 41**
3. **ALHR does not believe that Australian society should tolerate every behaviour that is religiously motivated, just by reason of that motivation, and strongly believes that our laws should not protect behaviour that is discriminatory and is likely to most heavily impact already vulnerable groups.** The 'right to believe' is an absolute personal right exercised internally, but there is no absolute right to manifest or act upon one's religious belief externally so as to impact upon others. **Religious freedom does not mean freedom to visit harm upon others in the name of one's own religion.**
4. The RDB legislative package is **not consistent with international human rights law**, and indeed **creates the anti-human rights situation** whereby discrimination will be permitted on the basis of religious faith. It will:
 - privilege religiously-based discrimination over the rights of others to be free from discrimination;
 - **build a fundamental imbalance into our existing anti-discrimination legal system by privileging the rights of one group within society at the expense of everyone else;**¹
 - create Commonwealth exemptions in favour of so-called 'religious' statements which will override concurrent and more protective State anti-discrimination legislation, setting an undesirable precedent; and
 - undermine, *inter alia*, Section 18C of the Racial Discrimination Act.
5. Nor is it clear how the proposed legislation would work in relation to conflicts between, or within, different religions, unlike the situation under a balanced human rights regime. Indeed it may encourage such conflicts by suggesting the existence of absolute rights which formerly would have been seen as needing to be balanced against the rights of others. That necessary restraint has now been removed.
6. ALHR's primary concern is that Australian legislation and judicial decisions should adhere to **international human rights standards**. Human rights laws cannot be selectively applied, they are not divisible nor hierarchical. All human rights are of equal importance and human rights laws can only achieve their objectives if they are applied completely to all human rights. That is not what would occur under the RDB legislative package, if passed. The proposed piecemeal legislative framework which singles out only select human rights for protection does not reflect Australia's international legal obligations to protect all human rights equally and fails to take account of the necessary interrelation between all human rights.

¹ Alastair Lawrie, at <https://alastairlawrie.net/2019/09/15/the-growing-list-of-problems-with-the-religious-discrimination-bills/>

7. Where State anti-discrimination legislation aligns more closely with international human rights law than does the proposed Commonwealth legislation (being the RDB and associated amending legislation) it is particularly objectionable for the Commonwealth legislation to override State human rights protections.
8. Australia is the only Western liberal democracy without a federal Human Rights Act or Bill of Rights. Australia is bound by the seven core international human rights conventions and has been elected to the UN Human Rights Council, yet our citizens and residents continue to live without the human rights protections enjoyed by others in comparable countries across the Western world.
9. ALHR submits that the human right to freedom of religion would best be protected by a Federal Human Rights Act or Bill of Rights and that the **RDB legislative package should not be passed.**

1. International Human Rights Law Principles

General principles

- 1.1 **ALHR recognises and calls the Department's attention to the following fundamental principles of international human rights law:**
 - All rights are equally valuable - there is no hierarchy of rights (**the principle of indivisibility**).
 - All rights should be protected together (**the principle of interdependence**).
 - Any interference with a right must have a legitimate aim - the interference or restriction must be proportionate and necessary (**the principle of proportionality**).
- 1.2 ALHR supports legislative reform to improve human rights protections in Australia insofar as legislative reform offers protections to all citizens who may themselves face discrimination on the basis of their religion. However the proposed legislation here is more about giving a right to discriminate than enshrining protection against discrimination.
- 1.3 It is a core principle of international law that there is no hierarchy of human rights – all human rights are universal, indivisible, interdependent and interrelated. The right to express one's religious beliefs does not "trump" other rights, such as the right to be free from discrimination, but rather must be considered in context. **A secular democratic government should not privilege the right to act on religious views above other human rights.**
- 1.4 In this regard, where protection is desired for a particular group, it will be relevant to consider the extent to which protection for that group negatively impacts on the rights of others or, conversely, reflects respect for the rights of others.
- 1.5 Human rights entail **both rights and obligations**. Hence in so far as any person is entitled to the protection of 'human rights', that person must also respect the human rights of others. A secular democratic government should not privilege the right to act on 'religious' views above other human rights.
- 1.6 Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.
- 1.7 Protection against behaviour that is inconsistent with our society's norms – as, we submit, discrimination on the basis of religious beliefs is inconsistent with Australian social norms - must only be granted where the protection ensures respect for the rights of others. That is not the case with the proposed legislation.
- 1.8 **ALHR does not support the subjugation of rights of other vulnerable groups in Australia**, including LGBTI Australians, Australian women and Australians with a disability, to the rights of religious Australians.

- 1.9 The full title of the right is the right to **“freedom of thought, conscience, religion or belief.”** This does not mean ‘freedom’ to follow only the majority religion or belief, and the right **includes freedom ‘from’ religion.** This interpretation is confirmed by human rights courts internationally and particularly in Europe. The right means freedom to:
- choose between different religions and beliefs,
 - convert between religions and beliefs,
 - leave a religion or belief, and
 - hold no religion or belief - following 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 (as any other situation would amount to compulsory religion).
- 1.10 Freedom of religion or belief is 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 (see paragraph **Error! Reference source not found.** in Annexure A).
- 1.11 It must also be recognised that while the right to believe is an absolute 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. (This is discussed at paragraphs 6.48 and following, 6.5, 8.4 and 8.5 in Annexure A).
- 1.12 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.**
- 1.13 We refer the Department to the various resources relating to the international human rights concept of religion referred to at paragraph 3.2 of Annexure A ,to the discussion in Section 5 of Annexure A of the relevant international instruments enshrining the right to freedom of religion or belief, and to the discussion in Section 6 of Annexure A of how the human right to freedom of religion intersects with other rights, and indeed should support other rights, not restrict them.

Practical problems with privileging religious ‘rights’

- 1.14 In practice, the beliefs and hence the activities of those of different religions will often conflict, because “each person's religious freedom is dependent on and coextensive with everyone else's religious freedom.”²
- 1.15 It is unclear how the proposed legislation would work in relation to conflicts between different religions, or conflicts within a particular religion. Indeed the legislation may encourage such conflicts by suggesting the existence of absolute rights which formerly would have been seen as needing to be balanced against the rights of others. That necessary restraint has now been removed.
- 1.16 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

² Dr Luke Beck in *Committee Hansard*, Joint Standing Committee on Foreign Affairs, Defence and Trade, Public Hearing in Sydney, 6 June 2017, p 13, at http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/toc_pdf/Joint%20Standing%20Committee%20on%20Foreign%20Affairs,%20Defence%20and%20Trade_2017_06_06_5146_Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/0003%22

inequality, and hence lack of freedom, of religion³. This principle is particularly important in multicultural Australia.

- 1.17 **ALHR urges the Australian Government to amend the RDB to maintain protections for religious Australians whilst avoiding the subjugation of rights of other groups, particularly including those currently protected under State anti-discrimination laws.**
- 1.18 It must be remembered that many religions have discriminatory aspects, both in relation to adherents of other religions and in relation to the religion's own adherents. See the discussion on this point in Section 7 of Annexure B. Adherence to a discriminatory religion should not give one the legal right to refuse to interact with others because of those persons' sexual orientation or gender identity, nor to vilify persons because of those persons' sexual orientation or gender identity. Legislation should not privilege the followers of one religion or belief against another, or discriminate between 'religions' or beliefs.
- 1.19 Nor should a secular democratic government 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. 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."*⁴

- 1.20 In the view of ALHR 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 better assist Australian society. A federal Human Rights Act is the appropriate legislative vehicle to achieve this result.

2. Groups Affected by the RDB

- 2.1 Members of one or more of the following groups will be affected by the proposed RDB changes to existing legislation:
 - People with a religious belief or who participate in religious activity;
 - Employees;
 - Employers;
 - Health practitioners; and
 - Patients.
- 2.2 Within the above groups, ALHR believes that LGBTI Australians and Australian women will be the following subgroups who will be most affected if the proposed legislation is enacted.
- 2.3 Further, the RDB particularly affects any Tasmanian coming within any category under s 17(1)(a)-(s) of the *Anti-Discrimination Act 1998 (Tas)*, including but not limited to:
 - LGBTI and gender diverse Tasmanian;
 - Tasmanian woman; and
 - Disabled Tasmanians.

³ 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>

⁴ *ibid*

Given that the rights of these groups are affected, the Government must therefore consider the relevant international instruments and principles which apply to each of the above groups and also to all groups generally, noting that (as discussed in more detail in Section 8 of Annexure A) there is no 'right of conscientious objection' under human rights law for persons holding discriminatory 'religious' beliefs. Relevant international instruments and principles are discussed in more detail in Section 4.

3. The RDB: Protections and Problems

Key Concerns

- 3.1 ALHR supports the RDB insofar as it seeks to protect Australians of all religions from direct discrimination as defined in the RDB.
- 3.2 However, **ALHR is very concerned that the RDB does not adhere to the principles of indivisibility, interdependence and proportionality** of human rights including by:
- Preventing employers from imposing 'reasonable' **conduct rules** which promote non-discrimination against other groups, for example LGBTI Australians and women.
 - Allowing health practitioners to **conscientiously object** to treatment, for example of LGBTI Australians and women seeking to terminate a pregnancy.
 - Privileging religious expression ("**statements of belief**") more broadly, where that expression has the potential to cause harm to other vulnerable group and where, as a result of the RDB, human rights protections previously afforded to those groups are no longer available to them, for example under s 17(1) of the *Anti-Discrimination Act 1998 (Tas)*.

Employer Conduct Rules - ss 8(3) and 8(4)

The proposed sections have the effect that:	Preventing business with revenue of over \$50 million per year from imposing standards of dress, appearance, or behaviour which limit religious expression being if that business can provide that compliance with the condition is "necessary to avoid unjustifiable financial hardship" to the business.
Example of consequence:	An employer of a business with revenue of over \$50 million per year cannot impose rules on their employees which eliminate discrimination in that workplace.

- 3.3 The RDB makes it unlawful for a private sector employer with revenues of at least \$50 million in the current or previous financial year to restrict or prevent an employee from making a 'statement of belief' outside of work hours unless compliance with that rule is necessary to avoid 'unjustifiable financial hardship' to the employer. There is an exception where that statement is malicious, or would likely harass, vilify or incite hatred or violence against another person. Employer conduct rules imposed by private sector employers with revenues of less than \$50 million per financial year, or in relation to conduct during work hours, are subject only to general indirect discrimination provisions.
- 3.4 ALHR understands this provision to have been introduced in response to the high profile case of Israel Folau. Mr Folau has taken Federal Court action against his employer Rugby Australia seeking to protect his ability to post content on social media which is deemed offensive to LGBTI Australians in what Ruby Australia say was a violation of his contract. ALHR urges the Parliament to make laws only based on relevant legal principles including fundamental human rights principles, not in response to individual high profile matters evoking an emotional public response.

- 3.5 ALHR is concerned that s 41 of the RDB fails to reflect the protections offered by Article 18(3) of the **ICCPR** which states that *“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”* or Article 2(1) of the ICCPR which states that *“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.”*
- 3.6 ALHR is also particularly concerned at the concept of balancing human rights by reference to financial consequences. ALHR submits that such a concept is quite inappropriate.
- 3.7 ALHR requests the Australian government to consider the its obligations under the **ILO convention** to pursue *a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.*

Conscientious Objections by the Health Profession - ss 8(5) and 8(6)

The proposed sections have the effect that:	If there is not otherwise State and Territory law providing for a doctor's ability to conscientiously object, that doctor could refuse to undertake a health treatment if it would not impact on their employer's ability (e.g. a hospital) to provide a health service OR compromise the health of the person accessing the service.
Example of consequence:	A woman has been admitted to hospital after a sexual assault. She asks a nurse where she can get the morning after pill. The nurse refuses to answer because her Catholic faith forbids contraception. Under the proposed laws, the right of women to have access to adequate health care facilities, including information, counselling and services in family planning is compromised, even if she is able to obtain that treatment from someone else or elsewhere.

- 3.8 In Australia, State and Territory laws currently balance the health needs of patients with the right of health professionals to object to the provision of certain, limited health services on religious grounds, for example assisted dying and the termination of pregnancy, and subject to conditions which ensure the rights of a patient are not subjugated. For example, under current State and Territory legislation a health practitioner can conscientiously object to assisting assist in:
- abortion subject to a duty to refer and to assist when necessary to preserve life or in an emergency;
 - abortion subject to a duty to assist when necessary to preserve life of, or prevent grave injury to physical or mental health (or serious injury) to, a pregnant women;
 - Abortion subject to a duty to inform and to assist when necessary to preserve life;
 - Using excess assisted reproductive technology embryos;
 - Refusal to act in accordance with advance care directive on conscientious grounds; and
 - Voluntary assisted dying, subject to duty to inform.
- 3.9 ALHR submits that these State and Territory protections appropriately balance the right to manifest religion and the rights of patients who require the type of care in relation to which a health practitioner might conscientiously object. ALHR specifically notes the internationally recognised

human rights of all Australians to accessible, safe and legal abortion services⁵ and to freely determine the number and spacing of their children.⁶

- 3.10 The RDB extends the ability to conscientiously object on religious grounds beyond those circumstances allowed by States and Territories. The RDB provisions:
- Cover a wide range of health professionals - from doctors and nurses through to psychologists;
 - Are not limited to any particular type of health service in which a conscientious objection might be considered appropriate.
- 3.11 ALHR is concerned that the provisions in s 8 of the RDB raises the potential for right to health to be subjugated to the right to manifest religion in the following circumstances (non-exhaustive):
- A woman seeking emergency contraceptive following a rape;
 - A trans person seeking hormones from a pharmacist; or
 - A gay man seeking to be prescribed PREP, the HIV preventative medication.
- 3.12 It is insufficient to suggest that these people might gain access to the treatment they need from an alternate practitioner who does not uphold the same conscientious objection, as the lawful conduct of the first health practitioner may be the cause of them being fearful of seeking that treatment at all. This does not uphold Article 12 of the **ICESR**, which is the *right of everyone to the enjoyment of the highest attainable standard of physical and mental health*.
- 3.13 ALHR submits that when considering the limits of a health practitioner's right to manifest their belief by conscientiously objecting, legislators must keep at the forefront of their minds Article 18(3) of the **ICCPR** which states that: *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*.
- 3.14 In terms of enforcement, ALHR also share the concern of others human rights advocates, including Equality Australia, in relation to the potential for conflicting claims being brought before the AHRC. It is foreseen that the conscientious objection provisions under the RDB may give rise to concurrent complaints of discrimination from patients who have been denied treatment and employees who have been required to provide health services which contradict their religious beliefs.

Prioritising Statements of Belief - s 41

- 3.15 Section 41 provides that 'statements of belief' do not constitute discrimination for the purposes of *any* anti-discrimination law, whether State, Territorial or Commonwealth. Thus a 'statement of

⁵ Convention for the Elimination of Discrimination Against Women [CEDAW], Art 16; CEDAW Art 2(f) and 5(a); see also Convention on the Rights of the Child, Art 24(3); Committee on the Elimination of Discrimination against Women, General Recommendation 24: Women and Health, A/54/38/Rev 1 (1999) [11]; concluding Observations on Peru, CEDAW/C/PER/CO/7-8 (2014), para. 36; Statement on sexual and reproductive health and rights: Beyond 2014 ICPD Review (2014); UN Secretary-General, Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/66/254 (2011), para. 21; General Comment 14 (2000) on the right to the highest attainable standard of health, paras. 8, 12, 27; General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health, para. 70; Mr Peter Arnaudo, Attorney-General's Department, Hansard - Joint Standing Committee on Treaties Reference: Treaties tabled on 14 May and 4 June 2008 16 June 2008, p.7.
<http://www.aph.gov.au/hansard/joint/commtee/J10940.pdf>.

⁶ United Nations Economic and Social Council, 'General comment No. 22 (2016) on the right to sexual and reproductive health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)', E/C.12/GC.22, 2nd May 2016, 2.; General Comment No 22, above n 4, 4-6

belief' is exempt from all anti-discrimination legislation including each of the Racial, Sex, Disability and Age Discrimination Acts at Commonwealth level, and *all* equivalent State and Territory laws.

- 3.16 This means that a person can legally say something which may have previously been determined to amount to discrimination on the basis of race, sex, age disability or other status - so long as their statement is in 'good faith' and may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of their particular religion, unless the victim can show the perpetrator is malicious, or their statement is likely to harass, vilify, or incite hatred or violence.
- 3.17 **This is a totally unsatisfactory situation. Purported 'good faith' is no reason to permit the expression of harmful discriminatory statements. The RDB will make it easier to make comments that 'offend, humiliate, intimidate, insult or ridicule' minorities with impunity.**
- 3.18 Neither are the purported protections offered by ss 41(3)(a) and ss 41(3)(b) satisfactory. These subsections lack clarity in their application. The extent to which a statement of belief is or is not "malicious" or "would or is likely to harass, vilify or incite hatred or violence against another person or group of persons" will only be known after litigation is brought to test the interpretation of those provisions.
- 3.19 ALHR is further concerned that it is contemplated that the Commonwealth Attorney-General be allowed to override additional laws by future regulation, without needing the further approval of federal Parliament.⁷
- 3.20 Human rights groups and individuals in Australia have long fought to have the principle of non-discrimination in Article 26 of the **ICCPR** enshrined in law. Pursuant to Article 26, the law of Australia, as a signatory state, is to *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*. Pursuant to Article 2(1) of the **ICCPR**, all individuals within the territory of Australia, as a State Party to the ICCPR, undertakes to recognise and ensure all individuals are afforded the rights recognised in the ICCPR 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*.
- 3.21 In Tasmania the parliament, informed by international human rights principles, passed laws offering the widest protection in the country against conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of a range of attributes set out in s 17(1) of the *Anti-Discrimination Act (Tas) 1998*. Included amongst the attributes protected are sexual orientation, gender, gender identity, disability, religious belief or affiliation and religious activity.
- 3.22 However under the RDB, protections against conduct which offends, humiliates, intimidates, insults or ridicules will no longer be afforded to those formerly protected groups where that conduct is a "statement of religious belief" and where that statement is made in good faith and is of a belief that may reasonably be regarded as being in accordance with the doctrines, tenants, beliefs or teachings of the religion.
- 3.23 When considering the rights of LGBTI Australians in particular, ALHR is concerned that the protections hard fought for this group and grounded in international human rights principles will be eroded and give rise to harmful comments without recourse.
- 3.24 Without the protection of s 17(1) of the *Anti-Discrimination Act 1998 (Tas)* the right of that person to *the enjoyment of just and favourable conditions of work which ensure safe and healthy working conditions* will be subjugated to the right of the religious person to state their belief no matter the consequence on the rights and wellbeing on another. Were the religious person not offered the protection of the RDB, the religious person can still hold that belief. They are only restricted from manifesting it, which is proportionate to the harm caused to the gay employee.

⁷

Alexander Lawrie, op cit.

- 3.25 ALHR is concerned that s 41 of the RDB was drafted in response to the case brought before Anti-Discrimination Commission against Tasmanian Archbishop Julian Porteous following the distribution of a pamphlet during the 2015 Tasmanian state same-sex marriage campaign titled “Don’t Mess with Marriage”, rather than in consideration of the **indivisibility** of human rights.
- 3.26 Again, ALHR submits that legislation should be made in accordance with proper international human rights law principles rather than as a response to high profile cases.

4. Relevant International Instruments

- 4.1 International instruments relating to freedom of religion are reviewed generally in Annexure A. We consider here the instruments relating to the rights to health and employment as well as to non-discrimination.

Right related to Health⁸

The following instruments deal with the subject of health:

<p>Generally</p> <p><i>International Covenant on Economic, Social and Cultural rights</i></p> <p>(ICESR)</p>	<p>Article 12:</p> <p><i>States recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.</i></p>
<p>Women</p> <p><i>Covenant on the Elimination of All Forms of Discrimination Against Women 1979</i></p>	<p>Art 11(f):</p> <p><i>The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.</i></p> <p>Art 12:</p> <p><i>States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.</i></p> <p>Art 14(2)(b):</p> <p><i>States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right To have access to adequate health care facilities, including information, counselling and services in family planning.</i></p>

- 4.2 “While the right to health is sometimes understood to focus only on positive guarantees for the progressive realization of the availability, accessibility, acceptability, and quality of health care for all,” say Cohen and Ezer, “it also incorporates negative guarantees for the assurance of freedom from abuse and discrimination by the state and third parties within health care service delivery.” That is, the right to health (which Australia has agreed to uphold) also includes the right to “a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.”⁹

⁸ OHCHR, The Right to Health, Fact Sheet No. 31, <https://www.ohchr.org/Documents/Publications/Factsheet31.pdf>

⁹ CESCR General Comment No. 14, par 8.

- 4.3 Many rights relating to health issues in the context of patient treatment are implicit rights. Cohen and Ezer note that:

*The provisions of these treaties have been interpreted by human rights bodies to prohibit numerous forms of abuse in health settings. For example, the right to liberty and security of the person has been held to prohibit institutionalization without due process of people with mental illness; the right to privacy has been held to prohibit unauthorized disclosure of personal health data; the rights to bodily integrity and security of the person have been held to prohibit the administration of medicine to a child against parents' wishes; and the right to freedom from cruel, inhuman, or degrading treatment or punishment has been held to oblige governments to secure the adequate health and well-being of prisoners.*¹⁰

- 4.4 The CESCR, in paragraph 12 of its *General Comment No. 14*, describes a number of rights and implicit rights that it sees as integral to the rights to health and to bodily integrity (as does the European Charter of Patients' Rights, discussed below). These rights include:

- Availability (par 12(a)) of health treatment and the underlying determinants of health, without discrimination;
- Accessibility (par 12(b)) including the right to seek, receive and impart information and ideas concerning health issues ;
- Acceptability (par 12(c)): meaning that health services must be "respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, [and] sensitive to gender and life-cycle requirements";
- Quality (par 12(d)): to the observance of quality standards, with services being scientifically and medically appropriate.

- 4.5 The European Charter of Patients' Rights¹¹ drafted by the Active Citizenship Network puts the implicit right to health information as key to the health rights of patients, saying that every individual:

- "has the right to access to all kind of information regarding their state of health, the health services and how to use them, and all that scientific research and technological innovation makes available" ¹²
- "has the right of access to all information that might enable him or her to actively participate in the decisions regarding his or her health" ¹³
- "has the right to freely choose from among different treatment procedures and providers on the basis of adequate information" ¹⁴ and
- "has the right of access to innovative procedures, including diagnostic procedures, according to international standards and independently of economic or financial considerations." ¹⁵

However it should be noted that this Charter, although influential in the European human rights context according to Cohen and Ezer, is written from the paradigm of patients as consumers, which is a different viewpoint from the broader (and in our view preferred) concept of patients as holders of human rights and as entitled to be treated with dignity.

¹⁰ Jonathan Cohen and Tamar Ezer, "Human rights in patient care: A theoretical and practical framework" (2013) 15 (2) *Health and Human Rights Journal*, available at <https://www.hhrjournal.org/2013/12/human-rights-in-patient-care-a-theoretical-and-practical-framework/>

¹¹ http://ec.europa.eu/health/ph_overview/co_operation/mobility/docs/health_services_co108_en.pdf

¹² Op cit, p 4.

¹³ Op cit, p 5.

¹⁴ Op cit, p 5.

¹⁵ Op cit, p 7. See also ICESCR (see note 13), Art. 15 as to the right to the benefits of scientific progress.

- 4.6 The Committee notes¹⁶ that inappropriate resource allocation can lead to “discrimination that may not be overt. For example, investments should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population.” In addition, the Committee comments that “indigenous peoples have the right to specific measures to improve their access to health services and care,” saying that such health services “should be culturally appropriate, taking into account traditional preventive care, healing practices and medicines.”¹⁷
- 4.7 A human-rights-based framework for patient care is increasingly being seen as a desirable alternative to consumer or contract-based ‘patient rights’ frameworks. A human rights framework considers the rights (and obligations) of both patient and provider, as well as wider social interests. As Cohen and Ezer say,

*the human rights in patient care concept refers not just to entitlements for actual patients, but also to human rights standards in the provision of care that concern health providers and the entire community. It calls for a pervasive human rights frame to govern the delivery of care to patients in all its aspects, which also highlights equality, participation, transparency, and accountability concerns.*¹⁸

Rights related to Employment

The following instruments deal with the subject of employment:

ICESCR	<p>Article 6: The right to work, which includes the right of everyone to the opportunity to gain a living by work they freely choose to accept, with appropriate safeguards to be taken to protect that right.</p> <p>Article 7(b): The right of everyone to the enjoyment of just and favourable conditions of work which ensure safe and healthy working conditions.</p> <p>Article 7(c): The right of everyone to the enjoyment of just and favourable conditions of work which ensure equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no consideration other than those of seniority and competence.</p>
<p>International Labour Organisation Discrimination (Employment and Occupation) Convention, 1958</p> <p>(ILO Convention)</p>	<p>Article 2: Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.</p> <p>For the purpose if the ILO convention-</p> <p>The term discrimination includes:</p>

¹⁶ CESCR, op cit, par 19.

¹⁷ Op cit, par 27. However Mpinga et al comment (text prior to footnote 56) that the CESCR “takes a reductionist view by framing the question of [non-conventional medicines] as a matter of interest and concern only for native people”, noting that “[i]n doing this, the Committee misses what current data show, namely that everybody (including urban populations) resorts to non-conventional and complementary medicines.”

¹⁸ Op cit.

	<p>(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;</p> <p>(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.</p> <p>Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.</p> <p>For the purpose of this Convention the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.</p>
--	---

- 4.8 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).

Principle of non-discrimination

The following instruments deal with the subject of non-discrimination:

<p>Generally</p> <p>ICCPR</p> <p>Article 26 is a 'stand-alone' right which forbids discrimination in <i>any law</i> and in <i>any field regulated by public authorities</i>, even if those laws do not relate to a right specifically mentioned in the ICCPR.</p>	<p>Article 2(1):</p> <p><i>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.</i></p> <p>Article 26:</p> <p><i>All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.</i></p> <p><i>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.</i></p>
<p>Health and work</p>	<p>ICESCR Art 2(2):</p> <p><i>The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race,</i></p>

	<i>colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</i>
Sexual orientation	<p>In <i>Toonen v Australia</i>, the Human Rights Committee held that the reference to 'sex' in Articles 2 and 26 of the ICCPR includes sexual orientation.</p> <p>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. Similarly the ICEPSR.</p>

5. Where Rights Compete: What Should Prevail?

The balancing of indivisible and interdependent human rights

- 5.1 International human rights law has developed a process or set of principles by which conflicts between different rights can be managed, both within the realm of human rights alone and in relation to external issues. As mentioned, when it comes to the right to the right to religious belief and the right to participate in religious activity as might be protected by the RDB, it is important to differentiate between:
- The internal **right hold a belief** (the right to freedom, conscious and religion); and
 - The external **right to manifest that belief**.
- 5.2 The internal right to a belief is absolute – the right to hold a personal belief cannot be restricted in any circumstances. The right to manifest one's religious belief externally within society can however be restricted if the restriction is necessary for the protection of public safety, public health or morals or for the protection of rights and freedoms for others and must be balanced against other rights, such as the right to be free from discrimination. 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*¹⁹

Rights must be balanced where they conflict

- 5.3 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).
- 5.4 Some rights are expressed as absolutes, such as 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.²⁰
- 5.5 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

¹⁹ Shaheed, op cit, par 46.

²⁰ See generally Attorney-General's Department Public Sector Guidance Sheet: *Absolute rights* at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx>

consideration’²¹ and so as to ‘ensure that none is inappropriately sacrificed’.²² 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.’²³ This is similar to the test of proportionate response to the harm in question which is generally used to assess whether or not legislation or policy is too wide in its scope.

Taking account of context and other values

- 5.6 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 (such as reasonableness or proportionality).
- 5.7 Human rights can validly be restricted 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 protection

- 5.8 Human rights entail **both rights and obligations**. **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, nor advocated by policy, where that behaviour itself infringes other human rights.
- 5.9 In balancing the competing claims, it is important to minimise any negative impact; to impinge as little as possible upon other rights.
- 5.10 That is, where there is a conflict between human rights and other interests it may be necessary to limit or constrain the other interests if they are to be implemented in a way that limits the free exercise of human rights.

6. Conclusion

- 6.1 **Any legislation which impinges upon 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, democracy and the rule of law.**
- 6.2 Australia’s international human rights treaty obligations should be enshrined in Commonwealth legislation. ALHR submits that this cannot be done on a piecemeal basis and we are concerned that the proposed legislative framework which singles out only select human rights for protection does not reflect Australia’s international legal obligations to protect other human rights equally. The rights contained in Article 18 of ICCPR which establish the right to freedom of thought, conscience and religion, are not superior to other human rights.
- 6.3 There is no hierarchy of human rights. Human rights laws cannot be selectively applied. As noted earlier in this submission, fundamental principles of international law clearly establish that human rights are indivisible, interdependent and interrelated. They come as a package. All human rights are of equal importance and human rights laws can only achieve their objectives if they are applied completely to everyone and with interconnection.
- 6.4 **It is ALHR’s submission that the appropriate balance between freedom of /from religion or belief and other freedoms would best be served by adoption at the federal level of a Bill of Rights or Human Rights Act.**

²¹ Grimm, op cit, 2382.

²² Alice Donald and Erica Howard, *The right to freedom of religion or belief and its intersection with other rights*, ILGA-Europe Research Paper, 2015, p i available at: <https://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights__0.pdf>.

²³ Ibid, p i.

6.5 In 2008, the National Human Rights Consultation Committee recommended the Federal Parliament adopt a *Human Rights Act* similar to legislation in place in Victoria and the ACT. Last year, Queensland passed a *Human Rights Act*. Eleven years later, Australia continues to lag behind the rest of the world at a federal level.

6.6 We would be happy to provide further submissions on the form that this legislation should take.

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

Contributors: Georgia Burke, Dr Tamsin Clarke, Kerry Weste, Nicholas Stewart

Annexure C

Submission dated 12 February 2018 to the Expert Panel on Religious Freedom as to *whether Australian law (Commonwealth, State and Territory laws) adequately protects the human right to freedom of religion*



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

12 February 2018

PO Box A147
Sydney South
NSW 1235

DX 585 Sydney

www.alhr.org.au

Panel Secretary
Expert Panel on Religious Freedom
c/o Department of the Prime Minister and Cabinet
PO Box 6500
Canberra ACT 2600

By email: religiousfreedom@pmc.gov.au

Dear Panel Secretary

Religious Freedom Review

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the Panel's current Inquiry as to **whether Australian law (Commonwealth, State and Territory laws) adequately protects the human right to freedom of religion.**

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.

Table of Contents

1.	Introduction	3
2.	Summary of submissions	4
3.	Relevant materials	5
4.	ALHR's Concerns	5
5.	What is the human right to 'freedom of religion or belief'?	6
5.1	International Instruments	6
5.2	Freedom 'of' and freedom 'from'	7
6.	How does the human right to 'freedom of religion or belief' intersect with other human rights?	9
6.1	Introduction	9
6.2	Is religious freedom possible without human rights?	9
6.3	Freedom of/from religion supports other human rights	10
6.4	The balancing of indivisible and interdependent human rights	10
	Rights must be balanced where they conflict	10
	Taking account of context and other values	11
	The good faith of those seeking State protection	11
6.5	Protecting and respecting the believer not the belief	12
7.	The existing legal situation	12
7.1	Lack of Australian Federal Human Rights Bill or Act	12
7.2	Australian Constitution	13
7.3	Other Commonwealth legislation	14
7.4	States and Territories	15
8.	Does Australian law adequately protect the human right to freedom of/from religion and if not, how can this be remedied?	16
8.1	Defect: the lack of a Human Rights Act or Bill of Rights to protect freedom of/from religion	16
8.2	Defect: the continued existence of blasphemy laws	16
8.3	Defect: no legal protection against religious vilification	17
8.4	Defect: the existence of religious practices which discriminate against members	18
8.5	Defect: the existence of religious practices which discriminate generally	20
8.6	Defect: the lack of protection of children's rights in relation to religion	21
8.7	Defect: the politicisation of Christianity as the dominant Australian religion	23
9.	Conclusion	25

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

- Ahmed Shaheed, UN Special Rapporteur on Freedom of Religion or Belief¹

1. Introduction

- 1.1 ALHR submits that the human right to freedom of religion would best be protected by a Federal Human Rights Act or Bill of Rights.
- 1.2 In practice, the beliefs and hence the activities of those of different religions will often conflict, because “each person’s religious freedom is dependent on and coextensive with everyone else’s religious freedom.”²
- 1.3 In addition, 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 by religious groups of children, women, LGBTIQ persons and other religious and ethnic minorities are obvious examples.
- 1.4 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.³
- 1.5 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.
- 1.6 Importantly, the full title of the right is **“freedom of thought, conscience, religion or belief.”** It does not mean ‘freedom’ to follow only the majority religion or belief, and it **includes freedom ‘from’ religion**. This interpretation is confirmed by human rights courts internationally and particularly in Europe. It means freedom to:
 - choose between different religions and beliefs,
 - convert between religions and beliefs,
 - leave a religion or belief, and

¹ 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>, accessed 26 January 2018.

² Dr Luke Beck in *Committee Hansard*, Joint Standing Committee on Foreign Affairs, Defence and Trade, Public Hearing in Sydney, 6 June 2017, p 13, at http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/toc_pdf/Joint%20Standing%20Committee%20on%20Foreign%20Affairs,%20Defence%20and%20Trade_2017_06_06_5146_Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/0003%22

³ 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>, accessed 10 February 2018.

- hold no religion or belief - following 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 (as any other situation would amount to compulsory religion).
- 1.7 Freedom of religion or belief is 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 (see paragraph 5.2.7).
 - 1.8 It must also be recognised that while the right to believe is an absolute 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. This is discussed further at paragraphs 6.48 and following, 6.5, 8.4 and 8.5.
 - 1.9 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 religion⁴. This principle is particularly important in multicultural Australia.
 - 1.10 The situation of minor children in relation to religion also needs to be considered as a 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.
 - 1.11 Under Australia's common law legal system, "(t)he general proposition at common law is that you are free to do anything at all you want unless some law expressly forbids you from doing it."⁵ This means that the **additional question** that needs to be posed is whether there are *existing laws or practices limiting Australians from exercising their freedom of religion or limiting their freedom from religion*.⁶ This is discussed further below in section 8.

2. Summary of submissions

- 2.1 ALHR submits that Australian law does not adequately protect the human rights to freedom of/from religion because there is no Commonwealth Constitutional protection of that human right and State protection is piecemeal and limited. The existing legal situation is discussed in Section 7.
- 2.2 The areas which ALHR identifies as of particular concern in Section 8 are:
 - (1) the lack of a federal Bill of Rights or Human Rights Act to protect human rights (see 8.1) and provide a structure for managing competing rights (as discussed at 6.4);
 - (2) the lack of legal protection against religious vilification as discussed at 8.3 (not to be confused with freedom to criticise the tenets of any religion, as discussed at 6.5);
 - (3) the continued existence of blasphemy laws as discussed at 8.2;
 - (4) the lack of legal protection against the imposition of anti-human rights practices upon members of some religions as discussed at 8.4;
 - (5) discrimination by religious organisations against other groups as discussed at 8.5;
 - (6) the lack of legal protection for the rights of children, as discussed at 8.6;
 - (7) the politicisation of Christianity as the dominant Australian religion, as discussed at 8.7.

⁴ 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>

⁵ Beck, op cit, p 15.

⁶ Ibid.

3. Relevant materials

3.1 This submission draws upon our previous submission in February 2017 to the *Inquiry of the Joint Standing Committee on Foreign Affairs, Defence and Trade into the status of the human right to freedom of religion or belief*.

3.2 We also refer the Panel 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*;⁷
- the 2015 *Interim Report* of the (then) Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, concerning children's freedom of/from religion (cited as Bielefeldt (2015));⁸
- the 2016 *Interim Report* of the (then) Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt;⁹
- the 2017 *Interim Report* of the Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed;¹⁰
- *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;¹¹
- the Hansard transcript of the public hearing in Sydney on 6 June 2017 of the Joint Standing Committee on Foreign Affairs, Defence and Trade into the 'Status of the freedom of religion or belief';¹² and
- Office for Democratic Institutions and Human Rights, the *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools*.¹³

4. ALHR's Concerns

4.1 ALHR's primary concern is that Australian legislation and judicial decisions should adhere to international human rights law and standards across the spectrum. Human rights laws cannot be selectively applied. All human rights are of equal importance and human rights laws can only

⁷ <http://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf>.

⁸ A/70/286 *Interim Report: Elimination of all forms of religious intolerance* (2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/245/07/PDF/N1524507.pdf>, accessed 10 February 2018.

⁹ 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), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/244/98/PDF/N1624498.pdf>, accessed 10 February 2018.

¹⁰ A/72/365 *Interim Report: Elimination of all forms of religious intolerance*, (2017), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/270/09/PDF/N1727009.pdf>, accessed 26 January 2018.

¹¹ *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.

¹² http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/toc_pdf/Joint%20Standing%20Committee%20on%20Foreign%20Affairs,%20Defence%20and%20Trade_2017_06_06_5146_Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/0003%22

¹³ Advisor Council of Experts on Freedom of Religion or Belief, OSCE/ODIHR, Warsaw, 2007, <http://www.osce.org/odihr/29154>. It should be noted that the Principles were adopted in Toledo "as an expressive reminder of the complex layering of civilizations that makes teaching about religion so significant. They remind us that our present is infused not only with history, but with each other's history" (page ii).

achieve their objects if they are applied completely to all human rights and with interconnection.

- 4.2 ALHR believes 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 human rights, and fosters pluralism and tolerance as a means of promoting and preserving democracy.
- 4.3 We endorse the views of the Parliamentary Joint Committee on Human Rights (**PJCHR**) expressed in Guidance Note 1 of December 2014¹⁴ 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.
- 4.4 Generally, behaviour should not be protected by Australian law where that behaviour itself infringes other human rights because human rights are all interrelated, interdependent and indivisible. The right to express one's religious beliefs does not 'trump' other rights, such as, for example, the right to be free from discrimination, but must be considered in context.
- 4.5 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.¹⁵ **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.

5. What is the human right to 'freedom of religion or belief'?

5.1 International Instruments

- 5.1.1 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').
- 5.1.2 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).
- 5.1.3 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."
- 5.1.4 Within the EU, the right to freedom of religion or belief is reflected in:

¹⁴ Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility*, December 2014, available at <http://www.aprh.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources> accessed 10 February 2018.

¹⁵ 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.

- 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).

5.1.5 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.¹⁶

5.2 Freedom ‘of’ and freedom ‘from’

5.2.1 The international instruments do not themselves define “freedom of thought, conscience, religion or belief,” “freedom of religion” nor “freedom of belief.” The ICCPR provides some guidance in article 18, which provides that:

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which shall impair his freedom to have or adopt a religion of his belief or choice.*

5.2.2 The ICCPR also provides that:

- advocacy of religious hatred which amounts to incitement to discrimination, hostility or violence must be prohibited by law (article 20);
- everyone is entitled to equality before the law and equal protection of the law without discrimination on the ground of religion among other grounds (article 26); and
- minority groups are entitled to profess and practise their own religion (article 27).

5.2.3 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.

5.2.4 Article 6 of the 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
- communicating with individuals and communities on matters of religion and belief.

5.2.5 It is generally agreed that “freedom of religion” and “freedom of belief”:

¹⁶ 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 February 2018.

- (a) include the freedom to hold secular or atheistic beliefs as well as the right not to profess any religion or belief;
- (b) are not limited to traditional religions; and
- (c) are further divided into 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).

These meanings clearly extend beyond the descriptions of 'religion' given by the Australian High Court in *The Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120 (the *Scientology case*).

5.2.6 In relation to (a), Bielefeldt notes that 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 religious community life.¹⁷ 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."¹⁸

5.2.7 In relation to (b), the European Court of Human Rights has, like the UN Human Rights Committee, given a wide interpretation to the meaning of religious beliefs as including non-religious beliefs such as pacifism, veganism and atheism and religious or philosophical convictions or beliefs

*if they attain a certain level of cogency, seriousness, cohesion and importance; are worthy 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.*¹⁹

5.2.8 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. We have summarised this by referring to *freedom of/from religion*.

5.2.9 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. Even amongst traditional religions, the messages and behavioural requirements are not just different but often irreconcilable²⁰ 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.

5.2.10 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."²¹

5.2.11 We consider in Section 8 whether Australian law adequately protects freedom of/from religion. We consider first how the human right to freedom of/from religion intersects with other human rights, and then in Section 7 we consider the existing legal situation.

¹⁷ Bielefeldt, op cit, par 15. See also Grimm, op cit, at 2373.

¹⁸ Bielefeldt, op cit, par 10.

¹⁹ Donald and Howard, op cit, p 2.

²⁰ Bielefeldt, op cit, par 11.

²¹ Bielefeldt (2015) op cit., par 14.

6. How does the human right to ‘freedom of religion or belief’ intersect with other human rights?

6.1 Introduction

- 6.1.1 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 adherents need to be considered just as much as the infringements upon human rights which a religion seeks to place on non-believers. These issues are discussed further at subsections 8.4 and 8.5.
- 6.1.2 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 structures within religions, sometimes with progressive outcomes, sometimes with retrogressive outcomes. ALHR believes that viewing religiously-based restrictions both upon believers and non-believers through a human rights lens will assist theological reform and reform of religious practices and procedures in a positive way.
- 6.1.3 Thus 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.*²²

6.2 Is religious freedom possible without human rights?

- 6.2.1 The first item in the Terms of Reference is consideration of “the intersections between the enjoyment of the freedom of religion and other human rights.” Those intersections can result in conflict, as discussed further below, but they can also result in benefits as overlapping rights reinforce each other.
- 6.2.2 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.”²³
- 6.2.3 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.²⁴

²² Bielefeldt (2015) op cit., p22.

²³ Sylvie Langlaude, “Indoctrination, Secularism, Religious Liberty and the ECHR” (2006) *International and Comparative Law Quarterly*, 55(4), 929 at 941-942.

²⁴ <https://pure.qub.ac.uk/portal/files/675413/Article%20ICLQ%20by%20Sylvie%20Langlaude.pdf>
Bielefeldt, op cit, pars 28 to 30 and Shaheed, op cit, par 46.

- 6.2.4 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.*²⁵

- 6.2.5 It is for this reason that politicization of Christianity is, as discussed further below, particularly undesirable in modern Australia.

6.3 *Freedom of/from religion supports other human rights*

- 6.3.1 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.*²⁶

- 6.3.2 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)).

6.4 *The balancing of indivisible and interdependent human rights*

- 6.4.1 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

- 6.4.2 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).
- 6.4.3 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)).
- 6.4.4 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’²⁷ and so as to ‘ensure that none is inappropriately sacrificed’.²⁸ 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

²⁵ Grimm, op cit, at 2371 and 2373.

²⁶ Shaheed, op cit, par 46.

²⁷ Grimm, op cit, 2382.

²⁸ Donald and Howard, op cit, p i.

others.’²⁹ 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

- 6.4.5 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.
- 6.4.6 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).
- 6.4.7 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

- 6.4.8 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.
- 6.4.9 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 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.’³⁰ 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.
- 6.4.10 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 mis-used 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.*³¹

- 6.4.11 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.³² The right to manifest one’s ‘religion’ or belief must be balanced

²⁹ Donald and Howard, op cit, p i.

³⁰ 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, accessed 10 February 2018 at <<http://www.ohchr.org/Documents/Issues/Religion/A.69.261.pdf>>.

³¹ Shaheed, op cit, par 46.

³² Donald and Howard, op cit, pp 8-9.

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.

- 6.4.12 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.³³

6.5 *Protecting and respecting the believer not the belief*

- 6.5.1 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**'.³⁴ Similarly, Bielefeldt notes that 'freedom of religion or belief protects believers rather than religion or belief'.³⁵
- 6.5.2 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, as mentioned above, be irreconcilable.³⁶
- 6.5.3 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.³⁷ This is one of the reasons that the offence of blasphemy is inconsistent with the human right of freedom of/from religion.
- 6.5.4 **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. This is discussed further below.**

7. *The existing legal situation*

7.1 *Lack of Australian Federal Human Rights Bill or Act*

- 7.1.1 Despite Australia having been a founding member of the United Nations and one of only eight nations involved in the drafting of the *1948 Universal Declaration on Human Rights*, today Australia is alone amongst first world democratic nations in not itself having any federal Human Rights Act or Bill of Rights. Australia's Constitution does not specifically protect any human rights. It has at the most been held to provide only a limited and implied right to free political communication. In 2017 Australia was elected to the United Nations Human Rights Council yet, to date, this seems to have provided the Federal Government with no motivation to move towards the adoption of a federal Human Rights Act or a Bill of Rights.
- 7.1.2 Australia has signed and ratified both the *1966 International Covenant on Civil and Political Rights* and the *1966 International Covenant on Economic, Social and Cultural Rights* over four decades ago, and has since ratified all seven core international human rights law treaties and some of the Optional Protocols. However, Australia has not enacted enabling legislation which enshrines all the basic universally recognised human rights and freedoms in local law. At the

³³ See Donald and Howard, op cit, p 10.

³⁴ Donald and Howard, op cit, p 17.

³⁵ Bielefeldt (2015), op cit, par 13.

³⁶ Bielefeldt, op cit, par 11.

³⁷ Shaheed, op cit, par 46.

Federal level, the Australian Government has passed a number of laws prohibiting specific types of discrimination, such as the *Sexual Discrimination Act* and the *Racial Discrimination Act*. But such legislation provides only a piecemeal approach to human rights law, and, as a result Australian law generally lacks the central human rights concept of the fundamental right of all persons to have their human dignity respected.

- 7.1.3 Many Australians have the mistaken belief that just because Australia is an affluent, multicultural and developed country, its citizens' human rights are properly and fairly protected. They are not. The common law does not fill the gap. Australia's abysmal record in relation to refugee rights and its cruel treatment of boat-arriving asylum seekers provides a case in point.
- 7.1.4 The common law has historically been concerned with protection of property rights and generally offers a very inadequate protection for human rights. In 2008, then Chief Justice Spigelman identified a limited number of common law principles of statutory interpretation or 'rebuttable common law presumptions' which could loosely be regarded as constituting a "common law bill of rights."³⁸ However, generally those principles and presumptions can be overridden by parliament through statute. In this way the common law has been significantly diminished and weakened by the development of the Doctrine of Parliamentary Supremacy and the Commonwealth Parliament's ability and desire to override human rights standards for policy purposes.
- 7.1.5 A carefully-crafted Bill, Charter or Act could provide appropriate safeguards against statutory incursions upon beneficial freedoms, particularly if it were to be constitutionally entrenched (there are various models which could be adopted and we would be happy to discuss this with you further if desired). But without such legislation, we are reliant upon the federal government of the day to protect our freedoms as it thinks fit, and have little redress where it fails to act or infringes our freedoms. Adopting human rights principles would enshrine those principles "beyond the reach of political expediency."³⁹
- 7.1.6 The adoption of Human Rights Acts in Victoria and the Australian Capital Territory is generally understood to have been successful, not to have opened the 'floodgates' to litigation, and to have resulted in improvements in legislation and policy.⁴⁰ The ambit of these Acts is modest as they do not overrule inconsistent legislation.⁴¹

7.2 Australian Constitution

- 7.2.1 Section 116 of the Australian Federal Constitution states that:

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

- 7.2.2 As Dr Luke Beck has explained⁴², the way in which section 116 was phrased was not the result of careful deliberations. It was "a rough copy and paste" from the United States Constitutional

³⁸ The Honourable J J Spigelman AC Chief Justice Of New South Wales, "The Common Law Bill of Rights," First Lecture in The 2008 McPherson Lectures: Statutory Interpretation & Human Rights, University Of Queensland, Brisbane 10 March 2008, accessed 9 May 2017, <http://www.aph.gov.au/DocumentStore.ashx?id=c190ac6b-aa39-4bab-97a4-c2aab8b899f9>

³⁹ Lucia Osborne-Crowley, "A bill of rights to rein in the rogues", *The Saturday Paper*, 24 October 2015.

⁴⁰ See for example the case studies at: <http://www.humanrights.vic.gov.au>.

⁴¹ But see Bill Swannie, "Rights without remedies," Law Institute of Victoria, *Staying Informed*, 1 June 2017 at <https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/June-2017/Rights-without-remedies>

⁴² *The Foundations of Section 116 of the Australian Constitution: An Historical and Conceptual Analysis*, Ph D Thesis, University of Sydney, <https://ses.library.usyd.edu.au/handle/2123/14597>, accessed 26 January 2018.

First Amendment with the addition of a clause prohibiting enforced religious observances; “a historical accident, really, not careful consideration.”⁴³

*The framers of the Constitution described that provision as providing a safeguard against religious intolerance and as preventing any infraction of religious liberty by federal law. Each of the four concepts employed by section 116 is readily understood as being about preventing religious intolerance on the part of the Commonwealth. Religious establishment, the first concept used by 116, or granting official imprimatur or playing favourites among religious beliefs, is intolerant because it frames those who are not members of the favoured religion as outsiders and not full members of the community. The second concept used by 116 is imposing a religious observance, and that has a similar effect, as well as being an attempt to compel conformity to favoured religious practices. Prohibiting the free exercise of religion, the third concept employed by 116, is explicitly the suppression of religious practices. And the final concept employed by section 116, imposing a religious test for public office, necessarily penalises individuals who did not adhere to favoured religious beliefs or who adhere to disfavoured religious beliefs by denying them access to public office.*⁴⁴

- 7.2.3 The operation of s 116 might protect rights to / from religion to some extent - by restricting the powers of the Commonwealth to legislate in a way that would privilege one religion over others and over freedom from religion - but that was not, says Dr Beck, the general purpose for which it was included in the *Constitution*. The section was a pragmatic response to concerns raised by a minority denomination.

*In the late 1890s, various Protestant denominations pursued a campaign to secure what they called a ‘recognition’ of God in the Constitution. As a result of that campaign, the Australasian Federal Convention of 1897–8 agreed to insert the words ‘humbly relying on the blessing of Almighty God’ in the constitutional preamble. At the same time, the small Seventh Day Adventist denomination pursued a counter-campaign seeking to prevent any recognition of God in the Constitution and, instead, the inclusion of a religious freedom provision. The Seventh Day Adventists were concerned that the religious words of the preamble might give rise to an implied power to make laws on the subject of religion. They were particularly concerned that the Commonwealth might be empowered to enact national Sunday closing laws, which they objected to since they observed Saturday as the Sabbath and found oppressive since they wished to work on Sundays.*⁴⁵

- 7.2.4 The effect of section 116 has been read narrowly by the High Court and does not explicitly create a personal or individual right to religious freedom.⁴⁶ Professor Williams notes that the section does not affect State law.⁴⁷

7.3 Other Commonwealth legislation

- 7.3.1 The *Human Rights and Equal Opportunity Commission Act 1986* provides the statutory schema for the Commission to consider allegations that an act or practice of the Commonwealth is inconsistent with any human right as defined in section 3 of HREOCA (Part II Division 3) and allegations of discrimination in employment or occupation based on the grounds of religion (amongst others) (Part II Division 4).

⁴³ Beck, op cit, page 27.

⁴⁴ Beck, op cit, pages 16 to 17.

⁴⁵ Luke Beck, “When Is An Office Or Public Trust ‘Under The Commonwealth’ For The Purposes Of The Religious Tests Clause Of The Australian Constitution?” (2015) *Monash University Law Review* (Vol 41, No 1) 17 at p 18, <http://www.austlii.edu.au/au/journals/MonashULawRw/2015/2.pdf>

⁴⁶ See Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Interim Report 127), par 4.21.

⁴⁷ Professor George Williams in *Committee Hansard*, Joint Standing Committee on Foreign Affairs, Defence and Trade, Public Hearing in Sydney, 6 June 2017, p 1.

- 7.3.2 The Commission is also empowered to consider allegations of unlawful discrimination under the *Disability Discrimination Act 1992 (Cth)*, *Racial Discrimination Act 1975 (Cth)* and *Sex Discrimination Act 1984 (Cth)*. While the anti-discrimination legislation does not specifically include the ground of discrimination on the basis of religion, courts have found that the term ‘ethnic origin’ (a prohibited ground of discrimination under the *Racial Discrimination Act*) covers persons discriminated against on the ground of Judaic or Sikh beliefs.⁴⁸
- 7.3.3 At the same time, exemptions that permit religious organisations to discriminate on the basis of religion are contained in the *Sex Discrimination Act*, being:
- section 23(3)(b), which provides that accommodation provided by a religious body is exempt from s 23(1) making it unlawful to discriminate against a person on the basis of a protected attribute in the provision of accommodation;
 - section 37, which exempts the ordination or appointment of priests, Ministers of religion or members of any religious order and accommodation provided by a religious body from the effect of the SDA; and
 - section 38, which exempts educational institutions established for religious purposes from the effect of the SDA in relation to the employment of staff and the provision of education and training, provided that the discrimination is in ‘good faith in order to avoid injury to the religious susceptibilities of adherents of that religion’.⁴⁹
- 7.3.4 The *Fair Work Act 2009 (Cth)* protects workers from discrimination on the ground of their religion in the following ways:
- section 153 provides that a modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee’s religion;
 - section 195(1) lists discriminatory terms in enterprise agreements including those terms that discriminate against an employee on the basis of their religion;
 - section 351(1), which relates to the General Protections division of the Act, provides that any adverse action taken against an employee on the basis of a protected attribute or characteristic is prohibited; and
 - section 772(1)(f) provides that a person’s employment may not be terminated on the basis of a protected attribute, subject to exceptions in s 772(2)(b).⁵⁰

7.4 States and Territories

- 7.4.1 Section 14 of the *Charter of Human Rights and Responsibilities 2006 (Vic)* and the *Human Rights Act 2004 (ACT)* include protection for religious freedom, but only to the extent that those Acts can be enforced.⁵¹ Those Acts do not overrule inconsistent legislation.
- 7.4.2 The Constitution of the State of Tasmania alone amongst State constitutions provides a limited basis for freedom of/from religion, providing in section 46 that:

(1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

⁴⁸ See *King-Ansell v Police* [1979] 2 NZLR cited approvingly in *Miller v Wertheim* [2002] FCAFC 156, and *Mandla v Dowell Lee* [1983] 2 AC 548. See also *Jones v Scully* (2002) 120 FCR 243, 271-273 [110]-[113], *Jones v Toben* [2002] FCA 1150, [101], *Jeremy Jones v Bible Believers Church* [2007] FCA 55, [21] and *Silberberg v Builders Collective of Australia Inc* [2007] FCA 1512, [22].

⁴⁹ See Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Interim Report 127), par 4.48.

⁵⁰ *ibid*, par 4.45.

⁵¹ Swannie, *op cit*.

(2) *No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.*

7.4.3 However the provision is not entrenched and could be overridden by other State legislation.⁵²

7.4.4 State legislation which prohibits discrimination on the basis of religion includes the *Equal Opportunity Act 1995* (Vic), the *Anti-Discrimination Act 1991* (Qld), the *Equal Opportunity Act 1984* (WA), the *Discrimination Act (ACT) 1991*, and the *Anti-Discrimination Act 1996* (NT). The *Anti-Discrimination Act 1977* (NSW) prohibits discrimination on the ground of "race" which also includes ethno-religious background. However many of these laws include religious exemptions. For example Section 84 of the *Victorian Equal Opportunity Act 2010* exempts:

discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or general identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.

7.4.5 State legislation which prohibits behaviour that incites or encourages hatred, serious contempt, revulsion or severe ridicule against another person or group of people because of their race and/or religion includes the *Victorian Racial and Religious Tolerance Act 2001*.

8. Does Australian law adequately protect the human right to freedom of/from religion and if not, how can this be remedied?

By holding legislation and behaviours up to the standard of international human rights it is possible to identify discriminatory practices and failures to protect human rights.

8.1 Defect: the lack of a Human Rights Act or Bill of Rights to protect freedom of/from religion

8.1.1 Most of the issues relating to freedom of/from religion identified below would be solved or substantially improved by the introduction of a Commonwealth Human Rights Act or Bill of Rights containing a 'freedom of thought, conscience, religion and belief' provision (especially if the model adopted were to overrule inconsistent Federal, State and Territory legislation).

8.1.2 It should be noted that under a Human Rights Act or Bill of Rights, competing rights would be balanced and assessed in the manner described in sections 6.3 and 6.4. The scope of freedom of/from religion would not be set in advance but would be identified and dealt with in context as particular issues arose. As Donald and Howard note:

*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.*⁵³

8.1.3 Failing such legislation, in the following paragraphs we have suggested potential remedies on an issue-by-issue basis.

8.2 Defect: the continued existence of blasphemy laws

8.2.1 As mentioned above, anti-blasphemy laws are inconsistent with the human right of freedom of/from religion and restrict free speech in the context of religion. In Australia, State laws against blasphemy amount to State protection of Christianity above other religions, effectively enforcing religious observance. This is inconsistent with the human right of freedom of/from religion. 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'.

⁵² Professor George Williams, op cit.

⁵³ Donald and Howard, op cit, p i.

- 8.2.2 The Special Rapporteur notes that blasphemy laws are associated with the politicization of religion and stifle free discussion about religion:

*When governments restrict freedom of expression on the grounds of ‘insult to religion’, any peaceful expression of political or religious views is subject to potential prohibition. In practice those laws can be used for the suppression of any dissenting view in violation of international human rights standards protecting freedom of opinion and expression and freedom of religion or belief... such laws have a stifling impact on the enjoyment of the right to freedom of religion or belief, not to mention the ability to engage in healthy dialogue and debate about religion.*⁵⁴

- 8.2.3 It has been suggested that the federal parliament could exercise the external affairs power and in conjunction with section 109 abolish the law of blasphemy throughout all of Australia in the same way that the federal parliament exercised its power under the external affairs power in conjunction with section 109 to abolish the criminality of same-sex consensual activity.⁵⁵

8.3 Defect: no legal protection against religious vilification

- 8.3.1 As the Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed, notes in his Interim Report of 2017, throughout the world there is a growing “climate of intolerance” driven by rising xenophobia and nativism against those perceived to be ‘different’ or ‘foreign’ which

*is also increasingly desensitizing the general public against incitement to discrimination or violence and other dangerous practices, such as stereotyping and stigmatization based on religion or belief or other characteristics.*⁵⁶

- 8.3.2 The concept of intolerance against persons based on their religion or belief has been repeatedly identified, says Shaheed, as an obstacle to the full enjoyment of the right to freedom of religion or belief.⁵⁷ State authorities, he notes, have a duty to protect individuals and groups against discrimination and other acts that violate the rights of persons based on their religion or belief.⁵⁸ Legislation may thus 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.

- 8.3.3 No ‘freedom’ can be truly experienced in the absence of safety. If one feels unsafe, for example because of hate speech against one’s religious 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.

- 8.3.4 It should be noted, says Shaheed, that

*the United Nations has adopted several tools for promoting the right to freedom of religion or belief by way of combating various forms of intolerance perpetrated against persons on the basis of their religion or belief, including Human Rights Council resolution 16/18 and its implementation mechanism, the Istanbul Process, and the Rabat Plan of Action. Those tools provide a common platform from which Member States may address domestic concerns and common challenges related to religious and other forms of intolerance despite diverse geographic, legal and political contexts, and offer more concrete means for translating into domestic practice protections offered by articles 18 to 20 of the International Covenant on Civil and Political Rights.*⁵⁹

- 8.3.5 Commonwealth legislation does not provide protection against vilification on the basis of religion (although, as mentioned in paragraph 7.3.2, ethnicity may cover some religions), and

⁵⁴ Shaheed, op cit, par 28.

⁵⁵ Beck, op cit, p 20.

⁵⁶ Shaheed, op cit, par 5.

⁵⁷ Shaheed, op cit, par 7.

⁵⁸ Shaheed, op cit, par 34.

⁵⁹ Shaheed, op cit, par, par 51.

State legislation is not consistent. This is a matter that is easily remedied by expansion of the Commonwealth *Racial Discrimination Act*.

- 8.3.6 It should be emphasized that an offence of vilification on the grounds of the religion of the vilified group or person would not include criticism of religious beliefs or tenets, only vilification of persons or groups on the basis of their religious adherence. It would protect the believer, not the belief (see section 6.4).
- 8.3.7 In addition to legislation, leadership by federal politicians against those who vilify religious groups would go a long way towards remedying this defect. Shaheed echoes his predecessor's recommendation that political and religious leaders, as well as civil society organizations, should:
- actively support and encourage an atmosphere of religious tolerance;
 - help to build societal resilience against manifestations of religious hatred;
 - refrain from using messages of intolerance or expressions which may incite to religious violence and manifestations of collective religious hatred", and
 - speak out firmly and promptly against intolerance, discriminatory stereotyping and instances of hate speech.⁶⁰
- 8.3.8 Unfortunately, Australian federal politicians are often the very people responsible for such vilification, particularly by identifying non-Christian religions as giving rise to national security issues.
- 8.3.9 Governments should do their utmost, says Shaheed
- to ensure that programmes implemented in the name of protecting national security are not, in fact, targeting, stigmatizing or profiling particular religious or belief communities and that they do not have a disproportionate and negative impact on them.*⁶¹
- 8.3.10 Bielefeldt notes that governments often refer 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'.*⁶²
- 8.3.11 It is no doubt against the background of such practices that the Gilbert and Tobin Centre for Public Law raised concerns about the effect of s 80.2C of the *Criminal Code* (which creates the offence of 'advocating terrorism') on freedom of religion, arguing that it and similar sections limits the capacity of individuals to express religious views which might be radical and controversial.⁶³

8.4 Defect: the existence of religious practices which discriminate against members

- 8.4.1 Many religions involve restrictions on the human rights of the adherents, including in relation to marriage and divorce requirements and the right to freedom from arbitrary interference with family matters (UDHR Article 12). Thus, the right to marry and to found a family expressed in Article 16 of UDHR is clearly breached by the Catholic Church, for example, in relation to its own priests and nuns.⁶⁴ Restrictions also apply as to eligibility to be a religious leader, with many religions restricting the role of women within the particular religion.

⁶⁰ [A/HRC/25/58](#), para. 62, quoted at Shaheed, op cit, par 45.

⁶¹ Shaheed, op cit, par 42.

⁶² Bielefeldt, op cit, par 16.

⁶³ Australian Law Reform Commission, op cit., par 4.85 and following.

⁶⁴ It should be noted that mandatory celibacy is in fact a late development in church practice, and has never been implemented uniformly within the Catholic church: Kim Haines-Eitzen, "How did celibacy become mandatory for priests?" *The Conversation*, 27 March 2017, at <https://theconversation.com/how-did-celibacy-become-mandatory-for-priests-75031>

- 8.4.2 Generally, the approach in Australia has been to leave religions to regulate themselves, and indeed to provide them with exemptions to continue their practices, even when the practices involve discrimination and would otherwise be illegal. However without Australia having a human rights framework or process which might encourage religions to identify and rectify areas in which their practices do infringe human rights, it is likely that change will be slow.
- 8.4.3 Difficulties can arise in a number of religions where there are differences between State requirements in relation to such matters as divorce, and religious requirements. These restrictions overlap with the civil law and may in practice restrict the ability of a person to remarry, or affect the status of their children.⁶⁵ In this way the refusal of one party to participate in a religious divorce, or one party unilaterally divorcing the other under religious law without civil law protections, may be a human rights issue.
- 8.4.4 An example of the legislation to overrule religious restrictions is the recent proposal in India to make illegal the Islamic 'triple talaq' or unilateral divorce of a woman by her husband. The bill renders the talaq void, in whatever form it is given, and gives the woman the right to claim a subsistence allowance for herself and minor children as well as to seek custody of her minor children.⁶⁶
- 8.4.5 In orthodox Judaism a religious divorce is required before a person can remarry, and the final religious dissolution of a marriage is brought about either through the death of a spouse or by the formal delivery of a divorce document, known as a *Gett*, by the husband to the wife. Where the husband fails to take this step, the Jewish court does not have the power to compel him to act and nor, it would seem, does the Family Court. This is a matter which can readily be remedied by an amendment to the *Family Law Act*, following the 2001 recommendations⁶⁷ and perhaps with the addition of sanctions to avoid the situation where neither a religious nor a civil divorce can be obtained because of the recalcitrance of one party.⁶⁸
- 8.4.6 One recommendation made in the context of Islamic divorce in Britain is that there should be an information campaign instructing Muslim women how to proceed with marriage in ways that are Islamically valid and which at the same time provide them with all available religious protections in relation to divorce: for example, to inform them that parties to a Muslim marriage contract (which is a civil contract) may enter legally binding stipulations whereby the wife is given the right to divorce herself or a clause is included in the *nikah* to accept the civil court as the forum for divorce.⁶⁹
- 8.4.7 Another worthwhile recommendation made in the context of the impact upon children's rights is that States should provide appropriate training for family court judges and officials involved in family conflict resolution "in order to ensure that the religious orientation of parents or legal

⁶⁵ Talya Faigenbaum and Nussen Ainsworth, "The complex world of religious divorce", *Law Institute of Victoria, Staying Informed*, 2 October 2017 at <https://www.liv.asn.au/Staying-Informed/LIJ/LIJ/October-2017/The-complex-world-of-religious-divorce>

⁶⁶ FP Staff, "Triple talaq bill to be tabled in Rajya Sabha today", *Firstpost* online, 3 January 2018 at <http://www.firstpost.com/india/triple-talaq-bill-to-be-tabled-in-rajya-sabha-today-noisy-showdown-likely-as-narendra-modi-govt-dares-opposition-4284843.html>

⁶⁷ Faigenbaum and Ainsworth, op cit, referring to *Family Law Council, Cultural-Community Divorce and the Family Law Act 1975: A Proposal to Clarify the Law* (2001)

⁶⁸ See generally Amanda Williamson, "An Examination of Jewish Divorce Under the Family Law Act 1975 (Cth)" [2004] JCU LawRw 7; (2004) 11 James Cook University Law Review 132 at <http://www.austlii.edu.au/au/journals/JCU LawRw/2004/7.html#fn152>

⁶⁹ Shaheen Sardar Ali, "A push to reform Islamic divorce could make Sharia councils redundant in Britain," *The Conversation*, 9 November 2016, , <https://theconversation.com/a-push-to-reform-islamic-divorce-could-make-sharia-councils-redundant-in-britain-68023>

guardians, including religious conversion, does not lead to discriminatory treatment” of the parties or of the children involved.⁷⁰

8.5 Defect: the existence of religious practices which discriminate generally

- 8.5.1 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.”’⁷¹
- 8.5.2 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.”*⁷²
- 8.5.3 The Panel would not need to look too far back into 2017 to recall the anti LGBTIQ speech that was encouraged in Australia in the name of religion.⁷³
- 8.5.4 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).
- 8.5.5 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.
- 8.5.7 Exclusionary behaviour would be discouraged if religiously-based exemptions were removed from anti-discrimination legislation. 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.⁷⁴
- 8.5.8 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).⁷⁵
- 8.5.9 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

⁷⁰ Bielefeldt (2015) op cit, p 22.

⁷¹ Shaheed, op cit, par 46.

⁷² 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.

⁷³ See, for example: http://www.acl.org.au/tags/freedom_of_speech

⁷⁴ 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.

⁷⁵ Donald and Howard, op cit, p 1.

give one the legal right to refuse to interact with others because of those persons' sexual orientation or gender identity, nor to vilify persons because of those persons' sexual orientation or gender identity. 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."*⁷⁶

8.6 Defect: the lack of protection of children's rights in relation to religion

- 8.6.1 A defect which is related to those previously mentioned (breaches of human rights of members of a religion or attempts to breach rights of those outside the religion) is that there is a lack in Australia of protection for the rights of children in relation to freedom of/ from religion, except in the extreme cases of forced (child) marriage and genital mutilation of girls, both of which can involve purported religious justifications.
- 8.6.2 The Commonwealth *Criminal Code Act 1995* contains offences regarding forced marriage. It is illegal to cause a person to enter a forced marriage, and to be a party to a forced marriage.⁷⁷ The Commonwealth *Marriage Act 1961* provides that a marriage may be void if the consent of a party was not real, or if a party was not of marriageable age. The *Marriage Act* permits a marriage where one party is aged between 16 and 18 years of age, where there is both the required consent (usually parental) and an Australian court order from a judge or magistrate authorising the marriage. It is illegal for any person under the age of 16, or two people under the age of 18, to marry.
- 8.6.3 All States and Territories of Australia prohibit female genital mutilation⁷⁸ both within their jurisdictions and extraterritorially and it is a criminal offence to remove a child from Australia, or to assist, whether overtly or tacitly, in such a removal for the purpose of submitting her to any

⁷⁶ Grimm, op cit, p 2374.

⁷⁷ Australia's forced marriage offences carry a maximum penalty of seven years' imprisonment, or nine years' imprisonment for an aggravated offence. An offence may be aggravated in several circumstances, including where the victim is under the age of 18. If the victim is under the age of 18 and is taken overseas for the purpose of forced marriage, the maximum penalty increases to 25 years' imprisonment.

⁷⁸ See World Health Organization (2016, May 16) *Female genital mutilation* available at: <http://www.who.int/mediacentre/factsheets/fs241/en/> and Y. Zurynski et al for Australian Paediatric Surveillance Unit Female Genital Mutilation Study Steering Committee, "Female genital mutilation in children presenting to Australian paediatricians" (2017) 102 *Archives of Disease in Childhood* 509-515 available at: <http://adc.bmj.com/content/102/6/509> and Elizabeth Elliott and Yvonne Zurnyski, "Female genital mutilation is hurting Australian girls and we must work together to stamp it out", *The Conversation*, 9 February 2017 at <https://theconversation.com/female-genital-mutilation-is-hurting-australian-girls-and-we-must-work-together-to-stamp-it-out-71885>

form of female genital mutilation overseas. However the legislation can be inconsistent in terms of penalties and age coverage.⁷⁹

8.6.4 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 their parents, families or communities, without having rights in their own capacity.”⁸⁰

8.6.5 “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.”⁸¹ 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.⁸²

8.6.6 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.⁸³ However in the area of education, he notes that pressure should not be exerted on children to conform to the socially dominant religion;⁸⁴ 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](https://www.unhcr.org/refugees/article/48612323.html)). 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.

⁷⁹ Australian Attorney-General’s Department, *Review of Australia’s Female Genital Mutilation legal framework: Final Report*, March 2013, p 3, available at <https://www.ag.gov.au/Publications/Documents/ReviewofAustraliasfemalegenitalmutilationlegalframework/Review%20of%20Australias%20female%20genital%20mutilation%20legal%20framework.pdf>

⁸⁰ Bielefeldt (2015) op cit, par 16.

⁸¹ Bielefeldt (2015) op cit, par 22, discussing the Convention on the Rights of the Child.

⁸² Bielefeldt (2015) op cit, pars 23 and 25,

⁸³ Bielefeldt (2015) op cit, pars 36 and 37.

⁸⁴ Bielefeldt (2015) op cit, par 13. This is relevant to the school chaplaincy programme referred to below at 8.7.3.

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.⁸⁵

- 8.6.7 These principles are very similar to those espoused by the Victorian and NSW *Religions in School* organisation.⁸⁶ Bielefeldt adds, following the *Toledo Principles*, that education about religions and beliefs should be of high quality, based on solid research, and take into account internal diversity within various religions.⁸⁷ 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.”⁸⁸

8.7 Defect: the politicisation of Christianity as the dominant Australian religion

Since religious freedom means equal freedom, the state may neither privilege nor discriminate against certain religious groups.⁸⁹

- 8.7.1 Owing to the general lack of appreciation of the scope of the human right of freedom of ‘religion’/belief, Bielefeldt comments, governments commonly but wrongly:
- privilege private expressions of religion while ignoring rights related to communal and institutional religions, or vice versa, and/or
 - privilege one particular type of religion as part of the national heritage, ignoring the principle of equality amongst religions, thus politicizing that religion.⁹⁰
- 8.7.2 Saheed also warns against the politicization of religion, describing it as the use of religion “as a means of shaping and reinforcing narrow concepts of national identity, tapping into feelings of religious belonging for the purposes of strengthening political loyalty”.⁹¹ With politicization, he notes,
- “religion [is] harnessed to promote national unity and societal homogeneity through the invocation of one predominant cultural and/or religious legacy to which all citizens are supposed to relate in a positive manner”.⁹²*
- 8.7.3 Christianity is politicised in Australia in various ways as described below. The remedy for these defects is to cease the practices, and for our political leaders to demonstrate leadership in advancing freedom of/from religion that respects human rights. Examples of the politicisation of Christianity are:
- the general practice of giving of exemptions from anti-discrimination legislation to Christian institutions, as mentioned above;
 - the general social acceptance of attacks by Christian institutions upon those with whom they do not agree, as exemplified in the Marriage Equality ‘debate;’

⁸⁵ 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.

⁸⁶ <http://religionsinschool.com>

⁸⁷ Bielefeldt (2015) op cit, par (i), page 21.

⁸⁸ First Key Principle, *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools* (<http://www.osce.org/odihr/29154>), p 16.

⁸⁹ Grimm, op cit, p 2374.

⁹⁰ Bielefeldt, op cit, par 28 and following.

⁹¹ A/HRC/25/58, para. 27, quoted at Shaheed, op cit, par 43.

⁹² Ibid.

- the school chaplains programme, which has resulted in employment of chaplains 99.5% of whom are Christian;⁹³
- calls to prioritise Christian refugees,⁹⁴ and
- the imposition of Christian practices in many areas of Australian public life, such as Christian prayers at the beginning of a session of Federal Parliament, or at the beginning of a session of local government.⁹⁵

8.7.4 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 adult 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. 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.’ In this case the ‘condition precedent’ was effectively a coercion, a breach of the childrens’ right to ‘religious’ freedom and therefore against public policy.

8.7.5 Grimm points out, in discussing German law, that freedom of all religion and of secularism in a multicultural nation necessarily requires a secular constitutional state which is not involved in any religion itself. He describes the characteristics of such a state as follows:

The secular state is the state that dissolves its bonds with religion and claims independence from religious truths. This state no longer derives its legitimacy from God, but instead bases its power on worldly grounds. It does not serve a divine destination and does not feel responsible for the eternal salvation of its subjects. Rather, it pursues a common good of a worldly nature whose core consists in the security and welfare of its inhabitants. This does not mean that religious truths lose their right to exist, but they ... become a matter for the individual and the associations that the individual chooses to join. They are regarded as compatible with the secular state as long as they do not claim absolute validity for society as a whole and stay within the framework of the public order.

*... the secular constitutional state, finally, is the state that derives its legitimacy from a consent of the governed. In short, it is the democratic state, in which a paramount law regulates the establishment and exercise of political power.*⁹⁶

8.7.6 In the German context, Grimm sees the state as an important umpire where religious and civil rights conflict, saying that:

it is important that, within the secular constitutional state, religious freedom cannot be recognized unconditionally, even within a religious community. There are two main reasons for this. First, unlike the general laws, which are binding independently of the addressee’s consent, religious norms depend on voluntary compliance. The state’s monopoly of legitimate force does not allow compulsory means in the hands of religious

⁹³ William Isadale and Julian Savulescu, “Remake school chaplaincy as a proper welfare program or scrap it”, *The Conversation*, 4 July 2014, at <https://theconversation.com/remake-school-chaplaincy-as-a-proper-welfare-program-or-scrap-it-28707>

⁹⁴ see generally Bielefeldt, op cit par 72, Sarah Hackett, “Favouring Christian over Muslim refugees is bad for everyone”, *The Conversation*, 15 September 2015 at <https://theconversation.com/favouring-christian-over-muslim-refugees-is-bad-for-everyone-47440>, and Michael Safi, “Calls to prioritise Christian refugees are discriminatory – Australia’s grand mufti,” *The Guardian* online, 9 September 2015 at <https://www.theguardian.com/australia-news/2015/sep/09/calls-to-prioritise-christian-refugees-are-discriminatory-australias-grand-mufti>

⁹⁵ For a discussion of this issue, see Luke Beck, op cit, p 17, who notes that “having a prayer frames those who are not religious or who are not members of the religion to which the prayer relates as not quite full members of the community.”

⁹⁶ Grimm, op cit, 2373.

*communities. Consequently, the state must prevent attempts by a religious community to enforce religious norms against an unwilling believer. Since freedom of religion includes the right not to join a religious community, the state must also guarantee the right to exit.*⁹⁷

- 8.7.7 He also sees the state as being required to actively protect constitutionally guaranteed liberties which may result in the balance being weighed in favour of a religion (for example, restricting an employer from unduly limiting their employee from complying with their religious duties), or in favour of protection from a religion (for example, where the state rules against the dismissal of an employee in a church- owned institution for violating a religious norm).⁹⁸
- 8.7.8 At the same time, Grimm takes the view that “state activities favoring traditions that may have Christian roots, but which developed a formative effect for society without retaining a specific religious connotation” do not amount to politicisation of Christianity, and do not justify equal treatment for other religions on equality grounds (for example in terms of equal number of public holidays to celebrate days that are important to other religions, or state support of religious education).⁹⁹
- 8.7.9 Similarly he believes that the state has no obligation to compensate for every disadvantage that may flow from compliance with religious duties, especially where that compensation could involve limiting the rights of others. He gives the example of non-believers being asked not to criticise specific religious beliefs, persons or symbols where such criticism is prohibited to members of that religion. He also rejects claims that members of some religions be permitted to withdraw from application of the general laws and from the jurisdiction of state courts in relation to certain areas of life such as marriage law.¹⁰⁰

9. Conclusion

- 9.1 It is clear that in practice there are a number of existing laws and practices limiting Australians from exercising their freedom of religion or limiting their freedom from religion.
- 9.2 It is ALHR’s submission that the appropriate balance between freedom of /from religion or belief and other freedoms would best be served by adoption at the federal level of a Bill of Rights or Human Rights Act. We would be happy to provide further submissions on the form that this legislation should take.
- 9.3 In conclusion we note the following important words from Professor Williams speaking at the *2017 Parliamentary Inquiry into the status of freedom of religion or belief*:

*It is wise for the inquiry to keep in mind that whatever protection we think of for religion cannot be in a vacuum. We have that problem at the moment with anti-discrimination and other statutes; they are too narrowly focused without the broader context. Here, being alive to freedom of speech, for example, and other counterbalancing or supporting interests is very important. In giving evidence to the section 18C inquiry recently I made the same point: in the end that inquiry was always going to be hamstrung by the fact that you cannot solve these problems with a narrow focus. These are about broader societal values, political leadership, cultural reinforcement and a legal scheme that does not cherry-pick things but says, 'Here are the things we think are important, and we will give them a consistent level of protection,' as opposed to the inconsistent ad hoc approach we have at the moment.*¹⁰¹

⁹⁷ Grimm, op cit, p 2379.

⁹⁸ Grimm, op cit, pp 2379 and 2380.

⁹⁹ Grimm, op cit, p.2380.

¹⁰⁰ Grimm, op cit, p.2381.

¹⁰¹ Professor George Williams, op cit, p 12.

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

Yours faithfully

A handwritten signature in black ink, appearing to be 'BC' followed by a stylized flourish.

Benedict Coyne
President
Australian Lawyers for Human Rights

Annexure D

Submission dated 19 November 2018 to the Senate Legal and Constitutional Affairs References Committee with reference to the desirability (or otherwise) of *legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff*



AUSTRALIAN
LAWYERS
FOR
HUMAN RIGHTS

19 November 2018

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney
www.alhr.org.au

Committee Secretary
Senate Legal and Constitutional Affairs References Committee
PO Box 6100
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

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.

Table of Contents

Executive Summary	2
1. Introduction	3
2. International Instruments	4
3. Is religious freedom possible without human rights?	6
4. Freedom of/from religion supports other human rights	6
5. The balancing of indivisible and interdependent human rights	7
6. Protecting and respecting the believer not the belief	8
7. Religious practices which discriminate	9
8. Children, discrimination and religious education	10
9. Australia's international obligations in relation to the rights of children	12
10. Conclusion	14
About ALHR	14
Select Bibliography	15

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 Bielefeldt (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-and-or>>

- 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.

Select Bibliography

- 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* at <http://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf>.
- the 2015 *Interim Report* of the (then) Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, concerning children's freedom of/from religion (cited as Bielefeldt (2015)) at A/70/286 *Interim Report: Elimination of all forms of religious intolerance* (2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/245/07/PDF/N1524507.pdf>.
- the 2016 *Interim Report* of the (then) Special Rapporteur on Freedom of Religion or Belief, 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), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/244/98/PDF/N1624498.pdf>,
- the 2017 *Interim Report* of the Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed, A/72/365 *Interim Report: Elimination of all forms of religious intolerance*, (2017), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/270/09/PDF/N1727009.pdf>.
- Dr Alice Donald and Dr Erica Howard, *The right to freedom of religion or belief and its intersection with other rights*, (2015), Middlesex University, for ILGA Europe, 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.
- the Hansard transcript of the public hearing in Sydney on 6 June 2017 of the Joint Standing Committee on Foreign Affairs, Defence and Trade into the 'Status of the freedom of religion or belief;' http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/toc_pdf/Joint%20Standing%20Committee%20on%20Foreign%20Affairs,%20Defence%20and%20Trade_2017_06_06_5146_Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/0003%22and
- Office for Democratic Institutions and Human Rights, the *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools*. Advisor Council of Experts on Freedom of Religion or Belief, OSCE/ODIHR, Warsaw, 2007, <http://www.osce.org/odihr/29154>.