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Protecting fundamental rights and freedoms in  
Australia

Submission to the Expert Panel on the Religious Freedom Review

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## Human Rights Law Centre

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# 1. Introduction

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The Human Rights Law Centre (**HRLC**) has long advocated for the protection of the right to freedom of thought, conscience, religion or belief within a framework which guarantees robust human rights protections for all Australians.<sup>1</sup>

According to the 2016 Census, a clear majority of Australians identify as religious.<sup>2</sup> Importantly, 52% of Australians identified as Christian, with the next most common religions being much smaller in number – with Islam at 2.6% and Buddhism at 2.4%.<sup>3</sup> However, there has been a rapid decline in religious belief in Australia in recent years, with 30% of Australians reporting no religion.<sup>4</sup>

The right to freedom of thought, conscience, religion or belief (hereafter referred to as the right to freedom of religion or belief) is a fundamental, non-derogable right under international law<sup>5</sup> and should be protected under Australian law. However, protecting the human rights of religious communities need not come at the expense of other equally important rights. Australia must protect the rights of people of faith to freely hold and practice their religious beliefs, while equally ensuring that the growing numbers of agnostic and atheist Australians can freely hold and live by their secular beliefs.

For the most part, Australian laws allow people of faith to freely hold their religious beliefs, wear religious dress and symbols, worship freely, establish religious institutions, build and preserve places of worship, engage in religious practice and educate their children in accordance with their religious beliefs. We live in a successful democracy where citizens are generally free to express political, philosophical and religious views and observe, practice and teach their faith. Australians can generally freely express their deeply held religious and political opinions in public debate across the country without fear of censorship, retaliation or criminal sanctions. Australians are generally free to voice opposition and exchange ideas on issues which are fundamental to an open liberal democracy.

Despite recent reforms to the *Marriage Act 1961* (Cth) (**Marriage Act**), lesbian, gay, bisexual, transgender and intersex (**LGBTI**) people continue to face significant discrimination and disadvantage in Australia. Discrimination entrenched in laws and policies or experienced at work, school or home, contributes to alarmingly high rates of suicide, self-harm and depression among LGBTI populations. Any proposals considered to advance religious freedom must not come at the expense of the health, well-being and safety of LGBTI people.

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<sup>1</sup> See e.g., Human Rights Law Centre, *Rights and freedoms in Australia: Response to the Australia Law Reform Commission interim report of its inquiry into traditional rights and freedoms* (2009)

[https://www.alrc.gov.au/sites/default/files/subs/148.\\_org\\_human\\_rights\\_law\\_centre\\_submission\\_.pdf](https://www.alrc.gov.au/sites/default/files/subs/148._org_human_rights_law_centre_submission_.pdf); Human Rights Law Centre, *Striking the right balance: Submission to the inquiry into the status of the human right to freedom of religion or belief* (2017)

<https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/593735f8be659441f726306b/1496790524658/FORB+submission+-+Final.pdf>.

<sup>2</sup> Australian Bureau of Statistics, "Religion in Australia", 2011.0 - *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (28 June 2017)

<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Religion%20Data%20Summary~70>.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> ICCPR art 4(2).

People of faith are not fully protected from discrimination across Australia, but should be. At the same time, existing religious exemptions allowing religious bodies to discriminate in goods and services, employment, education and other spheres of public life go too far. These religious exemptions override the rights of others to be free from discrimination. They act as a barrier to vulnerable people accessing essential support services, employment and education and contribute to lower health outcomes for marginalised communities which bear the brunt of this discrimination.

Australia is falling behind in providing legal and institutional protection of fundamental human rights and freedoms. We should not create arbitrary or piecemeal laws which pick and choose whose human rights deserve protection. It is time to protect all human rights in a coherent legal framework by consolidating and modernising federal discrimination protections and introducing a Human Rights Act.

## 2. Summary of recommendations

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1. The federal parliament should legislate to protect the fundamental rights and freedoms contained in the ICCPR and ICESCR, including the right to freedom of religion or belief.
2. The Expert Panel and the Australian Government should consult with Aboriginal and Torres Strait Islander peoples.
3. 'Religious belief or activity' (including not having a religious belief) should be introduced as a protected attribute under federal anti-discrimination law.
4. Federal anti-vilification laws should be introduced which prohibit public advocacy of national, racial or religious hatred that incites discrimination, hostility or violence.
5. The Royal Commission into Institutional Responses to Child Sexual Abuse's recommendations should be implemented as soon as possible.
6. The Australian Government should prohibit practices such as so-called 'conversion' or 'reparative' therapy, which attempt to change sexual orientation or gender identity and cause significant harm to a person's physical or mental health.
7. A general limitations clause should replace permanent exemptions only allowing for limitation of rights where there is a legitimate aim, and where reasonable, necessary and proportionate.
8. Existing exemptions that allow religious organisations to discriminate in the provision of facilities, goods and services should be repealed and replaced with a general limitations clause. Alternatively, we propose that religious exemptions are only available to organisations that do not receive any government funding, or religious exemptions are not available to organisations providing goods and services to vulnerable groups.
9. Blanket exemptions which allow religious organisations to discriminate in employment should be repealed and replaced with a general limitations clause. Alternatively, religious exemptions in employment should be narrowed to only permit discrimination when required to fulfil the 'inherent requirements' of a position (for roles closely connected with religious worship, observance, practice or teaching). There should be no religious exemptions in employment for organisations that receive government funding.

10. Any publicly funded school or educational institution should not be exempt from discrimination laws and must take positive steps to protect all students from harm, including LGBTI students.
11. If religious exemptions are retained, any organisation seeking to rely on a religious exemption must advertise its intention to do so and / or lodge a notice with the Australian Human Rights Commission specifying the policy or practice.
12. Proposals introduced during parliamentary debates on the marriage equality bill which would wind back existing discrimination protections, including allowing discrimination on the basis of conscientious belief, should not be introduced into law.
13. The Expert Panel accept the recommendations of Not-for-Profit Law to this inquiry and consider the potential detrimental impacts of the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth).
14. The right of freedom of expression should be protected through the introduction of a comprehensive Human Rights Act.
15. Australia should consolidate and modernise its anti-discrimination laws and add the additional ground of 'religious belief' (including non-religious beliefs).
16. Australia should enact a Human Rights Act that protects fundamental human rights and freedoms, including the right to freedom of religion or belief.

## 3. International human rights protections

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### 3.1 Background

In the immediate aftermath of the horrors of World War II, including the Holocaust and the ethno-religious persecution experienced by religious minorities, the world came together and signed the Charter of the United Nations. To give substance to the term "human rights" used in the Charter, the nations of the world adopted the Universal Declaration of Human Rights (**UDHR**),<sup>6</sup> the International Covenant on Economic Social & Cultural Rights (**ICESCR**),<sup>7</sup> the International Covenant on Civil and Political Rights (**ICCPR**),<sup>8</sup> with its two Optional Protocols, and other specialised conventions, declarations and procedures. Together, these form the core human rights protections around the world.<sup>9</sup>

### 3.2 Absolute right to hold a religious or secular belief

Article 18(1) of the ICCPR states that:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in

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<sup>6</sup> While the UDHR is not a treaty and is not legally binding on States, it is an expression of the fundamental values which are shared by all members of the international community and has had a profound influence on the development of international human rights law.

<sup>7</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) UN Treaty Series 993, 3.

<sup>8</sup> UN General Assembly, *International Covenant on Civil and Political Rights* (16 December 1966) UN Treaty Series 999, 171.

<sup>9</sup> Manfred Nowak, *UN Convention on Civil and Political Rights: CCPR Commentary (2<sup>nd</sup> revised edition)* (2005) XIX (Introduction).

community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.<sup>10</sup>

Every human being has an absolute right to believe whatever they choose to believe. This right to form, hold or change inner convictions (commonly referred to as the *forum internum*) extends to beliefs that may be objectionable or offensive to others. It includes freedom from coercion,<sup>11</sup> and “the right to declare religious beliefs openly and without fear of hindrance or reprisal”.<sup>12</sup> The ICCPR also requires countries to have respect for the liberty of parents or legal guardians to “ensure the religious and moral education of their children in conformity with their own convictions.”<sup>13</sup>

This fundamental human right equally protects all religions and applies equally for people who hold religious or secular beliefs. In practice, a religion is likely to automatically qualify a person for protection, whereas a secular belief system generally requires a level of seriousness and coherence before it has access to legal protection.<sup>14</sup>

Importantly, the fundamental human rights protected under international law cannot be read in isolation from one another – these rights interact with each other. Freedom of expression, freedom of assembly and association and the right to respect for privacy and family life are important aspects of freedom of religion or belief.

### 3.3 Limited right to manifest a religious belief

While “[all] human rights are universal, indivisible and interdependent and interrelated”,<sup>15</sup> human rights are rarely absolute.<sup>16</sup> There are express limitations on many human rights as well as mechanisms available to countries which allow them to limit their treaty obligations and restrict individual rights.<sup>17</sup>

While the freedom to hold religious beliefs is **absolute**,<sup>18</sup> manifesting a religious belief in worship, observance, practice or teaching can only be **limited** where those limitations are “prescribed by law

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<sup>10</sup> The General Assembly *Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief* (GA Res. 36/55 of 25 November 1981) has normative value in the interpretation of this provision. The right to freedom of religion or belief is also guaranteed in article 18 of the UDHR, article 9(1) of the European Convention of Human Rights (ECHR), article 14 of the Convention on the Rights of the Child (CRC) and article 12 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families. Further, a number of special studies from UN organs are taken into consideration in interpreting article 18 of the ICCPR. See Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, UN Sales No.60.XIV.2. See also Odio Benito, *Study of the current dimensions of the problems of intolerance and of discrimination on grounds of religion or belief*, UN Sales No E.89.XIV.3 (1989); Eide/Mubanga-Chipaya, *Conscientious Objection to Military Service*, UN Sales No. E.85.XIV.1 (1985); reports of the Special Rapporteurs on freedom of religion or belief (for example, the report E/CN.4.2004/63). These individual and collective manifestations of a religion or belief are also found in article 18 of the UDHR (teaching is mentioned first), article 9(1) of the ECHR and article 1(1) of the 1981 UN Declaration on Religious Intolerance. International human rights documents are interpreted within contemporary social understandings of human rights (e.g. it applies equally to all people regardless of their gender).

<sup>11</sup> ICCPR art 18(2).

<sup>12</sup> *R v Big M Drug Mart* [1985] 1 SCR 295 at 353-354.

<sup>13</sup> ICCPR art 18(4).

<sup>14</sup> Baroness Hale of Richmond, ‘Freedom of religion and freedom from religion’ (2017) 19 *Ecc LJ* 3, 4, referring to *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 AC 246 at [23] – [24].

<sup>15</sup> Vienna Declaration and Programme of Action, A/CONF.157/24 (Part I), chap. III; above n 9.

<sup>16</sup> The rights to freedom from torture and other cruel, inhuman or degrading treatment or punishment, freedom from slavery and servitude, freedom from imprisonment for inability to fulfil a contractual obligation, prohibition against the retrospective operation of criminal laws and the right to recognition before the law, are the only human rights which cannot be restricted under any circumstance: ICCPR art 1, 8 (1) 11 15 & 16.

<sup>17</sup> States can under certain circumstances derogate from their human rights obligations. They can also make reservations to certain articles of human rights treaties.

<sup>18</sup> UN HRC, *General Comment No. 22: Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/Rev.1/Add.4 (1993) [8] (**UN HRC General Comment No 22**). Paragraph 3 of UN HRC General Comment No 22 on article 18 states: “Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not

and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”<sup>19</sup> In other words, the *forum internum* can be contrasted with the *forum externum* – a person’s right to manifest or outwardly display a religion or belief or to live one’s life in accordance with it. The active exercise of this right is usually performed externally to the outside world.<sup>20</sup>

According to Nowak, the limitations contained in Article 18 of the ICCPR exercise an important corrective function due to the potential for far-reaching freedom of religion to lead to suppression not merely of freedom of religion of others but to other rights as well.<sup>21</sup> This is because of the inherently controversial character of freedom of religion – the fact that most religious faiths believe their faith to represent the “absolute truth” and thus reject the faiths or beliefs of others. It is the interplay between the principle of freedom of religion and its restrictions that truly determines the actual scope of the individual’s right.<sup>22</sup>

Article 18(1) of the ICCPR states that the manifestation element of this right applies to ‘worship, observance, practice and teaching’, which encompasses a broad range of acts.<sup>23</sup> The United Nations (UN) Human Rights Committee has clarified the scope of these concepts:

- **Worship** extends to ritual and ceremonial acts giving direct expression to belief, and various practices integral to such acts (e.g. building places of worship, use of ritual formulae and objects, display of symbols, observance of holidays and days of rest).
- **Observance** and **practice** include ceremonial acts and customs (e.g. observance of dietary regulations, wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and use of a particular language customarily spoken by a group).
- **Teaching** includes acts integral to the conduct by religious groups of their basic affairs (e.g. freedom to choose their religious leaders, priests and teachers, freedom to establish seminaries or religious schools, and freedom to prepare and distribute religious texts or publications).<sup>24</sup>

International law provides further guidance that an act must be “intimately linked” to the religious belief and there must exist “a sufficiently close and direct nexus between the act and the underlying belief”.<sup>25</sup> Places of worship (e.g. temples, mosques and churches), goods connected to the observance of a particular religion (e.g. candles, incense, ritual ornaments, a chuppah) and religious ceremonies are examples of public expressions of religious belief protected under this right.

Due to the vastly different legal frameworks in other countries and the broad margin of appreciation given to countries to introduce laws reflecting the social attitudes of their citizens and society, cases

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permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice...” (available at: <http://www.unhcr.ch/tbs/doc.nsf/0/9a30112c27d1167cc12563ed004d8f15>). Limitations on freedom of religion are also similarly expressed in article 14(3) or the CRC, article 12(3) of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, and article 9 of the ECHR.

<sup>19</sup> ICCPR art 18(3).

<sup>20</sup> Above n 9, 417.

<sup>21</sup> Ibid 408.

<sup>22</sup> Ibid 409.

<sup>23</sup> UN HRC General Comment No 22.

<sup>24</sup> Ibid [4].

<sup>25</sup> *Eweida & Ors v The United Kingdom* [2013] ECHR 37 [82]. See also *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 [52].

from international courts have limited utility in an Australian context. However, examples from international jurisdictions provide an indication of how courts approach balancing competing rights.

An example of the application of these limitations is the European case of *Pichon and Sajous v. France*, where the European Court of Human Rights rejected a “manifestly ill-founded” application from pharmacists who refused to sell contraceptives because of their religious beliefs.<sup>26</sup> The Court stated that “the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere.”<sup>27</sup>

As another example, in *Eweida v UK*, the Court held that a company’s ban on wearing religious symbols at work was justified for health and safety reasons for a geriatrics nurse, but not to maintain a corporate image for a British Airways employee.<sup>28</sup> The restriction in nursing was held to pursue a legitimate aim of protecting the health and safety of nurses and patients, and was equally enforced, including requiring that Sikh nurses remove a bangle or kirpan and prohibiting flowing hijabs at work.<sup>29</sup>

### 3.4 Right to equality and freedom from discrimination

Equality and non-discrimination also constitute basic and general principles relating to the protection of all human rights.<sup>30</sup> These obligations arise under the ICCPR, the ICESCR, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of Persons with Disabilities, and the Convention on the Rights of the Child.

Article 2(1) of the ICCPR and article 2(2) of ICESCR require States to respect and ensure the rights in the Covenant ‘without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’.<sup>31</sup> Article 26 of the ICCPR is a free-standing non-discrimination clause that prohibits discrimination and provides that all people are equal before the law – in fact or in law – in all aspects of public life.

People of faith are entitled to legal protections from discrimination on the basis of their religion. Equally, people from different faiths and secular people should be free from having the religious beliefs of others imposed on them.

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<sup>26</sup> *Pichon and Sajous v. France*, Application no 49853/99 (2 October 2001).

<sup>27</sup> *Ibid.*

<sup>28</sup> *Eweida & Ors v The United Kingdom* [2013] ECHR 37 [82].

<sup>29</sup> *Ibid.*

<sup>30</sup> UN HRC, *General Comment No 18: Non-discrimination* (1989) UN Doc HRI/GEN/1/Rev.6, 146 (**UN HRC General Comment No 18**).

<sup>31</sup> See, e.g. UN Economic and Social Council, Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights, UN Doc E/2009/90 (2009) [19].



The rights to non-discrimination and substantive equality have also been confirmed time and time again by a wide range of UN Treaty Bodies,<sup>32</sup> and international jurisprudence.<sup>33</sup> Australia is obliged to ensure full and effective legislative protection of the rights to non-discrimination and equality,<sup>34</sup> and has done so through a wide range of national laws.<sup>35</sup>

### 3.5 Limiting the right to freedom of religion or belief

Drawing a line as to which religious practices can be accommodated in a plural society that fairly respects the rights of diverse groups is not a simple exercise. It is properly a subject for discussion and debate and each country has a 'margin of appreciation' to decide where that line is to be drawn in its national circumstances.

International law provides a structured process for drawing this line.<sup>36</sup> In order for a limitation on a fundamental right to be justified, the limitation must be necessary, pursue a legitimate aim, and be proportionate to that aim (which can be referred to as the proportionality test).<sup>37</sup> These requirements are reflected in national human rights instruments, both constitutional and legislative, as well as applied by the federal Parliamentary Joint Committee of Human Rights. The presumption is always in favour of human rights, which places the burden of proof on those who would limit the right.

The proportionality test is an effective means of arbitrating between justified and unjustified limitations. Each limb of this test is designed to guard against potential misuse of the limitation provision to deprive individuals of their rights unnecessarily: it seeks to ensure that a measure does not limit a right more than is reasonably necessary to accomplish the measure's legitimate aims.

We direct the Expert Panel to the 'Limitations Criteria' provided in the Guide to Human Rights published by the Parliamentary Joint Committee on Human Rights for further explanation of these key concepts.<sup>38</sup>

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<sup>32</sup> See, e.g., UN HRC, *General Comment No 28: Equality of Rights between Men and Women* (2000) UN Doc CCPR/C/21/Rev.1/Add.10; UN HRC General Comment No 18; UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 16: The Equal Rights of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights* (2005) UN Doc E/C.12/2005/4; CESCR, *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights* (2009) UN Doc E/C.12/GC/20; UN Committee on the Elimination of Discrimination against Women, *General Recommendation No 25* (2004) UN Doc A/59/38.

<sup>33</sup> See, e.g., *D.H. v The Czech Republic*, Appl. No. 57325/00 (2007); *Nachova v Bulgaria*, Appl. Nos. 43577/98 & 43579/98 (2005); *Morales de Sierra v Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.LV/II.111, doc. 20 rev (2001); *Schuler-Zraggen v Switzerland*, Ser. A No. 263 (1993).

<sup>34</sup> See, e.g., ICCPR arts 2, 3, 26; ICESCR; CEDAW; CERD; CRPD art 5.

<sup>35</sup> See, e.g., *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth).

<sup>36</sup> See e.g. ICCPR art 18(3); UN HRC, *General Comment No. 22: Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/Rev.1/Add.4 (1993) [8].

<sup>37</sup> UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (1985). These principles are also reflected in the limitation provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2), and the *Human Rights Act 2004* (ACT) s 28 (which are almost identical). See further *S.A.S v France* (European Court of Human Rights, Grand Chamber (1 July 2014) Application No 43835/11 (1 July 2014); *Bull (And Another) v Hall (And Another)* [2013] UKSC 73 (27 November 2013); *Trinity Western University v The Law Society of Upper Canada* [2016] ONCA 518; *Achbita v G4S Secure Solutions NV* (European Court of Justice, C-157/15, 14 March 2017) and *Bouagnaoui v Micropole SA* (European Court of Justice, C-188/15, 14 March 2017); *Ladele v London Borough of Islington* [2009] EWCA Civ 1357; *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880; *Royal Devon & Exeter Hospitals NHS Foundation Trust* [2010] ET 1702886/2009; *Eweida v British Airways* [2010] EWCA Civ 80. See also, Australian Government Attorney-General's Department, *Permissible limitations*, <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Permissiblelimitations.aspx>.

<sup>38</sup> Parliamentary Joint Committee, *Guide to Human Rights* (June 2015) [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)

## 4. Freedom of religious worship, observance, practice and teaching in Australia

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### 4.1 Limited implementation of article 18 of the ICCPR

While some domestic laws in Australia seek to do so, the right to freedom of religion or belief is not fully protected in Australia within a comprehensive human rights framework.

Section 116 of the Australian Constitution provides that the Australian Government “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”. This constitutional guarantee of non-establishment and free exercise is directed to preventing the Australian Government from legislating in respect of religion rather than providing substantive protection of the right to religion or belief. Professor Carolyn Evans argues that the High Court’s historical approach in narrowly interpreting this section as a constraint on government power rather than a positive right has limited the Court’s capacity to meaningfully consider legal questions around religious freedom.<sup>39</sup>

The Constitution prevents the adoption of a state religion, but Australia does not have a strict separation of church and state, where God and religion is removed from the public sphere.<sup>40</sup> In Australia, religion – and particularly Christianity – continues to play a core role in the public sphere and particularly in religious, cultural and political institutions (e.g. public holidays on Christian days of observance, reading the Lord’s Prayer in federal, state and territory parliaments, chaplaincy programs in public schools).

Tasmania is the only state or territory with a Constitution that guarantees freedom of religion, but this can be repealed by an ordinary Act of the Tasmanian Parliament.<sup>41</sup> In Victoria and the ACT, statutory human rights acts protect the right to freedom of religion or belief, but these acts have limited enforceability as they do not provide a standalone cause of action, and they cannot invalidate legislation which is incompatible with human rights.<sup>42</sup>

The Australian Human Rights Commission (**AHRC**) has the power to inquire into, conciliate or report on any Commonwealth act or practice that may be inconsistent with any human right, including the freedom of religion or belief.<sup>43</sup> However, there are no federally enforceable remedies for individuals whose right to freedom of religion or belief has been violated under the AHRC Act.<sup>44</sup>

**Recommendation 1:** The federal parliament should legislate to protect the fundamental rights and freedoms contained in the ICCPR and ICESCR, including the right to freedom of religion or belief.

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<sup>39</sup> Carolyn Evans, ‘Religion as politics not law: the religion clauses in the Australian Constitution’ (2008) 36(3) *Religion, State and Society* 283.

<sup>40</sup> See Renae Barker, ‘Is Australia a secular country? It depends what you mean’, *The Conversation* (2015) <https://theconversation.com/is-australia-a-secular-country-it-depends-what-you-mean-38222>.

<sup>41</sup> Denise Myerson, ‘The protection of religious rights under Australian law’ (2009) *Brigham Young University Law Review* 552.

<sup>42</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14; *Human Rights Act 2004* (ACT) s 14.

<sup>43</sup> *Australian Human Rights Commission Act 1986* (Cth) s 20.

<sup>44</sup> *Ibid.*

The approach taken to recognising religion varies depending on the statutory or policy context, reflecting the challenges of defining the term 'religion'<sup>45</sup> (e.g. 'recognised' and 'non-recognised' denominations in the Marriage Act<sup>46</sup>).

Examples can be found where Australian law directly limits worship (e.g. laws criminalising the ritual use of narcotic substances<sup>47</sup>) or which may indirectly interfere with freedom to worship (e.g. planning laws which place restrictions on the building of places of worship). Such laws and regulations are generally accepted by the Australian community as acceptable limitations on this right.

When it comes to observance and practice, Australia grants exemptions to observe dietary regulations (e.g. kosher and halal exemptions from animal cruelty laws) but restricts other ritual practices where necessary to protect the fundamental rights and freedoms of others (e.g. female genital mutilation<sup>48</sup>). People of faith are largely free to wear religious dress and symbols, but in prescribed situations Australian laws limit freedoms to wear religious dress (e.g. laws requiring the removal of face coverings when requested by police in WA).

Religious institutions in Australia are free to choose and train their religious leaders, priests and teachers in accordance with their religious beliefs (e.g. exemptions from federal anti-discrimination laws to lawfully discriminate in appointment, training and education<sup>49</sup>) and parents are generally free to educate their children in accordance with their religious and other beliefs.

Unfortunately, the protection of Aboriginal and Torres Strait peoples' Islander religious, spiritual and cultural beliefs and practices (e.g. access to sacred sites<sup>50</sup>), including the recognition of the importance of allowing Aboriginal children to be raised with knowledge of traditional religious, spiritual and cultural beliefs has historically been very poor in Australia.<sup>51</sup> Legal safeguards continue to fail to prevent the removal of Aboriginal children from their families, and thus connection to their traditional religious, spiritual and cultural practices. Likewise, unfair criminal justice laws and policies see far too many Aboriginal and Torres Strait Islander peoples locked up, far away from family and culture.

Targeted consultations with Aboriginal and Torres Strait Islander organisations would allow for a greater understanding of these issues. It would also accord with the Government's obligations to respect the self-determination of Aboriginal and Torres Strait Islander peoples.

**Recommendation 2:** The Expert Panel and the Australian Government should consult with Aboriginal and Torres Strait Islander peoples.

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<sup>45</sup> See e.g. *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983) 49 ALR 65. A comprehensive examination of the relevant case law and statutes in question was not possible in the time available.

<sup>46</sup> *Marriage Act 1961* (Cth) s 26.

<sup>47</sup> See e.g. *Criminal Code Act 1995* (Cth) s 308.

<sup>48</sup> See e.g. *Crimes Act 1958* (Cth) s 32, 33.

<sup>49</sup> See e.g. *Sex Discrimination Act 1984* (Cth) s 37, 38.

<sup>50</sup> See e.g. David Cody, '\$500 fine for building toilet on sacred site', *ABC News* (2010) <http://mobile.abc.net.au/news/2010-09-17/500-fine-for-building-toilet-on-sacred-site/2264882>.

<sup>51</sup> See e.g. Katja Mikhailovich & Alexandra Pavli, 'Freedom of Religion, Belief, and Indigenous Spirituality, Practice and Cultural Rights', *Australian Institute of Aboriginal and Torres Strait Islander Studies* (2010). The time available has not permitted the HRLC to comprehensively research these issues.

## 5. Protecting people of faith from discrimination and vilification

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### 5.1 Discrimination protections for people of faith

Discrimination laws aim to protect people from being treated less favourably because of an attribute that is central to their identity and sense of self. Strong discrimination laws promote equality and foster happy, healthy and safe societies.

The Australian Constitution does not include legal protection of the right to equality and non-discrimination. Instead, federal anti-discrimination laws provide a patchwork of protections and exemptions under the *Age Discrimination Act 2004* (Cth), AHRC Act, *Disability Discrimination Act 1992* (Cth), *Racial Discrimination Act* (Cth) (**RDA**) and *Sex Discrimination Act 1984* (Cth) (**SDA**).

There is no federal legislation that explicitly prohibits discrimination on the ground of religion or belief. The AHRC has the power to inquire into, conciliate and report on discrimination complaints made in employment on the basis of religion, but this power is limited.<sup>52</sup>

In the area of employment, the *Fair Work Act 2009* (Cth) (**FWA**) provides protections against discrimination on the basis of religion and political opinion. For example, the FWA provides that a modern award or enterprise agreement must not include terms that discriminate against an employee because of their religion or political opinion.<sup>53</sup> Similarly, s 351 of the FWA provides that an employer must not take adverse action against a person because of their religion or political opinion. As with any other protected attribute, this protection does not apply to action taken because of the inherent requirements of the particular position concerned.<sup>54</sup> There are also broader exemptions made for conduct in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.<sup>55</sup>

State and territory laws provide differing levels of protection against discrimination and vilification for religion or belief (including not holding a religious belief).<sup>56</sup> For example, in South Australia, people of faith are protected from discrimination on the basis of religious appearance or dress, but not on the basis of their religious beliefs.<sup>57</sup> Some people of faith are protected under on the basis of their ethno-religious origin. In general, ethno-religious origin has been interpreted to include Jewish people but not Muslim people.<sup>58</sup>

We briefly summarise the differences between discrimination and vilification protections for religion, religious belief, non-religious belief, religious dress and appearance and political opinion below.

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<sup>52</sup> Australian Human Rights Commission Act 1986 (Cth) s 31, 32.

<sup>53</sup> *Fair Work Act 2009* (Cth) ss 153, 195.

<sup>54</sup> *Fair Work Act 2009* (Cth) ss 153, 195, 351.

<sup>55</sup> *Ibid.*

<sup>56</sup> See Table 1.

<sup>57</sup> *Equal Opportunity Act 1984* (SA) s 85T(1)(f).

<sup>58</sup> *Ekeremawi v Network Ten Pty Ltd* 2008] NSWADT 334 (18 November 2008); *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131 (31 July 2002); *Ahmed v Macquarie Radio Network* (Radio Station 2GB) [2006] NSWADT 89 (27 March 2006); *Alchin v Rail Corp* (NSW) (2012) 225 IR 171. See also Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law* (Federation Press, 2nd ed, 2014) 615; Gelber, Katharine & McNamara, Luke, "Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harms Occasioned and the Remedies Provided" (2016) 39(2) *University of New South Wales Law Journal* 44, 492.

**Table 1: Australian discrimination & vilification protections for religion or belief**

Jurisdiction	Legislation	Discrimination protections for religion	Vilification protections for religion	Discrimination protections for political opinion
Commonwealth	<i>Fair Work Act 2009</i> (Cth) s 351	Religion (in employment)	N/A	Political opinion (in employment)
	<i>Australian Human Rights Commission Act 1986</i> (Cth) s 20, 31, 32	Limited complaint-handling protections	N/A	Limited complaint-handling protections
	<i>Race Discrimination Act 1975</i> (Cth) s 9, 18C	Ethnic origin (including ethno-religious origin)		N/A
	<i>Criminal Code</i> s 80.2B(a)	N/A	Religion (urging violence)	N/A
Australian Capital Territory	<i>Discrimination Act 1991</i> (ACT) s 7	Religious conviction & ethnic origin (including ethno-religious origin)		Political conviction
New South Wales	<i>Anti-Discrimination Act 1977</i> (NSW) s 4	Ethno-religious origin		None
Northern Territory	<i>Anti-Discrimination Act 1996</i> (NT) s 19	Religious belief or activity & ethnic origin	None	Political opinion, affiliation or activity
Queensland	<i>Anti-Discrimination Act 1991</i> (Qld) s 7, 124A	Religious belief or religious activity & ethnic origin (including ethno-religious origin)	Religion	Political belief or activity
South Australia	<i>Equal Opportunity Act 1984</i> (SA) s 85T	Religious appearance or dress	None	None
Tasmania	<i>Anti-Discrimination Act 1998</i> (Tas) s 3, 16	Religious activity, religious belief or affiliation & ethno-religious origin		Political activity & political belief or affiliation
Victoria	<i>Equal Opportunity Act 2010</i> (Vic) s 4, 6 <i>Racial and Religious Tolerance Act 2001</i> (Vic)	Religious belief or activity & ethnic origin (including ethno-religious origin) Religious belief or activity defined as: (a) holding or not holding a lawful religious belief or view (b) engaging in, not engaging in or refusing to engage in a lawful religious activity		
Western Australia	<i>Equal Opportunity Act 1984</i> (WA) Pt III & IV	Religious conviction & ethnic origin (including ethno-religious origin)	None	Political conviction

Australia has an obligation under international human rights law to ensure all people in Australia are protected from discrimination on the basis of their religious and other beliefs. On 9 November 2017, the UN Human Rights Committee recommended that Australia introduce comprehensive anti-discrimination legislation, including direct protection against discrimination on the basis of religion at a federal level:

The State party should take measures, including by considering consolidating existing non-discrimination provisions in a comprehensive federal law, in order to ensure adequate and effective substantive and procedural protection against all forms of discrimination on all the prohibited grounds, including religion, and inter-sectional discrimination, as well as access to effective and appropriate remedies for all victims of discrimination.<sup>59</sup>

<sup>59</sup> UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia (advance unedited version)* UN Doc CCPR/C/AUS/CO/76 (9 November 2017) [18].

Including religious belief (including not holding a religious belief) as an additional protected attribute in federal discrimination law would reduce inconsistencies between federal and state and territory laws and strengthen protections for vulnerable communities within Australia in line with Australia's human rights obligations. Such legal protection would apply in various settings including education, goods and services, employment and clubs. The development of any such legislation would have to carefully consider any exemptions or exceptions that would be appropriate, particularly in relation to existing state and territory laws.

**Recommendation 3:** 'Religious belief or activity' (including not having a religious belief) should be introduced as a protected attribute under federal anti-discrimination law.

## 5.2 Protections from hate speech for people of faith

As Table 1 shows, there are limited federal protections from vilification on the basis of religion or belief and state and territory laws provide differing levels of protection.

Vilification of people because of their religion or belief – or any other protected attribute – diminishes the dignity, self-worth and integration of community members from a diverse range of backgrounds. Hate speech and vilification undermines the right of every person in our society to be treated equally and free from abuse, hatred, discrimination, intimidation or violence. If left unchecked, perceived acceptance or tolerance of vilification serves to embolden or encourage discrimination by providing an 'authorising environment' for the escalation to violence (e.g. anti-Semitism or Islamophobia).<sup>60</sup>

Anti-vilification laws necessarily restrict some people's right to free speech to protect the rights of other people to be free from discrimination and to prevent threats to their physical safety. Criminal sanctions for vilification have a high threshold to appropriately deter discriminatory speech and conduct that damages community cohesion and safety. The purpose of a high threshold is to allow the expression of information or ideas that are offensive, unpopular, shocking or disturbing – but nonetheless lawful – to adequately protect free speech in a democratic society. To ensure free and open debate, vilification laws typically include reasonable exemptions for fair media reporting, privileged communications, and public acts done reasonably and in good faith for academic, artistic, religious instruction, scientific or research purposes or other purposes in the public interest, including discussion or debate.<sup>61</sup>

Laws which prohibit causing offence on the basis of religious belief are particularly controversial. For example, one group's calls that its religion not be disparaged or its prophet not be depicted conflicts with the freedom of expression of others. Article 20 of the ICCPR explicitly prohibits advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

**Recommendation 4:** Federal anti-vilification laws should be introduced which prohibit public advocacy of national, racial or religious hatred that incites discrimination, hostility or violence.

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<sup>60</sup> See e.g., Gelber, Katharine & McNamara, Luke, 'Anti-Vilification laws and public racism in Australia: Mapping the gaps between the harms occasioned and the remedies provided' (2016) 39(2) *University of New South Wales Law Journal* 44; Ronald Sackville, 'Anti-Semitism, hate speech and Pt IIA of the Racial Discrimination Act' (2016) 90(9) *Australian Law Journal* 631.

<sup>61</sup> *Anti-Discrimination Act 1977* (NSW) s 49ZT.

## 6. Protecting the rights and freedoms of others

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### 6.1 Implementing the Royal Commission into Institutional Responses to Child Sexual Abuse's recommendations

In December 2017, the Royal Commission into Institutional Responses to Child Sexual Abuse released its findings that the majority of survivors of institutional child sexual abuse were in the care of religious organisations, with the abuse occurring over decades, primarily by religious ministers and teachers.<sup>62</sup> Despite progress, child sexual abuse in religious institutions is not historical, and particularly troubling because religious institutions are key providers of education, health and social welfare services to children in our society.<sup>63</sup>

The Royal Commission made a number of recommendations to change how institutions respond to child sexual abuse (e.g. reactions to disclosure, taking action following abuse, prevention and protection measures). The recommendations include ensuring religious ministers are mandated to report suspected child sexual abuse to child protection authorities, even where their knowledge or suspicions were formed based on information disclosed to them in religious confession.<sup>64</sup> This is at odds with previous mandatory reporting and failure to disclose laws.<sup>65</sup> Existing evidence laws extend privilege to information received in religious confession, which allow religious ministers to not report knowledge or suspicions to police, including in situations where a person is at risk of imminent harm.<sup>66</sup>

These recommendations recognise that inappropriate and damaging responses by religious institutions continue to place children at risk and re-traumatise victims and families who feel betrayed by religious institutions they trusted.<sup>67</sup>

**Recommendation 5:** The Royal Commission into Institutional Responses to Child Sexual Abuse's recommendations should be implemented as soon as possible.

### 6.2 Prohibiting religious practices and teachings that cause significant harm

Australian laws already prohibit certain religious practices which cause harm to a person's physical and mental health (e.g. female genital mutilation, child marriage and forced marriage). These laws should regulate other expressions of religious beliefs which cause demonstrable and reasonably foreseeable harm to a person's physical or mental health.

So-called "conversion therapy" which attempts to 'cure' a person's sexual orientation or gender expression or 'heal' a person's spirit (i.e. by 'praying the gay away') have now been accepted by

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<sup>62</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Preface and executive summary*, (15 December 2017) ([https://www.childabuseroyalcommission.gov.au/sites/default/files/final\\_report\\_-\\_preface\\_and\\_executive\\_summary.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_preface_and_executive_summary.pdf)) 11.

<sup>63</sup> *Ibid* 44.

<sup>64</sup> *Ibid* recommendation 7.4.

<sup>65</sup> See e.g., *Crimes Act 1958* (Vic) s 327(7) now repealed.

<sup>66</sup> *Evidence Act 1995* (Cth) s 127; *Evidence Act 1995* (NSW) s 127; *Evidence Act 2008* (Vic) s 127; *Evidence Act 1906* (WA) s 20B(5); *Evidence Act 2001* (Tas) s 127; *Evidence (National Uniform Legislation) Act* (NT) s 127; *Evidence Act 2011* (ACT) s 127.

<sup>67</sup> Above n 62, 17.

some, but not all, church leaders to be ineffectual and harmful practices.<sup>68</sup> While Australian research is limited, US research shows that conversion therapy has long-term negative mental health impacts.<sup>69</sup> The Australian Medical Association and Australian Psychological Society have made public statements opposing conversion therapy based on the assumption homosexuality is a mental disorder and a patient should change their sexual orientation.<sup>70</sup> While some state and territory governments are starting to address this issue, efforts to regulate these practices are largely limited to registered medical professionals and do not affect conversion therapy practiced by counsellors or pastors within religious institutions or settings.

**Recommendation 6:** The Australian Government should prohibit practices such as so-called 'conversion' or 'reparative' therapy, which attempt to change sexual orientation or gender identity and cause significant harm to a person's physical or mental health.

### 6.3 Reforming religious exemptions from anti-discrimination laws

#### (a) Comparison of federal, state and territory religious exemptions

Currently, all federal, state and territory anti-discrimination laws contain permanent religious exemptions<sup>71</sup> that allow otherwise unlawful discrimination for religious bodies.<sup>72</sup> These exemptions allow religious bodies to lawfully discriminate against another person on the basis of their sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, family responsibilities or age in the provision of essential support services for the benefit of the Australian public, except in Commonwealth-funded aged care services.<sup>73</sup> Notably, Tasmanian anti-discrimination laws only allow religious bodies and individuals to discriminate on the basis of "religious belief or affiliation or religious activity" but not on other grounds.<sup>74</sup> We have briefly summarised the differences between the scope and tests of federal, state and territory religious exemptions from discrimination laws in Table 2 below.

In addition, statutory exemptions create carve-outs from discrimination laws for acts done in compliance with or authorised by other laws.<sup>75</sup> In certain jurisdictions applications can also be made for time-limited exemptions from anti-discrimination laws on a case-by-case basis.<sup>76</sup>

<sup>68</sup> See Maya Rhodan, '9 ex-leaders of the gay conversion therapy movement apologise', *Time Magazine* (31 July 2014) <http://time.com/3065495/9-ex-leaders-of-the-gay-conversion-therapy-movement-apologize/>; Rohan Smith, 'Survivors tell their horror stories of ex-gay therapy treatments in Australia', *news.com.au* (19 May 2015) <http://www.news.com.au/lifestyle/real-life/true-stories/survivors-tell-their-horror-stories-of-exgay-therapy-treatments-in-australia/news-story/443cd4ff7fd72cd58705ae34d8327d61>; Luke Williams, 'Australia's anti-gay churches shift their focus to Asia Pacific', *The Saturday Paper* (19 – 25 April 2014) <https://www.thesaturdaypaper.com.au/news/religion/2014/04/19/australias-anti-gay-churches-shift-focus-asia-pacific/1397829600>.

<sup>69</sup> See e.g., Human Rights Campaign, *The Lies and Dangers of Efforts to Change Sexual Orientation or Gender Identity*, <https://www.hrc.org/resources/the-lies-and-dangers-of-reparative-therapy>.

<sup>70</sup> Australian Medical Association, *Position Statement: Sexual Diversity and Gender Identity* (2002); Australian Psychological Society, *Psychological Practices that attempt to change Sexual Orientation* (2015).

<sup>71</sup> Exemptions are also called 'exceptions' - the terminology varies across statutes.

<sup>72</sup> See Table 2.

<sup>73</sup> *Sex Discrimination Act 1984* (Cth) s 37.

<sup>74</sup> *Anti-Discrimination Act 1998* (Tas) s 52.

<sup>75</sup> *Sex Discrimination Act 1984* (Cth) s 40; *Discrimination Act 1991* (ACT) s 30; *Anti-Discrimination Act 1977* (NSW) s 54; *Anti-Discrimination Act 1996* (NT) s 53; *Anti-Discrimination Act 1991* (Qld) s 106; *Equal Opportunity Act 1984* (SA) s 92; *Anti-Discrimination Act 1998* (Tas) s 24; *Equal Opportunity Act 2010* (Vic) s 75; *Equal Opportunity Act 1984* (WA) s 69.

<sup>76</sup> *Equal Opportunity Act 2010* (Vic) provides for applications to be made to VCAT. See also *Sex Discrimination Act 1984* (Cth) s 44; *Disability Discrimination Act 1992* (Cth) s 55; *Age Discrimination Act 2004* (Cth) s 44.



**Table 2: Comparison of the scope and tests of religious exemptions in federal, state and territory discrimination laws relating to the provision of facilities, goods and services, employment, education and other areas of public life<sup>77</sup>**

Jurisdiction	Legislation	Individual or organisation	Protected attributes covered by exemption	Test for exemption
Commonwealth	<i>Sex Discrimination Act 1984 (Cth)</i> s 37(1)(d)	Body established for religious purposes	Family responsibilities, pregnancy or potential pregnancy, sex, breastfeeding, sexual orientation, gender identity, intersex status, marital or relationship status	An act or practice that conforms to doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion
	<i>Age Discrimination Act 2004 (Cth)</i> s 35		Age	
Australian Capital Territory	<i>Discrimination Act 1991 (ACT)</i> s 32(d)	Body established for religious purposes	Accommodation status, age, breastfeeding, disability, employment status, gender identity, genetic information, immigration status, industrial activity, intersex status, irrelevant criminal record, family or carer responsibilities, physical features, political conviction, pregnancy, profession / trade / occupation / calling, race, relationship status, religious conviction, sex, sexuality, subjection to domestic or family violence, association with a person with one of these attributes	Any other act or practice that conforms to the doctrines, tenets or beliefs of that religion <u>and</u> is necessary to avoid injury to the religious susceptibilities of adherents of that religion
New South Wales	<i>Anti-Discrimination Act 1977 (NSW)</i> s 56(d)	Body established to propagate religion	Race, sexual harassment, sex, transgender grounds, marital or domestic status, disability, carer responsibilities, homosexuality, age, HIV/AIDS vilification	Any other act or practice that conforms to doctrines or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion
Northern Territory	<i>Anti-Discrimination Act 1996 (NT)</i> s 51(d)	Body established for religious purposes	Race, sex, sexuality, age, marital status, pregnancy, parenthood, breastfeeding, impairment, trade union or employer association activity, religious belief or activity, political opinion / affiliation / activity, irrelevant medial record, irrelevant criminal record, association with a person believed to have one of these attributes	If the act is done as part of any religious observance or practice There are also specific exemptions for religious schools at s 30(2), 37A, 40(2A) & 40(3)

<sup>77</sup> Religious exemptions do not extend to sexual harassment. See e.g., *Sex Discrimination Act 1984 (Cth)* s 28G.

Queensland	<i>Anti-Discrimination Act 1991</i> (Qld) s 109(d)	Body established for religious purposes	Sex, relationship status, pregnancy, parental status, breastfeeding, age, race, impairment, religious belief or religious activity, political belief or activity, trade union activity, lawful sexual activity, gender identity, sexuality, family responsibilities, association with a person with one of these attributes	Act in accordance with the doctrine of the religion concerned <u>and</u> is necessary to avoid offending religious sensitivities of people of the religion
South Australia	<i>Equal Opportunity Act 1984</i> (SA) s 34, 50	Body established for religious purposes	Sex, sexual orientation, gender identity, intersex status	Any other practice that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion
Tasmania	<i>Anti-Discrimination Act 1998</i> (Tas) s 52	Person or organisation	Religious belief or affiliation or religious activity	Any other act that is carried out in accordance with the doctrine of a particular religion <u>and</u> is necessary to avoid offending the religious sensitivities of any person of that religion
Victoria	<i>Equal Opportunity Act 2010</i> (Vic) s 82(2)	Body established for a religious purpose <sup>78</sup>	Religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status, gender identity	Anything done that conforms to doctrines, beliefs or principles or is necessary to avoid injury to the religious sensitivities of adherents of the religion
	<i>Equal Opportunity Act 2010</i> (Vic) s 84	Person		If the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion
Western Australia	<i>Equal Opportunity Act 1984</i> (WA) s 72(d)	Body established for religious purposes	Sex, marital status, pregnancy, breastfeeding, gender history, family responsibility or family status, sexual orientation, race, religious or political conviction, impairment, age	Act or practice that conforms to doctrines, tenets or beliefs or is necessary to avoid injury to the religious susceptibilities of adherents of that religion

<sup>78</sup> The definition of religious body includes a body established for a religious purpose or an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

**(b) Consideration of religious exemptions by courts and tribunals**

There is limited case law providing guidance on the application of religious exemptions in practice.<sup>79</sup>

In *Pamas Foundation*, the Federal Court held that: “there is no principle of law that every body established for religious purposes is a religious institution.”<sup>80</sup>

The Queensland Anti-Discrimination Tribunal found that St Vincent de Paul was not a religious body under Queensland law for the purposes of requiring a long-serving volunteer local branch President to be Catholic. The volunteer identified as Christian and had volunteered for 7 years without incident before being told that a leadership position could only be held by a Catholic. The Tribunal reviewed the constitution documents and found that St Vincent de Paul was a society of lay faithful closely associated with the Catholic Church, but not a religious body for the purposes of the exemption available for “the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice”.<sup>81</sup> The Tribunal held that the functions of the local branch presidents performed some functions where religious observances and practices were said to be relevant (e.g. leading prayers), but the majority of the duties did not properly involve “religious observance or practice”.<sup>82</sup>

In contrast, the NSW Administrative Decisions Tribunal held that Wesley Mission was a body established for religious purposes and could lawfully refuse to allow a same-sex couple to foster children.<sup>83</sup> The Tribunal mentioned but did not reach a finding on “whether it was appropriate in 2003 for Wesley Mission to accept public funds for providing a service which it provided in a discriminatory fashion contrary to the terms of its contractual obligations to the relevant State instrumentality”.<sup>84</sup>

In determining whether a body is established for religious purposes under Victorian law, The Victorian Court of Appeal found in favour of a group of young same-sex attracted people in their dispute with Christian Youth Camps (**CYC**).<sup>85</sup> The Court found that CYC’s purposes were not “directly and immediately religious” as they offered facilities and services as a secular accommodation business to the public without any indication of association with the Christian Brethren Church.<sup>86</sup> President Maxwell relevantly stated that:

In all relevant respects, CYC’s activities are indistinguishable from those of the other participants in that market. In those circumstances, the fact that CYC was a religious body could not justify its being exempt from the prohibitions on discrimination to which all other such accommodation providers are subject. That step — of moving from the field of religious activity to the field of secular activity — has the consequence, in my opinion, that in relation to decisions made in the course of the secular undertaking, questions of doctrinal conformity and offence to religious sensitivities simply do not arise.<sup>87</sup>

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<sup>79</sup> See e.g. *Laurence Alan Scandrett v Right Reverend Owen Dowling* 1992 NSWCA 1170. See also *Christ Circle Oriona Community Inc v Deputy Commissioner of Taxation* (1995) 95 ATC 2040; *Young Men’s Christian Association of Melbourne v Federal Commissioner of Taxation* (1926) 37 CLR 351.

<sup>80</sup> *Pamas Foundation (Inc) v Deputy Commissioner of Taxation* (1992) 106 ALR 229.

<sup>81</sup> *Anti-Discrimination Act 1991* (Qld) s 109.

<sup>82</sup> *Walsh v St Vincent de Paul Society (No 2)* [2008] QADT 32.

<sup>83</sup> *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010) [30].

<sup>84</sup> *Ibid* [35].

<sup>85</sup> *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014).

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid* [269].

The Court examined CYC's website, brochures and other materials and took into account the absence of reference to the Christian Brethren religion or any overtly religious purposes of the resort.<sup>88</sup> The role that the "invisibility" of the religious origins of CYC and its similarity to other secular camp providers played in Court's reasoning highlights the underlying unfairness to consumers if religious motives are not transparent. Religious businesses should not be able to selectively invoke religious beliefs in defence of discrimination claims when the business is not conducted in accordance with those beliefs in practice.

Where a religious body or organisation provides facilities, goods and services in the public sphere as part of a commercial enterprise, the justification for a broad religious exemption materially lessens.<sup>89</sup> Courts have largely been unwilling to find an interference with the right to religion or belief in the secular, commercial marketplace or for people of faith employed to perform a civil function on behalf of the state.<sup>90</sup>

In determining whether a purpose was religious, Dixon J relevantly stated in *Roman Catholic Archbishop of Melbourne v Lawlor* that:

[I]t is not enough that an activity or pursuit itself secular is actuated or inspired by a religious motive or injunction: the purpose must involve the spread or strengthening of spiritual teaching within a wide sense, the maintenance of the doctrines upon which it rests, the observances that promote and manifest it ... But, whether defined widely or narrowly, the purposes must be directly and immediately religious. It is not enough that they arise out of or have a connection with a faith, a church, or a denomination, or that they are considered to have a tendency beneficial to religion, or to a particular form of religion.<sup>91</sup>

In summary, there has been very little judicial consideration of the scope of religious exemptions, particularly 'religious susceptibilities'. Different state and territory tests make comparisons between jurisdictions particularly problematic. However, the consideration of the Court of Appeal of the Victorian Supreme Court in the *Cobaw* case provides the most helpful guidance to date and underlines the importance of religious organisations operating transparently and consistently in accordance with their religious ethos if their conduct is to be exempt from the operation of discrimination laws.

### **(c) Impact of blanket religious exemptions on freedom from discrimination**

Permanent exemptions to anti-discrimination laws across a range of areas of public life have a substantial impact on marginalised and disadvantaged groups, such as LGBTI people.<sup>92</sup> The lack of knowledge and transparency surrounding the operation of religious exemptions means that many

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<sup>88</sup> *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014) [211].

<sup>89</sup> *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014) [269].

<sup>90</sup> *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; *Islington London Borough Council v Ladele (Liberty Intervening)* [2009] EWCA Civ 1357; *Eweida and Ors v The United Kingdom* (2013) 57 EHRR 8 [102]–[106]; *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014); *Ontario Human Rights Commission v Brockie* [2002] 222 DLR (4<sup>th</sup>) [51]; *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880 (29 April 2010) [22].

<sup>91</sup> *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1.

<sup>92</sup> See e.g., Australian Research Centre in Sex, Health and Society, La Trobe University, *Private Lives 2, the second national survey of the health and wellbeing of GLBT Australians* (2012) 46 <https://www.glhv.org.au/report/private-lives-2-report>; OII Australia (2016) *Intersex: Stories and Statistics from Australia*, <https://oii.org.au/30313/intersex-stories-statistics-australia/>; Australian Research Centre in Sex, Health and Society, La Trobe University, *Writing Themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people* (2010) 39 <http://www.latrobe.edu.au/arcschs/downloads/arcschs-research-publications/WTi3.pdf>.

Australians do not know whether they will face discrimination and can be unaware of the risk of discrimination when seeking out services, going to school or applying for a job. The existence of such exemptions operate as a barrier to those who fear discrimination accessing services from faith-based service providers.

### ***Provision of facilities, goods and services***

There is no doubt that many faith-based organisations provide critical welfare and social services to the Australian community and, in doing so, contribute greatly to the alleviation of poverty and disadvantage. Australians are indebted to many of these faith-based organisations for their compassionate and tireless work.

However, the HRLC has heard from LGBT people who have experienced discrimination in accessing basic support services, primarily in housing, health and family violence. While social research is limited, 34 per cent of LGBT people surveyed hide their sexuality or gender identity when accessing services to avoid discrimination, with young people being more likely to hide who they are.<sup>93</sup>

We have heard anecdotal examples from refugees who have experienced discrimination from religious charities because of their sexual orientation and gender identity, but are reluctant to speak out or lodge a complaint because they still rely on these services. Others are afraid of seeking support for fear of discrimination and mistreatment. These laws mean that LGBTI refugees do not always access essential support services they need to rebuild and move on with their lives in our community.

#### ***Case study: Discrimination by a rural religious support service***

Sarah\* moved to a country town and started experiencing financial hardship when she returned to study. She contacted a local religious organisation for assistance with paying her rent and bills to avoid being evicted into homelessness.

Sarah was initially treated well and offered her financial counselling and support. After Sarah mentioned that she was gay, she was asked probing and inappropriate questions about her living situation from a staff member trying to ascertain whether she was in a relationship and whether she was sexually active with another woman. Sarah spoke to other staff about the change in how she was being treated by the organisation and was told she shouldn't have mentioned her sexual orientation. The organisation contacted Sarah and told her they could not assist her, but did not provide a reason why they had decided to withdraw their previous offer of assistance.

Sarah was told that the religious organisation was the only service in her area that could assist. The refusal had a significant impact on Sarah's mental health and feelings of safety and support. Sarah fell behind in her rent and eventually became homeless.

"If support services want to discriminate, they should put a sign on their front door," said Sarah. "At least I would have had warning that I would be facing discrimination, and I could have avoided being harmed by people I trusted to help me."

*\*Not her real name. This case study has been de-identified to protect our client's privacy.*

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<sup>93</sup> Australian Research Centre in Sex, Health and Society, La Trobe University, *Private Lives 2, the second national survey of the health and wellbeing of GLBT Australians* (2012) 45-46 <https://www.glhv.org.au/report/private-lives-2-report>.

The Victorian Royal Commission into Family Violence heard evidence that LGBTI people regularly experience discrimination in family violence, housing and accommodation services. LGBTI victims of family violence believe that a faith-based provider may discriminate against them because of their sexuality or gender identity, which acts as a “a powerful deterrent to seeking help”:<sup>94</sup> The Royal Commission accepted that: “[l]iving in fear of discrimination damages victims’ trust in service providers and creates apprehension at the prospect of using mainstream services”.<sup>95</sup>

In order to effectively address family violence, the Royal Commission recommended that the Victorian Government examine the need to “remove any capacity for family violence accommodation and service providers to discriminate against lesbian, gay, bisexual, transgender and intersex Victorians”. The Victorian Government has not yet passed legislative changes, but there are other measures being developed to allay concerns about potential discrimination in the provision of family violence services.<sup>96</sup>

**Case study: Positive commitment to non-discriminatory service delivery**

With the assistance of Victoria’s Gender and Sexuality Commissioner, the Victorian Government is undertaking direct consultation with family violence service providers about what is needed to ensure non-discriminatory and inclusive family violence service provision. A network of faith-based service providers has been established to develop an LGBTI-inclusion action plan by early 2018.

## **Employment**

Unfortunately, many of the people who face potential discrimination from religious organisations already face high levels of unemployment, underemployment and discrimination.<sup>97</sup> For example, transgender and gender diverse people face particularly high rates of unemployment.<sup>98</sup>

Sally Beattie explained her experience of working at the Catholic Education Office knowing she could lose her job because of her sexual orientation to *The Age*:

The whole thing really ground me down, actually. It’s hard to go to work and not be able to talk about your partner, or what you’re doing on the weekends ... In the end I left, because I really didn’t want to keep facing that every day.<sup>99</sup>

In the same article, Rebecca Smith described her job at a Christian welfare organisation connected to her local church ending when her manager suspected she was in a same-sex relationship:

I was told that if I didn’t resign I would be fired ... The fallout was devastating. I lost everything – my vocation, faith, community – and had to rebuild myself from a very broken place.<sup>100</sup>

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<sup>94</sup> State of Victoria, *Royal Commission into Family Violence: Summary and Recommendations* (March 2016) <http://files.rcfv.com.au/Reports/Final/RCFV-All-Volumes.pdf> 155.

<sup>95</sup> *Ibid* 154-155.

<sup>96</sup> This work complements other recommendations that aim to build accessible and inclusive family violence services in Victoria, such as recommendations 140, 141 and 167.

<sup>97</sup> *Above* n 94, 45-46.

<sup>98</sup> School of Public Health, Curtin University, *The First Australian National Trans Mental Health Study* (2014).

<sup>99</sup> Farrah Tomazin, ‘Religious discrimination law: Paying the price of faith-based hiring’, *The Age* (24 September 2016) <http://www.theage.com.au/victoria/religious-discrimination-laws-paying-the-price-of-faithbased-hiring-20160924-grnmyx.html>.

<sup>100</sup> *Ibid*.

Thirty nine per cent of LGBT people surveyed hide their sexuality or gender identity at work.<sup>101</sup> Hiding an essential part of who you are prevents you from making full and active contributions in the workplace, affecting overall workplace culture, staff retention and satisfaction rates.

Experiencing discrimination also has a significant impact on the mental health of LGBTI people, who are disproportionately represented in statistics of mental health issues, self-harm and suicidal ideation.<sup>102</sup> For example, more than 1 in 3 transgender adults and 1 in 5 intersex adults surveyed had attempted suicide.<sup>103</sup> More than 1 in 2 bisexual women surveyed had been diagnosed or treated with a mental disorder in the last 3 years.<sup>104</sup>

### **Young people in religious communities and schools**

Religious schools make up a substantial portion of educational service providers in Australia and receive large amounts of government funding. More than 1 in 3 school students in Australia attends a religious school.<sup>105</sup> Existing religious exemptions allow religious schools to refuse admission, discipline, suspend, expel or cause any other detriment to a student on the basis of their sex, sexual orientation, gender identity, marital or relationship status or pregnancy provided it is in accordance with religious doctrines, tenets, beliefs or teachings or the discrimination is in good faith to avoid injury to the religious susceptibilities of adherents of that religion.<sup>106</sup>

A national Australian study has found that same-sex attracted and gender questioning young Australians with a religious background were more likely than their non-religious peers to:

- report self-harm and suicidal ideation;
- feel negatively about their same sex attraction;
- have experienced social exclusion;
- have been subjected to homophobic language from friends;
- report homophobic abuse and feeling unsafe at home;
- be unsupported by their parents, siblings and teachers when disclosing their sexual orientation or gender identity; and
- attend schools with no policies or supports protecting them from bullying because of their sexual orientation or gender identity.<sup>107</sup>

17 year old Thalia described her experiences in a religious boarding school as a teenager:<sup>108</sup>

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<sup>101</sup> Above n 94, 45-46.

<sup>102</sup> National LGBTI Health Alliance, *The Statistics at a Glance: The Mental Health of Lesbian, Gay, Bisexual, Transgender and Intersex People in Australia* (2016) <https://lgbtihealth.org.au/statistics/>.

<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392, 393.

<sup>106</sup> *Sex Discrimination Act 1984* (Cth) s 38.

<sup>107</sup> Lynne Hillier et al, 'Writing Themselves in 3: The Third National Study on the Sexual Health and Wellbeing of Same Sex Attracted and Gender Questioning Young People', *Australian Research Centre in Sex, Health and Society* (La Trobe University: 2010) <http://www.latrobe.edu.au/arcshs/downloads/arcshs-research-publications/WTi3.pdf> 91.

<sup>108</sup> Ibid 52.

***Case study: Disciplinary punishments at a religious boarding school***

“Due to my mother’s homophobia I was sent to a strict Catholic boarding school where I was forced to scrub floors and walls on my hands and knees and pray multiple times a day. I am not religious and it was an extremely homophobic environment. Within a month I was on anti-depressant and expelled after attempting suicide because ‘Suicide is a sin and so it was not acceptable to take part in the school’”

In contrast, Charlie described his experience of moving to a religious school which supported his gender identity:

***Case study: Religious school supports transgender boy to transition***

“When I came from my all-girls school to the small co-ed Christian school that I am at now, the first thing I said straight up was ‘I am trans and I want to be able to use the male bathroom’. They just said ‘Sure, that’s fine. Use whichever one you are comfortable with’. It’s such a great school, with a high proportion of staff to students and it’s for anyone who does not fit into regular school. And 100 per cent it has made a big difference. They use my preferred pronoun and my name. They treat me like any other boy.”

All schools have a duty of care to protect students from harm, including bullying on the basis of their physical sex characteristics. As part of the 2012 inquiry into the federal Human Rights and Anti-Discrimination Bill, OII Australia included the following case study:<sup>109</sup>

***Case study: Bullying of intersex teenager at a religious school***

“T is a 15 year old child, with male sex of rearing, who has just been diagnosed with 47,XXY when his doctor ran some tests as a result of significant breast development and other physical changes. T has been shunned by other pupils at school and has experienced bullying due to his physical differences. These include allegations that this makes him partly a woman, or gay. His religious school has recently banned a gay couple from a school formal. T should be protected from harassment at any school.”

Same-sex attracted young people with religious backgrounds have also shared the impact of them growing up surrounded by religious beliefs which were directly hostile to their sexual orientation:

I kept on telling myself that homosexuality was immoral and wrong, and I prayed and told myself that I liked people of the opposite sex. This caused me a great deal of depression and alienation from my peers... Being a Christian made me hate myself and who I was, and I really believed that God could change me. (Oscar, 14 years)<sup>110</sup>

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<sup>109</sup> OII Australia, *Submission on the proposed federal Human Rights and Anti-Discrimination Bill* (9 December 2012) 20.

<sup>110</sup> *Ibid* 92.



**(d) International examples of religious exemptions**

International jurisdictions such as the United Kingdom, Ireland, United States and New Zealand have some form of express exemption in federal anti-discrimination legislation for religious organisations and, in some instances, individuals. In contrast, Canada's federal legislation does not have express exemptions for religion, instead relying primarily on a general balancing limitation.<sup>111</sup>

In the UK, the *Equality Act 2010* (UK) protects individuals from discrimination in the workplace and wider society. It contains express exemptions from anti-discrimination laws based on religion and religious belief for imposing religion as a work requirement in hiring employees where: (a) it is an occupational requirement; (b) the application of the requirement is a proportionate means of achieving a legitimate aim; and (c) the person does not meet the occupational requirement, or there are reasonable grounds for not being satisfied that the person meets it.<sup>112</sup> Limited religious exemptions also exist in the provision of goods and services, disposal of property, and membership and guests of associations on the grounds of religion or belief or sexual orientation.<sup>113</sup>

Religious bodies have to show that their services are restricted because of the organisation's purpose or to avoid causing offence to their religious followers on the grounds of their religion or belief. Religious bodies are also permitted to specify that service users are of a particular sexual orientation where necessary to comply with the religious organisation's doctrine, religious or belief or to avoid conflict with the strongly held convictions of a significant number of a religion or belief's followers. However, religious organisations carrying out a public function (i.e. receiving government funding to provide a public service) do not have a religious exemption to discriminate.<sup>114</sup> Public authorities are also required to have due regard to the need to eliminate unlawful discrimination, harassment and victimisation, and advance equal opportunity across a range of other functions, such as procuring goods, works and services from other organisations.<sup>115</sup>

In Ireland, religious exemptions also exist from discrimination laws in limited situations.<sup>116</sup> Following the successful marriage equality referendum in 2015, the Irish Parliament narrowed the exemption for religious organisations.<sup>117</sup> Previously, religious run schools and hospitals could take action against an employee or prospective employee "in order to uphold their ethos", which could be applied broadly. This exemption has now been narrowed for publicly funded organisations.

In addition to constitutional protections and the *Civil Rights Act 1964* (USA), the US also has special protections for religion in the *Religious Freedom Restoration Act 1993* (USA) (**RFRA**). The RFRA provides that the government shall not substantially burden a person's exercise of religion, except in

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<sup>111</sup> See Table 3.

<sup>112</sup> *Equality Act 2010* (UK) Schedule 9.

<sup>113</sup> *Equality Act 2010* (UK) Schedule 23.

<sup>114</sup> Government Equalities Office (UK), *Equality Act 2010: What Do I Need to Know? A Quick Start Guide on Religion or Belief Discrimination in Service Provision for Voluntary and Community Organisations* (2010) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85027/vcs-religion-belief.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85027/vcs-religion-belief.pdf).

<sup>115</sup> Equality and Human Rights Commission (UK), *Buying Better Outcomes: Mainstreaming Equality Considerations in Procurement: A Guide for Public Authorities in England* (March 2013) [https://www.equalityhumanrights.com/sites/default/files/buying\\_better\\_outcomes\\_final.pdf](https://www.equalityhumanrights.com/sites/default/files/buying_better_outcomes_final.pdf).

<sup>116</sup> *Equal Status Acts 2000–2012* (IRE); *Employment Equality Acts 1998–2011* (IRE).

<sup>117</sup> Nick Duffy, 'Ireland passes bill removing religious exemptions from LGBT equality law', *Pink News* (3 December 2015) [www.pinknews.co.uk/2015/12/03/ireland-passes-bill-removing-religious-exemptions-from-lgbt-equality-law/](http://www.pinknews.co.uk/2015/12/03/ireland-passes-bill-removing-religious-exemptions-from-lgbt-equality-law/).

furtherance of a compelling governmental interest, using the least restrictive means of furthering that interest. A person can obtain relief against a government if the limitation is not justified. It appears that the RFRA has not been used by the courts to create exemptions from anti-discrimination legislation.<sup>118</sup> State versions of the legislation that attempt to go beyond merely a defence (i.e. a sword rather than a shield) have been attacked as an anti-LGBTI response following the legalisation of marriage equality.<sup>119</sup>

Canada also has three relevant federal anti-discrimination laws: the Canadian Charter of Rights and Freedoms (**Canadian Charter**), *Human Rights Act 1977* (CAN) and the *Employment Equity Act 1995* (CAN). None of these Canadian laws contain express religious exemptions. The Charter includes a general balancing clause, whereby the right to non-discrimination prevails over any inconsistent state or federal statute, except in so far as they impose “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Where religious freedoms conflict with other rights, Canadian courts have considered whether the claimant has a “practice or belief having a nexus with religion” calling for “a particular line of conduct”.<sup>120</sup> The belief must be sincerely held, the interference complained of should not be ‘trivial or insubstantial’, and religious freedom can be overruled where it could cause harm to others based on ‘overriding societal concerns’.

We have briefly summarised the differences between the scope and tests of religious exemptions in federal anti-discrimination legislation in Australia, New Zealand, the UK, Ireland, Canada and the US in Table 3 below.

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<sup>118</sup> See Anthony Gray, ‘The Reconciliation of Freedom of Religion with Anti-Discrimination Rights’ (2016) *Monash University Law Review* 42(1).

<sup>119</sup> See e.g., Southern Poverty Law Centre, ‘*Religious liberty’ and the anti-LGBT right* (11 February 2016) <https://www.splcenter.org/20160211/religious-liberty-and-anti-lgbt-right>.

<sup>120</sup> *Syndicat Northcrest v Amselem* [2004] 2 SCR 551, 583; Anthony Gray, ‘The Reconciliation of Freedom of Religion with Anti-Discrimination Rights’ (2016) *Monash University Law Review* 42(1) 88.

**Table 3: Comparison of permanent religious exemptions from federal anti-discrimination legislation in comparative jurisdictions**

Jurisdiction	Religious ministers	Provision of facilities, goods and services	Employment	Education
<p><b>Australia</b> No Human Rights Act / Charter or Rights</p> <p><i>Sex Discrimination Act 1984 (Cth)</i></p>	<p>Religious bodies can discriminate on the basis of <u>family responsibilities, pregnancy, sex, breastfeeding, sexual orientation, gender identity, intersex status, marital or relationship</u> in the ordination, appointment, training / education of religious ministers or for people to perform duties of functions in connection with any religious observance or practice.</p>	<p>Religious bodies can refuse to provide facilities, goods &amp; services on the basis of <u>family responsibilities, pregnancy, sex, breastfeeding, sexual orientation, gender identity, intersex status, marital or relationship</u> except in the provision of aged care services where this conforms with the doctrines, tenets or beliefs of that religious or where necessary to avoid injury to the religious susceptibilities of adherents of that religion.</p> <p>Religious ministers and religious marriage celebrants can also refuse to solemnise certain marriages not in accordance with their religion's doctrines, tenets or beliefs, where necessary to avoid injury to the religious susceptibilities of adherents of that religion or their individual religious beliefs.</p>	<p>Religious bodies can discriminate in employment on the basis of <u>family responsibilities, pregnancy, sex, breastfeeding, sexual orientation, gender identity, intersex status, marital or relationship status</u> where this conforms with the doctrines, tenets or beliefs of that religious or where necessary to avoid injury to the religious susceptibility of adherents of that religion.</p>	<p>Religious educational institutions can discriminate in admission, access to benefits, expulsion and detriment to students education on the basis of <u>pregnancy, sex, sexual orientation, gender identity, marital or relationship status</u> where this is conducted in accordance with the doctrines, tenets, beliefs or teaching of a religion or creed and the discrimination is in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed.</p>
<p><i>Note: As there are no explicit federal protections from discrimination on the basis of <u>religion or belief</u>, religious exemptions would also apply on this basis.</i></p>				
<p><b>Canada</b></p>	<p>All rights and freedoms are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. <i>Canadian Charter of Rights and Freedoms, Canadian Human Rights Act of 1977 (CAN) &amp; Employment Equity Act 1995 (CAN)</i></p>			
<p><b>Ireland</b> Constitution of Ireland <i>European Convention on Human Rights</i> <i>Equal Status Acts 2000 – 2017 (IRE)</i> <i>Employment Equality Act 1998 (IRE)</i></p>	<p>Religious minister training institutions can discriminate on the basis of <u>gender or religious belief</u>.</p>	<p>A person or organisation can discriminate on the basis of <u>religion</u> in relation to goods or services provided for a religious purpose.</p> <p>An organisation which reserves use of premises or accommodation for a <u>particular category of persons</u> for a religious purpose can discriminate in the provision or premises or accommodation (i.e. a refuge, nursing home, retirement home, home for persons with a disability, hostel for homeless persons or for a similar purpose).</p>	<p><b>Publicly funded</b> institutions cannot discriminate in employment unless more favourable treatment on the basis of <u>religion</u> does not constitute discrimination on any other discriminatory grounds and the religion or belief of the employee or prospective employee constitutes 'a genuine, legitimate and justified occupational requirement having regard to the institution's ethos'.</p> <p><b>Privately funded</b> religious educational or medical institutions under the direction or control of a religious bodies can discriminate in employment on the basis of <u>gender, marital status, family status, sexual orientation, religion, age, disability, race or traveller community</u> where it is reasonably</p>	<p>Religious schools can discriminate in the admission of students on the basis of <u>religion</u> where it is proved that 'the refusal is essential to maintain the ethos of the school'.</p>

			necessary to prevent an employee or prospective employee undermining 'the religious ethos of the institution'.	
<b>New Zealand</b> <i>Human Rights Act 1993</i> (NZ)	Religious bodies can discriminate on the basis of <u>sex</u> or <u>religious belief</u> where an authorisation or qualification facilitates engagement in a profession or calling for the purposes of an organised religion.	Religious organisations can discriminate in the provision of accommodation on the basis of <u>sex, marital status, religious or ethical belief, disability or age</u> .	Religious schools or organisations can discriminate on the basis of <u>religious or ethical belief</u> when a person's principal duties are as a religious minister, religious education teacher, a private school teacher or a social worker.  Religious bodies can discriminate on the basis of <u>sex</u> where the position is for the purpose of an organised religion and to comply with the doctrines, rules or established customs of the religion.	Religious educational institutions can discriminate in the admission of students on the basis of <u>religious belief or sex</u> .
<b>United Kingdom</b> <i>Equality Act 2010</i> (UK) <i>Human Rights Act 1998</i> (UK)	Religious ministers can discriminate in relation to <u>religion or belief or sexual orientation</u> by restricting participation in the religious organisation's activities or the provision of goods, facilities & services carried out in connection with the minister's functions.	<b>Publicly funded</b> religious organisations who are performing a public function cannot discriminate on the basis of <u>religion or belief or sexual orientation</u> .  <b>Privately funded</b> religious organisations can discriminate on the basis of <u>religion or belief or sexual orientation</u> in the provision of goods, facilities, services or activities and the use or disposal of premises.  <b>Commercial</b> organisations (whose main purpose is commercial) cannot discriminate.	An organisation with 'an ethos based on religion or belief' can discriminate in employment on the basis of <u>religion or belief</u> where this is an occupational requirement, the requirement is a proportionate means of achieving a legitimate aim and there are reasonable grounds to be satisfied that the person does not meet the requirement.	Religious educational institutions cannot discriminate against students, but there is an admissions cap for religious schools to discriminate on the basis of <u>religion</u> for 50% of students.
<b>United States</b> US Constitution <i>Civil Rights Act 1964</i> (USA) <i>Education Amendments of 1972</i> (USA)	N/A	Religious organisations can discriminate in the provision of public accommodation on the basis of <u>disability</u> .  Religious organisations can discriminate in the provision of dwellings on the basis of <u>religion</u> , unless membership in the religion is restricted by race, colour or national origin.	A religious corporation, association, educational institution or society can discriminate in employment on the basis of <u>religion</u> to perform work connected with the carrying out of its activities.  An employer can discriminate in employment on the basis of <u>religion, sex or national origin</u> where this is a 'bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise'.  A religious educational institution can discriminate in employment on the basis of <u>religion</u> .	Religious and same-sex educational institutions can discriminate on the basis of <u>sex</u> in admission.
<i>Note: There are no explicit federal protections from discrimination on the basis of <u>sexual orientation, gender identity or intersex status</u>, but protections have been implied by courts under the ground of 'sex'.</i>				

Table 3 makes clear that Australia has broad religious exemptions from federal anti-discrimination laws. Comparative jurisdictions most commonly allow religious bodies to discriminate on the basis of religion, and in some cases on the grounds of sex / gender, marital status, ethical belief, disability and sexual orientation. Interestingly, the UK and Ireland make distinctions based on whether an organisation is publicly funded or performing a public function, and the UK also delineates between not-for-profit and commercial bodies, which Australia does not.

**(e) Recommendations for reform to religious exemptions**

The HRLC considers that Australia's current permanent religious exemptions are unacceptably broad and fail to adequately protect the right to freedom from discrimination. The exemptions perpetuate a false and unjustified hierarchy of rights, entrench systemic discrimination and generally restrain society's pursuit of equality. We support limited exemptions for religious bodies to organise and conduct affairs closely connected to religious worship, observance, practice and teaching, but not blanket religious exemptions across a range of areas of public life regardless of the discriminatory impact on real people's lives. The purpose of article 18 of the ICCPR is not to allow 'religious freedom' to stand in as a justification for discriminatory behaviour by extending any act or practice of a religious person to be exempt purely because it is based on a religious belief.

In consultations undertaken by the AHRC in 2015, LGBTI organisations generally argued that publicly funded services should not enjoy religious exemptions under anti-discrimination laws in employment or treatment of clients.<sup>121</sup> They argued that prioritising physical and mental health, safety and welfare of all people – particularly children and vulnerable people – is paramount in balancing competing rights.<sup>122</sup>

In contrast, religious organisations have argued that employers of religious organisations need the freedom to choose employees consistent with the values of their faith.<sup>123</sup> They also argued that legally compelling them to accommodate LGBTI clients can undermine the operation of a distinct religious community and educating others about same-sex relationships and diverse gender identity can be inconsistent with faith-based practices.<sup>124</sup>

In cases of conflict, neither right should automatically prevail. Competing interests should be considered and balanced on a case-by-case basis. Rather than allowing a nuanced balancing of rights, these permanent exceptions are arbitrary, inflexible, broad, and unreasonable. This regime is incompatible with Australia's obligations under international human rights law, including the ICCPR, ICESCR and the Siracusa Principles.

***Replacing permanent religious exemptions with a general limitations clause***

The large number of permanent statutory exemptions in federal anti-discrimination laws are inconsistent, confusing and undermine the intended purpose of anti-discrimination legislation to eliminate discrimination and promote equality.

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<sup>121</sup> Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity & Intersex Rights: National Consultation Report (2015)* Table A [https://www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015\\_Web\\_Version.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/SOGII%20Rights%20Report%202015_Web_Version.pdf).

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

Instead, the HRLC recommends that a general defence of justification in discrimination law in place of these permanent statutory exemptions, including religious exemptions. Such a defence must properly enshrine the principles of necessity, reasonableness, and proportionality.<sup>125</sup>

A general limitations clause is a simple and nuanced solution to a range of permanent, and inflexible exemptions which require ongoing legislative amendment over time as social attitudes change. The limitations provision should be supplemented with guidelines and codes of practice produced by the AHRC.

Currently, organisations can apply to the AHRC for a temporary 5 year exemption from discrimination laws where necessary. We recommend that temporary exemptions remain available, but the limitations provision proposed above should also be adopted for temporary exemptions.

**Recommendation 7:** A general limitations clause should replace permanent exemptions only allowing for limitation of rights where there is a legitimate aim, and where reasonable, necessary and proportionate.

### **Provision of goods and services**

The denial of welfare and social services on the basis of religious belief disproportionately affects vulnerable members of our community in critical need of medical treatment, housing, family violence counselling, financial assistance and support, and undermine the purpose and intent of welfare services to provide a much-needed safety net for people in our community who most need support.

A limitation on discrimination by religious service providers in aged care settings was introduced in 2013, and there has been no negative reports regarding the implementation of these changes in the aged care sector. The HRLC strongly recommends this exclusion be extended to all government funded service delivery and, in particular, service delivery to vulnerable groups in other settings. As a matter of principle, public money should not fund discrimination, particularly against vulnerable groups.

If the vulnerability of older LGBTI people in aged care settings has been acknowledged and responded to, the HRLC urges the Expert Panel to respond to the vulnerability of people in other settings and extend the aged care exclusion to other areas, including:

- (a) mental health services;
- (b) disability services (including in home care services);
- (c) health services;
- (d) youth services;
- (e) housing and homelessness services;
- (f) schools;
- (g) services for the unemployed; and
- (h) other social or community services.

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<sup>125</sup> See e.g., Human Rights Law Centre, "A simpler, fairer law for all: Submission on the *Human Rights and Anti-Discrimination Bill 2012* (December 2012) 45 <http://www.equalitylaw.org.au/elrp/submissions/>.

As well as pre-existing vulnerability, the recipients of these services are often not able to choose or elect to receive services from a non-faith based service providers (e.g. regional, rural or remote locations).

**Recommendation 8:**

Existing exemptions that allow religious organisations to discriminate in the provision of facilities, goods and services should be repealed and replaced with a general limitations clause.

Alternatively, we propose that:

- religious exemptions are only available to organisations that do not receive any government funding; or
- religious exemptions are not available to organisations providing goods and services to vulnerable groups.

**Employment**

Religious organisations in receipt of government funding are a source of hundreds of thousands of jobs across Australia across a range of industries. In contrast, LGBTI people face higher rates of discrimination and experience higher rates of poverty and unemployment.<sup>126</sup> Ensuring that discrimination laws apply to all organisations, including religious organisations, will work to alleviate this disadvantage and allow for equal opportunity in employment.

Specialised roles within religious organisations may be more closely linked to worship, observance, practice or teaching, where an exemption is arguably more justified. Existing religious exemptions allow for lawful discrimination in the appointment and training of ministers of religion in accordance with religious beliefs on the basis of family responsibilities, pregnancy, sex, breastfeeding, sexual orientation, gender identity, intersex status, marital or relationship status.<sup>127</sup> These narrower religious exemptions are less controversial (but not entirely uncontroversial<sup>128</sup>) due to the closer and more direct nexus between the position of a religious minister and their central role in engaging in worship, practice, observance and teaching.

State and territory governments have often debated introducing an “inherent requirements” test. For example, a limited exemption for ministers of religions or religious education teachers at schools could be justified given their role in guiding spiritual practice and teaching. Discrimination is less justified in other roles such as gardeners or mathematics teachers. The level of compliance with religious values required of any role will depend on the nature of the organisation and require case by case analysis.

The inherent requirements test comes closer to balancing the competing rights at play. An ‘inherent requirement’ test should not be linked to any particular attribute but focus on any particular skills, values or lived experience that is required in a role.

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<sup>126</sup> Above n 125; Australian Human Rights Commission, *Face the Facts: Lesbian, Gay, Bisexual, Trans and Intersex People* (2014) [https://www.humanrights.gov.au/sites/default/files/7\\_FTF\\_2014\\_LGBTI.pdf](https://www.humanrights.gov.au/sites/default/files/7_FTF_2014_LGBTI.pdf).

<sup>127</sup> See Table 2.

<sup>128</sup> In 1992, the Chief Justice of the Supreme Court uncharacteristically voiced his personal views on whether the Anglican Church could prevent a Bishop from lawfully ordaining a woman as a priest: *Laurence Alan Scandrett v Right Reverend Owen Dowling* (1992) NSWSC 1170.

**Recommendation 9:**

Blanket exemptions which allow religious organisations to discriminate in employment should be repealed and replaced with a general limitations clause.

Alternatively, religious exemptions in employment should be narrowed to only permit discrimination when required to fulfil the ‘inherent requirements’ of a position (for roles closely connected with religious worship, observance, practice or teaching).

There should be no religious exemptions in employment for organisations that receive government funding.

**Education and young people**

In 2017, MPs and Senators tabled amendments to the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 (Cth) and Senator Paterson publicly released the alternative Marriage Amendment (Definition and Protection of Freedoms) Bill 2017 (Cth) (**Paterson Bill**).<sup>129</sup> These proposals included a provision which would allow parents to withdraw children from instruction in schools that might go against their religious beliefs across a range of areas that discussed non-traditional views on marriage, family and gender (e.g. health, relationships, politics, society and history). The amendments were voted down in both the Senate and the House of Representatives and the Paterson Bill was withdrawn.

International law requires respect for the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.<sup>130</sup> However, it is reasonable and necessary to limit this right to religious teaching to protect fundamental rights and freedoms of others. For example, where necessary to ensure the best interests of the child or the right of the child to an education appropriate to their needs.<sup>131</sup> All schools – whether religious or non-religious – have a duty of care to their students to provide an environment that is safe and welcoming, including for LGBTI students attending a school in accordance with their parents’ wishes rather than through choice. This may be a challenge for religious schools with doctrines, tenets or beliefs that do not support homosexual conduct or gender transition but the psychological welfare of children in their care should be paramount.

**Recommendation 10:** Any publicly funded school or educational institution should not be exempt from discrimination laws and must take positive steps to protect all students from harm, including LGBTI students.

**Transparency in the operation of religious exemptions**

The lack of transparency surrounding the operation of religious exemptions means that those interacting with religious organisations and schools may be unaware of the potential for discrimination. If the exceptions are to be maintained, this information must be communicated to potential employees, customers, students and others on the receiving end of discriminatory conduct (e.g. publicly available

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<sup>129</sup> Marriage Amendment (Definition and Protection of Freedoms) Bill 2017 (Cth) cl 1 - 63.

<sup>130</sup> UN HRC General Comment No 22 [6].

<sup>131</sup> CRC arts 3, 28, 29.



information on websites, service points and phone lines). Religious organisations could also lodge a notice with the AHRC specifying their policy or practice which relies on an exemption.

This requirement will provide the opportunity religious bodies to consider whether the discrimination is necessary and appropriate in each case and adopt policies accordingly. It would allow potential victims of discrimination to be aware of the organisation's practice and make informed decisions accordingly. It would also ensure accountability to the wider community, which is particularly relevant for an organisation that receives public funds.

**Recommendation 11:** If religious exemptions are retained, any organisation seeking to rely on a religious exemption must advertise its intention to do so and/or lodge a notice with the Australian Human Rights Commission specifying the policy or practice.

**(f) Proposed broadening of religious exemptions should be rejected**

There are no principled or compelling arguments to extend the already broad religious exemptions in Australian anti-discrimination laws. Proposals tabled during debates on the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 (Cth) would have wound back discrimination protections through legally unorthodox and unnecessary amendments. The proposals would have dramatically lowered the bar for discrimination by amending existing religious exemptions.<sup>132</sup> These proposals were resoundingly rejected by the Australian Parliament and should be rejected by the Expert Panel.

**Exemptions for 'conscientious' belief**

Proposals also recommended importing new exemptions for 'conscientious belief' into the Marriage Act.<sup>133</sup> The term 'conscientious belief' should not be confused with 'conscientious objection'. 'Conscientious objection' has a specific meaning under international human rights law that refers to a conscientious objection to military service.<sup>134</sup> To be clear, international law does not contain a right to a 'conscientious objection' to solemnising marriage.

A small number of Australian statutes refer to statutory exemptions for decisions made on conscientious grounds (often encompassing religious beliefs) in very limited situations, primarily relating to medical treatment and strictly confined in decisions by courts.<sup>135</sup> The bulk of legal guidance in this area concerns 'life or death' medical decision-making, where a medical practitioner or patient can refuse to provide or receive particular types of medical treatment in non-emergency situations,<sup>136</sup> including abortions.<sup>137</sup> Legal exemptions on conscientious grounds are available in limited

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<sup>132</sup> Marriage Amendment (Definition and Protection of Freedoms) Bill 2017 (Cth) cl 1 - 63.

<sup>133</sup> See e.g., Amendments moved by Michael Sukkar MP and Senators David Fawcett and James Paterson [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bid=s1099](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bid=s1099).

<sup>134</sup> Ibid.

<sup>135</sup> See e.g., *Krygger v Williams* (1912) 15 CLR 366; *Zarb v Kennedy* (1968) 121 CLR 283; *Collett v Loane* [1967] ALR 225.

<sup>136</sup> See e.g. *South Australian Public Health Act 2011* (SA) s 75(5); *Advanced Care Directives Act 2013* (SA); *Rail Safety National Law Act 2014* (ACT) s 37(4)(a); *Road Transport (Alcohol and Drugs) Act 1977* (ACT) s 17, 23.

<sup>137</sup> *Abortion Law Reform Act 2008* (Vic) s 8. See also *Criminal Law Consolidation Act 1935* (SA) s 82A; *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 6-7; *Medical Services Act* (NT) s 11.

circumstances in relation to voting,<sup>138</sup> jury service,<sup>139</sup> vaccination for children,<sup>140</sup> use of excess ART embryos,<sup>141</sup> registration in education on religious grounds,<sup>142</sup> exemption from classes (e.g. religious education classes)<sup>143</sup> and membership to a specific organisation.<sup>144</sup>

None of the laws which allow a refusal based on a conscientious belief allow discrimination against another person because of a characteristic of who they are (e.g. another person's race or sexual orientation). The dilemmas of conscience raised by certain medical procedures relate to the nature of the procedure itself – not the attributes of the person being treated. The other references to conscientious belief relate to the performance of a civil service (voting or jury service) or involvement in unionism. Importantly, these actions do not limit the rights of others.

Introducing conscientious exemptions would represent a significant weakening in discrimination protections and set a disturbing precedent for future reform. For these reasons, the HRLC strongly opposes the winding back of existing protections from discrimination exemptions based on conscientious belief.

**Recommendation 12:** Proposals introduced during parliamentary debates on the marriage equality bill which would wind back existing discrimination protections, including allowing discrimination on the basis of conscientious belief, should not be introduced into law.

## 7. Supporting Australian charities

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All charities should be treated equally and should have an equal right to advocate.

Religious charities provide essential services for our community, as do secular charities.

Approximately 1 in 3 charities listed the advancement of religion as their charitable purpose or their main activity in Australia – the largest group of any charitable purpose.<sup>145</sup>

Currently, the Australian Government is investigating the regulatory framework for charities and their reporting obligations, including whether environmental groups should retain their charitable and Deductible Gift Recipient (**DGR**) status. Other legislative reforms before the Parliament have a negative impact on the flow of international philanthropy to charities. The Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth) may silence Australian

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<sup>138</sup> *Electoral Act 1985* (SA) s 85.

<sup>139</sup> *Juries Act 1927* (SA) s 16(2)(c).

<sup>140</sup> *Public Health Act 2010* (NSW) s 87; *Health Act 1911* (WA) s 275; *Public Health Act 1997* (Tas) s 58.

<sup>141</sup> *Human Reproductive Technology Act 1991* (WA) s 53ZWA.

<sup>142</sup> *Education Act 1990* (NSW) s 75-77.

<sup>143</sup> *Education Act 1972* (SA) s 102(2); *School Education Act 1999* (WA) s 71; *Education Act* (NT) s 87.

<sup>144</sup> *Fair Work (Registered Organisations) Act 2009* (Cth) s 180; *Industrial Relations Act 1999* (Qld); *Industrial Relations Act 1996* (NSW) s 212; *Fair Work Act 1994* (Cth); *University of Tasmania Act 1992* (Tas); *R v Sweeney; Ex part Northwest Exports Pty Ltd* (1981) 35 ALR 135; *R v District Court of the Queensland Northern District; Ex Parte Thompson* (1968) 118 CLR 488.

<sup>145</sup> Many charities with religious affiliation who conduct these activities do not list religion as one of their charitable purposes or activities. This means that schools and community service providers affiliated with religious organisations are not reflected in the data with the ACNC. See Australian Charities and Not-For Profits Commission & Curtin University, *Australian Charities Report* (2017) <http://australiancharities.acnc.gov.au/wp-content/uploads/2017/12/Australian-Charities-Report-2016-FINAL-20171203.pdf> 10.

charities from speaking publicly on issues in an election.<sup>146</sup> Charities have enormous expertise to contribute, drawn from the work they do – whether it be promoting mental health, running essential welfare services, or protecting the environment. For example, religious church groups and organisations have played a pivotal role in speaking publicly about the treatment of refugees in offshore detention on Nauru and Manus Island as lacking compassion and running counter to their religious teachings.<sup>147</sup> Sidelining charities from public discussion also silences the voices of vulnerable people that charities work with and represent and undermines good policy making.

During parliamentary debates on the Marriage Amendment (Definition and Religious Freedoms) Bill 2017(Cth), MPs and Senators proposed amendments relating to religious charities' charitable status, DGR status and tax exemptions that were not also extended to non-religious charities.<sup>148</sup> Freedom of speech applies equally to religious and secular beliefs and any changes to charity laws should ensure equal treatment under the law.

We endorse the submission of Not-for-Profit Law to this inquiry in relation to the protection of charities in Australia.

**Recommendation 13:** The Expert Panel accept the recommendations of Not-for-Profit Law to this inquiry and consider the potential detrimental impacts of the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth).

## 8. Free speech in Australia

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During the marriage equality debate in 2017, a number of MPs and Senators proposed amendments in defence of 'free speech'. These amendments would have introduced unprecedented carve outs from discrimination protections and would have limited the operation of hate speech and criminal law protections under a number of Commonwealth and state and territory laws.<sup>149</sup> These amendments were unnecessary, legally unorthodox and ultimately not supported by the majority of the Australian parliament.

The Paterson Bill also proposed a 'no detriment clause' at items 88K and 88KB which would have made it unlawful for a public authority to directly or indirectly propose action or take action which result in any unfavourable treatment, detriment, disadvantage, obligation, sanction or denial of benefit, because a person or entity holds or expresses a traditional view on marriage.

These proposals would only have applied to certain religious and non-religious beliefs about marriage, family and gender, and would not have provided equal protections for opposing beliefs on these

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<sup>146</sup> Human Rights Law Centre, *Submission on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (29 January 2018).

<sup>147</sup> See e.g. Darren Mara, 'Religious groups 'disheartened' by asylum policy', *SBS News* (4 November 2013) <https://www.sbs.com.au/news/religious-groups-disheartened-by-asylum-policy>.

<sup>148</sup> See e.g., Amendments moved by Scott Morrison MP and Senators David Fawcett and James Paterson [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=s1099](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s1099).

<sup>149</sup> Paterson Bill, items 5AB – 5AC and Paterson Bill, items 88J, 88JA, 88KA, 88L, 88P and 88Q; amendments moved by Andrew Hastie MP and Senators David Fawcett and James Paterson [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=s1099](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s1099).

issues. In effect, these protections were one-sidedly weighted in favour of a minority of people opposed to marriage equality without providing equal protection for the majority of Australians who support it.

These proposals and arguments raised by the No campaign during the Postal Survey stemmed from a fear that religious advocates and organisations would not be able to freely express their traditional or religious views after marriage equality was introduced in Australia. Yet individuals and organisations in society can largely already freely express their views in relation to politically controversial issues such as marriage equality in Australia. For example, the majority of Australians who supported marriage equality before it became law were free to express this view.

There are legitimate threats to free speech in Australia, for example those contained in new secrecy offences found in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth) currently before parliament that would see a dramatic lessening in protections for whistle-blowers acting in the public interest.<sup>150</sup> In order to protect against such threats, the HRLC recommends the legal protection of the right to freedom of expression.

**Recommendation 14:** The right of freedom of expression should be protected through the introduction of a comprehensive Human Rights Act.

## 9. Embedding human rights safeguards in Australia

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### 9.1 Consolidation and modernisation of anti-discrimination laws

A fundamental principle of human rights law is that human rights are indivisible, as they relate to the inherent dignity of every human right. All human rights have equal status, and cannot be positioned in a hierarchical order. As human rights are interrelated and interdependent, denying one right invariably impedes the enjoyment of other right. It is important that human rights are not protected in isolation, or that one right is automatically privileged over other rights.

Australia has signed a number of international human rights treaties and has an obligation to protect human rights equally. In October 2017, Australia was criticised by the UN Human Rights Committee for its inconsistent protection of human rights at home, saying Australia cannot “pick and choose” its compliance with human rights law.<sup>151</sup>

Legal protection from discrimination for religious belief (and non-religious beliefs) could be incorporated into a consolidated bill or a stand-alone statute. However, this would not address the weaknesses in the current machinery of Australia’s anti-discrimination laws. Federal anti-discrimination laws currently provide inconsistent and piecemeal protections and rely on a fault-based

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<sup>150</sup> Human Rights Law Centre, *Secrecy Offences: The Wrong Approach to Necessary Reform: Submission to the Inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Cth)* (2018) <https://www.hrlc.org.au/submissions/2017/1/23/secrecy-offences-the-wrong-approach-to-necessary-reform>.

<sup>151</sup> UN Live & On Demand, *Closing of Session 3519<sup>th</sup> Meeting 121<sup>st</sup> Session of Human Rights Committee* (19 November 2017) (<http://webtv.un.org/search/consideration-of-australia-contd-3419th-meeting-121st-session-of-human-rights-committee/5616286583001/?term=&lan=english&cat=121st%20session&page=2>).

system of individual complaints rather than incorporating measures to promote substantive equality and tackle systemic discrimination. In 2013, following a number of inquiries and consultations, the former Commonwealth Government proposed a *Human Rights and Anti-Discrimination Bill 2013* (Cth) (**HRAD Bill**). The HRAD Bill would have consolidated and modernised the five separate Commonwealth anti-discrimination laws to ensure justice is not denied because of complex technicalities of our current laws.

Australia should continue the process of modernising and consolidating federal anti-discrimination laws to bring them federal anti-discrimination law in line with our international human rights obligations as recommended by the UN Human Rights Committee in 2017.<sup>152</sup>

**Recommendation 15:** Australia should consolidate and modernise its anti-discrimination laws and add the additional ground of 'religious belief' (including non-religious beliefs).

## 9.2 A Human Rights Act for Australia

Australia is the only Western liberal democratic nation without comprehensive statutory or constitutional protection of human rights. Australia has agreed to be bound by the major international human rights treaties, but individuals cannot enforce these protections directly under Australian law.

In 2009-2010, the National Human Rights Consultation found that the adoption of a Human Rights Act was supported by over 87% of a record 35,000 public submissions and was a key recommendation of the National Human Rights Consultation Committee.<sup>153</sup> The Australian Government decided not to introduce a Human Rights Act on the basis that 'the enhancement of human rights should be done in a way that, as far as possible, unites rather than divides us'.

Piecemeal protections for human rights provide insufficient safeguards against human rights abuses in Australia (e.g. federal anti-discrimination laws, common law protections for procedural fairness in criminal justice, state and territory charters). These gaps in legal protection leave Australians - and in particular vulnerable groups, including religious minorities - vulnerable to having their human rights violated. There is no recourse for Australians whose right to freedom of religion or belief is curtailed by government law or policy or through the conduct of a state agency, department or public official, except if it breaches the protections in the FWA.

Protecting human rights in law – through a national act of parliament, a bill of rights, or by enshrining them in our constitution – will help maintain the health of our democracy and ensure that when governments or corporations overstep and infringe our human rights, any human being can enforce their fundamental human rights and freedoms.

**Recommendation 16:** Australia should enact a Human Rights Act that protects fundamental human rights and freedoms, including the right to freedom of religion or belief.

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<sup>152</sup> Above n 59 [18].

<sup>153</sup> National Human Rights Consultation Committee, *National Human Rights Consultation: Report* (2009).