

Submission to the Australian
Commonwealth Parliament
Human Rights Sub-Committee
Joint Standing Committee on Foreign
Affairs, Defence and Trade

Inquiry into the Status of the Human Right
of Freedom of Religion or Belief

Presbyterian Church of Queensland

Contents

Summary of Findings and Recommendations	4
Part I - Encroachment on Religious Freedom with Australia	4
Part II – An Australian Religious Freedom Act?	6
Part III - Religious Freedom and Australian Charities	12
Part IV - Failure of State Based Human Rights Charters to Protect Religious Freedom	12
Part V –Protecting Religious Freedom on the International Stage	12
Introduction	14
Part I - Encroachment on Religious Freedom with Australia	15
The State should not arrogate to itself the ability to define religious doctrine.	16
Historical Context.....	16
Judicial Reticence to Make Determinations of Acceptable Religious Belief	17
Practical Examples of Dangers of Courts Weighing Religious Truth	19
Resolving the Issue.....	22
Employment and Religious Institutions	24
Inherent or Genuine Occupational Requirements Tests	25
The receipt of Government funding or Provision of Services should not be a ground to limit religious freedom	28
Receipt of Government Funding	28
Provision of Services to the Community.....	29
Engagement in Commercial Supplies.....	29
Religious Freedom Protections Extend to Individuals	30
Religious belief should be recognised as a protected attribute for the purposes of Commonwealth anti-discrimination law	32
General Exceptions Clause to be Preferred over Exemptions Clause.....	34
Part II - Religious Freedom Act.....	36
Existing Protections in Australian Law	38
Commonwealth Constitution.....	38
<i>Krygger v Williams</i>	39
<i>Jehovah’s Witnesses</i>	40
<i>Kruger v Commonwealth (Stolen Generations Case)</i>	41
Common Law	43
Principle of Legality.....	44
States and Territories.....	45
Conclusion.....	45
International Protections.....	46

United Nations International Covenant on Civil and Political Rights.....	46
Canada	51
United States.....	51
Comparing the tests.....	53
An Australian Religious Freedom Act?	55
Australian Human Rights Commission Recommendation	56
The Right to Religious Freedom Applies to Individuals and Groups.....	57
Proposed Drafting for a Religious Freedom Act	59
Religious Freedom Should not be Limited to an Exemption to Another Right.....	60
Interaction with State Laws	60
Addressing Concerns of Judicial Discretion	61
Part III - Religious Freedom and Australian Charities	63
Charitable Endorsements.....	63
Basic Religious Charities.....	64
Part IV - Failure of State Based Human Rights Charters to Protect Religious Freedom	66
Part V –Protecting Religious Freedom on the International Stage.....	68

Summary of Findings and Recommendations

Part I - Encroachment on Religious Freedom with Australia

1.1 Our submissions commence with a statement of certain of the areas in which it is considered that religious freedom is being encroached upon in Australia, or in which calls for encroachment are being made. We make certain targeted recommendations to enhance religious freedom protections. These include:

- (a) The following test, offered as a response to the potential of courts to limit religious freedom through the adoption of narrow interpretations of religious doctrine or belief:

For the purposes of this Act where an individual or entity holds a religious or conscientious belief, that belief is to be taken to be genuine if the holding of belief is neither fictitious, nor capricious, and is not an artifice.

This drafting draws upon the decision of Iacobucci J in *Syndicat Northcrest v Amselem*¹ and might be utilised in Commonwealth enactments that require the interpretation of religious doctrine, such as the *Sex Discrimination Act 1984* (Cth), with necessary amendments made *mutatis mutandi*.

- (b) The Inquiry should give consideration to the merits of a Commonwealth enactment that preserves the right to religious freedom and which:
 - i. does not contain a genuine occupational or inherent requirements test, to the extent that it operates in the employment and pre-employment areas;

¹ (2004) 241 DLR (4th) 1.

- ii. protects the religious freedom rights of both individuals and corporations;
- iii. operates irrespective of whether an organisation:
 - 1. receives government funding;
 - 2. operates for profit or not-for profit; or
 - 3. provides commercial services.

The Inquiry should also consider the means by which such an enactment might prevail against State-based anti-discrimination laws, to the extent that those laws fail to protect religious freedom, as internationally recognised. Specific drafting for such a protection is considered in the light of international law and current Australian protections to religious freedom in our discussion of an Australian Religious Freedom Act in Part II below.

- (c) The Inquiry should also give consideration to the merits of a Commonwealth enactment protecting organisations and individuals from discrimination on the basis of religious belief. Given the wide-range of protected attributes within Commonwealth anti-discrimination law there is no reason why religion should be precluded from those attributes. Given the paucity of protections at common law there are very real reasons why such a protection should be legislated. The protection should be extended to religious belief (or conviction, which terms we consider to be interchangeable), affiliation, and expression, practice and activity and should cover both direct and indirect discrimination.
- (d) Consideration should be given to a review of the current exemptions for religious institutions in anti-discrimination law with a view to replacing exemptions with general limitations clauses. One such clause that has

been recommended for further consideration by the Australian Law Reform Commission (ALRC) is as follows:

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

- a. it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or
- b. it is made because of the inherent requirements of the particular position concerned; or
- c. it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or
- d. it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.

(2) The protection, advancement or exercise of another human right protected by the *International Covenant on Civil and Political Rights* is a legitimate objective within the meaning of subsection 1(a).

Part II – An Australian Religious Freedom Act?

1.2 If competition between comprehensive religious worldviews is a necessary concomitant of a pluralist society, the State has an interest in finding the means by which resulting conflict can be constructively resolved. Fundamental to the resolution of such conflict is the applicable mean applied by the Courts. Differing jurisdictions around the globe have approached this question with varying degrees of balance.

1.3 In order to give consideration to an appropriate standard, this submission considers the context of the applicable protections in Australian law. It then turns to consider differing means of protecting religious freedom internationally. We include in this discussion the relevant international instruments under which Australia has obligations. Although caution is to be exercised, it is found that from this review that

certain authorities hold the potential to provide significant resources from which the solutions recommended in the conclusion to Part II might be fashioned.

1.4 We first turn to consider the sufficiency of existing protections in Australian law. It is found that the limited protection offered by section 116 of the Australian Constitution, including as a result of the purposive test adopted by the High Court, is a real limitation upon the expression of religious freedom within Australia. The content of the current protection to the exercise of religious freedom as recognised by the High Court may be described as only protecting citizens against any Commonwealth legislation that has as its purpose the removal of religious freedom rights. It fails to acknowledge that neutral laws may actually burden religious expression. Contrary to the High Court's jurisprudence, and as recognised by section 2(2) of the United States *Religious Freedom Restoration Act 1993* (RFRA),² generally applicable 'laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise'.

1.5 As noted by Cole Durham if 'the laws authorizing the official's activity are reviewed under a deferential standard of review according to which any neutral or general law can trump religious freedom, the official has virtually no legal incentive to cooperate and an accommodation depends on his or her good graces.'³ The concern over the limited scope of section 116 is also held by the Australian Human Rights Commission, which in 1998 (as the HREOC) concluded: 'the wording of Section 116, coupled with the weight of judicial opinion, leaves little doubt that its scope is limited. In particular, it does not amount to a constitutional guarantee of the right to freedom of religion and belief.'⁴ Our overview of religious freedom protections world-wide demonstrates that this is, comparatively, a very weak protection.

² *Religious Freedom Restoration Act 1993*, 42 USC §2000bb.

³W. Cole Durham, Jr, 'Religious Freedom in a Worldwide Setting: Comparative Reflections' (Speech delivered at Pontifical Academy of Social Sciences, Brigham Young University, 30 April 2011).

⁴ Human Rights and Equal Opportunity Commission, 'Report of the inquiry into freedom of religion and belief in Australia' (Human Rights and Equal Opportunity Commission, Article 18 Freedom of Religion and Belief 1998) 13.

1.6 The question then considered in these submissions is: what is an acceptable test for balancing the claims of religious freedom with competing governmental interests? In answering that question, we consider the means by which religion freedom may be protected at a national level. Included in this discussion is the prior proposal of the Australian Human Rights Commission that an Australian Religious Freedom Act be enacted.

1.7 It is acknowledged that the concept of a Religious Freedom Act is not without contention. Many voices, including those of Christians, have spoken against its introduction. This paper does not take a position on whether such an Act should be legislated. It instead aims to provide a helpful analysis that sets out what is considered to be the better models of protection and lessons learned from jurisdictions in which such enactments have worked to the detriment of religious liberty. It also weighs the relative strengths of existing models.

1.8 Whilst concerns over the potential for wide ranging judicial discretion to undermine legislated religious freedom protections are significant, it is also noted that when considered against both the United States protections and against the jurisprudence of both the UNHCR and the ECHR, the religious freedom jurisprudence of the High Court and the common law in Australia seems manifestly inadequate. If it was thought that such is an insufficient protection, the RFRA exists as precedent for the proposition that a legislature may respond to concerns that the judiciary is failing to sufficiently protect religious freedom in the form of a broad legislated protection.

1.9 The American and the ICCPR models offer differing responses to the challenges of protecting religious freedom in pluralistic modern democracies. Drawing upon those models, drafting for a Religious Freedom Act which may accommodate such concerns is suggested as follows:

(1) Definitions

‘body established for religious purposes’ includes an entity:

(a) to which section 37 of the *Sex Discrimination Act 1984* (Cth) applies; or (without limiting the foregoing)

(b) established by or under the direction, control or administration of a body established for religious purposes; or (without limiting the foregoing)

(c) that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed and is:

(i) a not for profit entity; or

(ii) a charity as defined by section 12(1) of the *Charities Act 2013* (Cth).

'entity' has the meaning given by section 184-1 of the *A New Tax System (Goods and Services Tax) Act 1999*, and in this Act also includes a non-entity joint venture.

(2) For the purposes of this Act, an entity that is not an individual:

(a) includes an entity, regardless of whether:

(i) the entity is for-profit or not-for-profit;

(ii) is a body established for religious purposes; or

(iii) operates to make a profit or not; and

(b) can hold a religious or conscientious belief, including where:

(i) the entity has stated or adopted that belief (whether or not such is stated in its governing documents, organising principles or its statement of values), including by adopting a set of beliefs or values of another entity or from a document or source which includes that belief; or

(ii) a majority of the individuals who comprise the governing persons of the entity hold that belief.

(3) For the purposes of this Act, where an individual or entity holds a relevant belief, that belief is to be taken to be genuine if the holding of belief is neither fictitious, nor capricious, and is not an artifice.

(4) The rights to express a relevant belief contained in this Act include, but are not limited to, the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media.

1.10 To the extent that any Religious Freedom Act recommended by the Committee contains a protection to religious institutions against claims of religious discrimination, following the recent recommendations of the ALRC,⁵ consideration should be given to adopting a general limitations clause, as opposed to an exemption clause.

1.11 Consideration will also need to be given to whether the proposed Religious Freedom Act should then be stated to prevail against any inconsistent State law. The Act might be based upon the external affairs power, and made:

(i) as a law giving effect to Article 18 of the *International Covenant on Civil and Political Rights* done at New York on 16 December 1966 ([1980] ATS 23);

(ii) as a law giving effect to the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* Proclaimed by General Assembly of the United Nations on 25 November 1981 (resolution 36/55); and

(iii) as a law on a matter of international concern.

1.12 Several legislated protections to be contained within a Religious Freedom Act are suggested to assist in limiting judicial discretion that has the potential to undermine legislated religious freedom protections. These means include:

(a) That a proportionate approach to the resolution of the boundary of competing rights will require investigation of means to accommodate

⁵ Australian Law Reform Commission, *Traditional Rights and Freedoms— Encroachments by Commonwealth Laws*, ALRC Report No 129 (2016).

competing rights without unduly burdening the right to religious freedom.

- (b) That set out in the ICCPR Siracusa Principles, being '[i]n applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.'
- (c) That set out in the RFRA, requiring the State to use 'the least restrictive means'.
- (d) Whilst not exhausting the factors which would be proportionate, in the context of service supply, where there are equivalent services that may be supplied by an alternative provider, religious freedom should be protected by a statutory presumption that the limitation is disproportionate.
- (e) The foundational aspect of the conscience of the religious individual or corporation must be relevant to whether the expression is proportionate. The law should contain a presumption that any action which requires an individual or corporation to act against conscience is disproportionate, and that presumption might only be displaced where the conscience of another individual is similarly impacted upon so as to require a course of conduct against their own conscience.

Whilst these recommendations have been made with a view to a Religious Freedom Act, they may equally be utilised in other legislative contexts where religious freedom is sought to be protected.

1.13 It is important that we note that we offer these considerations as comments only. They should not be seen to be offered in support of the enactment of a Religious Freedom Act. They are only offered to enable the Committee to weigh the respective benefits and limitations of such an approach. We should only proceed with great caution towards any Religious Freedom Act. Durham offers a critical warning that such tests may not be sufficient as means to protect religious freedom: 'in countless

situations, legislation cannot fully specify the full range of protections for religious freedom that reasonable interpretation of legislation will afford.’⁶

Part III - Religious Freedom and Australian Charities

1.14 We consider the powers of the ACNC over registered religious institutions, including the power to give directions, to instigate investigations, and suspend, remove and replace the leadership of religious institutions, to be significant incursions upon the right of religious freedom under Commonwealth law. The exemption granted from these requirements to Basic Religious Charities is highly limited in its application. Under section 205-35(2) of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth), it excludes any incorporated entity. Whether a religious body chooses to take a corporate form is an arbitrary distinction in the consideration as to whether its religious freedom rights should be maintained. The Basic Religious Charity exemption should be expanded to include all incorporated entities that otherwise meet the criteria.

Part IV - Failure of State Based Human Rights Charters to Protect Religious Freedom

1.15 The Committee should find that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Human Rights Act 2004* (ACT) fail to protect religious freedom as required by the ICCPR. The Committee should also recommend that any proposal made by the Queensland Government to implement a Human Rights Act acquit Australia’s obligations to protect religious freedom pursuant to the ICCPR.

Part V –Protecting Religious Freedom on the International Stage

1.16 We recommend that the combination of ongoing reporting requirements and education of Departmental officials in religious freedom required by the United States *International Religious Freedom Act 1998* may provide suitable bases for Australia to enhance its role in the promotion of religious freedom on the global stage. It is recommended that the Australian Human Rights Commission (AHRC) be required to report on religious freedom persecution in its annual report to be provided to

⁶ Durham, above n 3.

Parliament pursuant to section 30 of the *Human Rights Commission Act 1981* (Cth). The Report should also detail the impact of Australian Government actions on religious freedom. It is also recommended that Department of Foreign Affairs officers receive mandatory religious freedom training.

1.17 Similar policy provisions to those contained in the United States *International Religious Freedom Act 1998* could be adopted and applied to Australian charities operating internationally and regulated by the Department of Foreign Affairs and Trade (including those operating under the Overseas Aid Gift Deductibility Scheme Guidelines) or the Australian Charities and Not-for-profits Commission. Those bodies could

- (a) make specified assistance available to promote international religious freedom, and
- (b) prefer assistance to projects targeting religious freedom violations in countries designated as countries of particular concern for religious freedom and in countries on a special watch list.

Introduction

1.18 The Presbyterian Church of Queensland welcomes the opportunity to make submissions to the Australian Commonwealth Parliament Human Rights Sub-Committee Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the Status of the Human Right of Freedom of Religion or Belief. We have been assisted in the preparation of this submission by Mark Fowler of Neumann & Turnour Lawyers. The Inquiry's Terms of Reference are as follows:

The Committee shall examine the status of the freedom of religion or belief (as recognised in Article 18 of the *International Covenant on Civil and Political Rights*) around the world, including in Australia. The Committee shall have particular regard to:

1. The enjoyment of freedom of religion or belief globally, the nature and extent of violations and abuses of this right and the causes of those violations or abuses;
2. Action taken by governments, international organisations, national human rights institutions, and non-government organisations to protect the freedom of religion or belief, promote religious tolerance, and prevent violations or abuses of this right;
3. The relationship between the freedom of religion or belief and other human rights, and the implications of constraints on the freedom of religion or belief for the enjoyment of other universal human rights;
4. Australian efforts, including those of Federal, State and Territory governments and non-government organisations, to protect and promote the freedom of religion or belief in Australia and around the world, including in the Indo-Pacific region.

1.19 Our submissions are made principally in respect of Terms of Reference 1 and 4 and are divided into the following areas:

- (a) Part I - Encroachment on Religious Freedom with Australia
- (b) Part II – An Australian Religious Freedom Act?
- (c) Part III - Religious Freedom and Australian Charities
- (d) Part IV - Failure of State Based Human Rights Charters to Protect Religious Freedom
- (e) Part V – Protecting Religious Freedom on the International Stage.

Part I - Encroachment on Religious Freedom with Australia

1.20 We consider that religious freedom is under increasing threat within Australia. The pressures on religious freedom continue to arise in the context of same sex marriage, the associated freedom of speech and within controversies over matters such as tax exemptions to religious institutions, the wearing of religious symbols and the employment practices of religious institutions. There are a number of ways in which existing laws encroach upon the right to freedom of religion in Australia. We are also deeply concerned with proposals calling for an expansion of the various existing encroachments.⁷

1.21 Mason ACJ and Brennan J summarised the centrality of the freedom of religion in *Church of the New Faith v Commissioner for Pay-Roll Tax*⁸ where they held:

Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance

⁷ As for example are enunciated in various submissions to the Australian Law Reform Commission's Freedoms Inquiry and detailed in the Interim Report (ALRC Interim Report No 127) of that Inquiry, available at <<http://www.alrc.gov.au/inquiries/freedoms>>.

⁸ *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 57 ALJR 785.

with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.⁹

It is submitted that this statement provides a suitable recognition of the foundational importance of religious freedom within Australian society and a suitable standard against which to demonstrate the extent of incursion upon that freedom within current Commonwealth law.

The State should not arrogate to itself the ability to define religious doctrine.

Historical Context

1.22 We first concern ourselves with the interplay of the right to religious freedom with anti-discrimination law. Various Commonwealth laws that grant exemptions to religious institutions from anti-discrimination laws require those institutions to demonstrate that either the conduct is either:

- (a) Necessary to avoid injury to the religious susceptibilities of adherents; or
- (b) In accordance with the doctrines, beliefs or principles.¹⁰

A further test focusses on the 'inherent' or 'genuine occupational' requirements of the position in question, a matter to which we return below.¹¹

1.23 We first note that any consideration of the recognition of the religious freedom rights of religious organisations must take place in the century's old and ongoing dialogue concerning the separation of Church and State evidenced in the Western tradition. This is necessary as it is often within the contemporary expression

⁹ Ibid 787.

¹⁰ Similarly styled exemption clauses may be found in the *Age Discrimination Act 2004* (Cth) s35; *Sex Discrimination Act 1984* (Cth) s37; *Fair Work Act 2009* (Cth) s351(2)(c)(i).

¹¹ See, eg, *Anti-Discrimination Act 1991* (Qld) s 24 that imposes a 'genuine occupational requirements' test. See also *Fair Work Act 2009* (Cth) s 351(2)(b); *Sex Discrimination Act 1984* (Cth) s 35.

of that dialogue where the purported ability of the State to incur upon the religious freedom of its citizens is asserted. However, the historical expression of that dialogue provides a record of the disastrous consequences of State incursions upon the individual's religious conscience that must not be overlooked. In the British common law that dialogue traces back to the Magna Carta of 1215 AD, and further than that, the dialogue streams back to Emperor Constantine and the Edict of Milan in 313 AD. It leads us to consider whether the State should impose a religious belief on its citizens and the extent (and ability) of the State's power to regulate the Church's ability to act in accordance with its beliefs.

1.24 The history of the endeavours of the established church to enforce religious observance in the English tradition is well documented. Indeed the modern (as opposed to medieval) conception of separation of church and State was adopted as an attempt to preserve the conscience of religious minorities against State efforts to enforce religious uniformity and in light of the disastrous consequences of State attempts to impose sanctioned forms of religion and morality upon the populace in breach of individual conscience. Consistent with and drawing upon this history, in recent centuries the courts have disclosed a reticence to determine matters of doctrine for religious institutions. Any attempt by the State to circumscribe the bounds of permissible religion through the law (including anti-discrimination law) flies in the face of such lessons. To do so risks the allegation of wilful historical amnesia. Furthermore, modern anti-discrimination law, in requiring determinations of permissible religious doctrine runs the risk of ennobling a modern State sanctioned form of religion.

[Judicial Reticence to Make Determinations of Acceptable Religious Belief](#)

1.25 Any regime that requires a court to make determinations as to the nature of religious truth is further complicated by the difficulty in determining whether a system of belief comprises a religion, which is a necessary precursor to any determination of worth. Chief Justice Malcolm notes:

the courts have recognised that our language has a strictly limited capacity to capture the nature of “religious belief”. Indeed, one judge has ventured the opinion that: “... in no field of human endeavour has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man’s predicament in life, in death or in final judgement and retribution.”¹² The courts have also been influenced by the essentially unknowable nature of “religious truth”¹³, and by an awareness of the lessons of history in relation to religious persecution and intolerance.

1.26 Justices Wilson and Deane have held that the question of whether a belief is “religious” should be “approached and determined as one of arid characterisation not involving any element of assessment of the utility, the intellectual quality, or the essential ‘Truth’ or ‘worth’ of tenets of the claimed religion.”¹⁴ It is arguable that this common sense approach reflects a post-Enlightenment preference for State neutrality in matters spiritual and an aversion to State endorsed determinations of what comprises truth in light of the religious wars of the sixteenth and seventeenth centuries. Instead, as typified by the judgement of Wilson and Deane JJ, the courts have wisely, in our view, preferred a relationship with religious institutions that have permitted them to determine their own enunciations of truth.

1.27 Several further practical policy imperatives have driven the courts’ reticence to wade into determining matters spiritual. We include in this the concern to avoid accusations of preferring one religious belief over another.¹⁵ The courts’ reticence to sanction one religious entity over another is also properly seen as an expression of the doctrine of separation of Church and State, as reflected in section 116 of the Australian Constitution. That reticence is required as a natural extension of the Constitutional prohibition on the Commonwealth establishing a religion or restricting the flourishing

¹² *United States v Seeger* (1965) 380 US 163, 858 (Clark J).

¹³ See, e.g. *United States v Ballard et al* (1944) 322 US 78, 889-890 (Jackson J).

¹⁴ *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 174.

¹⁵ See, e.g., *Thornton v Howe* (1862) 54 ER 1042 for an application of such reasoning to the determination of charitable endorsements.

of a religion by giving preference to any one religion over another pursuant to section 116.

1.28 Courts have also displayed a strong appreciation of the dangers involved in tailoring legal protection according to the views of the prevailing majority.¹⁶ As highlighted in ex curial commentary by Malcolm CJ:

One of the problems with claims to necessity is that what is considered necessary usually depends on the experience and values of those who impose the relevant restriction. In these circumstances, as Brennan J observed in *Goldman v Weinberger*¹⁷, one of the tasks of the courts must be: "... to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar."

In making this reference to the "quiet erosion" of the right freely to exercise a religion, Brennan J highlights the ever-present potential of the majority, indirectly and unthinkingly, to discriminate against the religious practices of a minority. Regulations and restrictions which are not intended to discriminate against religious practice, and are applied uniformly, may nevertheless in their effect discriminate to the extent of imposing an intolerable burden on the adherents of a particular religion.¹⁸

This is particularly pertinent within contemporary Australia, where various recent polls demonstrate that those holding a traditional Christian view on sexuality find themselves in the minority.

Practical Examples of Dangers of Courts Weighing Religious Truth

1.29 An illustration of the practical consequences of legislation that requires courts to weigh the nature of religious truth can be found in the following determinations, each of which provide examples of judicial or executive bodies purporting to hold the curious ability to declare to religious adherents the nature of their doctrines or beliefs:

¹⁶ See, e.g., *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 131.

¹⁷ *Goldman v Weinberger* (1986) 475 U.S. 503.

¹⁸ The Hon Mr Justice David Malcolm AC, 'Religion, Tolerance and the Law' (1996) 70 *Australian Law Journal* 976, 981.

- (a) Justice Maxwell in *Christian Youth Camps v Cobaw*,¹⁹ who found the doctrine of plenary inspiration (that each word within the Bible is divinely inspired) could not be relied upon to support the argument that the doctrines of the Christian Brethren teach that homosexuality is contrary to God's will on the basis that 'the applicability of that doctrine to individual passages in the Bible was shown by the evidence to be quite variable, and to have changed over time ... [and] that there was even some diversity between Christian Brethren congregations as to which parts of the Bible were to be applied literally.'²⁰ Justice Maxwell also found that even if the doctrines were to hold that homosexuality is contrary to God's will, such was 'a rule of private morality' and the refusal of a booking to a group of same sex attracted individuals by a camping ground operator was not necessary for the operator to conform with those doctrines. The Court also adopted a very narrow understanding of the concept of religious 'doctrines' which led it to look to only the trust deed of the entity in question. The Court thus displayed a fundamental misconception of the nature of religious doctrine, which often takes form in a myriad of expressions arising from lived experience.
- (b) In Report of Inquiry into a Complaint of Discrimination in Employment and Occupation,²¹ the Human Rights and Equal Opportunity Commission (HREOC) upheld the complaint of discrimination by a teacher who was a co-convenor of the Gay and Lesbian Teachers and Students Association and who was refused employment in Catholic schools on the basis that her 'public lifestyle' as a lesbian activist was at variance with the values and principles of Catholic teachings. Curiously, notwithstanding clear

¹⁹ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75.

²⁰ *Ibid* 278.

²¹ Human Rights and Equal Opportunity Commission, 'Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the ground of sexual preference' (HRC Report No 6, Human Rights and Equal Opportunity Commission, March 1998) 92-98.

evidence on the traditional position of the Catholic Church concerning sexuality, the HREOC found that ‘the known or public stance of Ms Griffin in relation to homosexuality does not conflict with the official teachings of the Catholic Church.’²²

- (c) The complexities of defining religious doctrine is also demonstrated by the range of judicial determinations made in the various proceedings concerning a complaint against the Wesley Mission for refusing to consider a homosexual couple’s application to become foster carers.²³ The matter underwent seven differing hearings. Each judicial body reached a differing conclusion. Ultimately, after being ordered to reconsider the matter, the New South Wales Administrative Decisions Tribunal held that ‘while there is no relevant doctrine of the Uniting Church which would bind the Wesley Mission the Mission itself is entitled to propagate its own doctrines on the subject of homosexuality and may do so by teaching or other means not necessarily amounting to the formal pronouncement of a “doctrine”.’²⁴ However, it did so begrudgingly, calling upon Parliament to reconsider the legislation.

1.30 We conclude that courts are not the appropriate vehicles to determine what should be considered to be the doctrine of religious institutions. If theologians of a particular denomination are not able to conclusively determine foundational doctrines, how can we realistically expect that secular courts could have the resources to so determine?

²² Ibid.

²³ Culminating in the decision in *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293.

²⁴ Ibid 33.

Resolving the Issue

1.31 How are these concerns to be addressed? The Courts should adopt an approach that permits the religious institution and religiously convicted individual the maximum scope to define their own doctrine. The law should permit religious institutions a wide scope of appreciation in which to extend their own interpretation of the applicable doctrine. The comments of Lord Nicholls in *R (on the application of Williamson) v Secretary of State for Education and Employment*²⁵ are considered to be informative in this respect:

It is necessary first to clarify the court's role in identifying a religious belief calling for protection under article 9. When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith: 'neither fictitious, nor capricious, and that it is not an artifice', to adopt the felicitous phrase of Iacobucci J in the decision of the Supreme Court of Canada in *Syndicat Northcrest v Amselem* (2004) 241 DLR (4th) 1, 27, para 52. But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual. As Iacobucci J also noted, at page 28, para 54, religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising. The European Court of Human Rights has rightly noted that 'in principle, the right to freedom of religion as understood in the Convention rules out any appreciation by the state of the legitimacy of religious beliefs or of the manner in which these are expressed': *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 306, 335, para 117. The relevance of objective factors such as source material is, at most, that they may throw light on

²⁵ [2005] 2 AC 246.

whether the professed belief is genuinely held. The relevance of objective factors such as source material is, at most, that they may throw light on whether the professed belief is genuinely held. Everyone, therefore, is entitled to hold whatever beliefs he wishes. . . . The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention.

1.32 In that matter Lord Walker held:

For the court to adjudicate on the seriousness, cogency and coherence of theological beliefs is (as Richards J put it in *R (Amicus) v Secretary of State for Trade & Industry* [2004] IRLR 430, 436–7, para 36) to take the court beyond its legitimate role. . . .

Only in clear and extreme cases can a claim to religious belief be disregarded entirely, as in *X v United Kingdom* (1977) 11 DR 55 (no evidence of the existence of the 'Wicca' religion).

1.33 Recommendation: Drawing upon the wording of Iacobucci J in *Syndicat Northcrest v Amselem* (2004) 241 DLR (4th) 1, this test may be legislatively phrased in the following terms:

For the purposes of this Act where an individual or entity holds a religious or conscientious belief, that belief is to be taken to be genuine if the holding of belief is neither fictitious, nor capricious, and is not an artifice.

This wording might utilised in Commonwealth enactments that require the interpretation of religious doctrine, such as the *Sex Discrimination Act 1984 (Cth)*, with the necessary amendments made *mutatis mutandi*. This wording is further utilised below in Part II (paragraph 1.110 & 1.113 to 1.118) wherein we make certain further recommendations as responses to the potential of courts to limit religious freedom through the adoption of narrow interpretations of religious doctrine or belief in the context of Religious Freedom Act.

1.34 Indeed, it might be said that the foundational enactment of the Presbyterian Church in Australia reflects the wisdom of such an approach. The Schedule to the *Presbyterian Church of Australia Act 1900 (Qld)* sets out the Basis of Union and Articles of Agreement of the Presbyterian Church. The Act, in accepting at face value the pronouncement of doctrine offered by the Presbyterian Church for enactment, reflects the State’s recognition of the Church’s autonomy in determining its statement of truth.

Employment and Religious Institutions

1.35 Turning to anti-discrimination law, one of the key areas in which this area of the law has the potential to impact upon the religious freedom of religious institutions is in the area of employment of staff and engagement of volunteers. We note that several submissions to the recently held ALRC Freedoms Inquiry called for the total or partial removal of exemptions in these areas (including where faith-based community organisations receive government funding).²⁶ However, such calls fly in the face of traditional protections key to religious freedom for millennia within the Western tradition. The first clause of the 1215 Magna Carta states, ‘*quod Anglicana ecclesia libera sit*’ (‘the English Church shall be free’). In its historical context, this clause was directed at preserving the Church’s rights to determine appointments to bishoprics, and hence the right to independently determine doctrine. These are not historical

²⁶ As for example are enunciated in various submissions to the Australian Law Reform Commissions Freedoms Inquiry and detailed in the Interim Report (ALRC Interim Report No 127) of that Inquiry, available at <<http://www.alrc.gov.au/inquiries/freedoms>>.

curiosities, the wisdom of such State / Church settlements continue to resonate today. The analogy to modern day discrimination law was not lost on United States Chief Justice Roberts when in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (2012) he observed:

Controversy between church and state over religious offices is hardly new. In 1215, the issue was addressed in the very first clause of Magna Carta. There, King John agreed that “the English church shall be free, and shall have its rights undiminished and its liberties unimpaired.” The King in particular accepted the “freedom of elections,” a right “thought to be of the greatest necessity and importance to the English church.” J. Holt, *Magna Carta* App. IV, p. 317, cl. 1 (1965).²⁷

1.36 In that decision the U.S. Supreme Court unanimously upheld the right of a religious school to determine appointments to its staff as a fundamental expression of the right to religious freedom. The ability to proclaim truth is central to the ongoing survival of truth within the conscience of the members of a community. Where a religious body operates an institution for the education of children, any removal of the ability to determine and teach doctrine in accordance with its teaching would be a restriction on these historically hard won liberties, which arguably are characteristic of the Western legal tradition.

[Inherent or Genuine Occupational Requirements Tests](#)

1.37 The same principle applies not only to governing bodies and 'frontline' staff but also to 'back office' roles. 'Inherent requirements' or 'genuine occupational requirements' tests contained within existing exemptions from various anti-discrimination laws risk encroaching upon religious freedom by failing to account for several foundational and distinct attributes unique to religious institutions.

1.38 First, the test potentially ignores the importance of 'mission fit' to associations generally. No suggestion is made that an organisation with purposes to promote indigenous culture should be required to employ persons from a differing culture. Nor

²⁷ *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (2012) 565 U.S. ____.

is it suggested that an environmental organisation should be required to employ a climate change denier. No one would argue that a sitting member of a mainstream political party should be required to offer employment to a member of an opposing party in the interests of promoting equality. Whilst the suggestion of any of these proposals would be treated rightly as absurd, calls for the removal of associational freedoms from religious organisations (as made to the ALRC Freedoms Inquiry)²⁸ extend the same reasoning. There is no logical reason to limit such a withdrawal of exemptions from religious institutions from indigenous cultural organisations, environmental organisations, political parties or any other form of associational engagement. All of these associational bodies are defined by their unifying attributes, being adherence to a legitimate common philosophy, worldview, culture or cause. Parkinson outlines the relevant principle: 'A right of positive selection is rather different from discrimination ... Selection based in part on a characteristic which is relevant to the employment is not discriminatory.'²⁹

1.39 To the contrary, the historical analysis provided above supports the conclusion that there are very real concerns that religious institutions are uniquely subject to the lure of questionable State regulation. That history should enliven a concern that demands to remove the ability of religious institutions to determine their membership, their representatives and their leadership are to be resisted. That history demonstrates the divisive consequences where protection is not afforded to religious institutions as aggregators of expressions of religious conviction.

1.40 The assertion that only those roles that are inherently 'spiritual' should be afforded the exemption suffers from a fundamental misunderstanding of the nature of religious conviction, including as understood within the Christian tradition. Belief is transformative and, if sincere, is demonstrated in action.³⁰ The gardener working

²⁸ Australian Law Reform Commission, Submissions (9 March 2016) Australian Law Reform Commission <<http://www.alrc.gov.au/inquiries/freedoms/submissions>>.

²⁹ Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 83, 94.

³⁰ The words of the Apostle Paul in the Epistle of James summarise this position:

within a Christian school should be enabled to consider their work as a vocation, a calling in which their inner convictions are expressed in the quality of their work efforts and their interactions with their fellow human beings. The gardener in particular should be free to pursue her work cultivating the earth as an image bearer of God, the Creator of all nature. Equally, the receptionist should be free to express his convictions concerning the obligations of love in human relationships through his employment.

1.41 In the Christian tradition, such persons do not see themselves, nor are they appreciated solely, as individuals. They are members of a community, and should be free to consider the role they may play and the contribution they may offer to the unique expression of the community ethos. The same applies to the gardener, to the office receptionist, or to the typist. Each participant within the organisation has a contribution to make to the organisational character of the organisation.

1.42 As further elaborated upon below, it is also arguable that those calling for removal of exemptions for religious institutions from anti-discrimination law, are actually making calls for Australia to breach its obligations under international human rights instruments. Article 18(1) of the *International Covenant on Civil and Political Rights* (ICCPR) provides ‘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 community with others and in public or private, to manifest his religion or belief in worship, observance,

‘14 What does it profit, my brethren, if someone says he has faith but does not have works? Can faith save him? 15 If a brother or sister is naked and destitute of daily food, 16 and one of you says to them, “Depart in peace, be warmed and filled,” but you do not give them the things which are needed for the body, what does it profit? 17 Thus also faith by itself, if it does not have works, is dead. 18 But someone will say, “You have faith, and I have works.” Show me your faith without your works, and I will show you my faith by my works. 19 You believe that there is one God. You do well. Even the demons believe—and tremble! 20 But do you want to know, O foolish man, that faith without works is dead? 21 Was not Abraham our father justified by works when he offered Isaac his son on the altar? 22 Do you see that faith was working together with his works, and by works faith was made perfect? 23 And the Scripture was fulfilled which says, “Abraham believed God, and it was accounted to him for righteousness.” And he was called the friend of God. 24 You see then that a man is justified by works, and not by faith only. 25 Likewise, was not Rahab the harlot also justified by works when she received the messengers and sent them out another way? 26 For as the body without the spirit is dead, so faith without works is dead also.’ (New King James Version).

practice and teaching.’ The right to religious freedom under Article 18 of the ICCPR is not limited to religious institutions or their employees, it applies to all. Article 18(3) provides that the ‘Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.’

The receipt of Government funding or Provision of Services should not be a ground to limit religious freedom

Receipt of Government Funding

1.43 Various submissions recorded in the ALRC’s Interim Report argue for the limiting or total removal of existing exemptions granted to religious institutions in anti-discrimination law. The use of such exemptions, it is argued, are particularly egregious where an institution receives government funding. However such arguments are misguided, and fail to account for several foundational aspects unique to religious institutions which are to govern their treatment at law.

1.44 To adopt one of the examples provided at paragraph 1.38, few would argue that an indigenous cultural organisation should be required to employ persons from a differing culture on the basis that the organisation receives government funding. The mere receipt of funding does not alter or limit the legitimacy of the rationale for the separate treatment of the organisation. This is because the proper treatment to be accorded to the indigenous cultural organisation is determined with respect to the purposes that are carried out by the organisation. In the allocation of government funding the correct questions are then twofold:

- (a) is this an end that the government should be supporting in the form of subsidy or direct funding?
- (b) is the chosen path the most appropriate means (having regard to efficiencies, economies of scale, community networks and the location of existing resources) to achieve that end?

Provision of Services to the Community

1.45 A further criteria in determining the appropriateness of the application of exemptions to religious bodies in receipt of government funding is whether the withdrawal of religious organisations from the provision of services would detrimentally impact upon the autonomy of the recipients of services. Where religious institutions are one of a number of service suppliers, the autonomy and choice of the recipient is enhanced. They are free to choose to receive services from an entity that is not religiously motivated or one that is.³¹ To enforce the withdrawal of religious institutions from the service provider offering is to limit the choice available to individuals within wider society. Conversely, the existing framework does not limit the choice of those who do not wish to receive services from religiously inspired institutions.

Engagement in Commercial Supplies

1.46 There is also a danger in limiting religious freedom to only those religious entities that do not engage in the commercial sphere. The right to religious freedom (both as classically understood and under contemporary international instruments) is not limited to religious institutions, it applies to all. All Australian jurisdictions that prevent discrimination, including the Commonwealth, have enacted provisions that endeavour to “balance” religious freedom with the right to freedom from discrimination. However, Professor Foster concludes that, “the only major provision in anti-discrimination legislation designed to provide protection for religious freedom for general citizens (as opposed to religious organisations or ‘professionals’) is contained in the law of Victoria”.³² Even this provision has been construed very narrowly. In 2014 the Victorian Court of Appeal ruled that a Christian Youth Camp had breached Victorian law by refusing to take a booking from a group of same sex attracted

³¹ Further consideration of these principles is given by Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' 40(2) *Monash University Law Review* 413.

³² Neil Foster, 'Religious Freedom in Australia' (Paper presented at the 2015 Asia Pacific JRCLS Conference, Sydney, 29 - 31 May 2015). He notes that a more limited exception exists in Tasmania: *Anti-Discrimination Act 1998* (Tas) s 52(d).

individuals.³³ Central to the decision was Maxwell J’s determination that, due to the commercial nature of the operations undertaken by Christian Youth Camps, it could not rely upon the exemption:

The conduct in issue here was an act of refusal in the ordinary course of the conduct of a secular accommodation business. It is not, in my view, conduct of a kind which Parliament intended would attract the attention of s 75(2). Put simply, CYC has chosen voluntarily to enter the market for accommodation services, and participates in that market in an avowedly commercial way. 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.³⁴

1.47 The decision is to be contrasted with the 2014 decision of the United States Supreme Court in *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al*, where the Court held that closely held corporations can assert religious freedom rights, proclaiming “[f]urthering their religious freedom also ‘furthers individual religious freedom’”.³⁵

Religious Freedom Protections Extend to Individuals

1.48 The right to religious freedom (including as recognised under Article 18 of the ICCPR) is not limited in its application, it applies to ‘everyone’, not just religious ministers. The Victorian Court of Appeal decision highlights the concern that discrimination law within Australia fails to ensure that sufficient recognition of religious freedom rights are provided to not only religious institutions but also

³³ *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75.

³⁴ *Ibid* 269.

³⁵ *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al* (10th Cir, 2014) 573 U.S.

individuals. Such is inconsistent with the extension of religious freedom rights to all within a community.

Freedom to act in accordance with one's conscience (including as informed, or burdened, by religious conviction) is at the root of the post-Enlightenment vision of the modern liberal State. Antidiscrimination law proposes the breach of this fundamental citizen State compact in the interests of preserving convenience of access to services or in the interests of protecting other citizens against 'offence'. Should a right against offence be equated with or greater than an individual's right to act in accordance with their conscience? The State risks abdicating its hard-won post-Enlightenment role as the champion of the individual conscience by proposing that the deeply-held convictions of religious persons may be compromised in the interests of preventing offence or in maintaining convenience of service supply.

1.49 Recommendation: The Inquiry should give consideration to the merits of a Commonwealth enactment that preserves the right to religious freedom and which:

- (a) does not contain a genuine occupational or inherent requirements test to the extent that it operates in the employment and pre-employment areas;**
- (b) protects the religious freedom rights of both individuals and corporations;**
- (c) operates irrespective of whether an organisation:**
 - (i) receives government funding;**
 - (ii) operates for profit or not-for profit; or**
 - (iii) provides commercial services.**

The Inquiry should also consider the means by which such an enactment might prevail against State-based anti-discrimination laws, to the extent that those laws fail to protect religious freedom, as internationally recognised. Specific drafting for such a protection is considered in the light of international law and current Australian protections to religious freedom in our discussion of an Australian Religious Freedom Act in Part II below.

Religious belief should be recognised as a protected attribute for the purposes of Commonwealth anti-discrimination law

1.50 Protection against discrimination on the ground of religion is protected under international law, being explicitly guaranteed by Article 26 of the ICCPR. As a result of the ratification of the ICCPR, the Commonwealth has legislative power to protect religious freedom by enacting a similar protection. It has however failed to do so. All State jurisdictions excepting New South Wales and South Australia have enacted provisions to protect religious belief from discrimination. There is no stand-alone Commonwealth statutory protection against discrimination on the grounds of religious belief or conviction. Section 351 of the *Fair Work Act 2009* (Cth) provides a limited protection against adverse action that only operates in respect of an employment relationship. It does not cover volunteers.

1.51 An example of the resulting level of exposure for religious institutions can be found in the recent threat by the University of Sydney Union to deregister the Sydney University Evangelical Union on the basis of their "discriminatory" requirement that new members ascribe to a statement of faith that affirms that "Jesus is Lord." As religious belief is not a protected attribute under the *Anti-Discrimination Act 1977* (NSW), and in the absence of an equivalent protection under Commonwealth, the Evangelical Union was left with limited recourse. A Commonwealth enactment would protecting organisations and individuals from discrimination on the basis of religious belief would address this concern.

1.52 The U.N. *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, (Religious Declaration)* has also been adopted by Australia. On 8 February 1993 the then Attorney-General made a declaration under s 47 in relation to the U.N. Declaration which was published in the Government Gazette on 24 February 1993 in the following terms:

I, MICHAEL JOHN DUFFY, Attorney-General, after consulting the appropriate Minister of each State, under subsection 47(1) of the Human Rights and Equal Opportunity Commission Act 1986, declare that the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief proclaimed by the General Assembly of the United Nations on 25 November 1981 (resolution 36/55), being a declaration that has been adopted by Australia, is an international instrument relating to human rights and freedoms for the purposes of that Act.

1.53 The *Religious Declaration* contains the following:

Considering that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed ...

Concerned by manifestations of intolerance and by the existence of discrimination in matters of religion or belief still in evidence in some areas of the world,

Resolved to adopt all necessary measures for the speedy elimination of such intolerance in all its forms and manifestations and to prevent and combat discrimination on the ground of religion or belief...

1.54 Article 2 of the *Religious Declaration* relevantly provides:

1. No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs.

2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

1.55 Given the wide-range of protected attributes within Commonwealth anti-discrimination law there is no reason why religion should be precluded from those attributes. Given the paucity of protections at common law there are very real reasons why such a protection should be legislated. This is particularly the case in light of the preponderance of religious minorities within contemporary, multicultural Australia.

The protection should be extended to religious belief (or conviction, which terms we consider to be interchangeable), affiliation, and expression, practice and activity and should cover both direct and indirect discrimination.

1.56 Such is consistent with the recommendations of the recent *Senate Select Committee Report on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill*, released 15 February 2017. In a significant recognition of religious freedom rights, and in light of Australia's international human rights obligations, the Committee agreed that broader reform of Commonwealth anti-discrimination law 'should be reconsidered to advance protections for religious freedom' and to 'enhance the current protections for religious freedom.' The Committee considered that this could most appropriately be done by including religious belief as a protected attribute in Commonwealth anti-discrimination law. Importantly, in the Committee's view, reform was needed irrespective of whether same-sex marriage was legislated.

1.57 The protection to religious freedom through a prohibition on religious discrimination could be enacted as a component of a Religious Freedom Act (further discussed below), or as a stand alone measure.

General Exceptions Clause to be Preferred over Exemptions Clause

1.58 It is also important to note that styling the freedom of religious expression as an exemption to the requirements of anti-discrimination law is not consistent with the fundamental nature of the right to religious freedom, including, as is further outlined below, the protection of that right in international human rights law. It assumes that the only real human rights are anti-discrimination rights, with the remaining rights being cast and secondary in recognition. As noted by Neil Foster:

The danger is that in a "secular" Western society where religion is often perceived as archaic and anachronistic, freedom of religion rights will be restrictively construed,

ignored or reduced to a merely formal principle and automatically subordinated to other rights and interests.³⁶

The presumption behind this practice is that religious freedom is not as legitimate a right as other rights, and should always be ‘trumped’ by those other rights. As noted by Patrick Parkinson:

The concern is that in a situation where the prevailing intellectual fashions of the day tend towards a disregard for religious freedom, a narrow interpretation may be given to what it means to practice religion, confining it to private belief and worship. In Communist countries of the old Soviet bloc, that amount of respect for freedom of religion was also given.³⁷

The correct interpretation however is that religious freedom is a right independent and equal to other rights, and that where the right to religious freedom conflicts with another right, the relevant boundary between the two rights is to be determined by reference to the appropriate reach of each right. This focus should be on the maximum preservation of each right, not the subjugation of one right to the other. Arguably the focus on recognising religious freedom through the vehicle of exemption fuels the current calls for removal of exemptions, reflected in certain of the submissions to the ALRC Freedoms Inquiry.³⁸

1.59 In its 2016 Report the ALRC Freedoms Inquiry noted that:

Parkinson and Aroney have proposed a general limitations clause that redefines discrimination to include limitations on freedom of religion where ‘necessary’. The proposed definition is comprehensive and combines direct and indirect discrimination. The definition includes a proportionality test and what is not

³⁶ Neil Foster, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (Paper presented at the Magna Carta and Freedom of Religion or Belief Conference, St Hugh's College, Oxford, 21-24 June 2015) available at: <http://works.bepress.com/cgi/viewcontent.cgi?article=1150&context=neil_foster> 3.

³⁷ Parkinson, Patrick, 'Christian Concerns about an Australian Charter of Rights' (2010) 15(2) Australian Journal of Human Rights 83, 102.

³⁸ Australian Law Reform Commission, *Submissions* (9 March 2016) Australian Law Reform Commission <<http://www.alrc.gov.au/inquiries/freedoms/submissions>>.

discrimination—due to religious beliefs—within the definitional section itself, rather than expressing it as a limitation, exception or exemption:

1. A distinction, exclusion, restriction or condition does not constitute discrimination if:
 - a. it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or
 - b. it is made because of the inherent requirements of the particular position concerned; or
 - c. it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or
 - d. it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.
2. The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate objective within the meaning of subsection 1(a).

The ALRC concluded ‘further consideration should be given to whether freedom of religion should be protected through a general limitations clause rather than exemptions’.³⁹

1.60 Recommendation: Consistent with the recommendation of the ALRC, consideration should be given to a review of the current exemptions for religious institutions in anti-discrimination law with a view to replacing exemptions with general limitations clauses.

Part II - Religious Freedom Act

1.61 Having mapped certain of the areas in which it is considered that religious freedom is being encroached upon in Australia, or in which calls for encroachment are

³⁹ Australian Law Reform Commission, above n 5, at paragraph 5.124 and 5.154.

being made, and having made certain targeted recommendations to enhance religious freedom protections, we now turn to consider means by which this freedom may be protected at a national level. As noted by the European Court of Human Rights in *Serif v. Greece*:

Although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other ... In general, protecting the framework of pluralism involves protecting the right of individuals and groups to maintain their differences. The aim is not to repress difference but to allow differences to be authentically expressed, albeit in peaceful ways.⁴⁰

1.62 If competition between comprehensive worldviews is a necessary concomitant of a pluralist society, the State has an interest in finding the means by which resulting conflict can be constructively resolved. Fundamental to the resolution of such conflict is the applicable mean applied by the Courts. Differing jurisdictions around the globe have approached this question with varying degrees of balance. In order to give consideration to an appropriate standard, we first consider the context of the applicable protections in Australian law. We then turn to consider differing means of protecting religious freedom internationally. We include in this discussion the relevant international instruments under which Australia has obligations. It is found that from this review that certain authorities hold the potential to provide significant resources from which the solutions recommended in conclusion might be fashioned. We then conclude with a comment on an Australian Religious Freedom Act.

1.63 It is acknowledged that the concept of a Religious Freedom Act is not without contention. Many voices, including those of Christians, have spoken against its introduction. This paper does not take a position on whether such an Act should be

⁴⁰ *Serif v. Greece* (ECtHR, App. No. 38178/97, 14 December 1999).

legislated. It instead aims to provide a helpful analysis that sets out what is considered to be the better models of protection and lessons learned from jurisdictions in which such enactments have worked to the detriment of religious liberty. It also weighs the relative strengths of existing models. It does note that the Australian protection operates within a very limited scope.

Existing Protections in Australian Law

Commonwealth Constitution

1.64 Section 116 of the Australian Constitution protects the free exercise of religion in the following terms:

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

The text was based upon, although modified, the United States First Amendment. Section 116 only restricts Commonwealth legislative power. It does not apply to the States.

1.65 In these submissions we are concerned with the free exercise clause contained within section 116 of the Australian Constitution. We do not address the establishment clause contained within section 116. Unlike the position in the United States, the Australian High Court has had relatively few occasions to consider the scope of the religious freedom clause within section 116. We set out an overview of the principal authorities.

1.66 In *Krygger v Williams*⁴¹ the High Court considered the claim that attendance at peacetime military drill would limit the free exercise of the plaintiff's religion as it would limit his ability to read the scriptures and require him to fight in war. The *Defence Act* allowed for conscientious objectors to be deployed to non-combative roles, but did not permit an absolute exemption. Chief Justice Griffith held:

Sec. 116 of the Constitution provides that "the Commonwealth shall not make any law for . . . prohibiting the free exercise of any religion" - that is, prohibiting the practice of religion-the doing of acts which are done in the practise of religion. To require a man to do a thing which has nothing at all to do with his religion is not prohibiting him from the free exercise of religion. It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec. 116, and the justification for a refusal to obey a law of that kind must be found elsewhere. The constitutional objection entirely fails.⁴²

1.67 As noted by the ALRC, 'these statements can be seen as suggesting that the free exercise clause is concerned only with laws which "in terms" ban religious practices or otherwise forbid the free exercise of religion'.⁴³

1.68 Justice Barton held:

As to the constitutional objection, the Defence Act is not a law prohibiting the free exercise of the appellant's religion, nor is there any attempt to show anything so absurd as that the appellant could not exercise his religion freely if he did the necessary drill. I think this objection is as thin as anything of the kind that has come before us.

1.69 Justice Barton found that the *Defence Act* defined the boundaries for religious exemption from the requirements of the Act, and whether the plaintiff could meet those exemptions was the relevant determinant. Essentially Barton J held that the

⁴¹ (1915) 15 CLR 366.

⁴² *Krygger v Williams* (1912) 15 CLR 366, 369.

⁴³ Australian Law Reform Commission, above n 5, at paragraph 5.33.

legislature had turned its mind to the question, and it was a question left to the legislature to determine. The Court ultimately found the law requiring attendance at military training did not infringe the free exercise clause of s 116.

Jehovah's Witnesses

1.70 In *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*⁴⁴ (*Jehovah's Witnesses*) the High Court considered a declaration by the Governor General made during World War Two that the Jehovah's Witnesses were prejudicing the defence of the Commonwealth and permitting subsequent seizure of property. The High Court held that the declaration was not in breach of section 116. After a survey of U.S. religious freedom cases prior to 1900, Latham CJ held that section 116 was intended to operate as a limitation upon the legislative authority of Parliament and that the appropriate test would be whether the impugned law is an 'undue infringement on religion'.⁴⁵ In making that determination, his Honour said that the purpose of legislation was to be considered as only one of the applicable factors when considering purported breach of s 116. Justice Starke held that an individual's right to religious freedom is constrained by the right of other society members to protection against 'unsocial actions of actions subversive of the community itself.'⁴⁶

1.71 The Australian Law Reform Commission concludes that 'Arguably, the judges in the *Jehovah's Witnesses* case took a broad view of the free exercise clause, and assumed that a "facially-neutral regulation directed at the suppression of subversive organizations, burdening religion in its effect", could offend the clause.'⁴⁷

⁴⁴ (1943) 67 CLR 116.

⁴⁵ *Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116, [10] (Latham CJ).

⁴⁶ *Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116, 155 (Latham CJ).

⁴⁷ Australian Law Reform Commission, above n 5 at paragraph 5.35.

Kruger v Commonwealth (Stolen Generations Case)

1.72 In *Kruger v Commonwealth*⁴⁸ the High Court held that section 116 was not breached by a law authorising the removal of aboriginal children from their families. The Court adopted an interpretation of the free exercise clause which focussed on the ‘purpose’ of the impugned legislation. The High Court offered several variations of a ‘purposive’ test for s 116, all of which required an examination of the purpose of relevant legislation to see if it had the purpose of impairing freedom of religion.

1.73 Chief Justice Brennan held that to offend section 116 ‘a law must have the purpose of achieving an object which s 116 forbids’.⁴⁹ Justice Gummow, with whom Dawson J agreed,⁵⁰ held that the relevant question is ‘whether the Commonwealth has made a law in order to prohibit the free exercise of any religion, as the end to be achieved’.⁵¹

1.74 Justice Gaudron also followed a purposive approach. Her Honour held that to determine the purpose of legislation, regard might also be had to the effect of the legislation upon the free exercise of religion. She held that ‘s 116 was intended to extend to laws which operate to prevent the free exercise of religion, not merely those which, in terms, ban it.’⁵² She retained a focus on the purpose of the legislation, but allowed that the determination of purpose may be informed by the legislation’s effect upon free exercise.

1.75 Neil Foster has offered the following analysis:

The upshot of *Kruger*, then seems to be that the majority of the Court took a reasonably narrow, “purposive” view of s 116, requiring a close examination of the purpose of relevant legislation to see if it had the purpose of impairing freedom of

⁴⁸ (1997) 190 CLR 1.

⁴⁹ *Kruger v Commonwealth* (1997) 190 CLR 1, 40.

⁵⁰ *Kruger v Commonwealth* (1997) 190 CLR 1, 60-61.

⁵¹ *Kruger v Commonwealth* (1997) 190 CLR 1, 160.

⁵² *Kruger v Commonwealth* (1997) 190 CLR 1, 131.

religion. Arguably this is something of a retreat from comments made by Latham CJ in the JW's case, where his Honour there said that the purpose of legislation was only one factor in determining whether it breached s 116 (see JW's at 132, though this passage itself was doubted by Gaudron J in Kruger at 132.) However, some members of the Court at least allowed that legislation could have more than one purpose, and Gaudron J demonstrates how even in this case it could have been concluded that one purpose at least of the relevant legislation was the impairment of free exercise of religion.⁵³

1.76 The High Court thus held that laws that have the effect of indirectly prohibiting the free exercise of religion are not invalidated by s 116. The section is directed towards laws that have the prohibited purpose, not merely an indirect effect. The content of the current protection to the exercise of religious freedom as recognised by the High Court may thus be described as only protecting citizens against any legislation that has as its purpose the removal of religious freedom rights. It fails to acknowledge that neutral laws may actually burden religious expression.

1.77 The limited protection in the form of the purposive test adopted by the High Court is a concern for the expression of religious freedom within Australia. As noted by Cole Durham if 'the laws authorizing the official's activity are reviewed under a deferential standard of review according to which any neutral or general law can trump religious freedom, the official has virtually no legal incentive to cooperate and an accommodation depends on his or her good graces. This is particularly problematic for unpopular or less known groups.'⁵⁴ The concern over the limited scope of section 116 is also held by the Australian Human Rights Commission, which in 1998 (as the HREOC) concluded: 'the wording of Section 116, coupled with the weight of judicial opinion, leaves little doubt that its scope is limited. In particular, it does not amount to a constitutional guarantee of the right to freedom of religion and belief.'⁵⁵

⁵³ Foster, above n 32.

⁵⁴ Durham, above n 3.

⁵⁵ Human Rights and Equal Opportunity Commission, above n 4, 12.

Common Law

1.78 We now turn to consider whether there is a common law protection for religious freedom in Australia. The weight of Australian authority has held that, to the extent such a protection exists, the doctrine of parliamentary sovereignty will permit Parliament to infringe upon such common law freedom where there is a clear intention in legislation to do so. In *Grace Bible Church Inc v Reedman* the South Australian Supreme Court held that there is no inalienable right to religious freedom at common law.⁵⁶ The Australian Human Rights Commission (then HREOC) has concluded:

The level of protection for the right to freedom of religion or belief under State law has been judicially considered in South Australia, one of the States which does not have a constitutional guarantee for this right. The Full Court of the Supreme Court of South Australia has confirmed there is no legal remedy available to any person who believes his or her right to freedom of religion or belief has been violated by that State's Parliament or Government.⁵⁷

1.79 In a separate case involving the lawfulness of a Commission of Inquiry established to consider the "secret women's business" claims of Ngarrindjeri women and whether such were relevant to the construction of the Hindmarsh Island Dam, Chief Justice Doyle held that, "I accept that freedom of religion is one of the fundamental freedoms which entitles Australians to call our society a free society. I accept that statutes are presumed not to intend to affect this freedom, although in the end the question is one of Parliamentary intention."⁵⁸ On the basis of this case, Neil Foster concludes that:

[I]t is unlikely that there is a common law freedom of religion principle. If there were, it would not operate as a constitutional constraint on law making by Parliaments, but

⁵⁶ *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376.

⁵⁷ Human Rights and Equal Opportunity Commission, above n 4, 14.

⁵⁸ *Aboriginal Legal Rights Movement Inc v State of South Australia and Another (No 1)* (1995) 64 SASR 551, 552.

it could function (as in the recent past the freedom of speech principle has functioned) as a “presumption” which would inform courts when interpreting legislation. The “principle of legality” means that a court, when reading an Act, will assume unless there are clear words to the contrary that Parliament does not intend to infringe a fundamental common law right. So if it could be argued that “freedom of religion” is, or perhaps has now become, a fundamental common law right, as “the essence of a free society”, then it may provide guidance for courts interpreting legislation.⁵⁹

Principle of Legality

1.80 The High Court’s doctrine of the ‘principle of legality’ contains some protection to religious freedom, although this again operates subject to any countervailing parliamentary intention. The ALRC has recently summed up the relevance of this principle for religious freedom in the following terms:

The principle of legality provides some protection to freedom of religion. When interpreting a statute, courts will presume that Parliament did not intend to interfere with freedom of religion, unless this intention was made unambiguously clear. In *Canterbury Municipal Council v Moslem Alawy Society*, it was suggested that Australian courts should show restraint in upholding provisions which interfere with the exercise of religion: If the ordinance is capable of a rational construction which permits persons to exercise their religion at the place where they wish to do so, I think that a court should prefer that construction to one which will prevent them from doing so.

However, under Australia’s model of parliamentary supremacy, common law protection of freedom of religion has its limits, where a legislative intention is clearly expressed: Although a court intent on maximally protecting the common law right to freedom of religion might exhibit unusual reluctance to find that Parliament intended

⁵⁹ Neil Foster, 'Religious Freedom in Australia' (Paper presented at the 2015 Asia Pacific JRCLS Conference, Sydney, 29 - 31 May 2015) 15, 20.

to invade the right, the presumption that Parliament does not intend to interfere with common law rights and freedoms remains rebuttable.⁶⁰

1.81 Again, the principle fails to provide a clearly enunciated religious freedom protection, and suffers from the prospect of failing to protect religious freedom against legislative incursion.

States and Territories

1.82 Section 46 of the *Tasmanian Constitution (Constitution Act 1934 (Tas))* is the only Australian State enactment that provides a Constitutional guarantee to religious freedom. It is in the following terms:

PART V - General Provisions 46. Religious freedom

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

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

1.83 As noted by Professor George Williams in his submission to this Inquiry, ‘this provision is of limited, perhaps no, utility. It is not entrenched in that Constitution, and so can be overridden by any subsequent statute of the Tasmanian Parliament.’

Conclusion

1.84 The Australian Human Rights Commission (then HREOC) concluded its 1998 survey of religious freedom within Australia with the following suitably worded findings:

Section 116 of the Australian Constitution provides only limited protection of the right to freedom of religion and belief. It restricts only the legislative powers of the Commonwealth. It does not apply to the States. It is not a positive guarantee of

⁶⁰ Australian Law Reform Commission, above n 5, at paragraph 5.39.

freedom of religion and, apart from the prohibition of a religious test, it does not apply to executive and judicial powers and activities. Tasmania is the only Australian State to provide for the right to freedom of religion and belief in its constitution. The mainland States could therefore, if they saw fit, establish a state church or religion, oppress religious beliefs and practices or require a religious test as a qualification for any public office. Relevant federal, State and Territory laws do not provide comprehensive guarantees of the freedom of religion and belief. The level of protection afforded to the right to freedom of religion and belief in Australia is relatively weak compared to a number of other comparable countries.⁶¹

International Protections

United Nations International Covenant on Civil and Political Rights

1.85 Article 18 of the *International Covenant on Civil and Political Rights* provides the international protection of religious freedom that Australia has ratified. It is in the following terms:

Article 18

1. 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 community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

⁶¹ Human Rights and Equal Opportunity Commission, above n 4, 23.

1.86 Australia is a signatory to the ICCPR and is bound by the First Optional Protocol to the ICCPR. This means that individuals may make complaints to the United Nations Human Rights Committee that Australian legislation (including legislation of individual States and Territories pursuant to Article 50 of the ICCPR) does not align with the protections offered by the ICCPR.

1.87 Under the ICCPR, limitations clauses, of which Article 18(3) is an example, are to be interpreted in accordance with *The United Nations Economic and Social Council's Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*.⁶² These Principles provide that 'all limitation clauses shall be interpreted strictly and in favor of the rights at issue'. The Principles provide that:

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

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

A proportionate approach to the resolution of the boundary of competing rights requires investigation of means to accommodate competing rights without unduly burdening the right to religious freedom. Importantly, the Siracusa Principles require that 'In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.'⁶³

⁶² UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, E/CN.4/1985/4 (28 September 1984).

⁶³ *Ibid*, paragraph 11.

1.88 The United Nations Human Rights Committee in its General Comment on ICCPR Article 18 has described the right to freedom of thought, conscience and religion in the following terms:

The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.

1.89 Article 4(2) of the ICCPR reflects the fundamental aspect of the right to religious freedom, listing it amongst a limited suite of the freedoms that may not be infringed upon in a time of ‘public emergency which threatens the life of the nation’. This has led the Human Rights Committee in General Comment 22 to describe the right to religious freedom as a ‘fundamental’ right, ‘which is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security.’⁶⁴

1.90 In its General Comment 18, the United Nations Human Rights Committee has explained that conduct is not discriminatory if it is for a purpose that is legitimate under the ICCPR:

the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.

This statement is not qualified by necessity, nor does it require that the purported differentiation is the most appropriate means of achieving the purpose, rather the test is to achieve a legitimate purpose and be determined by reasonable and objective criteria.

⁶⁴ Human Rights Committee, *General Comment No 22: Article 18*, 48th sess, (20 July 1993), [8].

1.91 Furthermore, in respect of education, removal of any exemption from anti-discrimination regimes may breach Article 18(4) which provides for the right of parents to educate their children in these terms:

The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The ability to model faith is essential to the teaching of faith. The distinction between belief and practice underpinning the treatment of religion within many modern legal regimes is not a presumption that accords with a Christian understanding of the role of faith in practice.

1.92 Cole Durham offers the following analysis of the ICCPR's requirements for limitations to the right to religious freedom:

Limitations on manifestations must pass three tests. First, they must be prescribed by law. This requirement has a formal element (requiring that the interference in question is legally authorized) and a qualitative element (requiring that fundamental rule of law constraints such as non-retroactivity, clarity of the legal provisions, absence of arbitrary enforcement and the like be observed)...

International standards go further and prescribe a restricted set of permissible or legitimating grounds for limitations. ... these legitimating grounds are restricted to those which are necessary "in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." While the legitimating grounds are quite broad and in most cases at least one is available to support the particular limitations being challenged, it is quite clear that only the enumerated legitimating grounds may be invoked to justify a limitation...

The real core of the ICCPR... test lies in assessing whether the particular limitation is "necessary"⁶⁵

⁶⁵ Durham, above n 3.

1.93 As outlined in the Siracusa Principles to be ‘necessary’ a limitation must not be disproportionate. Durham concludes that ‘Proportionality analysis has ... become the dominant approach in many parts of the world for addressing religious liberty claims.’⁶⁶ He provides the following review of the jurisprudence of the ICCPR and the European Court of Human Rights:

the issue of necessity must be assessed on a case-by-case basis. However, certain general conclusions have emerged. First, in assessing which limitations are “proportionate,” it is vital to remember that “freedom of thought, conscience and religion is one of the foundations of a democratic society”. State interests must be weighty indeed to justify abrogating a right that is this significant. Second, limitations cannot pass the necessity test if they reflect state conduct that is not neutral and impartial, or that imposes arbitrary constraints on the right to manifest religion. Discriminatory and arbitrary government conduct is not “necessary”—especially not in a democratic society. In particular, state regulations that impose excessive and arbitrary burdens on the right to associate and worship in community with others are impermissible. In general, where laws are not narrowly tailored to further one of the permissible legitimating grounds for limitation, or *where religious groups can point to alternative ways that a particular state objective can be achieved that would be less burdensome for the religious group and would substantially accomplish the state’s objective, it is difficult to claim that the more burdensome alternative is genuinely necessary*. Further, counterproductive measures are obviously not necessary. Finally, the U.N. Human Rights Committee has noted that limitations “must not be applied in a manner that would vitiate the rights guaranteed in article 18,” and the European Court would no doubt take a similar position. Finally, restrictions on religious freedom “must not impair the very essence of the right in question.” (our emphasis added).⁶⁷

⁶⁶ Ibid.

⁶⁷ Ibid.

Canada

1.94 The *Canadian Charter of Rights and Freedoms* took effect in 1982 as an amendment to Canada's Constitution. It provides the following protection:

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication ...

Article 15(1) also provides that every individual has the right to equal protection and benefit of the law without discrimination based on religion.

1.95 The Supreme Court of Canada has offered the following definition of religious freedom:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that. Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.⁶⁸

United States

1.96 The *Religious Freedom Restoration Act 1993* (RFRA)⁶⁹ was enacted in response to the U.S. Supreme Court's decision in *Employment Div., Dept. of Human Resources of Ore v Smith*⁷⁰. In that decision the Court held that "neutral generally applicable laws may be applied to religious practices even when not supported by a compelling

⁶⁸ *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 336 per Dickson J, 94–95.

⁶⁹ *Religious Freedom Restoration Act 1993* 42 U.S.C. §2000bb.

⁷⁰ 494 U.S. 872 (1990).

governmental interest.”⁷¹ In so doing, the Court overturned its prior decision in *Sherbert v Verner*.⁷² That case concerned a Seventh-day Adventist who, being dismissed for refusing to work on Saturday, her Sabbath, was denied unemployment compensation under a rule requiring applicants to accept available work. Sandel notes that in that case:

The Supreme Court decided in her favor, holding that the state could not force a worker to choose between her religious convictions and means of support. According to the Court, requiring the state to take account of Sabbath observance in the administration of its unemployment program did not prefer religion in violation of neutrality. Rather, it enforced "the governmental obligation of neutrality in the face of religious differences."⁷³

In reaching this conclusion the Supreme Court stated that the applicable test for First Amendment religious freedom claims was whether the challenged action imposed a substantial burden on the practice of religion, and if it did, whether it was needed to serve a compelling government interest.

1.97 The RFRA is a response to what Michael Sandel has called ‘the [Supreme] Court’s occasional hospitality to the claims of encumbered selves’⁷⁴. It provides an example of a legislative response to a perceived inability of the Supreme Court to protect religious freedom. Section 3 of the RFRA effectively restates the prior law under *Sherbert v Verner*:

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) In General: Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

⁷¹ *Employment Div., Dept. of Human Resources of Ore v Smith* 494 U.S. 872 (1990). Quote from *City of Bourne v Flores* 521 U.S. 507, 514 (1997).

⁷² 374 U.S. 398 (1963).

⁷³ Michael J Sandel, 'Religious Liberty- Freedom of Conscience or Freedom of Choice?' (1989) 597(3) *Utah Law Review*, 612-613.

⁷⁴ *Ibid*, 614.

(b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

Section 5(4) clarifies that the RFRA is intended to be a statement of the protections contained in the First Amendment: 'the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution'. While section 5(1) states that the RFRA extends to the States, this provision was struck down by the Supreme Court in *City of Boerne v. Flores*.⁷⁵ This led a number of States to enact their own religious freedom restoration Acts. RFRA remains in effect with respect to federal legislation.

Comparing the tests

1.98 The American and the ICCPR models offer differing responses to the challenges of protecting religious freedom in pluralistic modern democracies. In this section we consider whether there are any aspects of these models that may be said to be preferred.

1.99 Article 18(3) of the ICCPR only permits limitations upon the right to religious freedom where they fall within a defined list of criteria, being those that 'are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. Cole Durham has claimed the U.S. compelling state interest 'test is arguably broader [than the ICCPR], in the sense that anything a court thinks is "compelling" may meet the standard.'⁷⁶ The U.S. model thus leaves religious freedom subject to a wide scope of judicial discretion.

⁷⁵ 521 U.S. 507, 514 (1997).

⁷⁶ Durham, above n 3.

1.100 However, as Durham notes, both models are subject to the concern that they leave wide scope for judicial discretion:

More significantly, both American compelling state interest and proportionality analysis confer significant discretion on judges in weighing religious freedom claims. A primary issue here is that cultural shifts associated with the process of secularization lead many judges to assign greater weight to secular state interests and less to religious concerns. This can occur because religion is no longer seen to deserve special protection, because there is a sense that religious activities and religious views should be consigned exclusively to the private sector, because religion has become more suspect as a locus of social danger, or for any of a variety of other reasons.

Even if judicial biases are not skewed in this way, there is a risk that the characterization of the values being balanced can be manipulated so that the system wide interests of the state are balanced against the individualized concerns of the religious freedom claimant...

1.101 Durham argues that ‘the interpretation of what constitutes an “interference” with or a “substantial burden” on religious freedom can be manipulated in ways that significantly reduce the viability of religious freedom claims.’⁷⁷ He identifies this trend in both American and ICCPR and European human rights jurisprudence:

In addition to the foregoing, both the United States strict scrutiny and the ICCPR/ECHR approaches impose threshold requirements below which religious liberty claims are not cognizable. In the United States there must be a “substantial burden” on free exercise before the burden shifts to the state to establish that there is a compelling state interest that cannot be accomplished in some less restrictive manner. In Europe, there must be an “interference” with a manifestation of religion. As cases proliferate, it is becoming evident that courts will often find ways to set this threshold fairly high, so that they can dismiss a case without further analysis ... in the future, efforts are needed to prevent setting these thresholds too high. Some of the cases seem to

⁷⁷ Ibid.

suggest that mere financial burdens are not sufficient to cross the threshold. In some cases, this has allowed imposition of significant burdens on individual claimants.⁷⁸

1.102 In Durham’s view, such judicial biases have left religious communities with reason for concern:

Depending on the particular country, the history of judicial appointments, the current composition of the judiciary, and traditions of deference or activism, religious communities may be more or less wary of judges and the power they have in interpreting religious freedom norms.⁷⁹

An Australian Religious Freedom Act?

1.103 Whilst these concerns over judicial discretion are significant, it is also noted that when considered against both the United States protections and against the jurisprudence of both the UNHCR and the ECHR, the religious freedom jurisprudence of the High Court and the common law in Australia seems manifestly inadequate. Notwithstanding the bold sentiments expressed by Mason ACJ and Brennan J concerning the centrality of the freedom of religion in *Church of the New Faith v Commissioner for Pay-Roll Tax*⁸⁰ extracted in the opening paragraphs of this submission, the weight of Australian authority has held that (in the words of the Australian Human Rights Commission) ‘The level of protection afforded to the right to freedom of religion and belief in Australia is relatively weak compared to a number of other comparable countries.’

1.104 The High Court has limited the protection of religious freedom under section 116 to circumstances in which legislation has a ‘purpose’ of limiting religious freedom. However, as recognised by section 2(2) of the RFRA, generally applicable ‘laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise’. Having acknowledged this fact, contrary to the High

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ (1983) 57 ALJR 785.

Court's jurisprudence, the question then asked in these submissions is: what is an acceptable test for balancing the claims of religious freedom with competing governmental interests? If it was thought that Australian law offered insufficient protection, the RFRA exists as precedent for the proposition that the legislature may respond to concerns that the judiciary is failing to sufficiently protect religious freedom in the form of a broad legislated protection.

[Australian Human Rights Commission Recommendation](#)

1.105 In 1998 the Australian Human Rights Commission (then HREOC) recommended the legislating of a Religious Freedom Act. The HREOC Report titled 'Article 18 Freedom of Religion and Belief' made the following findings and recommendations:

Findings and recommendations

- Australia does not fully satisfy its international human rights obligations relating to freedom of religion and belief as set out in the ICCPR and the Religion Declaration [*Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981.*]
- The Commonwealth has power under the Constitution to pass legislation to ensure greater protection of the right to freedom of religion and belief as set out in the ICCPR and the Religion Declaration.
- It is also open to the Commonwealth to put to the people a referendum proposing that the right to freedom of religion and belief be guaranteed through an amendment to Section 116 of the Constitution. However, the Commission is of the view that the enactment of Commonwealth legislation is a more appropriate way of addressing the issue at this stage. This would enable a period of reflection and debate within the community and would provide an opportunity to observe the operation of the legislation prior to taking the further step of proposing constitutional entrenchment.

The Commission recommends

R2.1 The Commonwealth Parliament should enact a Religious Freedom Act which, among other things, recognises and gives effect to the right to freedom of religion and belief.

R2.2 The Religious Freedom Act should affirm the right of all religions and organised beliefs as defined to exist and to organise and determine their own affairs within the law and according to their tenets.

R2.3 The Religious Freedom Act should cover the full range of rights and freedoms recognised in ICCPR article 18 and Religion Declaration articles 1, 5 and 6 including but not limited to

- freedom to hold a particular religion or belief
- freedom not to hold a particular religion or belief
- freedom to manifest religion or belief in worship, observance, practice and teaching
- freedom from coercion which would impair religion or belief
- the right of parents and guardians to organise family life in accordance with their religion or beliefs
- freedom from discrimination on the ground of religion or belief.

R2.4 In accordance with ICCPR article 18.3 the Religious Freedom Act should permit only those limitations on the right to manifest a religion or belief which are prescribed by law and necessary to protect public safety, health or morals or the fundamental rights and freedoms of others.

[The Right to Religious Freedom Applies to Individuals and Groups](#)

1.106 The Australian Human Rights Commission (then HREOC) also recommended that ‘The obligations in the Religious Freedom Act should apply to individuals, corporations, public and private bodies and all other legal persons who may be subject to Commonwealth legislation.’ We would extend this to not only the obligations, but also the freedoms.

1.107 It is important to note that the right to religious freedom does not operate solely at the individual level, it is also expressed and nourished by religious communities, which in themselves are to be accorded religious freedom rights. Furthermore, the right of religious communities to define their character is foundational to the preservation of the religious freedoms of the individual. This principle has been recognised by the European Court of Human Rights in *Hasan v Bulgaria* as follows:

Religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of divine origin ... Participation in the life of the community is thus a manifestation of one's religion protected by art 9 of the Convention. Where the organisation of the religious community is at issue, art 9 must be interpreted in the light of art 11 of the Convention which safeguards associative life against unjustified State interference. Seen in this perspective, the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which art 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by art 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.⁸¹

1.108 As noted by Parkinson, the modern tendency that 'the only human rights that should be given any real significance are individual ones, and not group rights ... can make adherents disregard the competing claims of groups which would justify a right of positive selection in order to enhance the cohesion and identity of the group.'⁸²

⁸¹ *Hasan and Chaush v Bulgaria* (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000) [62].

⁸² Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 83, 88.

1.109 Furthermore, for the reasons put at paragraphs 1.46 to 1.47 it is considered that the religious freedom rights of corporations should not be limited solely to bodies established for religious purposes, but should also include for profit and not-for-profit corporations.

Proposed Drafting for a Religious Freedom Act

1.110 Drafting for a Religious Freedom Act which may accommodate such concerns is suggested as follows:

(1) Definitions

‘body established for religious purposes’ includes an entity:

- (a) to which section 37 of the *Sex Discrimination Act 1984* (Cth) applies; or (without limiting the foregoing)
- (b) established by or under the direction, control or administration of a body established for religious purposes; or (without limiting the foregoing)
- (c) that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed and is:
 - (i) a not for profit entity; or
 - (ii) a charity as defined by section 12(1) of the *Charities Act 2013* (Cth).

‘entity’ has the meaning given by section 184-1 of the *A New Tax System (Goods and Services Tax) Act 1999*, and in this Act also includes a non-entity joint venture.

(2) For the purposes of this Act, an entity that is not an individual:

(a) includes an entity, regardless of whether:

- (i) the entity is for-profit or not-for-profit;
- (ii) is a body established for religious purposes; or
- (iii) operates to make a profit or not; and

(b) can hold a religious or conscientious belief, including where:

- (i) the entity has stated or adopted that belief (whether or not such is stated in its governing documents, organising principles or its statement of values), including by adopting a set of beliefs or values of another entity or from a document or source which includes that belief; or
- (ii) a majority of the individuals who comprise the governing persons of the entity hold that belief.

(3) For the purposes of this Act, where an individual or entity holds a relevant belief, that belief is to be taken to be genuine if the holding of belief is neither fictitious, nor capricious, and is not an artifice.

(4) The rights to express a relevant belief contained in this Act include, but are not limited to, the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media.

Religious Freedom Should not be Limited to an Exemption to Another Right

1.111 In response to the Australian Human Rights Commission (then HREOC) 1998 recommendations for a Religious Freedom Act, Garth Blake QC noted that consideration will need to be given to:

the extent to which an exemption is granted permitting discrimination in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, and in other areas of public life such as club or society membership, the provision of goods and services, education and accommodation.⁸³

Our comments above at paragraphs 1.35 to 1.42 outline our position that legislation should not adopt genuine occupational or inherent requirements tests. They also contain our comments that any similar clauses should be styled as a ‘general exceptions’ clause rather than an ‘exemption’ clause. Consideration should be given to adopting a general limitations clause, as opposed to an exemption clause in any Religious Freedom Act recommended by the Committee.

Interaction with State Laws

1.112 Consideration will also need to be given to whether the proposed Religious Freedom Act should then be stated to prevail against any inconsistent State law. The Act might be based upon the external affairs power, and made:

⁸³Human Rights and Equal Opportunity Commission, above n 4, 306-7.

(i) as a law giving effect to Article 18 of the *International Covenant on Civil and Political Rights* done at New York on 16 December 1966 ([1980] ATS 23);

(ii) as a law giving effect to the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* Proclaimed by General Assembly of the United Nations on 25 November 1981 (resolution 36/55); and

(iii) as a law on a matter of international concern.

Addressing Concerns of Judicial Discretion

1.113 Cole Durham identifies several means which he suggests may assist in limiting judicial discretion that has the potential to undermine legislated religious freedom protections. The first focusses upon a weighing of the detriment to the state against the detriment to the religiously convicted. He suggests that ‘A more reasonable approach balances the marginal burden faced by the state in the particular interest against the actual burden of the claimant.’

1.114 He sees merit in specificity as a means to limit discretion:

In most areas, the tendency is toward generating greater specificity in human rights norms. Excessive abstraction leaves too much room for discretion. This helps to explain why most constitutions around the world are much more detailed today than similar documents were in the 18th century. Some see this as a loss of elegance, but in large part it is a result of increased experience and a desire to clearly resolve known issues.

1.115 He also notes that the state should be required to adopt the least restrictive means to achieve the desired outcome:

Another factor that can be particularly significant as a practical matter is whether the governmental interest in question can be sufficiently achieved in a way that is narrowly tailored to assure that it does not intrude unduly on the religious right in question. It is important to insist on fair characterizations of the state’s interest in this

regard, since characterizing a state interest in one way will rule out consideration of all possible alternatives, where a more reasonable description of the state's interest might allow more room for negotiation. There are a number of formulations of this basic narrow tailoring requirement, including among others insisting that the state employ the "least restrictive alternative," [as in the RFRA] to the Canadian notion of "minimal impairment" of the right or freedom.⁸⁴

The ICCPR's Siracusa Principles provide a similar restrictive means test wherein they require that 'In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.'⁸⁵ On the question of the assessment of alternative means, the RFRA sets the standard at a higher level, requiring that 'the application of the burden to a person ... is the least restrictive means.'

1.116 There are additional means which may be adopted as a response to concerns over excessive judicial discretion. As noted above, under the ICCPR a policy that purports to limit religious freedom must, amongst other factors, be shown to be a proportionate means to fulfil the aim. A proportionate approach to the resolution of the boundary of competing rights requires investigation of means to accommodate competing rights without unduly burdening the right to religious freedom. Whilst not exhausting the factors which would be proportionate, in the context of service supply, where there are equivalent services that may be supplied by an alternative provider, religious freedom should be protected by a statutory presumption that the limitation is disproportionate.

1.117 In addition, the foundational aspect of the conscience of the religious individual or corporation must be relevant to whether the expression is proportionate. The law should contain a presumption that any action which requires an individual or corporation to act against conscience is disproportionate, and that presumption might

⁸⁴ Durham, above n 3. The Canadian limitation is found in *Multani v. Commission Scolaire Marguerite-Bourgeoys and Attorney General of Quebec*, Supreme Court of Canada, 1 S.C.R. 256, 2006 SCC 6 (2006).

⁸⁵ at Paragraph 11.

only be displaced where the conscience of another individual is similarly impacted upon so as to require a course of conduct against their own conscience. Rights cannot operate in a vacuum. They must relate to the rights of others. Where rights compete, they must then be conversant within a realm that prioritises a vision of the common good, or the good life for the community.

1.118 However we offer these considerations as comments only. They should not be seen to be offered in support of the enactment of a Religious Freedom Act. They are only offered to enable the Committee to weigh the respective benefits and limitations of such an approach. We should only proceed with great caution towards a Religious Freedom Act. Durham offers a critical warning that such tests may not be sufficient as means to protect religious freedom: ‘in countless situations, legislation cannot fully specify the full range of protections for religious freedom that reasonable interpretation of legislation will afford.’⁸⁶

Part III - Religious Freedom and Australian Charities Charitable Endorsements

1.119 In its recent decision, *Obergefell v Hodges*,⁸⁷ the United States Supreme Court held that any U.S. State that holds a traditional view of marriage is acting unlawfully. Chief Justice Roberts in dissent stated that, as a result of the decision, the tax exempt status of U.S. religious institutions that opposed same-sex marriage ‘would be in question,’ based on the reasoning of the Court in *Bob Jones University v United States*.⁸⁸ That earlier decision drew upon the common law of charities, as applies in Australia, including as enunciated by the House of Lords in *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

⁸⁶ Durham, above n 3.

⁸⁷ *Obergefell v Hodges*, U.S. LEXIS 4250 (6th Cir, 2015).

⁸⁸ *Bob Jones University v United States; Goldsboro Christian Schools Inc v United States* 103 S. Ct. 2017 (1983) 461 U.S. 574, 76 L.Ed.2d 157.

1.120 There are sufficient reasons to consider that an Australian charity's position on sexuality may also be relevant to a determination of whether it meets the requirement of a charity at law. To demonstrate the salience of the interplay between antidiscrimination law, religious freedom and charitable status, under the subheading of 'unlawful activity', the Australian Charities and Not-for-profits Commission (ACNC) recently released public information guidance on 'Advocacy by Charities' that contained the following example:⁸⁹

Examples – likely to be unlawful purposes

A charity that has a charitable purpose of advancing social or public welfare by providing aged care and accommodation routinely refuses to provide these services to same-sex couples. Such a refusal amounts to unlawful discrimination, and a regular pattern of this behaviour or activity may disclose a purpose of engaging in unlawful activities.

Failure to allow for religious freedom within the context of Commonwealth anti-discrimination law may then impact detrimentally upon a religious institution's recognition as a charity at law.

Basic Religious Charities

1.121 Furthermore the ACNC has been given considerable powers over registered religious institutions, including the power to give directions, to instigate investigations, and suspend, remove and replace the leadership of religious institutions. The power to give directions also extends to giving directions to individuals in leadership, requiring them to not participate in making decisions that affect a substantial part of the business of the organisation.⁹⁰ These powers mean that a situation could arise where the ACNC, as a government body, has power to remove the eldership or senior pastor or other leader of a Church, and appoint another person in their place. It could

⁸⁹ Available at Australian Charities and Not-for-profits Commission, *Advocacy by Charities* <http://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/What_char_purp/ACNC/Reg/Advocacy.aspx>.

⁹⁰ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) Divisions 85 and 100.

prevent those in leadership from engaging in activities that influence the behaviour of others in the organisation. Elizabeth Shalders has argued that the ACNC could issue directions requiring the religious body to do, or refrain from doing, theoretically anything.⁹¹ It is not necessary for it to obtain prior Court approval for the exercise of the powers, representing a significant break from the position prior to the establishment of the ACNC, where for example the Attorney-General was given power to bring concerns before a Court.⁹² We consider these powers to be significant incursions upon the right of religious freedom under Commonwealth law.

1.122 The exemption granted from these requirements to Basic Religious Charities is highly limited in its application. Under section 205-35(2) of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth), it excludes any incorporated entity. In the 2014 reporting period, 12146 charities reported to the ACNC that their 'main activity' was the undertaking of 'religious activities'. Of these bodies, 4628 reported that they were not basic religious bodies. The vast majority of those charities reporting as not eligible to be a basic religious charity were incorporated. Whether a religious body chooses to take a corporate form is an arbitrary distinction in the consideration as to whether its religious freedom rights should be maintained.

1.123 Recommendation: The basic religious charity exemption should be expanded to include all incorporated entities that otherwise meet the criteria.

⁹¹ Elizabeth Shalders, 'The Use of Taxation Powers in Constraining Freedom of Association in Australia' (Paper presented at the Freedom of Religion: Freedom of speech, conscience and association in a religiously tolerant society, University of Queensland, St Lucia, 22 September 2014).

⁹² See for e.g. *Associations Incorporation Act 1981* (Qld); *Trusts Act 1973* (Qld) Part 8.

Part IV - Failure of State Based Human Rights Charters to Protect Religious Freedom⁹³

1.124 In Queensland Premier Anastacia Palaszczuk has announced her government's commitment to a Queensland human rights act, modelled on the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic). One of the purported justifications for a human rights charter is the protection it offers to individual rights against authoritarian State incursion. Rights here are seen as a bulwark protecting minority concerns against majoritarian consensus.

1.125 However, in this contest, precisely where the boundary lines are drawn can determine whether rights are preserved, or are trampled upon. As noted above, the 'limitations clauses' provide when rights can be limited, effectively defining their outer boundaries, the realm of permitted state incursion.

1.126 As noted above, the *International Covenant on Civil and Political Rights 1966*, which Australia has ratified, sets the international standard. For those rights that may be limited by State incursion, it permits only 'necessary' limitations. Contrary to this, the ACT Charter and the Victorian Charter both draw the boundary much further into the heartland of an individual's rights, permitting 'reasonable' State incursion.

1.127 The practical differences between these 'necessary' and 'reasonable' limitations are best illustrated in the context of the 'right to freedom of thought, conscience and religion' by real-life claims. Examples drawn from other jurisdictions include a Jewish prisoner not able to access a kosher diet in a remote prison; a health authority banning the wearing of a cross; Sikhs being directed to remove their turban in identity photos and a health authority banning the wearing of Sikh traditional dress. In each of these cases, the 'reasonable' standard offers a much shorter path to

⁹³ The following section draws, with the permission of the author, on an article by Mark Fowler appearing in the *Spectator Australia* on 05 December 2016.

majoritarian rule than the test of 'necessity'. The ICCPR requires the State to demonstrate that its interests 'necessarily' require the desired limitation of minority rights. The conflict between these standards takes on enhanced meaning in our multicultural, settler society. The choice adopted provides a measure of our willingness to accommodate minority convictions.

1.128 To grasp just how concerning the issue is for the purportedly 'protected' individual, consider these other rights protected by the ICCPR: the right to liberty of movement (Article 12); the right to privacy during court proceedings (Article 14); the 'right to hold opinions without interference' (Article 19); and the right to freedom of association (Article 22). All of these rights are protected by the 'necessary limitations' requirement.

1.129 For Queensland to adopt the Victorian model would effectively limit rather than protect human rights. A Charter of Rights should not derogate from the standards implemented in international law.

1.130 One way to think of 'rights' is as circumscribed domains of entitled conduct. Assume that under the ICCPR, Right Y protects both Act A and Act B. In Victoria a 'right' bearing the same name protects Act A, but not Act B. In substance the rights are materially different. Although sharing the same name, in practice, we are no longer talking about the same right.

This is not just a concern for citizens in each of the ACT, Victoria and Queensland. Under the ICCPR, the Commonwealth is held to account for the actions of the States in failing to protect human rights. The concern is accentuated by the fact that the violation of an ICCPR right by removal could be grounds for a complaint to the UN Human Rights Committee. As pointed out by Associate Professor Julie Debaljak, 'where the Victorian Charter obligations are less rigorous than the minimum protections guaranteed under international human rights law, the Commonwealth may still be held to account internationally for any violations of Australia's international human rights obligations.' Importantly for Victoria and Queensland,

under Article 50 the ICCPR applies in all parts of a federation ‘without any limitations or exceptions’.

1.131 Recommendation: The Committee should find that the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* and the *Human Rights Act 2004 (ACT)* fail to protect religious freedom as required by the ICCPR. The Committee should also recommend that any proposal made by the Queensland Government to implement a Human Rights Act acquit Australia’s obligations to protect religious freedom pursuant to the ICCPR.

Part V –Protecting Religious Freedom on the International Stage

1.132 The Committee’s Terms of Reference also require the Committee to have regard to:

1. The enjoyment of freedom of religion or belief globally, the nature and extent of violations and abuses of this right and the causes of those violations or abuses;
2. Action taken by governments, international organisations, national human rights institutions, and non-government organisations to protect the freedom of religion or belief, promote religious tolerance, and prevent violations or abuses of this right;

1.133 The Committee’s attention is also drawn to recent amendments to the United States *International Religious Freedom Act 1998* which impose the following requirements:

- (a) Noting that religious freedom had not been reported in ongoing U.S. Government Global Human Rights Reports, the Act creates an Ambassador for Religious Freedom to ensure that it is focussed upon.

- (b) U.S. Government Global Human Rights Reports are now required to report on:
 - i. severe violations of religious freedom in a country where a government does not exist or does not control its territory;
 - ii. identification of prisoners in a country;
 - iii. actions taken by a government to censor religious content, communications, or worship activities online;
 - iv. persecution of human rights advocates seeking to defend the rights of members of religious groups or highlight religious freedom violations; and
 - v. country-specific analysis of the impact of U.S. actions on religious freedom.
- (c) Designations of countries that appear twice in the special watch list for two years will be identified in a Report by the President and:
 - i. an evaluation of the impact on the advancement of U.S. interests in democracy, human rights, and security; and
 - ii. a description of policy tools being applied in the country, including programs that target democratic stability, economic growth, and counter-terrorism.
- (d) Mandatory religious freedom training is now required for all Foreign Service Officers.
- (e) The Commission shall make publicly available lists of persons who are imprisoned, detained, disappeared, placed under house arrest, tortured, or subject to forced renunciations of religious faith by the government of a foreign country or by a non-state actor that the commission recommends for designation as a country or entity of particular concern for religious freedom.

Recommendation: We recommend that this combination of ongoing reporting requirements and education of Departmental officials in religious freedom may provide suitable bases for Australia to enhance its role in the promotion of religious freedom on the global stage. It is recommended that the Australian Human Rights Commission (AHRC) be required to report on religious freedom persecution in its annual report to be provided to Parliament pursuant to section 30 of the *Human Rights Commission Act 1981* (Cth). The Report should also detail the impact of Australian Government actions on religious freedom. It is also recommended that Department of Foreign Affairs officers receive mandatory religious freedom training.

1.134 A non-binding component of the Bill expresses ‘the sense of Congress’ that:

- (a) the State Department should make specified assistance available to promote international religious freedom, and
- (b) preference for such assistance should be given to projects targeting religious freedom violations in countries designated as countries of particular concern for religious freedom and in countries on a special watch list.

Recommendation: Although the concept of conveying ‘the sense of Congress’ is unknown to the Australian Parliamentary system, similar policy provisions could be adopted and applied to Australian charities operating internationally and regulated by the Department of Foreign Affairs and Trade (including those operating under the Overseas Aid Gift Deductibility Scheme Guidelines) or the Australian Charities and Not-for-profits Commission. A further non-binding part of the Bill also calls upon U.S. Universities operating outside of America to adopt codes to ensure the protection of religious freedom of their workers, as examples to the wider foreign society.

1.135 We take the opportunity to thank the Commission for the opportunity to offer submissions in respect of this Inquiry. Should you have any further questions or comments you may liaise with Ron Clark on 07 3716 2800.

1.136 Presbyterian Church of Queensland, submitted by Ron Clark the Assembly Clerk on behalf of the Assembly.

Bibliography

Articles/Books/Reports/Internet Sources

Australian Charities and Not-for-profits Commission, *Advocacy by Charities*

<http://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/What_char_purp/ACNC/Reg/Advocacy.aspx>.

Australian Law Reform Commission, 'Traditional Rights and Freedoms— Encroachments by Commonwealth Laws', ALRC Report No 129 (2016).

Durham, W. Cole Jr, 'Religious Freedom in a Worldwide Setting: Comparative Reflections' (Speech delivered at Pontifical Academy of Social Sciences, Brigham Young University, 30 April 2011).

Foster, Neil, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (Paper presented at the Magna Carta and Freedom of Religion or Belief Conference, St Hugh's College, Oxford, 21-24 June 2015)

<http://works.bepress.com/cgi/viewcontent.cgi?article=1150&context=neil_foster>.

Foster, Neil 'Religious Freedom in Australia' (Paper presented at the 2015 Asia Pacific JRCLS Conference, Sydney, 29 - 31 May 2015).

Harrison, Joel and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' 40(2) *Monash University Law Review* 413.

Human Rights and Equal Opportunity Commission, 'Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the ground of sexual preference' (HRC Report No 6, Human Rights and Equal Opportunity Commission, March 1998).

The Hon Mr Justice David Malcolm AC, 'Religion, Tolerance and the Law' (1996) 70 *Australian Law Journal* 976.

Parkinson, Patrick, 'Christian Concerns about an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 83.

Sandel, Michael J, 'Religious Liberty- Freedom of Conscience or Freedom of Choice?' (1989) 597(3) *Utah Law Review*,

Shalders, Elizabeth, 'The Use of Taxation Powers in Constraining Freedom of Association in Australia' (Paper presented at the Freedom of Religion: Freedom of speech, conscience and association in a religiously tolerant society, University of Queensland, St Lucia, 22 September 2014).

Cases

Aboriginal Legal Rights Movement Inc v State of South Australia and Another (No 1) (1995) 64 SASR 551.

Adelaide Company of Jehovah's Witnesses v The Commonwealth (1943) 67 CLR 116.

Bob Jones University v United States; Goldsboro Christian Schools Inc v United States 103 S. Ct. 2017 (1983) 461 U.S. 574, 76 L.Ed.2d 157.

Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al, 573 U.S. (10th Cir, 2014).

Christian Youth Camps Ltd v Cobaw Community Health Services Ltd [2014] VSCA 75.

Church of the New Faith v Commissioner for Pay-Roll Tax (1983) 57 ALJR 785.

Church of the New Faith v Commissioner for Pay-roll Tax (Vic) (1983) 154 CLR 120.

City of Boerne v. Flores 521 U.S. 507, 514 (1997).

Goldman v Weinberger, 475 U.S. 503 (1986).

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

Hasan and Chaush v Bulgaria (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000).

Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission (2012) 565 U.S. ____.

Krygger v Williams (1912) 15 CLR 366.

Multani v. Commission Scolaire Marguerite-Bourgeoys and Attorney General of Quebec, Supreme

Obergefell v Hodges, U.S. LEXIS 4250 (6th Cir, 2015).

Ore v Smith, 494 U.S. 872 (1990).

OW & OV v Members of the Board of the Wesley Mission Council [2010] NSWADT 293.

Court of Canada, 1 S.C.R. 256, 2006 SCC 6 (2006).

R v Big M Drug Mart Ltd [1985] 1 SCR 295.

R (on the application of Williamson) v Secretary of State for Education and Employment [2005] 2 AC 246.

Serif v. Greece (ECtHR, App. No. 38178/97, 14 December 1999).

Sherbert v Verner, 374 U.S. 398 (1963).

Syndicat Northcrest v Amselem (2004) 241 DLR (4th) 1.

Thornton v Howe (1862) 54 ER 1042.

United States v Ballard et al., 322 US 78 (1944).

United States v Seeger, 380 US 163 (1965).

Legislation

Age Discrimination Act 2004 (Cth).

Anti-Discrimination Act 1998 (Tas).

Anti-Discrimination Act 1991 (Qld).

Associations Incorporation Act 1981 (Qld).

Fair Work Act 2009 (Cth).

Religious Freedom Restoration Act 1993, 42 USC §2000bb (USA).

Sex Discrimination Act 1984 (Cth).

Trusts Act 1973 (Qld).

Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic).

Other

Human Rights Committee, *General Comment No 22: Article 18*, 48th sess, (20 July 1993).

International Covenant on Civil and Political Rights 1976.

UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, E/CN.4/1985/4 (28 September 1984).