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Liberty Victoria submission

Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into *The status of the human right to freedom of religion or belief*

28 June 2017

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

Dear Committee Secretary,

Submission on *The status of the human right to freedom of religion or belief*

Liberty Victoria is grateful for the opportunity to make this submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade.

1. Introduction

1.1 The Victorian Council for Civil Liberties Inc – Liberty Victoria – is an independent non-government organization which traces its history back to the first civil liberties body established in Melbourne in 1936. Liberty is committed to the defence and extension of human rights and civil liberties. It seeks to promote Australia's compliance with the rights and freedoms recognised by international law. Liberty's contribution is well known to Senate and House committees, and we have campaigned extensively in the past on issues

concerning human rights and freedoms, democratic processes, government accountability, transparency in decision-making and open government.

1.2 Liberty Victoria welcomes the opportunity to contribute to the inquiry but time will not permit us to address in full all aspects of the Terms of Reference. Instead our concern centres on “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*” (ToR 3). In particular we consider the balancing of freedom of religion or belief with the human right to equality. We also make some related comments on ToR 2 and ToR 4.

1.3 There are well over a hundred principal religious groupings in Australia, and many more subdivisions.¹ In many ways they overlap with ethnic, cultural and national identities. Religious beliefs and membership of religious groupings have a long history of being the focus for discrimination and conflict. Many religious bodies also have a long history of prejudice against people of other, or of no, religion. Many cruelties have been and continue to be inflicted on these grounds.

1.4 It is natural, therefore, that the establishment of religious freedom, against the imposition of religious orthodoxy and the persecution of the heterodox formerly widespread, and now perhaps less so, is a vital principle of the modern human rights framework. It is a principle that Liberty Victoria strongly supports, as part of our support for the human rights framework itself.

1.5 Individuals should not be persecuted or discriminated against because they hold, or do not hold, particular religious beliefs, or engage in or do not engage in particular religious practices. This is clear.

1.6 Unfortunately religious bodies have a long history of discriminating against and persecuting others. This is not surprising, given that many religions are based on a firm, even unshakeable, belief that they alone are in possession of the Truth. It is inevitable, however, that this cannot be true, given the incompatible competing claims.

1.7 Unfortunately the importance of religious freedom in the history of our politics has led to undue deference to the claims of religious bodies and individuals to be allowed to persecute or discriminate against holders of other beliefs or those with no religion. As a result, the freedom of religion as against the state, which is important, sometimes gives way to a licence to discriminate, and which the state (wary of infringing the freedom of religion or belief, but yielding to one religion over others or none) fails adequately to rein in.

1.8 A troubling feature of recent history is the new tactic of some Christian religious bodies to seek not only to mutate their freedom of religion into a licence to vilify or oppress people who hold other or no religious beliefs, but to claim that resistance to this overweening encroachment is bullying and persecution. The spectre of Islamic “sharia law” is often invoked by such

¹ *Australian Standard Classification of Religious Groups*, 1266.0 (3rd ed) ABS 2016: over 130, indeed.

groups, which apparently remain oblivious to their own attempts to undermine Australian democratic institutions in favour of their American-inspired dominionist ideology,² which has a similar theocratic tendency.

1.9 This submission points out several instances where this pernicious licence leaves individuals vulnerable to unrestrained discrimination by religious bodies, and where the state needs to protect such individuals' human rights, and for that matter their religious freedom not to accept the beliefs, nor act according to the dictates of a religious ideology to which they do not subscribe.

1.10 In spite of the historic features and abuses mentioned, religious freedom must take its place as just one among many human rights elaborated in the modern human rights framework. As with most human rights the freedom of religion and belief is subject to the limitations inherent in that framework, and summarised at the end of this submission in the words of s.7(2) of the Victorian *Charter of Human Rights and Responsibilities*. Except in relation to their own internal practices, and involving their own members who are adult and competent, religious bodies and individuals must be subject to the general law, and must not infringe the human rights of those who do not share their beliefs or follow their rituals and practices.

2. Legal Protections

2.1 The Terms of Reference also invite comment on "Australian efforts... to protect and promote the freedom of religion or belief" in this country and beyond.

2.2 Liberty Victoria is a strong supporter of and advocate for human rights and the international human rights instruments under which Australia has expressly undertaken to protect, respect and fulfil the human rights they cover, the protection of freedom of religion or belief among them. We reject, however, the notion that freedom of religion or belief should be elevated to special protection in isolation from other human rights.

2.3 It is our view that the Australian Government should seek to enact a comprehensive *Human Rights Charter* which will reflect the international human rights instruments (ICCPR, ICESCR, CEDAW, CERD, CAT, etc) and include all the human rights that Australia has promised to respect, protect and fulfil under those instruments rather than privileging one right above others. Embedding rights in a comprehensive federal *Charter* is important because rights often require a balancing act, given that the human rights of people in one group may necessarily be in tension with the rights of those in another group. For example, there is a tension between freedom of religion and belief on the one hand and equality for all citizens on the other. This contestation

² See, for example, Frederick Clarkson, "Dominionism Rising: A Theocratic Movement Hiding in Plain Sight," (Summer 2016) *The Public Eye*, 12, (accessed 27 June 2017 at <http://www.politicalresearch.org/2016/08/18/dominionism-rising-a-theocratic-movement-hiding-in-plain-sight/#sthash.fVbB2AqY.dpbs>).

often occurs over the human rights – to equality and non-discrimination – of women, of lesbians and gay men, of bisexual, transgender or intersex people when confronted with assertions of religious freedom.

2.4 The tension between these conflicting rights and the influence or privileging of religious beliefs has been highlighted at the federal level in the debate over equal access to marriage without discrimination on the basis of sex, sexual orientation or gender identity. Another issue concerned the availability of RU486 to Australian women, which was apparently inconsistent with Roman Catholic doctrine, and this was considered by members of the Government of the day to be of prevailing importance to the debate about an issue of public health policy.

2.5 As to the latter issue, a parliamentary vote in 2006 overturned the Minister's veto power over RU486. That veto power had been instituted by a religiously partisan amendment in 1996 by Senator Harradine, a Catholic and social conservative politician, irrespective of the harms to women and their rights under international human rights instruments and federal and state equal opportunity and anti-discrimination law.³ Both the exercise of this veto and the power to do so were examples of the imposition of Roman Catholic religious doctrines upon women who did not subscribe to those doctrines. This was a violation of their human rights to bodily integrity and security, and to the best available standard of health, at least, not to mention their freedom of religion or belief.

2.6 Similarly, federal and state equal opportunity and anti-discrimination laws have failed to live up to the expectation of lesbians and gay men who are often on the receiving end of discriminatory conduct because of prejudice against their sexual orientation. This prejudice itself often has its roots in the doctrines of some religions, and is vehemently perpetuated by them in a shameful abuse of the right to freedom of religion. The prevention of such abuses of this right is a matter that the Committee should, under ToR 2, urge the government to legislate for.

2.7 Indeed, before the 2007 election both leaders, John Howard and Kevin Rudd, sought the Christian vote in a webcast streamed live to a claimed 100,000 Christians across the country.⁴ In that webcast both leaders spoke of the "traditional" family and opposed "gay marriage" despite the fact that this version of "tradition" discriminates against lesbians and gay men and that equality in marriage is, and has long been, supported by the majority of

³ See Luke Buckmaster, *RU486 for Australia?* Research Note no 19, Parliamentary Library, Parliament of Australia, (2005-06): <http://www.aph.gov.au/library/Pubs/RN/2005-06/06rn19.htm>; also Judith M Dwyer and Terri Jackson, 'Unwanted pregnancy, mental health and abortion: untangling the evidence', *Australian and New Zealand Health Policy*, 5(2) (2008), <http://www.anzhealthpolicy.com/contents/5/1/2>.

⁴ See ABC, *Howard, Rudd woo christians online*, (2007) <http://www.abc.net.au/news/stories/2007/08/10/2001287.htm>; and *Australian Election Study 2007*, <http://aes.anu.edu.au/index.html>.

Australians.⁵ If the majority of Australians support gay marriage then it is arguable to assume that both leaders were opposing same-sex marriage merely as a means to appeal to a perceived religious vote.

2.8 Section 116 of the Constitution expressly bars the ‘establishment of religion’. In their classic 1901 book, *The Annotated Constitution of the Australian Commonwealth*, John Quick and Robert Garran explained that playing favourites among religious groups would breach section 116. They wrote: "By the establishment of religion is meant the erection and recognition of a State Church, or the concession of special favours, titles, and advantages to one church which are denied to others."⁶ It seems possible that the 2004 amendment of the *Marriage Act 1961* to change the definition of marriage in law to match the doctrines of at least the Catholic Church, if not those of every religious group, was itself unconstitutional in this way.

2.9 In a democratic society, which is necessarily pluralist and secular, government policy and laws should not be based on religious belief. For given the multiplicity of religions, religiously-based laws almost inevitably place unjustifiable limitations on the human rights, including the religious freedom, of those who do not subscribe to the dominant beliefs. Government must be neutral and ensure the rights of all, limited only by the principled human rights framework itself. People must be free to believe and follow their particular religious belief, so long as they respect the human rights of others, and government must ensure that those who do not share or accept that belief are not constrained by it, nor have it imposed on them.

2.10 US academic Cass R Sunstein, in a paper on the tension between religious belief and equality in US constitutional jurisprudence, discusses the (possibly rebuttable) presumption that ‘facially neutral’ laws are *prima facie* permissible,⁷ where

A law is facially neutral if it does not specifically aim at religious practices or belief; thus a law banning the payment of taxes, the burning of animals, or the use of peyote is facially neutral, whereas a law banning the Lord’s Prayer, or the practice of Buddhism, is facially discriminatory.⁸

A US law that stated that Roman Catholics could not marry other Roman Catholics would be a facially discriminatory law and so unconstitutional.

⁵ A National Galaxy Poll for GetUp! in June 2007 found that 57% of Australians agreed “that same sex couples should be able to marry” and 37% disagreed. In the ten years since then polls have consistently shown majority support—as high as 72%, and steadily at two-thirds: Jess Jones, 20 June 2017, “Ten years since marriage equality first reached majority support in Australia”, starobserver.com.au (accessed 21 June 2017).

⁶ Cited in Dr Luke Beck, “Why proposed same-sex marriage exemptions would be unconstitutional,” *The Age*, 25 January 2017.

⁷ Sunstein, 2007, *On the Tension Between Sex Equality and Religious Freedom*, Public Law and Legal Theory Working Paper No 167, 5, The Law School, The University of Chicago

⁸ *Ibid.*

2.11 But this is precisely analogous to what the Australian parliament did in excluding same-sex couples from marriage: it enacted a facially discriminatory law for no other reason than to appease certain religious beliefs (while overriding the human rights not only to equality but also of freedom of religion and belief of those of a contrary view). Allowing all competent, consensual couples of marriageable age (irrespective of sexual orientation or gender identity) to marry is neutral as it does not interfere with any groups' rights and does not affect the capacity of religious or non-believers to marry. In changing the law in 2004, the Australian parliament was unduly influenced by a particular religious view and deliberately maltreated one group of Australian citizens who did not hold that religious view. As Sunstein points out, the reason for religious exemptions from ordinary law is respect for religious autonomy;⁹ allowing all citizens to marry does not interfere with religious autonomy as it does not affect the behaviour or rights of the religious in-group; it just provides those same rights to others. We discuss this issue further below as we believe that there are circumstances in which compelling public interest requirements and human rights principles necessitate the restriction of some behaviours based on religious beliefs.

2.12 In summary, the right to freedom of religion or belief should be protected, along with the full human rights framework, in a *Human Rights Act* or federal *Charter of Human Rights*.¹⁰ In a democracy, religious rights should not be privileged over other rights but rather should reflect the *Universal Declaration of Human Rights* and the ICCPR where they are recognised as but one amongst many compelling rights. Protecting human rights in a comprehensive document will ensure that rights are balanced in a principled way rather than one group's rights prevailing over others in a way that has significant costs in the exercise of rights by other groups as outlined in the two examples highlighted above.

2.13 While protecting freedom of religion or belief in company with other human rights is appropriate, Liberty Victoria considers it essential to distinguish the freedom to hold a belief from a licence to impose it on others. Religious belief and practice that is self-regarding, held or engaged in willingly by competent adults, must be respected. Religious practice that affects others, directly or indirectly, should have no special status.

3. Religion and Human Rights

3.1 The vital question raised in ToR 3 is the "relationship between the freedom of religion or belief and other human rights." This issue has taken on a new significance due to increasing promotion of "faith-based" services as major government service delivery agencies, especially under the Howard, Abbott and Turnbull governments. Article 18.3 of the ICCPR makes it clear that

⁹ *Op. cit.* n7, 8.

¹⁰ Liberty has long advocated a statutory *Charter*. Some have argued such protections should be in the Constitution, as in many countries. Given Australia's current politics, this may be a project for a future generation.

the freedom to “manifest one’s religion or beliefs” may be limited “to protect ... health ... or the fundamental rights and freedoms of others.”

3.2 Since the advent of “competition policy” and the creeping privatisation of public functions religious organizations have become more prominent in the provision of services such as employment assistance, welfare and counselling services. “Faith-based” services may be as capable as secular organizations of providing excellent public services, but, once again, tensions can appear depending on the type of service and the clients involved.

3.3 In some instances the delivery of service is inadequate, or worse, due to religious prejudice. For example, counselling groups such as those that claim they can “cure” homosexuality through “acceptance of Jesus Christ” and the use of so-called “reparative therapy”, which is neither reparative nor therapy, often do enormous damage to vulnerable people that can result in self-loathing, alienation and suicide.¹¹ Such “therapies” are based on false science and the notion that homosexuality is a disease of the mind or mental illness, a notion that has long been dismissed by medical experts yet still persists amongst religious groups.¹²

3.4 The delivery of counselling services must be based on sound, scientific, medical evidence and not on religious views. Any service that provides counselling must adhere to a code of ethics and evidence-based practice recognised by independent medical bodies. Governments need to ensure that vulnerable people are not damaged by the delivery of services using pseudoscience misrepresented as science. There are grave issues to be explored with “faith-based” service delivery as an abuse of religious freedom, as ToR 2 puts it, an abuse against which, Liberty urges, governments must act.

3.5 Another example that raises similar issues concerns pregnancy counselling by services that fail to declare their religious affiliation. This was highlighted when Senators Natasha Stott-Despoja (Dem), Judith Adams (Lib.), Claire Moore (Lab.) and Kerry Nettle (Greens) joined together to support Stott-Despoja’s *Transparent Advertising and Notification of Pregnancy Counselling Services Bill 2005* which would have required religious counselling groups to inform women seeking counselling that they opposed abortion on religious grounds. The Bill was also designed to stop such groups from giving women false and misleading information about the impact of abortion. Such counselling services did not provide women with accurate information but instead were faith-based organisations that opposed abortion and acted to discourage women from seeking abortions. This is yet another example of one group using, or rather abusing, the freedom of religion or belief to trample on another’s freedom to have and act on a different, or no, religion or belief.

¹¹ Mel Sheesholtz, 2005, *Science v Politics and Religion: The ex-Gay Sham*, Counterbias, <http://www.counterbias.com/478.html>; see also Arthur Berliner, ‘Sex, Sin and the Church: The Dilemma of Homosexuality’, (1987) *Journal of Health and Religion*, 26:2.

¹² Berliner, *op. cit.* n11; see also Shidlo and Schroeder, ‘Changing Sexual Orientation: A consumer’s report’, *Professional Psychology: Research and Practice*, (2002) 33:3, 249.

3.6 A similar issue was raised some years ago in Victoria during the debate on the *Abortion Law Reform Act 2008*. Religious hospitals, primarily Roman Catholic, opposed the conscientious objection clause in the Act as it required them to refer the woman on to a non-objector in the event that she wished a termination. As Liberty highlighted in its submission to the Victorian Law Reform Commission at the time:¹³

Liberty Victoria does not believe that people should be forced to do things that they morally object to. If medical practitioners object to abortion on religious or ethical grounds then they should inform their patients of their objections. Medical practitioners should not be forced to undertake procedures they object to.

Even this concession may go too far. Putting a vulnerable woman in distress to the unnecessary and undignified quest for yet another medical appointment is a manifestation of religious belief by the doctor, or the doctor's employer, which steps well beyond the confines of the devotees of the religion in question. (Indeed, perhaps it is odd that someone whose religious beliefs do not permit them to practise medicine in accordance with the scientific standards of the medical profession and the Hippocratic Oath should even seek to practise medicine at all.)

3.7 Where a woman's life is in serious danger, however, and she presents at a hospital for treatment that may require termination of a fetus, the situation is different:¹⁴

Under such circumstances refusal to treat the woman is highly questionable, if not objectionable. Doctors working in public hospitals are to some degree the medical equivalent of a public servant and refusing treatment that could result in the death of a woman on the basis of subjective religious beliefs is problematic and should not be protected in legislation.

3.8 This raises the question as to whose human rights prevail: the woman's or the religious doctor's? In relation to the applicability of discrimination laws and religious beliefs—but equally applicable to the provision of public services—Evans and Gaze argue that if 'neither religious autonomy nor non-discrimination should always prevail in liberal democracies, then some principles are necessary'.¹⁵ One principle they outline concerns public funding. They argue:

When public funding is used by religious organizations to fund their activities, there should be a presumption that non-discrimination laws apply to those activities. Religious organizations are not obliged or coerced to take public money and can exercise their autonomy by refusing it. ... Public money is raised by all members of society and should not be expended in a manner that deliberately excludes some members of that society.¹⁶

¹³ <http://www.libertyvictoria.org/submission-2007-abortion.pdf> (accessed 27 June 2017).

¹⁴ *Ibid.*

¹⁵ Evans and Gaze, 'Between Religious Freedom and Equality: Complexity and Context', (2008) *Harvard International Law Journal* 49, 49.

¹⁶ *Ibid.*

3.9 This does not mean that doctors who have a conscientious objection should be forced to perform abortions. What it does mean is that in a secular democracy religious beliefs, particularly in the context of publicly funded provision of services, should not be privileged over other rights such as unbiased and timely access to counselling or medical services. Women who are—not of their own free will—bound by those beliefs are entitled to be protected from them. A balancing exercise must be undertaken and the provision of advice or services must be based on sound science and respect the rights of others to equal treatment. The law must guarantee that if faith-based services cannot provide unbiased counselling or the full range of medical services then the state must do so. The rights of others must be guaranteed by the state if religious service providers are unable to offer the full range of services or unbiased counselling.

4. Religion, politics and culture

4.1 This issue encompasses gender and cultural equality and the right to freedom of religion. There is a perception amongst many commentators – and it is shared by Liberty Victoria – that religious freedom is too often prioritised over gender equality. Hilary Charlesworth *et al.*, noting Australia’s obligations under CEDAW, write that the *Sex Discrimination Act 1984 (Cth)*, grants “an extraordinarily broad ambit for discrimination on the basis of sex in relation to ‘any...act or practice of a body established for religious purposes’ ”.¹⁷ They state:

The clash between the norm of non-discrimination on the basis of sex and the practice of most religious traditions in excluding women from significant spiritual roles is usually resolved in favour of religious tenets.¹⁸

4.2 They further highlight that the *SDA* empowers “religious institutions [to be] free to discriminate on the basis of marital status and pregnancy in employment of staff” if that discrimination is “in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed”.¹⁹ The argument relating to sex applies equally to discrimination against lesbians and gay men, especially given the 2013 amendment of the *SDA* to apply expressly to discrimination on the basis of sexual orientation, gender identity and intersex status, but with the same arbitrary religious licence as is granted about the attribute of sex. In both cases the latitude afforded to discrimination by religious institutions is an affront to human dignity, an unjustifiable breach of human rights and inconsistent with ICCPR Article 18.3. It is a historical anomaly, and must be ended.

4.3 Charlesworth *et al.* point out that if religious groups sought exemption from laws preventing racial discrimination there would be public

¹⁷ Hilary Charlesworth and Sara Charlesworth, “The Sex Discrimination Act and International Law”, (2004) *University of NSW Law Journal* 27(3) 858, 863.

¹⁸ *Op. cit.* n17 at 864.

¹⁹ *Op. cit.* n17 at 863.

consternation.²⁰ Substituting the word 'black' for women and homosexuals illustrates the point: modern Australia would find such discrimination unacceptable.

4.4 Proof that this example is not fanciful is provided by the case of the Dutch Reformed Church in South Africa and its absolute support of *apartheid*. The Church insisted on the total separation and segregation of the races, holding strong views on miscegenation and prohibiting inter-racial marriage.²¹ The Church Congress stated that "only carrying out the policy of apartheid in the light of God's Word and with God's blessing would provide deliverance from the dark danger of colour mixing and bastardization."²²

4.5 If a Church wished to teach such views—even in its own schools to its believers' own children—should the state intervene to stop the teaching of these views or should the state refrain because of freedom of religion or belief? In this example we would expect the state to intervene and apply anti-discrimination laws. The teaching of racial discrimination to children surely amounts to child abuse.

4.6 It is a disgrace that when religious groups assert that to treat lesbians and gay men without discrimination would violate their religious beliefs the state supinely allows them exemption from such laws. The indoctrination of children in homophobia, or sexual prejudice, is as much child abuse as the teaching of racial prejudice in *apartheid* South Africa was.

4.7 We need to remember that the burning of old women alleged to be witches was also a religious practice²³ fully sanctioned by the church fathers: what was once taken to be a religious imperative we now rightly view as repugnant and indeed criminal.

4.8 Another example of religious views supporting outdated prejudice can be found in the American case, *Loving v Virginia*, 1967. This concerned the marriage of a white man and a black woman in 1958 which violated Virginia's laws on interracial marriage. They pleaded guilty and each received a one year jail sentence which was suspended provided they leave the state of Virginia for a period of 25 years. In sentencing the couple the Judge in the Virginia Court said:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.²⁴

²⁰ *Op. cit.* n17 at 864.

²¹ Susan Rennie Ritner, 'The Dutch Reformed Church and Apartheid', *Journal of Contemporary History*, (1967) 2:17, 24

²² *Ibid.*

²³ *Exodus* 22:18, "Thou shalt not suffer a witch to live".

²⁴ As quoted in *Loving v Virginia* 388 US 1 (1967), where the US Supreme Court struck down the miscegenation statute of Virginia (and so too of the other 15 US states which similarly privileged religious belief over racial equality); see <http://www.ameasite.org/loving.asp>.

4.9 In *Loving* the US Supreme Court finally struck down both the Virginia miscegenation statute and the analogous statutes in 15 other US states. Here too a discriminatory tradition based upon religious belief was finally discredited.

4.10 Sunstein also highlights the tension between religious belief and equality and the anomaly of society's predilection for favouring religious belief over equality. He specifically focuses on the relativisation of non-discrimination laws in relation to the exercise of religious belief. He argues that 'interference with religious autonomy is pervasive under the ordinary criminal and civil law' but is absent 'if sex discrimination is the problem that the government is seeking to address'.²⁵ As a result of this anomaly he states that an important commonplace of democratic theory and practice might therefore be called the *Asymmetry Thesis*: 'it is unproblematic to apply the ordinary civil and criminal law to religious institutions, but problematic to apply the law forbidding sex discrimination to these institutions.'²⁶ He argues against this asymmetry pointing out the circular nature of its acceptance. He says that there is

good reason to believe that some of the most pernicious forms of sex discrimination are a result of the practices of religious institutions, which can produce internalized norms. Those internalized norms might undermine equality of opportunity itself, as when women scale back their aspirations to conform to those internalized norms. People's preferences, especially in the domain of sex equality, should not be taken as a given, or as coming from the sky; discriminatory beliefs and role based choices are often produced by a discriminatory society.²⁷

4.11 As a society we need to question our acceptance of the Asymmetry Thesis, and indeed to repudiate it. Australian politicians too often privilege freedom of religion over the human right of others to equality. Australians need to acknowledge that there are no compelling social or public interest reasons that dictate that anti-discrimination laws should be routinely overruled by religious beliefs. Action needs to be taken by governments to prevent such abuses of the right to freedom of religion, as ToR 2 enquires and ICCPR 18.3 requires.²⁸

5. Religion, diversity and human rights.

5.1 In this section we address how faith communities perceive diversity of sexual orientation and how they can be more inclusive. Most, perhaps all,

²⁵ *Op. cit.* n7, 2.

²⁶ *Ibid.*

²⁷ *Op. cit.* n7, 4.

²⁸ See also the Human Rights Committee's General Comment 22 (http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.4&Lang=en accessed 22/6/2017), which notes about Article 18.3 that in constraining the right to act on religious beliefs "States parties should proceed from the need to protect the rights guaranteed under the [ICCPR], including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26." (The latter grounds include "sex" and "other status" including sexual orientation and gender identity.).

religions have a problem with this diversity and very many believe that sex other than between a man and a woman is morally wrong. As outlined in examples above, recent debates over non-discriminatory marriage are one example of the prejudice against citizens who do not fit within the religiously defined “traditional family” framework. Indeed, many religions actively and openly promote discrimination against lesbians and gay men.²⁹

5.2 While some advances have been made, such as the enactment of the *Assisted Reproductive Treatment Act 2008* in Victoria and the removal of discrimination against same-sex couples in legislation at the federal level in 2009, there is still much discrimination against lesbians and gay men, and bisexual, transgender and intersex people. Often this discrimination involves opposition to gay people parenting, and the promotion by Christian organisations of pseudo-scientific material claiming that such parenting damages children. This claim has been clearly refuted by sound research.³⁰ The problem for the children of gay parents is not their parenting but the prejudice and abuse practised by others, and mostly fanned under the cover of religion.³¹

5.3 Sexual prejudice – a broader term encompassing the commonly used, if confusing, term “homophobia”³² – is a blight on the lives of lesbians and gay men, transgender, intersex and bisexual people, and also on their families. The transmission of sexual prejudice is fostered by, and often actively engaged in, by religious bodies. Under the guise of religious freedom some religious bodies cause great harm and human rights violations in this way, and use their unjustified licence to obstruct and delay social progress towards the greater protection and promotion of human rights. This traditional licence of religious bodies and individuals to vilify, exclude and harm LGBTI folk and their families cannot be allowed to continue. It must be revoked.

6. Religious exemptions from anti-discrimination and equal opportunity law

6.1 Liberty Victoria believes that freedom of religion or belief should be protected. We acknowledge, however, that religious accommodations and

²⁹ See for example Christian websites such as the so-called Australian Christian Lobby <http://www.acl.org.au/> (accessed 22/6/2017): and the former Salt Shakers <http://www.saltshakers.org.au/> Archive only (accessed 22/6/2017).

³⁰ Elizabeth Short, Damien W. Riggs, Amaryll Perlesz, Rhonda Brown, Graeme Kane, *Lesbian, Gay, Bisexual and Transgender (LGBT) Parented Families – A Literature Review prepared for the Australian Psychological Society*, August 2007: accessed 27 January 2009 via http://www.psychology.org.au/publications/statements/lgbt_families/.

³¹ See Stephen Hicks, ‘The Christian Right and Homophobic Discourse: a Response to ‘Evidence’ that Lesbian and Gay Parenting Damages Children’, *Sociological Research Online*, 8:4, <http://www.socresonline.org.uk/8/4/hicks.html>, Hicks reviews the evidence on such claims and provides references for further examination on this topic.

³² Herek, G. (2004). Beyond “homophobia”: Thinking about sexual stigma and prejudice in the twenty-first century. *Sexuality Research and Social Policy*, 1(2), 6-24. For an excellent collection of articles on this topic see Dr Herek’s blog: <http://www.beyondhomophobia.com/blog/category/sexual-prejudice/>.

exemptions often impose costs on others, sometimes quite significant costs. We believe that Sunstein's analysis of the Asymmetry Thesis is applicable to the approach adopted by the various governments in Australia and demonstrates the illegitimacy of this approach. If a law is derived from religious beliefs – such as that only heterosexual couples can marry – and has no negative impact on those in the religious in-group but harmful consequences for those aside the religious group then the law should favour neutrality not the religious groups. Allowing same-sex couples to marry does not impact on, nor interfere with, the capacity of those with religious convictions to marry and raise a family, and non-discrimination and equal opportunity for all should be the basis for the enactment of laws relating to human rights. As Skjeie points out, systematically allowing the maltreatment of certain categories of people, namely women, lesbians and gay men, effectively annuls their citizenship status.³³

6.2 Liberty Victoria is not arguing that religious groups should be forced to ordain women or homosexuals, or eat pork, or wear clothing of mixed fibre. We believe that within their own organizations and membership, religious groups are entitled to freedom of conscience and protection of their right to hold their beliefs – subject always to the ordinary criminal law: for example clergy are not entitled to abuse children, nor husbands to beat their wives. We can see, however, no justification for allowing religious groups to discriminate in the public sphere against others based on just their beliefs, however holy and ancient they think them, or for governments to enact laws reflecting such beliefs to the detriment of those who hold different beliefs.

6.3 In deliberating whether religion should be exempted from anti-discrimination laws another factor, alongside public funding, that must be considered is the seriousness of the impact on those people subject to the discrimination.³⁴ The reason for balance is illustrated by Evans and Gaze:

Religions are powerful social and economic actors in most societies. They play a significant role in creating culture and public morality and some actively seek political influence ... [T]hey are significant employers and welfare providers. If religious organizations are excluded, in all their manifestations, from non-discrimination laws, then the goal of equality is undermined and non-discrimination laws run the risk of being treated as trivial, optional or – at worst – illegitimate.³⁵

6.4 Allowing religious bodies an exemption automatically, without giving due consideration to the equally compelling right to equality, would in effect mean that discrimination becomes a religious group right. This is an

³³ Hege Skjeie, 'Religious Exemptions to Equality, *Critical Review of International Social and Political Philosophy*, (2007) 10:4, 472.

³⁴ *Op. cit.* n15, 46.

³⁵ *Op. cit.* n15, 45.

indefensible policy position in a democracy that respects, protects and fulfils human rights, as Australia has promised to do.³⁶

7. Blasphemy

7.1 Another aspect of the overreach, indeed abuse, of religious freedom is the criminal law of blasphemy, both in general and, in particular, when, as in Australia, it is invoked against critics of one religion only, namely Christianity. Liberty Victoria is of the view that the existence of the crime of blasphemy is wholly inconsistent with a secular and religiously diverse Australian society and calls for this crime to be abolished in Australia.

7.2 Liberty Victoria has the benefit of reading Dr Beck's views on this area of law and we endorse his views with respect to the abolition of this crime.³⁷

7.3 Liberty believes that the state has no role to play in the enforcing of religious orthodoxy and practice through criminal prosecution of persons who do not conform with Christian belief, or indeed any religious belief.

7.4 It is Liberty's view that blasphemy laws are bad for Australia in a number of respects. Such laws give lawful preference to Christianity over other religions - in this country (unlike some) the crime of blasphemy is only about Christianity. As noted by Dr Beck, it is not proper for the law to favour one religion over another.

7.5 Blasphemy laws also have the potential to impinge on freedom of speech; Cardinal Pell's unsuccessful attempt to prevent the National Gallery of Victoria from displaying the Piss Christ artwork on the basis that it was blasphemous is a relatively recent example of religious orthodoxy attempting to limit freedom of expression on the basis of blasphemy.³⁸

7.6 Australia's commitment to international law is also undermined by the continued existence of the crime of blasphemy. As noted by the United Nations Human Rights Committee:

Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the [International Covenant on Civil and Political Rights].³⁹

³⁶ For a very thorough analysis of the balance between both equality and the human rights of children to have their best interests paramount on the one hand, and the claims of religious freedom on the other, see "Should discrimination in Victoria's religious schools be protected? Using the Victorian Charter of Human Rights and Responsibilities ... to achieve the right balance," John Tobin (2010) 36(2) *Monash University Law Review* 16.

³⁷ Luke Beck, 21 June 2017 "Blasphemy is still a crime in Australia - and it shouldn't be," <http://www.sbs.com.au/topics/life/culture/article/2017/06/21/blasphemy-still-crime-australia-and-it-shouldnt-be>.

³⁸ *Pell v Council of Trustees of the National Gallery of Victoria* [1997] VSC 52; [1997] VICSC 52 (9 October 1997).

³⁹ *General Comment 34*, <https://www.humanrights.gov.au/freedom-thought-conscience-and-religion-or-belief> (accessed 26 June 2017).

7.7 Liberty recommends that the Federal Parliament act consistently with its obligations under international human rights law and abolish the crime of blasphemy in Australia.

7.8 Having regard to the Committee's ToR 4, Liberty calls on the Committee to recommend that the Australian Government make every effort to encourage the restriction and indeed abolition of the crime of blasphemy "around the world, including the Indo-Pacific region." Recent events in Indonesia highlight the importance of this goal.

8. Conclusion

8.1 As stated at the beginning of our submission, Liberty Victoria supports the human rights framework, which includes freedom of religion or belief. That freedom is not absolute. As with most rights it must be balanced with the rights of others to believe – or not – as they consider appropriate. Religious beliefs – or rather religious practices and behaviour – cannot be above the law, and the state must instead ensure that all its citizens are treated with true equality, dignity and respect.

8.2 The best way to ensure the rights of all is in a comprehensive *Human Rights Charter* where no right is privileged above other rights, but all rights are subject to limitations in a principled framework. The principle is eloquently put in Victoria's *Charter of Human Rights and Responsibilities*, section 7(2):

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

Yours faithfully,



Jessie Taylor

President, Liberty Victoria



Jamie Gardiner

Vice President, Liberty Victoria