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21 January 2019

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600
legcon.sen@aph.gov.au

Dear Secretary,

**Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018
(Senator Wong's Bill)**

Liberty Victoria is grateful for the opportunity to make this submission

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. We seek to promote Australia's compliance with the rights recognised by international law and in the treaties that Australia has ratified and has thereby accepted the legal obligation to implement. We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community. Further information may be found at www.libertyvictoria.org.au.

This is a public submission, not confidential.

It consists of this brief summary and the two Appendices, being submissions made to the last two inquiries on the theme of which this is just another variation: the vital, and growing need to roll back the unjustifiable privileges (falsely called, USA-style, "religious freedoms") enjoyed, and profited from, by some religious groups.

In summary:

1. Insofar as the Bill removes the privilege to discriminate against students in their education at schools run by religious bodies it is whole-heartedly supported. Passage of the Bill in its current form would be a significant improvement on the current discriminatory situation.
2. Insofar as the Bill fails to extinguish that privilege in relation to employment in such schools the Bill is inadequate and should be amended to remedy that deficiency. Passage of the Bill with this amendment would be a further significant improvement, and is therefore even more desirable.
3. Liberty Victoria strongly opposes the adoption of any of the Government's tabled amendments.
4. Finally, Liberty notes that the so-called religious exemptions amount to a preference or benefit for some religious groupings over others (including the growing numbers of the non-religious), which appears to contravene section 116 of the Constitution.

The appendices canvas these and related issues in much greater detail and at greater length, and they form part of this submission. Appendix 1 is the submission of Liberty Victoria (submission 227, 28 June 2017) to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into "The status of the human right to freedom of religion or belief." Appendix 2 is the submission of Liberty Victoria to the Religious Freedom Review, 14 February 2018.

Yours faithfully,

Jamie Gardiner
Senior Vice-President
Liberty Victoria

Appendix 1

This appendix contains the text of Liberty Victoria's 28 June 2017 **Submission on *The status of the human right to freedom of religion or belief*** to the Joint Standing Committee on Foreign Affairs, Defence and Trade. It was recorded as Submission 227 by that committee.

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

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 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 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.fvB2AqY.dpbs>).

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 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

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>.

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 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,

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>.

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.

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.

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

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.*

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.

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 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

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.

3.4 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.

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.)

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

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

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

¹⁴ *Ibid.*

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

¹⁶ *Ibid.*

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 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.

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.

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.*

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

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

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>.

²⁵ *Op. cit.* n7, 2.

²⁶ *Ibid.*

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, 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

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.)

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](http://www.saltshakers.org.au/Archive%20only) (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*

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 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

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/>.

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

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 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.

³⁴ *Op. cit.* n15, 46.

³⁵ *Op. cit.* n15, 45.

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.

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

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

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).

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.

Appendix 2

This appendix contains the text of Liberty Victoria's public submission to the Expert Panel on Religious Freedom. It was submitted on 14 February 2018.

(Note: The Appendix referred to at the end of this Appendix 2 is contained in the present submission's Appendix 1.)

1 **Recommendations**

- 1 Freedom of religion is properly understood to mean the freedom for an individual to have, or not have, a religious belief, to join a religion and take part in its rites and rituals, or change religion, or leave a religion, and not to be discriminated against because of their having or not having a religion; and also the right of religions—taken to mean (more or less) organized groups of persons adhering to a common belief system—to coexist in society on a basis of equality with each other and with individuals or groups of no religion.
- 2 Freedom of religion in Australia, properly understood, is not in need of further protection beyond what might be afforded by the enactment of a Commonwealth Charter of Human Rights and Responsibilities implementing the obligations Australia has accepted by ratifying international human rights treaties including the ICCPR, ICESCR and CRC.
- 3 The many privileges that religions in Australia enjoy are incompatible with the principle of equality that underlies the freedom of religion and belief, and indeed adversely affect the human rights and freedoms of others, and being unjustifiable they should be revoked. In particular, the actions required include:
 - a. Remove "religious exemptions" from Commonwealth, State and Territory laws, including the *Sex Discrimination Act* 1984, the *Fair Work Act* 2009 and the *Age Discrimination Act* 2004, except for provisions necessary to comply with s.116 of the *Constitution*; or, if necessary as an interim measure, make the operation of any remaining religious exemptions open and transparent (as outlined in this submission);
 - b. Repeal the provisions of the *Charities Act* 2013 and the *Australian Charities and Not-for-profits Commission Act* 2012 that treat the "advancement of religion" as inherently charitable, and abolish any related rule of the common law;
 - c. End all exemptions from Commonwealth, State, Territory and municipal taxes, rates and duties allowed to religious bodies, including preferential reductions, other than those generally available in relation to services of benefit to the community at large;

- d. End the school chaplains program and reallocate the funds to the provision of professional psychological and counselling support to students and teachers according to need;
- e. End the practice of allowing “Special Religious Instruction” by agents of particular religions in public schools which receive any form of Commonwealth funding, direct or indirect, and ensure that if a school includes religious materials in its teaching it is done only by qualified teachers and fairly includes non-partisan reference to the many religions in or relevant to Australia, including the existence of non-religious ways of being;
- f. Abolish the offence of blasphemy, and any associated rules of the common law;
- g. Conduct a careful inquiry into any other law or practice that is inconsistent with the letter or spirit of s.116 of the *Constitution* and must therefore be changed or discontinued, amended or repealed.

2 Introduction

The Terms of Reference of this Review consist of an Objective and three brief items describing its Scope.

2.1 Objective

OBJECTIVE

The Panel shall examine and report on whether Australian law (Commonwealth, State and Territory) adequately protects the human right to freedom of religion.

2.1.1 The Objective rather begs the question, by appearing to foreclose discussion of even the possibility that Australian law is *overly* protective of “the human right to freedom of religion.” For it is clear that what current public discourse appears to mean by the term “religious freedom” is, instead, unjustified religious privilege and overweening power, rather than the traditional meaning.

2.1.2 That meaning holds that there can be no “established religion,” the government may not favour adherents of one religion or denomination over others or none and barriers to official and other employment for people of one faith or another are removed: in other words, none of the sectarianism that plagued many areas of Australian society until the 1960s or even later.

2.2 Scope

SCOPE

In undertaking this Review, the Panel should:

- Consider the intersections between the enjoyment of the freedom of religion and other human rights.

- Have regard to any previous or ongoing reviews or inquiries that it considers relevant.
- Consult as widely as it considers necessary.

2.2.1 As paragraph two of the Scope observes, and directs this Review towards, there are two “previous or ongoing” inquiries at least. The first is the Australian Law Reform Commission’s 2015 Report 129, *Traditional Rights and Freedoms*, whose Chapter 5 examines the freedom of religion and concludes⁴⁰ that there is “no obvious evidence that Commonwealth anti-discrimination laws encroach on freedom of religion.” Significantly, however, it adds this is “especially given the existing exemptions for religious organisations,” which may hint at the significant overreach of such exemptions.

2.2.2 The other is being conducted by the Joint Standing Committee on Foreign Affairs, Defence and Trade into “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.” Chapter 7 of the committee’s Interim Report⁴¹ sets out in some detail the conflicting evidence on the tension between the right to equality and non-discrimination and the freedom of religion.

2.2.3 The submission that Liberty Victoria made⁴² to that Committee in June 2017 analyses “the intersections between the enjoyment of the freedom of religion and other human rights” (paragraph one of the Scope) in some detail, and is attached to this submission as an integral Appendix.

2.3 Context of the Review

2.3.1 The particular context of this Review is a political manoeuvre in response to the overwhelming public YES vote in the marriage equality postal survey and the intricacies of navigating a reform bill through the Parliament. This in turn was seen as necessary because of the misconception—avidly promoted throughout the years leading up to that reform bill—that marriage equality impinged on religious freedom.⁴³

2.3.2 At its narrowest, this assertion concerned an erroneous, and almost certainly bad faith, misinterpretation of the *Marriage Act’s* “protection” of religious celebrants’ freedom to choose whom they marry (and under what conditions). Consistent with the *Constitution’s* s.116 prohibition on “imposing any religious observance, or...

⁴⁰ Australian Law Reform Commission, 2015, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* Report 129, Paragraph 5.154, page 159

⁴¹ Joint Standing Committee on Foreign Affairs, Defence and Trade, 30/11/2017, *Legal Foundations of Religious Freedom in Australia*

⁴² Inquiry into the status of the human right to freedom of religion or belief, Submission 227

⁴³ Prof Carol Johnson and Prof Marion Maddox, 28/8/2017, <https://theconversation.com/talk-of-same-sex-marriage-impinging-on-religious-freedom-is-misconceived-heres-why-82435> (accessed 19/1/2018)

prohibiting the free exercise of any religion," the *Marriage Act* 1961, by s.47, made it clear that ministers of religion authorized to solemnize marriages had *carte blanche* as to religious matters such as whom they could admit to the marriage liturgy of their religion.⁴⁴ The scare campaign about such ministers being forced to marry couples whom their religion barred from marriage was always a furphy.⁴⁵ Its constant propagation by religious figures who (or whose legal advisers) certainly knew better, was dishonest, indeed disgraceful. The ignorance or complicity of the media, who seldom called it out, compounded its deliberate misleading of the public.

2.3.3 As Professors Johnson and Maddox point out, however, the claim that marriage equality would impinge on religious freedom was much more expansive, if equally bogus. Johnson and Maddox note that, "given increasing public support for same-sex marriage, including among religious adherents, [conservative religious organisations] often argue that same-sex marriage is really about broader issues, such as gender roles and parenting." They continue:

A key argument – espoused recently by Tony Abbott – is that same-sex marriage will threaten "religious freedom". Such arguments, often based on a small number of yet-to-be-finalised overseas cases, or a Tasmanian complaint that was later withdrawn, effectively reframe the debate away from discrimination against those in same-sex relationships.

Consequently, conservative Christians now depict themselves as potential victims of discrimination. This is despite the long history of past discrimination against gays and lesbians, including criminalisation of male homosexuality and the ineligibility of same-sex couples for many federal government entitlements. Such reframings have proved an effective political tactic in the US.⁴⁶

2.3.4 The reference to US political tactics is telling. The reframing of freedom of religion and belief—a quintessentially equal, non-discriminatory norm—as "religious freedoms" is a deliberate tactic of the US religious right, as Jay Michaelson has

⁴⁴ Except, of course, religious bodies such as the Religious Society of Friends—the Quakers—whose wish and freedom to marry couples regardless of the sex of the parties was (perhaps unconstitutionally) stomped upon by the 2004 amendment.

⁴⁵ Refusal to marry couples where one party or both were previously divorced, for example, was routine for Roman Catholics, for example; refusal of marriage rites to mixed denomination or faith couples was also routine; and no doubt, given the variety of religious beliefs, there were a variety of other religious marriage bars. Unsurprisingly the proportion of marriages by religious celebrants has been steadily shrinking for decades, and is now below 25%: Australian Bureau of Statistics 28/11/2017 *3310.0 - Marriages and Divorces, Australia, 2016*.

⁴⁶ Prof Carol Johnson and Prof Marion Maddox, 28/8/2017, <https://theconversation.com/talk-of-same-sex-marriage-impinging-on-religious-freedom-is-misconceived-heres-why-82435> (accessed 19/1/2018)

demonstrated in his 2013 report *Redefining Religious Liberty: The Covert Campaign Against Civil Rights*⁴⁷.

2.3.5 The careless adoption of the US “religious freedoms” reframing should be called out for what it is, namely a covert US campaign tactic⁴⁸ imported by bodies such as the ACL. Its lazy use by Australian media, and some politicians, is to be deplored.

3 Freedom of Religion is adequately protected

3.1 Constitutional and Statutory protection

3.1.1 Australia is a secular democracy. It is not a theocracy. It does not have an “established religion.” Indeed, the Constitution expressly forbids making any law to establish a religion: s.116.⁴⁹

3.1.2 Australia does have freedom of religion. At the Commonwealth level this is constitutional. It means that individuals may belong to any religion of their choosing, or none. They may change religion, or adopt no religion. They may worship, individually or with others, and observe religious rites. No religion is to be given advantages over other religions. Religious bodies and individuals must, however, obey laws of general application.⁵⁰

3.1.3 As s.116 of the *Constitution* does not bind the States, it remains possible for State laws to impinge on freedom of religion or belief. Most jurisdictions protect against discrimination on the basis of religious belief in the usual areas: employment and so on. The Commonwealth does not.

3.1.4 The best way to ensure that individuals were not discriminated against because of their beliefs would be to enact a comprehensive *Charter* or *Human Rights Act*, such as the inquiry led by panel member Fr Frank Brennan recommended some years ago. This would ensure that the necessary balancing between freedom of religion or belief and the human rights and freedoms of others would be

⁴⁷ *Redefining Religious Liberty: The Covert Campaign Against Civil Rights*, Jay Michaelson, 2013 http://www.politicalresearch.org/wp-content/uploads/downloads/2013/04/PRA_Redefining-Religious-Liberty_March2013_PUBLISH.pdf accessed 20180109

⁴⁸ See also: *When Exemption is the Rule: The Religious Freedom Strategy of the Christian Right*, Frederick Clarkson, 12 January 2016 <http://www.politicalresearch.org/2016/01/12/when-exemption-is-the-rule-the-religious-freedom-strategy-of-the-christian-right/#sthash.e2jLQsKw.XfMYf6a4.dpbs>

⁴⁹ *Constitution*. Commonwealth not to legislate in respect of religion.

116. 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.

⁵⁰ As the High Court’s Mason ACJ and Brennan J said, concerning definitions of religion, “canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.” (*Scientology Case*, (1983) 154 CLR 120, 136.)

accomplished under the well understood principles of international human rights law, as in s.7(2) of the *Charter of Human Rights and Responsibilities* (Vic).⁵¹

3.1.5 It may be, indeed, as Matt Holden argues,⁵² that even better is an evolution of society. The *Charter*, it is submitted, is a necessary step towards that society. Holden writes, "The best guarantee of religious freedom is a secular/pluralist society where people of all faiths – Judaism, Hinduism, Christianity, Islam, Buddhism, whatever – and people of no faith – are free to practice[sic] their beliefs collectively in churches, temples, mosques and synagogues, or in the privacy of their homes, and don't get to tell anyone else what to believe, or how to live."

3.1.6 As many have pointed out, however, the same bodies that are now clamouring for new "protections" have previously been vehement opponents of moves to incorporate them in law, terrified apparently that what is sauce for the goose may be sauce for the gander too. Johnson and Maddox write:⁵³

A striking feature of the debate has been the sudden enthusiasm for protecting religious freedom among those who were, until recently, committed opponents.

For years, conservative Christians campaigned against laws to protect religious freedom – because that would mean freedom for everyone. Time and again, what mattered to conservative Christians was "freedom to assert the superiority of their [own] belief system and the inferiority of others".

In 1984, a landmark New South Wales Anti-Discrimination Board report recommended extensive protections for belief and practice. Exemplifying conservative Christian opposition, the Synod Standing Committee of the Anglican Diocese of Sydney declared itself "deeply disturbed" by the report's "serious bias against mainstream Christian churches".

In 1988, the federal government proposed widening Section 116's religious freedom protections to apply to the states and territories. The Central Commission of the Australian Catholic Bishops' Conference feared a US-style religion-state separation, threatening state aid to church schools. Some Anglican bishops foretold threats to religious instruction and prayer in public schools. Other Christian leaders warned of state-sanctioned stonings and female circumcision.

In 2005, the NSW Legislative Council debated the Anti-Discrimination Amendment (Religious Tolerance) Bill. The Christian Democrats thanked "thousands of Christians" for helping secure the bill's defeat. The Sydney Diocese of the Anglican Church applauded.

In 2009, the federal government considered legislating a Charter of Rights. The inquiry, chaired by Jesuit priest Frank Brennan, recommended in favour, including "freedom from

⁵¹ This of course emphatically refutes the US claim that "religious freedoms" permit or "protect" the imposition of religious beliefs or practices on others of other or no faith group.

⁵² Matt Holden, *SMH*, 14/9/2017, accessed 25/1/2018 at <http://www.smh.com.au/comment/the-best-guarantee-of-religious-freedom-is-keeping-religion-out-of-politics-20170914-gyhjt8.html>

⁵³ Prof Carol Johnson and Prof Marion Maddox, 28/8/2017, <https://theconversation.com/talk-of-same-sex-marriage-impinging-on-religious-freedom-is-misconceived-heres-why-82435> (accessed 19/1/2018)

coercion or restraint in relation to religion and belief". The Australian Christian Lobby led the opposition, supported by various church and Christian interest groups.

And now, in the marriage equality debate, those who fought against religious freedom protection are suddenly all for it.

3.2 Undue privilege

3.2.1 For historical reasons Australian society, and law, have granted religions significant privileges in excess of what the doctrine of "freedom of religion" requires. Indeed since an essential element of that freedom is not preferring one belief system over another, it could be said that the practice of granting privileges to religious bodies violates the freedom of religion, because it discriminates against those who do not have a religion. This latter group—almost 30% saying "No Religion" (or 39.2% including those who did not claim any religion)—constitute the largest single category reported by the 2016 Census on the religion question, a proportion which has steadily grown over the years, and is now putting adherents of Roman Catholicism in second place.⁵⁴

3.2.2 The unjustifiable privileges enjoyed by religious bodies are numerous. They include exemptions from ordinary laws, such as freedom from rates and taxes, a licence to discriminate on numerous (in some states all) attributes covered by anti-discrimination laws, and a freedom from scrutiny and accountability⁵⁵. This latter freedom, as the Royal Commission has revealed,⁵⁶ enabled the rape of children and the covering up of such crimes with, even very recently, near impunity.

3.2.3 The existence of blasphemy laws is another example of unjustifiable privilege, whether they apply to one religion only or theistic beliefs in general: such laws, even if apparently fallen into desuetude, need to be repealed, and any rules of the

⁵⁴ "The most common responses for religion in Australia were No Religion, so described 29.6%, Catholic 22.6%, Anglican 13.3%, Not stated 9.6% and Uniting Church 3.7%"
ABS <http://www.censusdata.abs.gov.au/ausstats/abs@.nsf/Lookup/2901.0Chapter49802016>
(accessed 19/1/2018)

⁵⁵ See, for example, Jane Lee, 8/12/2015, Police to apologise to detective over cover-up of child abuse investigation, *The Age* (accessed 11/2/2018 at <http://www.theage.com.au/victoria/police-to-apologise-to-detective-over-coverup-of-child-abuse-investigation-20151208-glidw9.html>): "Victoria Police will apologise and pay compensation to a former detective more than 30 years after senior officers covered up his investigation into child abuse allegations against a Catholic priest. The Royal Commission into Institutional Responses to Child Sexual Abuse on Tuesday heard from Denis Ryan, who had doggedly investigated allegations of child sexual abuse against Monsignor John Day in Mildura under intense pressure to stop. His superiors later took over the investigation and cleared Day of any wrongdoing. Police tried to force Mr Ryan to transfer to another station in 1972, and he ultimately resigned from the force."

⁵⁶ *Ibid.*

common law prohibiting “blasphemy” or similar concepts must be abolished: see Appendix section 7, p14.⁵⁷

3.2.4 These privileges should all be revoked. They are anachronistic. They are offensive to the rule of law, all notions of fairness, and growing public opinion.⁵⁸

3.3 Support for change

3.3.1 Two important events in 2017 led to or demonstrated a significant change in public attitudes to religious freedom or privilege. The Royal Commission into Institutional Responses to Child Sexual Abuse revealed the horrifying extent of clerical, and particularly Roman Catholic, rape of and sexual assault upon young girls and boys, and the complicity of the hierarchy in protecting the child molesters, covering up the crimes and facilitating their continuation.

3.3.2 Clearly, protecting the vulnerable from the predations of religious organisations was a more urgent concern of the public than merely theoretical, even fanciful, protection of “religious freedoms,” especially as campaigned on by those seeking a NO majority in the marriage equality postal survey.

3.3.3 The second event was that postal survey, and in particular the overwhelming 61.6% majority in favour of equality and thus, by the NO campaign’s own insistence, against the supposed need for greater “religious protections”.

3.3.4 In *The Meaning of YES... and NO*⁵⁹ it was argued:

The 61.6% YES margin revealed on 15 November 2017 was bigger than any federal election winner’s 2PP vote. ...There is a lot more to be gleaned from the success of the YES voters—“survey respondents”—than simply the command to Parliament to legislate for genuine marriage equality. Why? Because the NO campaign claimed time and again that the survey was about many things other than marriage equality, and the Australian people, by this emphatic majority, have rejected those claims, each and every one. ...

Right-wing NO warrior Tony Abbott announced that the vote was about more than marriage—and in stating as much he made it so.⁶⁰ ...[He] said: “If you’re worried about religious freedom ... vote no.” Other leaders of the NO campaign put other red herrings

⁵⁷ For a more detailed discussion see: Luke Beck, 19/6/2017, “Blasphemy is still a crime in Australia – and it shouldn’t be” *The Conversation*, <https://theconversation.com/blasphemy-is-still-a-crime-in-australia-and-it-shouldnt-be-78990> (accessed 3/2/2018)

⁵⁸ Public opinion on tax exemptions is discussed below under the heading “Rates and taxes”.

⁵⁹ Gardiner, Jamie, 15 November 2017, “The Meaning of YES... and NO” (accessed 1/1/2018 at <http://www.powertopersuade.org.au/blog/the-meaning-of-yes-and-no/27/11/2017>); also (with minor variations) at <https://libertyvictoria.org.au/content/meaning-yes...and-no>

See too: Edser, Dr Stuart, 10 December 2017, “When We Voted Yes, We Also Voted No,” Medium.com (<https://medium.com/@DrStuartEdser/when-we-voted-yes-we-also-voted-no-920fba9d20d8> accessed 1/1/18)

⁶⁰ Tony Abbott: “If you’re worried about religious freedom ... vote no” <https://www.theguardian.com/australia-news/2017/aug/09/abbott-says-vote-no-to-marriage-equality-and-stop-political-correctness-in-its-tracks> (accessed 15/11/2017)

up [and] the people did indeed vote on those other things. They rejected, emphatically, ... the unwinding of anti-discrimination laws...

The people's opinion empowers this Parliament, and future governments, to strengthen anti-discrimination laws, ... to curtail the unjustifiable special privileges of religious institutions to discriminate in the public sphere. Religious bodies must not be exempt from the ordinary laws, and the strong majority in this postal survey have clearly rejected their claim to such exemptions. This claim was perhaps the main plank of the NO campaign, and it was rejected. Emphatically.

3.3.5 The people's emphatic rejection of the NO campaign's claims, together with the shocking abuse revealed in the Royal Commission, and the consequent loss of public respect by religious institutions, together mark a shift in public opinion that can no longer be denied. This loss of respect is hardly new⁶¹, but it has acquired new urgency.

4 Intersections between human rights

4.1 Schools

4.1.1 A basic principle of the development of public schooling by governments across Australia in the 19th century was that it should be secular, universal and free. This remains the ideal, and the importance of education being secular is higher than ever. A secular education is one that does not proselytise one faith over another, or any religious faith at all. It was an essential compromise to avoid the ghettoization of Australian society into competing and warring religious groups. Religions may of course enter into the curriculum in many ways, as religion has played a large, and often conflictual, part in history, literature and art—and even science. Understanding the many different religions that have existed, as well as the non-religious philosophies, and their interactions over time, is a proper study for all children. Indoctrination in any single faith, however, is antithetical to a healthy education, and a violation of the human rights of the child.⁶²

4.1.2 In several States including until recently Victoria, the secular nature of public schooling has been often subverted by religious proselytising under the guise of Special Religious Instruction and similar names. Allowing privileged access to one religious body or another to proselytise children is a dangerous and divisive practice that must be stopped. The Royal Commission on Institutional Responses to Child Sexual Abuse has shown how unsafe children can be when entrusted to religious bodies, quite apart from the prejudicial content of the "instruction" itself.

⁶¹ See, for example, Matt Wade, 12/10/2017, "Ipsos global poll: Two in three Australians think religion does more harm than good in the world" *Sydney Morning Herald*, <http://www.smh.com.au/national/ipsos-global-poll-two-in-three-australians-think-religion-does-more-harm-than-good-in-the-world-20171011-gyz7ii.html> (accessed 25/1/2018)

⁶² See, for example, articles 13 and 14 of the *Convention on the Rights of the Child* and related General Comments of the Treaty Committee.

4.1.3 On a larger scale still secular education is subverted by public funding for religious schools. This promotes sectarianism, and narrows the education of children in divisive ways, not to mention harming and bullying children who are of different or no faith, and children who are same sex attracted or gender diverse. While ideally such funding should be ceased, so long as it continues it should be a mandatory condition that children be taught about all religions, and non-religious ways of being, as described above, and that discrimination against both children and staff on the basis of sexual orientation, gender identity and intersex characteristics, as well as on the basis of religion, sex and relationship status, not be permitted.

4.2 Chaplains

4.2.1 The school chaplaincy program is an egregious example of the creeping overreach of religious privilege. Imposing religious officials on schools instead of professional counsellors, youth workers or psychologists as needed is a misuse of public moneys. It is unfortunate that when this program was challenged in the High Court the main issue, its blatant inconsistency with section 116 of the *Constitution* was not reached and so not ruled upon.

4.2.2 The chaplains program should be discontinued and the funds, perhaps increased even, re-allocated to providing professional assistance for students and staff by qualified youth workers, psychologists or counsellors.

4.3 Anti-discrimination law

4.3.1 A major area in which freedom of religion has been suborned by its transmutation into unjustifiable religious privilege is the granting of blanket exemptions to religious bodies and institutions. These effectively license them to discriminate on some or all attributes covered by modern anti-discrimination laws, rendering their protections ineffective for large portions of the workforce and the population.

4.3.2 Except for the training and appointment of religious officials such as pastors, imams, priests, bishops, rabbis, sheikhs and the like, and the conduct of religious rites and observances, these exemptions are an unacceptable violation of the human right to equality before the law and under the law. Exemptions which privilege religious bodies and beliefs over laws of general application—such as in the *Sex Discrimination Act* 1984, the *Disability Discrimination Act* 1992 the *Fair Work Act* 2009 and the anti-discrimination laws of most states and territories, for starters—should be repealed entirely or, at the very least and as an interim measure only, firmly limited in application.⁶³

⁶³ This and subsequent paragraphs in this section (4.3) are adapted from: Jamie Gardiner, "Equality and Religion" 20/1/2012, <http://www.equalitylaw.org.au/elrp-guest-blogs/equality-and-religion> accessed 5/1/2018

4.3.3 Equality is in fact at the heart of religious freedom, or religious tolerance as it was called in the nineteenth century, when still a very novel idea.

4.3.4 There are dozens of major religions in Australia, and the Australian Bureau of Statistics counts hundreds in total. Most believe they are privy to the One and Only Truth, and that the others and their gods are heretics, heathens, impostors or worse. One thing their leaders seem to agree on, however, for themselves and often for others, is that they are or should be above the law. In particular they seem to think—and have successfully lobbied governments for decades—that laws prohibiting discrimination should not apply to them. As Acting Chief Justice Mason and Justice Brennan said, however, in a High Court decision on what “religion” means in Australian law, “canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.” (*Scientology Case*, (1983) 154 CLR 120, 136.) Discrimination today, unlike fifty years ago, does “offend against the ordinary laws.”

4.3.5 The Commonwealth Government has an opportunity this year, in this Religious Freedom Review, to revisit a great anomaly. This anomaly, found in every state but Tasmania, and in territory law as well as the Commonwealth *Sex and Age Discrimination Acts*, is the blanket “exemption” given to religious bodies. It places them effectively above the law.

4.3.6 Blanket exemptions are wrong. The human right to freedom of religion is not a peremptory norm of international law; it has the same status as other human rights. Like the human right to equality, it may be limited for legitimate purposes, by proportionate measures likely (on evidence) to be effective, and to the least extent possible. A blanket exemption for religious bodies imposes an unjustifiable limitation on the human right to equality.

4.3.7 While full repeal is desirable, some compromise may be possible in the interim. Bringing clarity, openness and transparency to the law may be sufficient.

4.3.8 Current laws give religious bodies, or “educational institutions established for religious purposes,” a licence to discriminate when to do so “conforms with” their “doctrines, tenets, beliefs or teachings,” or is “necessary to avoid injury to the religious susceptibilities of adherents of” the religion. The latter test in particular is impossibly vague, subjective and of uncertain meaning. This licence is not only unprincipled, it is neither clear nor transparent. But it could be made so.

4.3.9 Many religious bodies, moreover, wish neither to discriminate nor to be tarred with the same brush of bigotry that the loudest lobby calls for.

4.3.10 Legal clarity, openness and transparency, the reputations of fair-minded religious bodies, and the political realities can all be accommodated.

4.3.11 The key is to provide religious bodies the opportunity to claim a formal licence to discriminate, time-limited but renewable, conditional only on specifying precisely on what grounds and in which areas it is required, and in each case which

specific “doctrines, tenets, beliefs or teachings” necessitate it. The limits of the licence would thus be clear, and outside them ordinary law would apply.

4.3.12 For example, the claim might be that the employment of unmarried mothers as primary teachers violates particular religious tenets. Or the provision of accommodation to divorced persons or unmarried couples (mixed sex or same-sex, perhaps with different doctrinal particulars for each) is contrary to specified teachings.

4.3.13 The claim would be lodged with the Australian Human Rights Commission, in the case of Commonwealth laws, or the equivalent State or Territory bodies as required. It would be in writing and be displayed on the claimant religious body’s website and in other promotional material so that any potential employee, recipient of services or other person interacting with the body can be duly alerted to the body’s intended discrimination practices. A condition of the licence would be that the religious organisation “should also be required to detail the procedures with which they intend to invoke their exemption, and publicly report back to the relevant human rights body when they use their exemption.”⁶⁴ If it appears to the human rights body that the licence is being invoked in an arbitrary manner the licence can be revoked.

4.3.14 This process would apply to all attributes where a religious exemption currently exists, other than the primary exemption for employment and training of religious officials and the conduct of religious observance. It would not extend to attributes such as race and disability.

4.3.15 The licence to discriminate would (within its terms, and subject to the *bona fides* of the claimed justificatory doctrine) exempt the body from the operation of the law in question in relation to the specified conduct in its own activities with its own adult members and guests.

4.3.16 It will not, however, apply to anything done by the body in carrying out any activity or providing services funded in whole or in part by Commonwealth, State or local government, directly or through statutory authorities or other government-funded entities. Public funds should not be expended on supporting discriminatory activity. For the Commonwealth, giving financial support to religious bodies automatically goes against the spirit, and arguably the letter, of Section 116 of the *Constitution*, as it inevitably discriminates between those who hold, or do not hold, some religious or other beliefs.

4.3.17 The licence to discriminate will also not apply to permit discrimination against minors. They do not have legal capacity to assess the conditions represented by the licence and cannot give informed consent to them.

⁶⁴ Jim Woulfe, *Comment*, 20/1/2012, <http://www.equalitylaw.org.au/elrp-guest-blogs/equality-and-religion> accessed 5/1/18

4.3.18 The default position must be to respect, protect and fulfil the human right to equality. To depart from that principled position is the exception requiring specific action.

4.4 Rates and taxes

4.4.1 An aspect of “religious freedom” that increasingly⁶⁵ irks the Australian public is the freedom to pay no taxes. As Brian Morris writes in *The AIM Network*,⁶⁶ “Religion is a mega-billion-dollar entrepreneurial colossus that pays virtually no tax.” Citing an April 2016 national poll⁶⁷ he notes that “[64 per cent](#) of the community think religions should now be taxed” and “while two-thirds of the nation supported the notion of taxing religious businesses, only 7 per cent thought they should remain tax-exempt.”⁶⁸ Morris notes “disquiet with revelations from the Royal Commission into [Institutional Responses to] Child Sexual Abuse” and “the rank politicisation of religion across a raft of contemporary social issues” as being reasons for the strong disapproval of religions’ tax-exempt status. Another poll in the same month found even stronger opposition to this “religious freedom” to escape taxes.⁶⁹

4.4.2 In 2008 a submission⁷⁰ to the Review of Australia’s Future Tax System attempted a comprehensive estimate of the cost to taxpayers of the tax-exempt status of religions, finding a figure of \$31bn a year. The submission notes:

More accurate estimates of this kind could be obtained if the information was available, but it is not. It is standard budgetary procedure that the loss of revenue arising from exemptions, for example those applying to superannuation pensions, are listed in budget papers and can be quantified. It is anomalous that no such requirement exists for religious organisations, even those that may be involved in significant business and investment related activities.

4.4.3 As a first step to reforming the anomalous privilege of tax-exempt status given to religious bodies, including business activities, it is essential that

⁶⁵ “The majority of Australians say church and state should be separate, yet religion continues to be privileged in our society at taxpayer expense,” Chris Fotinopoulos, 28/8/2013, “Religion continues its free ride without our blessing” *ABC News* at www.abc.net.au/news/2013-08-29/fotinopoulos-why-does-the...still.../4918626

⁶⁶ Brian Morris, “Why the public want religion to be taxed”, 6 May 2016, (<https://theaimn.com/public-want-religion-taxed/> accessed 4/1/18)

⁶⁷ *Essential Report*, 5/4/2016, <http://www.essentialvision.com.au/tax-on-religious-organisations> accessed 4/1/18

⁶⁸ With 64% in the *Essential Report* poll against tax exempt status for religions it is clear a substantial proportion of those who do themselves identify with a religion are nevertheless of this opinion.

⁶⁹ “A new *poll* by market research firm Ipsos has found that only 19.5 per cent of Australians are in favour of *religious* organizations having *tax* free status. The study asked if ‘churches and other basic *religious* organisations should continue to have *tax*-exempt status to advance *religion*?’ The answer was Yes = 19.5% No = 64% Maybe = 16.5%” Rationalist Society, 12/4/2016 at <https://www.rationalist.com.au/australians-against-giving-religions-tax-free-status/>

⁷⁰ www.taxreview.treasury.gov.au/content/submissions/pre_14_november_2008-/Secular_Party_of_Australia.pdf accessed 5/1/2018

Commonwealth and State budgetary procedures be reformed to reveal accurately the revenue loss (or “tax expenditure”) involved.

4.5 Charities

4.5.1 A little over 400 years ago it may have made sense in Tudor England to consider “the advancement of religion” an inherently charitable purpose. It is utterly absurd in the 21st century. Yet this anomaly remains in our laws.

4.5.2 There are of course many valuable charities run under religious auspices. They derive their charitable aspect from the works they do, such as ministering to the sick or the poor, and many other contemporary roles of genuine public benefit. The advancement of religion, however, does not have that character. It is a reminder of an era when religion had official endorsement and commanded (albeit often unjustifiably) respect and deference. The Royal Commission has shown just how wrong society has been to accord religious bodies such deference and respect.

4.5.3 This archaic relic of another world must go. To begin with the *Charities Act* 2013 needs the following amendments:

- repeal subsection 12(1)(d) and thus remove from s.12 (Definition of *charitable purpose*) the words “(d) the purpose of advancing religion;”
- repeal subsection 7(e) and thus remove from s.7 (“Certain purposes presumed to be for the public benefit”) such a presumption in relation to “(e) the purpose of advancing religion”
- repeal subsection 10(2) to end the special privilege—not needing to be for the public benefit—which permits an entity to have the status of being a charity even though not being for public benefit “if the entity is a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the general public”.

4.5.4 Several other legal changes must follow in consequence. The *Australian Charities and Not-for-profits Commission Act* 2012, in particular, needs amendments to:

- repeal the “basic religious charity” concept (s.205-35), which removes governance and reporting standards from such entities
- repeal item 4 of the “Entitlement to registration” table in s.25-5(5), being the item referring to “advancement of religion” as a charitable purpose.

Appendix

The submission of Liberty Victoria (submission 227, 28 June 2017) to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into *The status of the human right to freedom of religion or belief* concentrated mostly on the third Term of Reference of that inquiry, namely *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*.

The present inquiry's Objective and in particular paragraph 1 of the Scope covers essentially the same ground, and the present submission therefore includes the earlier one as an integral part of its response to the Freedom of Religion Review.

[NOTE: The above description of the Appendix to the 2018 submission is in effect a reference to Appendix 1 of this 21 January 2019 submission.]