AUSTRALIAN CATHOLIC BISHOPS CONFERENCE
OFFICE OF THE PRESIDENT

14 February 2018

The Expert Panel on Religious Freedom
C/O Department of the Prime Minister and Cabinet
PO Box 6500
Canberra ACT 2600

Email: religiousfreedom@pmc.gov.au

Dear Sir/Madam

Religious Freedom Review

This submission is from the Australian Catholic Bishops Conference (ACBC). The ACBC is a permanent institution of the Catholic Church in Australia and the instrumentality used by the Australian Catholic Bishops to act nationally and address issues of national significance.

The Catholic community is the largest religious group in Australia with more than one in five Australians identifying as Catholic. The Church provides Australia's largest non-government grouping of hospitals, aged and community care services, providing approximately 10 per cent of health care services in Australia. It provides social services and support to more than 450,000 people across Australia each year. It has more than 1,730 schools enrolling more than 760,000 Australian students.

The ACBC seeks to participate in public debate by making reasoned arguments that can be considered by all people of goodwill.

The ACBC appreciates the opportunity to make a submission to the Religious Freedom Review.

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Summary

Australia has been successful as a pluralist society because it has been able to accommodate a range of viewpoints. It has also been able to accommodate a diversity of races, cultures and religions. The Religious Freedom Review is a timely opportunity to consider whether Australia's laws need to be updated to ensure we continue to enjoy freedom of thought, conscience and religion and the associated freedom of association.

The ACBC argues there are three key opportunities to reform Australia's laws to better support freedom of religion and belief:

1. A general limitations clause to address the concern that religious freedom is only ever expressed by way of exception or exemption, rather than as a right. This would operate in addition to the existing express exceptions and exemptions in anti-discrimination laws, which have the benefit of established acceptance and meaning
2. To clarify religious freedom protection offered to religious bodies so they cannot be compelled to allow Church property to be used for purposes which do not accord with their beliefs, and
3. Amending existing legislation that restricts freedom of conscience, especially for those engaged in medical practice.

Introduction

Freedom of religion is a fundamental human right. Its existence and importance is acknowledged in the Australian Constitution, in the common law and in international covenants to which Australia is a signatory. It is a freedom which arises from a fundamental and constitutive attribute of being human: the search for a truth and meaning greater than ourselves, which shows us how to live good and fulfilling lives.[1]

For these reasons, freedom of religion must not be ignored, treated with embarrassment or suspicion by policy and decision makers, treated as contrary to reason or science, or read down and so narrowly interpreted that it is reduced to mean nothing more than freedom of individual belief or worship within the confines of places of worship. While ensuring that the rights and freedoms of others are protected, governments are also obliged to ensure that freedom of religion and the freedom to manifest religious beliefs in public is recognised and protected by law. It applies equally to participation in "private" religious observances and to the delivery of "public" services by religious people and agencies, to religious organisations and to individual believers.

Australia is a pluralist society and inherent in a pluralist society are different views and beliefs and the challenge of how to accommodate those different perspectives.

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[1] John M. Finnis, *Natural Law and Natural Rights* (2nd ed, Oxford University Press, 2011).

Excluding or discouraging views from people who have a religious faith is unjust and risks impoverishing public policy debate.

Governments must recognise that when talking about people of faith, they are talking about their own citizens, whether from a Christian, Jewish, Muslim or other faith tradition. Religious believers are still in fact the majority of Australians.

Most people who adhere to a religious belief exercise their religious freedom in the service of the common good. Overwhelmingly they do so in a spirit that respects the rights and liberties of others, and as Australian citizens, they expect in fairness that they will be accorded equal respect in the exercise of their rights to practise and manifest their religious beliefs.

The ACBC contends that, rather than privileging one group over another, adopting binary mindsets or seeking a victory in a zero-sum game, the focus of lawmakers and the general community should be on the common good. This requires recognition that the assertion of any particular right will sometimes in practice conflict with respect for other rights. The objective of the law in such circumstances should be to take into account the interests of all and strike a fair balance between competing rights so that, for example, the right to be protected from unjust discrimination is not pursued in a way which undermines religious freedom or vice versa.

Freedom of thought, conscience and religion is not just freedom to worship, important as that is. The fundamental character of religious belief is public, which is why people of faith build houses of worship and undertake good works. Freedom of thought, conscience and religion, and consequent freedoms of association, speech, worship and religious practice, are positive liberties essential to human flourishing. Most people of faith are not ministers of religion; most people of faith carry their beliefs with them beyond the church, synagogue, mosque or temple into the choices of their daily lives.

The Christian faith, like many other faiths, is not just a private spirituality, restricted to rituals in churches and prayers behind closed doors. Our faith is something to be lived with our family and friends and in the broader community. Communities are strengthened when people come together in various projects around shared beliefs, as well as when they respect a similar freedom for others. Limiting respect for religion and for religious freedom to ministers of religion or places of worship perverts the meaning and significance of religion.

The PM Glynn Institute of the Australian Catholic University has drafted a very useful summary of the scope of religious freedom and belief called “Ten Principles of Religious Freedom” in its publication “Nine questions about religious freedom”.[2]

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[2] Brennan SJ, F and Casey MA, *Nine questions about religious freedom*. PM Glynn Institute, 2018. Pages 33-34.

Religious faith-based organisations

Catholic health and welfare services serve all people without discrimination, although there are some services not provided because they are not compatible with our beliefs. In delivering its services, the Church employs many people who are passionate about the Church's faith and mission and others who may not share our faith but who recognise the value of our mission to serve others and are willing to abide by our ethos and teachings.

Australian Commonwealth, state and territory governments have traditionally recognised the right of religious faith-based schools to govern themselves in relation to employment, religious curriculum and other matters so as to ensure religious freedom and foster the religious purposes of the particular school. The Catholic Church intends to continue serving people through education at the preschool, primary, secondary and tertiary levels, and to employ people who wish to join us in this work according to our beliefs and values.

Sometimes this will mean that religious believers' organisations privately or even publicly disagree with the state, on matters such as intake of refugees, pervasive inequality or lack of support for families. We can contribute to the respectful debate on these issues, resisting the temptation of governments or other institutions to think they have all the wisdom on an issue and should enforce conformity upon the community. Allowing for such diversity is one of the strengths of Australia's democracy and our laws should not be used to reduce it.

The Catholic Church intends to continue serving people who are in poverty, seeking education or in poor health. We want to continue to employ people who wish to join us in these worthy goals according to our beliefs and values. We want to continue to partner with governments without any threat that funding or contracts will be denied because of our beliefs, or subject to conditions that contravene those beliefs. We want to continue exercising our religious freedom for the common good.

The concern for the rights of parents "to ensure the religious and moral education of their children in conformity with their own convictions" (ICCPR, article 18(4)) also applies to parents with children in government schools. Parents with a religious affiliation who have children in government schools are a significant group and their views need to be taken into account by school authorities. More than 55 per cent of children at government schools have a religious affiliation. About 350,000 children attending government schools, or one in six of all students, are Catholic.[3]

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3 Australian Bureau of Statistics 2011 and 2016 Census of Population and Housing.

The law and religious freedom

Freedom of religion under international law

"Religious freedom" is a short-hand expression for a fundamental human right. In international law, it is part of "freedom of thought, conscience and religion" and, by its nature, in order to be meaningfully enjoyed, it is inextricably allied with freedom of expression and freedom of association.[4]

Freedom of thought, conscience and religion "is far-reaching and profound. The fundamental character of these freedoms is also reflected in the fact that the freedom to hold a belief cannot be derogated from, even in time of public emergency."[5]

Religious freedom has at least two principal dimensions – first, the freedom to hold a belief (International Covenant on Civil and Political Rights (ICCPR) art 18(1)); secondly, the freedom to manifest belief in community and in public (as well, privately and individually) in worship, observance, practice and teaching. Thirdly, states "undertake to have respect for" the liberty of parents to ensure the religious or moral education of their children (ICCPR art 18(4)). This aspect, although expressed in different language from the primary rights, cannot be restricted.[6]

Neither the first aspect (freedom of belief) nor the third can be limited (derogated from) by the state in times of public emergency (ICCPR, art 4(1)). In that respect, the right of belief has the highest status in international law, comparable to the right to life, freedom from torture and slavery and the right of all persons to recognition before the law. However, the second aspect (manifesting belief, especially publicly, analysed as the "active" component[7]) may be limited by law to the extent necessary to protect certain public interests (public order, public health and "the fundamental rights and freedoms of others" (ICCPR art 18(1), (3))).[8]

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4 *Universal Declaration of Human Rights* (UN GA Res 217A, 10 Dec 1948), art 18 (thought, conscience and religion) and arts 19 (expression) and 20 (peaceful assembly and association);

International Covenant on Civil and Political Rights (1966) (**ICCPR)**, art 18 and arts 19 (expression), 21 (assembly) and 22 (association);

United Nations Declaration on the Elimination of All Forms of Discrimination based on Religion or Belief (1981).

5 UN Human Rights Committee, *General Comment 22 (48) – The Right to Freedom of Thought, Conscience and Religion – Art 18* (1993), §§ 1, 3 (**General Comment 22**); ICCPR, art 4(1).

6 General Comment 22, § 8.

7 Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* 2nd ed (2005), pp 413-418.

8 The recognition of the need to accommodate religious freedom with other rights has a long history: for example, reflecting the English Enlightenment philosopher, John Locke *(A Letter Concerning Toleration* (1689)). Influenced by such writings, the penultimate draft of the Virginia Declaration of Rights (May 1776), the first governmental or constitutional human rights instrument, proposed toleration in the exercise of religion, 'unpunished and unrestrained by the magistrate, *unless, under colour of religion, any man disturb the peace, happiness or safety of society*'. [As amended on the motion of James Madison and adopted in June 1776, this became 'all men are equally entitled to the

Freedom of religion under common law

Under Australian common law, the judge-made or traditional law inherited from England, there is no guarantee of freedom of religion.[9] That is, while, under Australian law, a person is free to do anything and everything which is not expressly forbidden, and there is today, and has been traditionally in Australia, little legislative encroachment on freedom of religion, there is no great barrier to such legislation. The absence of such a barrier becomes more important as the scope and range of legislation inexorably expands.

Freedom of religion under Commonwealth law

Under the Commonwealth Constitution, there are few guarantees of "human rights" to constrain federal legislation or executive action.[10] One of these is section 116 of the Commonwealth Constitution.[11] It contains a four-part guarantee, providing that the federal Parliament may establish:

- no law for establishing any religion;
- no law for imposing any religious observance;

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free exercise of religion' without the exception in respect of disturbing the peace: Noah Feldman *The Three Lives of James Madison* (2017), p 37. Nevertheless, the exception was well understood.

In the Virginia *Act for Establishing Religious Freedom* soon afterwards introduced by Thomas Jefferson in 1779, passed 1786, the preamble recorded 'it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order': that is, there should only be interference with religious opinions when they create an actual breach of the peace.

The language of art 18(3) of the ICCPR also reflects the classic definition of John Stuart Mill's *On Liberty*: AnneMarie Devereux *Australia and the Birth of the International Bill of Rights 1946-1966* (2005), pp 115-117.

9 *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376, 388.

10 Express Constitutional rights conferred include: right to vote at federal elections (s 41, eviscerated by High Court interpretation); acquisition of property only for public purposes and on payment of just terms of compensation (s 51(31)); trial by jury of indictable offences (s 80, also cut down by High Court interpretation); freedom of internal trade, commerce and intercourse (s 92); protection against preference between States (s 99); protection of reasonable rights to use water (s 100); freedom of religion (s 116); protection of interstate residents from discrimination on the basis of residence (s 117, which took many years to establish as meaningful).

Many of these rights have limited application or been given limited interpretation by the High Court: see eg Leslie Zines *The High Court and the Constitution* 5th ed (2008), ch 16; ch 15 (s 41); pp 190 – 193; cf 6th ed (2015); Peter Hanks, Frances Gordon, Graeme Hill *Constitutional Law in Australia* 3rd ed (2012) ch 10 and [1.72]-[1.78]; 4th ed (2018, forthcoming). See also JSC FADT 2017, pp 31-8.

Implied rights have been discerned by the High Court, of which the most important for present purposes is the implied right of communication on political and public affairs and, as a corollary for that purpose, freedom of expression and of association: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1; *Tajjour v New South Wales* (2014) 254 CLR 508, 566–567 [95] (Hayne J), 578 [143] (Gageler J), 606 [244] (Keane J). See also Gaudron J's views in *Kruger v The Commonwealth* (1997) 190 CLR 1, 125 (Gaudron J) 126. See JSC FADT 2017, pp 39-43.

11 It was proposed by Henry Bourne Higgins and draws from the US Constitution, First Amendment (first and third part of s 116); art VI, s 3 (fourth part): Hanks et al, above n 12, [10.171]-[10.172].

- no law for prohibiting the free exercise of any religion; and
- no religious test for public office.

Section 116 was narrowly construed, at least initially,[12] but more recently has been recognised as containing a guarantee "protecting fundamental human rights".[13] Mason ACJ and Brennan J stated that "freedom of religion, the paradigm freedom of conscience, is of the essence of a free society".[14]

Aside from the fields of preclusion marked by s 116 of the Constitution, the Commonwealth Parliament has limited authority to legislate, in essence only with respect to the subject matter (topics or purposes) identified in s 51 of the Constitution. Where it may validly legislate, federal law takes precedence over state or territory laws to the extent of any inconsistency (s 109).

Enacting religious freedom through implementing international treaties

Other than laws with respect to marriage and divorce (Constitution ss 51(21), (22)) and taxation (s 51(2))[15], the power of the Commonwealth Parliament to legislate with respect to "religious freedom" arises principally under the power with respect to "external affairs" (Constitution s 51(29)). In the present context, while the outer boundaries of the external affairs power have not been fixed, the power relevantly enables the federal Parliament to give effect to international treaties ratified by Australia[16] and other international obligations and recommendations (e.g. recommendations of the International Labour Organisation relating to the implementation of certain conventions).[17]

Federal legislation on a treaty or other international obligation or recommendation must, in fact, give effect to the treaty (allowing for the fact that international treaties are

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12 *Krygger v Williams* (1912) 15 CLR 366, *Adelaide Co of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116. Both decisions were challenges by minority religions against war-time controls.

13 *Attorney-General (Vic); Ex rel Black v The Commonwealth (DOGS case)* (1981) 146 CLR 599, 603 (Gibbs J, referring to third limb of s 116 – no law for prohibiting free exercise of religion).

14 *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130 (Mason ACJ and Brennan J). That case arose under state taxation law but was of importance for s 116 of the Constitution 'with its fourfold guarantee of religious freedom', given the paucity of Australian authority on what was 'religion': ibid.

15 Commonwealth drafting typically seeks to invoke all possible bases, including with respect to corporations (trading, financial and foreign), banking and insurance, communications, interstate and international trade and commerce, and territories: see eg SDA, ss 9 and 10.

16 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1998) 164 CLR 261; *Victoria v Commonwealth* (1996) 187 CLR 416.

17 *Victoria v Commonwealth* (1996) 187 CLR 416, 504-9. Cf. *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 687 (Evatt and McTiernan JJ); *Ffrost v Stevenson* (1937) 58 CLR 528, 597-601 (Evatt J); *Commonwealth v Tasmania* (1983) 158 CLR 1, 131 (Mason J), 259 (Deane J).

not negotiated or expressed with the same precision or detail as domestic statutes[18]). The central point is that the treaty does not confer a general unconstrained power to legislate on the underlying subject matter of the treaty – the legislation must be appropriate and adapted to implementing or fulfilling an obligation imposed by the treaty.[19] The High Court allows a margin of discretion in how that is undertaken[20] and what has been described as a "relaxed attitude" to what is an obligation[21], but a mere aspiration generally expressed in a treaty which does not identify the general course to be taken by a signatory state may not authorise legislation under the external affairs power.[22] These matters are relevant to the legislation on religious freedom, as they require correspondence between a treaty obligation and the proposed Commonwealth law.

Relying on the external affairs power and the ICCPR and other international law treaties, federal law already recognises freedom of religion in certain respects – in the Fair Work Act, Racial Discrimination Act and Sex Discrimination Act, Evidence Act and Marriage Act. In addition, the Human Rights Commission[23] has educative and conciliations functions in respect of the ICCPR and other human rights instruments scheduled to the Commission's Act or declared by the Attorney-General to be an international instrument, adopted or ratified by Australia, relating to human rights and freedoms. The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief (1981) was so declared in 1993.[24]

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18 *Commonwealth v Tasmania* (1983) 158 CLR 1, 261-2 (Deane J); *Victoria v Commonwealth* (1996) 187 CLR 416, 486 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

19 *Commonwealth v Tasmania* (1983) 158 CLR 1, 125-6 (Mason J); *Richardson v Forestry Commission* (1998) 164 CLR 261, 298 (Wilson J), 317 (Deane J, dissenting), 321-3 (Dawson J), 332 (Toohey J), 342, 347-8 (Gaudron J, dissenting); *Victoria v Commonwealth* (1996) 187 CLR 416, 484, 487.

20 *Richardson v Forestry Commission* (1988) 164 CLR 261, 295-6 (Mason CJ and Brennan J).

21 *Richardson v Forestry Commission* (1988) 164 CLR 261; *Queensland v Commonwealth* (1989) 167 CLR 232.

22 *Victoria v Commonwealth* (1996) 187 CLR 416, 486. As an example of the drafting which the Commonwealth undertakes so as to ensure that legislation is within power *see Age Discrimination Act 2004*, s 10(7).

23 Established under *Human Rights Commission Act 1981* (Cth); refounded and expanded by *Human Rights and Equal Opportunity Commission Act 1986* (now *Australian Human Rights Commission Act 1986*) (**AHRC Act**).

24 Michael Duffy (Attorney-General) 8 Feb 1993: Federal Register of Legislative Instruments F2009B00174.

Freedom of religion under State and Territory law

There is no limitation on the legislative capacity of states and territories to give effect to freedom of religion or to limit it. [25]

State law presently recognises freedom of religion in certain respects, principally as exemptions and exceptions to broad prohibitions of discrimination in anti-discrimination / equal opportunity legislation. These are not entirely consistent in their terms or scope.

Many state anti-discrimination laws preclude discrimination on the ground of religion or religious belief.

Additionally, in Victoria and the ACT, human rights legislation gives effect to the ICCPR, including a modified version of art 18,[26] and requires all government bodies and officials to consider human rights in carrying out their functions. There are some aspects of

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25 *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376. Section 116 of the Constitution does not apply to the States. The Constitutional Convention (1898) defeated such a proposal (Hanks et al, above n 12, [10.171]). A referendum proposal to extend it to the States was heavily defeated in 1988. The Bishops' Conference was concerned and counselled: "*The long tradition of freedom of religion which our country enjoys is best protected through the democratic process in the Federal parliament and each State and Territory legislature. ... The proposal [to extend s 116 to the States] is vague, its meaning uncertain and its outcome unpredictable. There is no widespread discontent among ordinary Australians with the present religious freedoms that exist*.": Frank Brennan *Legislating Liberty* (1998), pp 38-40, 42.

26 *Human Rights Act 2004* (ACT) s 14; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 14. The provisions differ from the ICCPR in that all aspects of freedom of conscience, thought and belief are capable of being limited under a general limitation provision (*HRA* s 28; *Charter* s 7), instead of the more focussed terms of arts 4(2) and 18(3) ICCPR.

Victoria also has comprehensive religious anti-vilification legislation: *Racial and Religious Toleration Act 2001* (Vic); *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* (2006) 15 VR 207. See also: *Discrimination Act 1991* (ACT), s. 67A(1)(f); *Anti-Discrimination Act 1991* (Qld), s. 124A; *Anti-Discrimination Act 1998* (Tas), s. 19; *Anti-Discrimination Act 1977* (NSW), s. 20; JSC FADT 2017 [5.24]-[5.28].

religious freedom in education settings in some state legislation,[27] while Tasmania has a constitutional recognition of freedom of religion.[28]

Finally, those jurisdictions which have adopted the uniform Evidence Act recognise a confessional privilege in like terms to the Commonwealth.[29]

Challenges to religious freedom

People of faith face a large number of challenges with regard to religious freedom, but the ACBC has identified three particular areas of concern where there is an opportunity to improve the law:

- A general limitations clause
- Protection of the right to conscientious objection, and
- Protection of the uses of Church property.

In each case the submission will outline problems associated with the particular aspect of the law and a legislative change that would improve the situation.

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27 Since 1851, NSW legislation establishing Universities has provided for no religious test for or political discrimination in respect of the admission or graduation of students: *University Act 1851* (NSW) [14 Vic No 31], s 20, see now 31 of the *University of Sydney Act 1989* (NSW); s 7 of the *Australian Catholic University Act 1990* (NSW); and similar provisions in other NSW University Acts. The provision is reproduced in s 7 of the *Australian Catholic University (Victoria) Act 1991* (Vic).

Equal Opportunity Act 2010 (Vic) s 38(1) provides to similar effect for all levels of educational institutions, on grounds of all protected attributes, including religion, subject to an exception allowing exclusion in the case of an institution wholly or mainly for students of a particular sex, race, religious belief, age or age group or disability. Cf *Equal Opportunity Act 1984* (WA), s 73(3): a religious school may discriminate 'in good faith in favour of adherents of that religion or creed generally, but not in a manner that discriminates against a particular class or group of persons who are not adherents of that religion or creed'. Sections 41 and 30 of the *Anti-Discrimination Act 1991* (Qld), combine to the effect that a religious school may exclude non-adherent applicants, but once the school chooses to admit an applicant not of the religion, it may not discriminate against them. Somewhat to the contrary, *Equal Opportunity Act 1984* (SA), s 85ZE provides that an educational institution may not discriminate against students on any ground, except for 'an act of discrimination by an educational authority administered in accordance with the precepts of a particular religion against a student or potential student because the student or potential student appears or dresses, or wishes to appear or dress, in a manner required by, or symbolic of, a different religion' (s 85ZE(5)).

In *Arora v Melton Christian College* [2017] VCAT 1507, the Victorian Civil and Administrative Tribunal held that the exception for faith-based schools did not justify a requirement that an applicant for enrolment at a 'Christian college' not wear a Sikh head-covering (*patka*) where 50% of enrolments at the College were, in fact, non-Christian. "It is not reasonable [under the Victorian Act for a professed Christian school] to accept enrolments from non-Christian students on condition that they do not look like non-Christians": at [105]-[107]. The prohibition on religious-based restrictions on access to State educational facilities is a recognised element of guaranteeing religious freedom: see General Comment 22, §§ 5, 9.

28 *Constitution Act 1934* (Tas), s 46. This is not entrenched and so can be over-ridden or qualified by later legislation: JSC FDAT 2017, pp 51-2.

29 *Evidence Act 1995* (NSW), *2001* (Tas), *2008* (Vic), *2011* (ACT), *Evidence (National Uniform Legislation) Act* (NT): s 127 (privilege in respect of religious confessions).

Exceptions and exemptions to discrimination law

One of the principal ways religious freedom is recognised in Australia is in exceptions or exemptions to anti-discrimination law. The exceptions are in legislation in order to allow religious groups to operate in accordance with their beliefs, particularly with regard to whom they employ. The difficulty of such an approach is that religious freedom is presented more as a right to get out of something rather than the right to pursue our religious mission.

The language of exemptions is misleading and fails to recognise that religious freedom is not a special permission to discriminate granted by government in contradiction to the general law, but a fundamental human right that government is obliged to protect and which helps to define what kinds of discrimination are in fact unjust.

The principle of exemptions and exceptions is settled in law, but under sustained attack in a number of jurisdictions in Australia. This is demonstrated in the two examples set out below:

- Northern Territory - Modernisation of the Anti-Discrimination Act, 2017, and
- Commonwealth - Greens policy to eliminate exemptions for religious groups from anti-discrimination laws

Northern Territory - Modernisation of the Anti-Discrimination Act

The Northern Territory Government issued a discussion paper last year called *Modernisation of the Anti-Discrimination Act*.[30]

Under the heading "Removing content that enshrines discrimination", the discussion paper proposes the removal of all exemptions from the Anti-Discrimination Act for "… religious educational institutions, accommodation under the direction or control of a body established for religious purposes and access to religious sites".

The paper says this is to "promote equality of opportunity for all Territorians" and "ensure that cultural and religious bodies are more accountable for their actions and more inclusive".

The discussion paper does not present evidence of any problems experienced under the current legislation as a reason for change. It recognises the important right to equality, but does not acknowledge or appear to be aware of the fundamental right to freedom of religion and belief.

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30 NT Department of the Attorney-General and Justice, Discussion Paper: *Modernisation of the Anti-Discrimination Act*. September 2017. See: https://justice.nt.gov.au/__data/assets/pdf_file/0006/445281/anti-discrimination-act-discussion-paper-september-2017.pdf

The exemptions merely enable religious schools to uphold the values of the communities they serve in extremely rare circumstances where there is deliberate and wilful behaviour contrary to the values of the school.

Greens policy to eliminate exemptions for religious groups from anti-discrimination laws

In 2016, the Australian Greens launched an election policy which they said would "strengthen anti-discrimination laws by eliminating exemptions that currently enable religious organisations to discriminate based on sexuality".[31]

Further, they stated that "under current anti-discrimination laws, a gay man can be fired from working at a private school and a transgender person can be turned away from a religious homeless shelter. We shouldn't be giving religious organisations a get-out-of-jail-free card and the right to discriminate."[32]

Catholic health and welfare services are committed to serving everyone without discrimination, noting there are some services not provided because of our religious beliefs.

A Greens senator said "I know people who teach in religious schools and are afraid to come out about sexuality. How can that be allowed? Most people would recognise that sexuality doesn't impact on your ability to do your job."[33]

Catholic teaching makes it clear that a gay person should be assessed for employment on the same basis as anyone else. That is, staff in a school could reasonably be expected to support the teachings of the particular religion, to not undermine that teaching and to act as role models to their students.

<u>Schools and parents' rights</u>

The right of parents to send their children to the school of their choice and to be taught in accordance with their religious convictions must be respected and protected (ICCPR, art 18(4)). Parents, of all faiths and none, choose Catholic schools for their children because they expect that this education will be provided by school staff in a manner consistent with the Gospel of Jesus Christ and the teachings of the Church: this goes to the very heart of the identity and mission of the Catholic school.

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31 Election 2016: what the Greens will do for Australia - http://textlab.io/doc/9587356/election-2016-what-the-greens-will-do-for-australia

32 Media statement, Australian Greens launch LGBTIQ policy package on IDAHOBIT, 17 May 2016. Senators Janet Rice and Robert Simms.

33 Karp, P, Greens promise to end religious exemptions to Sex Discrimination Act. The Guardian Australia, 17 May 2016.

The freedom of Catholic schools to employ staff who embrace Christianity is essential for providing effective religious education and faith formation to their students. Staff in Catholic schools have a professional obligation to be supportive of the teachings of the Catholic Church, to act as role models to students and to do nothing publicly that would undermine the transmission of those teachings.

Catholic schools do not impose their beliefs on anyone, nor do they compel anyone to work in Catholic education. Moreover, they employ people from religious backgrounds other than Catholic, provided they are enthusiastic about the mission and conduct themselves in alignment with the ethos and Catholic principles of the school. Because this is widely understood, it seems that religious faith-based schools only very rarely have to rely on the religious liberty protections available to them when making employment decisions. Nonetheless, it is not unreasonable for religious faith-based schools and the families who choose them to continue to expect that staff will support and not undermine their school's mission.

A Commonwealth Religious Freedom Act?

As a matter of public perception, the structure of using exemptions and exceptions to recognise religious freedom diminishes the relative weight or value that the legislature appears to accord to freedom of religion in comparison with freedom from discrimination. Our preference is that the law recognise religious freedom in a positive way as a basic, internationally-protected human right that deserves protection. The use of exemptions is a grudging recognition of religious freedom that presents a fundamental freedom as a right to get out of something rather than the right to pursue our religious mission. This is despite the very high status which the freedom of conscience, thought and religion has in the history and discourse of international human rights and the non-derogable nature[34] of religious freedom. For that reason, there is considerable attraction to the symbolism of an enactment by the Commonwealth of a Religious Freedom Act. This has long been recommended, dating back to the Human Rights and Equal Opportunity Commission in 1998[35] and also the Joint Standing Committee on Foreign Affairs, Defence and Trade in 2017.[36]

In 1998, the Human Rights Commission recommended:

1. the enactment of a Religious Freedom Act; and
2. a definition of discrimination that accommodated religious freedom, in the following terms:

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34 This refers to ICCPR art 4 which states that freedom of religion may not be abridged in time of public emergency. It is accepted to be a pointer to the status and importance of religious freedom: General Comment 22, §1: 'fundamental character is reflected' in art 4(2). Of course, as noted above [7](5), art 18(3) permits specific forms of limitation on the active aspect of religious freedom.

35 Human Rights and Equal Opportunity Commission (HREOC), Article 18: Freedom of Religion and Belief, July 1998.

36 Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Status of the Human Right to Freedom of Religion or Belief - Interim Report. November 2017.

a. 'The proposed Religious Freedom Act should make unlawful direct and indirect discrimination on the ground of religion and belief in all areas of public life, in accordance with ICCPR articles 2 and 18 and Religion Declaration article 4, subject to two exemptions:
    i. A distinction, exclusion or preference in respect of a particular job based on the inherent requirements of the job should not be unlawful. Preference in employment for a person holding a particular religious or other belief will not amount to discrimination if established to be a genuine occupational qualification.
    ii. A distinction, exclusion or preference in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference required by those doctrines, tenets, beliefs or teachings made in good faith and necessary to avoid injury to the religious susceptibilities of adherents of that particular religion or that creed, should not be unlawful provided that it is not arbitrary and is consistently applied.'[37]

This proposal requires further consideration.

A general limitations clause

In the Australian Law Reform Commission's 2015 report (ALRC 129),[38] the Law Reform Commission drew attention to work of Professor Patrick Parkinson and Professor Nicholas Aroney that addressed the concern that religious freedom is only ever expressed by way of exception, rather than as a right. In a joint submission in 2011 to the federal Attorney-General's Department, on a proposal (later abandoned) for a Consolidation of Commonwealth Anti-Discrimination Laws into one Act, the two authors had proposed a general limitations clause that redefined discrimination.

The definition was a reformulation of a proposal advanced by the then-Government that endeavoured to have an overarching definition of discrimination and which encapsulated language of the High Court from the implied freedom of political communication, and from European Court of Human Rights jurisprudence – this is, as set out below, "*reasonably capable of being considered appropriate and adapted to achieve a legitimate objective"*.

As summarised (and edited by the ALRC) the proposed definition is

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37 HREOC 1998, recommendation 4.1. The final rider, requiring 'consistent application' has been criticised as too restrictive if it does not allow for exceptions for temporary or emergency recruitment: Freedom 4 Faith 2018.

38 Australian Law Reform Commission, Traditional Rights and Freedoms— Encroachments by Commonwealth Laws - Final Report. December 2015.

"… comprehensive and combines direct and indirect discrimination. The definition includes a proportionality test and what is not discrimination—due to religious beliefs or other human rights —within the definitional section itself, rather than expressing it as a limitation, exception or exemption:

1. A distinction, exclusion, [preference],[39] restriction or condition does not constitute discrimination if:
    a. it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or
    b. it is made because of the inherent requirements of the particular position concerned; or
    c. it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or
    d. it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.
2. The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate objective within the meaning of subsection 1(a)".

Under this clause, there would not be discrimination in hiring a teacher for a religious school or declining to solemnise a marriage if the Church's action was accepted as being "reasonably capable of being considered appropriate and adapted to" the exercise (or protection or advancement) of the freedom of religious belief.

The benefit of this clause is that it recognises that protection, advancement or exercise of another human right (in the present case, religious freedom) is a *legitimate objective* and not inherently discriminatory.

As noted by the ALRC, in 2008 the Senate Legal and Constitutional Affairs Committee recommended that the exemptions in s 30 and ss 34–43 of the *Sex Discrimination Act 1984* (SDA) —including those for religious organisations — be replaced by a general limitations clause[40], of which this is an example.

There is merit in adopting the Parkinson-Aroney definition of discrimination, in combination with the existing express exceptions and exemptions in anti-discrimination laws, which have the benefit of established acceptance and meaning and might be

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39 As recommended by HRC 1998 (see [66] above), 'preference' should be included. It reflects ILO Convention 111, arts 1(1), definition of 'discrimination', and 1(2).

40 Senate Standing Committee on Legal and Constitutional Affairs, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) rec 36. Making my point as to the on-going need to satisfy some criterion, the Senate Committee commented that 'such a clause would permit discriminatory conduct within reasonable limits and allow a case-by-case consideration of discriminatory conduct. This would allow for a more 'flexible' and 'nuanced' approach to balancing competing rights'.

preserved by a provision that indicates anything that was lawful or permitted under the pre-existing law is to be taken to satisfy 1(a).

Conscientious objection

Laws that force doctors to refer for abortion are another example of an imposition on the religious freedom of Christians and other people of faith. For example, the Victorian *Abortion Law Reform Act 2008* forces medical practitioners who may have a religious or conscientious objection to abortion to "refer the woman to another registered health practitioner in the same regulated health profession who the practitioner knows does not have a conscientious objection to abortion".[41] Section 8 was included in the *Abortion Law Reform Act 2008* following a review of the Bill by the Victorian Scrutiny of Acts and Regulations Committee who made the following comments in relation to Clause 8:

> "The Committee observes that these provisions involve the difficult assessment of competing rights and freedoms, that of the right of a woman to choose to terminate a pregnancy and the right in an emergency circumstance to reasonable medical treatment in order to preserve a woman's life, and on the other hand the right of health practitioners not to be compelled to assist or act against their conscience.
>
> Whether the Bill strikes an appropriate balance to these competing rights or whether the policy objectives of the Bill may be achieved by less intrusive alternative means is a question for the Parliament to determine.
>
> The Committee refers for Parliament's consideration the question whether the provisions of the Bill constitute an undue trespass to rights or freedoms within the meaning of the Act".[42]

It is striking that neither the Scrutiny of Acts and Regulations Committee nor the Victorian Parliament were prepared to uphold the freedom of conscience of health practitioners in these circumstances.

Dr Mark Hobart was reportedly investigated by the Medical Board of Victoria for declining to "refer the woman to another registered health practitioner in the same regulated health profession who the practitioner knows does not have a conscientious objection to abortion" (Section 8(1)(b), Abortion Law Reform Act 2008 (Vic)). Dr Hobart was investigated by the Medical Board because he spoke of his difficulty reconciling his conscience with the law.[43] Dr Hobart had earlier written to the Victorian Parliament's Scrutiny of Acts and Regulations Committee to detail his inability to comply with the

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41 Victorian *Abortion Law Reform Act 2008*, section 8(1)(b)

42 Scrutiny of Acts and Regulations Committee Alert Digest No. 11 of 2008. 9 September 2008.

43 Miranda Devine, Doctor risks his career after refusing abortion referral. *Herald Sun*, 5 October 2013.

legislation because it would violate his conscience.[44] Given the investigation it is unlikely other doctors or nurses will be as open with their concerns.

With respect to conscientious objection and *Abortion Law Reform Act 2008* (Vic):

- Conscientious objection is a fundamental human right. It is a necessary and integral part of the right of freedom of thought, conscience, religion and belief.
- Section 8 of the Victorian legislation (dealing with aspects of conscientious objection) is overly narrow in its practical application and more generally is deficient in failing to state expressly the right of conscientious objection or define the extent of the right. Rather, it assumes the existence of the right and then sets out certain qualifications to that right. Comparable legislation in the UK, New Zealand, ACT, WA, SA, Tasmania and the Northern Territory contains a clear statement of the right of conscientious objection.[45]
- It would be a simple step for the Act to recognise a general right of conscientious objection. This could be done, for instance, by including a provision modelled on s 4 of the Abortion Act 1967 (UK) to the following effect:
    - "No person shall be under any duty, whether legal or contractual, to perform or participate in any act authorised by this Act to which the person has a conscientious objection."
- Section 8(1)(a) (requiring that a practitioner with a conscientious objection tell a patient of the objection) infringes the freedom of thought, conscience, religion and belief, contrary to art 18(2) of the ICCPR (no coercion). The UN Human Rights Committee has determined that under this article "no one can be compelled to reveal his thoughts or adherence to a religion or belief". [46]
- Section 8(1)(b) (that a practitioner with a conscientious objection should be compelled to refer a patient to another practitioner) likewise infringes arts 18(1) and (2) of the ICCPR. The objector is being coerced in a way that limits his or her rights; it does so by requiring the health practitioner to provide a referral for purposes to which he or she conscientiously objects on religious or moral grounds.
- The requirements in s 8(3) and (4) are a limitation on the freedom of thought, conscience, religion and belief in s 14 of the Charter, art 18(1) of the ICCPR. The essential reason is that these sections compel a medical practitioner or registered nurse, despite their conscientious objections, to perform an abortion in an emergency. They are thus compelled to undertake a course of action in which

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44 Letter from Dr Mark Hobart to Mr Edward O'Donohue MLC, chairperson of the Scrutiny of Acts and Regulations Committee. 7 June 2011.

45 See: *Abortion Act 1967* (UK), s 4; *Contraception, Sterilisation and Abortion Act 1977* (NZ), s 46. *Health Act 1993* (ACT), s 84; *Health Act 1911* (WA), s 334; *Criminal Law Consolidation Act 1995* (SA), s 82A(5); *Criminal Code Act 1924* (Tas), clause 164(7); *Medical Services Act 2006* (NT), s 11.

46 General Comment 22, § 3.

they would not voluntarily engage and which is contrary to their conscience and religious beliefs.

There has been concern for some time that laws allowing euthanasia or assisted suicide might take a similar direction.[47] With respect to conscientious objection and the *Voluntary Assisted Dying Act 2017* (Vic), section 7:

- Conscientious objection of registered health practitioners is provided for in some circumstances but no provision exists for conscientious objection to be made on behalf of a hospital, health service or other institutional or corporate body. Many who work in a Catholic hospital and many who come to be cared for in a Catholic hospital do so because of the ethos and beliefs of the service provider. Health care is integral to the mission of the Church, and Catholic providers of health and aged care services are committed to developing a culture that affirms life and healing. Voluntary assisted dying is not considered quality end-of-life care in accordance with *The Code of Ethical Standards for Catholic Health and Aged Care Services in Australia*.[48]

Use of Church property

There is considerable concern that the religious freedom protection offered to religious bodies in the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* does not extend to all forms by which Church property is held. Given the legislation was passed late last year, there has not been time to allow the collection of examples of problems arising. It would be much better to clarify the law before problems arise.

The *Marriage Amendment (Definition and Religious Freedoms) Act 2017* was assented to on 8 December 2017 and amended the Marriage Act 1961.

Sections 47(3)(a) and 47B as inserted are intended to give effect to religious freedom, including on grounds of conforming to "doctrines, tenets or beliefs of the religion" concerned.[49] It would be preferable if this were amended to conform with the more widely used Commonwealth formulation, found in s 38 of the SDA; Fair Work Act 2009, ss 153, 195, 351 and 772; and s 3 of the Australian Human Rights Commission Act 1986 (definition of 'discrimination'): "doctrines, tenets, beliefs or teachings". The wider formula avoids semantic and scholastic distinctions about the nature and status of religious belief.

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47 Brennan, F (2009), Euthanasia: doctors' conscience vs patient rights. *Eureka Street*, 2 March 2009.

48 *Code of Ethical Standards for Catholic Health and Aged Care Services in Australia*. Catholic Health Australia, 2001. See: https://cha.org.au/code-of-ethical-standards

49 This phrase is used in a minority of federal laws: s 37 of the SDA (religious bodies) and s 35 of the *Age Discrimination Act 2004* (Cth). (There is a longstanding inconsistency between ss 37 and 38 of the SDA, which should be addressed as well, as recommended, above.)

Section 47B dealing with facilities of bodies established for religious purposes remains deficient in scope and certainty. There were two principal concerns from an earlier draft of the Bill - the meaning of (1) "body established for religious purposes" (in short-hand, "religious body") and (2) what was a facility "reasonably incidental to solemnisation of a marriage". An attempt has been made to address these, but uncertainty and ambiguity remain.

The definition of religious body now cross-refers to s 37 of the SDA, but the concept is not defined there; the concerns are that the phrase does not extend to all forms by which Church property is held, and that reference to a "body" implies some form of company or trust, which may fail to protect decisions by individuals on behalf of the holders of Church property.[50]

Because "solemnisation of a marriage" is the religious element of a marriage, the question of whether refusal of the hire of a Church hall for a wedding reception is protected by s 47B turns on whether a reception is "is intrinsic to, or directly associated with, the solemnisation of the marriage". There is doubt that a wedding reception is "intrinsic" to the solemnisation – that refers to what is part of the religious ritual; while, arguably, a reception is "directly associated" with the solemnisation in terms of community practice, the matter is not entirely clear.

This matter should be clarified in the law before problems arise.

Conclusion

There is a need to reform the law in a number of areas to improve protections for religious freedom in Australia. The ACBC has put arguments to reform the protection of the right to conscientious objection, the protection of the uses of Church property and to improve the recognition given to religious freedom by exemptions and exceptions with a general limitations clause. This review process is an important opportunity to improve the recognition of religious freedom in Australian law and I commend these recommendations to the Expert Panel.

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[50] In *Cobaw* (2014) 50 VR 256, there was considerable discussion and disagreement among the Court of Appeal as to whether the individual manager of the facility was liable for refusing a booking on discriminatory grounds, in addition to or instead of the body which owned the property.

I consent to this submission being made public and would be happy to answer any questions you may have. I can be contacted via Mr Jeremy Stuparich, Public Policy Director at the ACBC on 02 6201 9863 or at policy@catholic.org.au
Yours sincerely in Christ

ARCHBISHOP OF MELBOURNE
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