Anglican Church Diocese of Sydney

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

By email: religionorbelief@aph.gov.au

Dear Committee Secretary

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

The Joint Standing Committee has been asked to examine the status of the freedom of religion or belief (as recognised in Article 18 of the International Covenant on Civil and Political Rights) around the world, including in Australia, with particular regard to:

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

This submission is made on behalf of the Anglican Church Diocese of Sydney and will address the status of freedom of religion or belief in Australia, with a particular focus on the third element prescribed by the terms of reference: the need for an appropriate balancing of the freedom of religion or belief and other universal human rights.

We have been advised that other Christian organisations are making submissions to the inquiry that address the nature and extent of global abuses of the right to freedom of religion and the causes of those abuses. We are also aware of the submission prepared by the Rev'd Michael Palmer, which provides his perspectives on the specific issue of freedom of religion

in Syria, based on his recent experiences there. This submission will not seek to cover that ground, except to note the stark contrast between the high degree of religious freedom in Australia and the dire experience of people of faith – especially Christians – in many other parts of the world. In its "World Watch" report released in January 2017, the Christian organisation Open Doors reports that Christians are being killed for their faith in more countries than ever before, and that global persecution of Christians is still increasing. The report examined 50 countries where over 200 million Christians experience high levels of persecution because of their faith. Some of the key findings of this report are:

- Religious persecution is a significant factor in the global phenomenon of displacement
- Religious nationalism in Asia is a significant and accelerating source of persecution
- Islamic radicalisation in sub-Saharan Africa is increasingly mainstream
- Islamic extremism is the main engine of persecution in 14 out of the most hostile 20 countries in the World Watch List, and 35 of the top 50
- In the Middle East, Christians face pressure under both radical and autocratic regimes
- Somalia, Sudan, Mali and Mauritania are countries of special concern
- North Korea is still the most difficult place in the world to be a Christian

(see further http://www.opendoorsuk.org/persecution/documents/wwl-report-2017.pdf).

Given this global context, Australia can and should make a vital contribution. We should be taking a greater role internationally to encourage other nations to provide better protection of religious freedom for all their citizens, especially those in minority situations. Australia is in a position to bring pressure to bear by diplomatic means, by the targeted use of international aid, in negotiations with our international trading partners and the use of other powers of influence. Australia should adopt a foreign policy stance that promotes religious freedom in all nations, especially where (for example) anti-blasphemy laws and anti-apostasy laws are used to persecute minority faith groups, when anti-proselytising laws stifle free speech, and where certain faith groups are openly persecuted without legal protections or a State willing to enforce any legal protections that might exist.[1] At the very least, our government should be willing to identify and speak out against such abuses.[2]

Australia can also play an important role internationally as an exemplar. Australia has an impressive track record to date in supporting freedom of religion, and by continuing to foster and support the right to freedom of religion and belief we provide leadership and encouragement to other nations to do likewise.

[1] 26% of the world's countries and territories have anti-blasphemy laws or policies, and 13% have laws or policies penalizing apostasy. See further http://www.pewresearch.org/fact-tank/2016/07/29/which-countries-still-outlaw-apostasy-and-blasphemy.

[2] See, for example, the recently released 2016 Annual Report of the U.S. Commission on International Religious Freedom (USCIRF), which identifies 17 nations as "Countries of Particular Concern" and a further 10 nations where there are ongoing, systematic or egregious religious freedom violations engaged in or tolerated by the government. See further http://www.uscirf.gov/sites/default/files/USCIRF%202016%20Annual%20Report.pdf

The status of freedom of religion or belief in Australia

Although contested by some, most acknowledge that the religious freedoms enjoyed in Australia by all people come from Western liberal democratic traditions that have grown out of, and are intrinsically shaped by, a Christian understanding of the human person and society.[3] Arguably better than many other nations, Australia has incorporated the religious diversity that immigration and multiculturalism has brought to our shores, giving "a fair go" to people of all faiths and none. This submission is based on the premise that our positive achievements with respect to religious freedom are not the result of legal protection alone, but arise from the particular form of societal compact that underlies our secular liberal democracy. For this reason, recent calls to adopt a radically different stance towards the place of religion in national life should be resisted.

Freedom of religion in Australia did not arise out of Article 18 of the International Covenant on Civil and Political Rights (ICCPR) – we only became signatories to the ICCPR in 1980. However, our national conversation about rights is increasingly being shaped by the application of the International Covenant on Civil and Political Rights and other related international instruments to which Australia has become a signatory, such as the Religion Declaration.[4] What is often unacknowledged in these debates, however, is that the ICCPR is a broad instrument, which permits a variety of outcomes for many different signatory State Parties. The ICCPR acknowledges universal human rights, such as the right to non-discrimination and the right to freedom of thought, conscience and religion, but it only provides limited guidance as to the balancing of these rights when they are in tension.[5]

Article 18 guarantees to everyone "the right to freedom of thought, conscience and religion". The freedom to ***have*** a belief is absolute, and the freedom to ***manifest*** a belief "may only be subject to those limitations which are prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others" (18.3). The importance of this provision is emphasised by the fact that, while article 4 of the ICCPR allows "derogation" from many Convention rights during times of "public emergency", Article 18 is one of the few provisions to which this right of derogation does not apply (see 4.2). In other words, the only permissible exceptions to religious freedom are the narrowly defined ones in Article 18.3.

International jurisprudence recognises a degree of latitude as to how different State Parties may choose to balance competing universal rights. For example, the European Court recently

---

[3] See, for example, Oliver M.T. O'Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology*. (Cambridge: Cambridge University Press, 1996), especially chapter 7. See also Graham Maddox, *Religion and the Rise of Democracy.* (London, New York: Routledge, 2002).

[4] The full title is "Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981". Since 1993, the Religious Declaration has been a "relevant international instrument" for the purposes of the Human Rights and Equal Opportunity Commission Act 1986.

[5] It is for this reason that the American Association for the International Commission of Jurists convened a colloquium in Siracusa, Italy in 1984, which resulted in what are now known as the "Siracusa Principles". The Siracusa Principles address the circumstances in which derogations of certain rights may be justified and establish principles of interpretation in relation to specific limitation clauses.

considered provisions very similar to Article 18 of the ICCPR in *Eweida and Others v United Kingdom.* One of the applicants was a marriage registrar employed by the government who was dismissed for refusing to officiate at a same-sex civil partnership ceremony. This case involved balancing the right of a Christian registrar not to be discriminated against on the basis of her religion against the right of a same-sex couple to non-discrimination. The European Court decided that the case fell within the "margin of appreciation", which is a discretion allowed to State Parties to determine for themselves where the balance should be drawn in cases of competing Convention rights. The point is that the alternative outcome would also have been permissible, had the relevant State Party legislation allowed a freedom of religion exception for marriage celebrants.

In short, the ICCPR and other international instruments do not provide a single "right" way for a country to decide how to balance competing rights.[6]

The critical issue, then, is how we as a nation will choose to engage in the balancing of competing rights. This is not, in the end, a legal question, but an ideological question.

Freedom of Religion and the ideological debate about secularism in Australia

One of the most significant developments in relation to freedom of religion or belief in Australia since the Joint Standing Committee's last report in November 2000 has been the increasingly ideological contest over what it means for Australia to be a "secular" nation. The outcome of this contest will have significant implications for freedom of religion and belief.

To cite just one example of this debate, calls for the removal of all voluntary religious instruction from State schools has been grounded on the fact that education in NSW Public Schools in NSW should be "free, compulsory and *secular*".[7]

This argument is based on a flawed understanding of what it means for a nation to be "secular". Australia is a secular democracy. So is America. So is France. So is Spain. But each is a different manifestation of the secular principle. Brian Kosmin, in his essay "Contemporary Secularity and Secularism", describes a continuum between "hard" and "soft" secularism. France is cited as an example of hard secularism, which he describes as "unreservedly antagonistic to religion".[8] Hard secularism leads to a complete separation of church and State and the removal of all religious influence and activity in the public sphere. In contrast, soft secularism, which arose out of liberal-protestant values, supports religious pluralism by requiring that no religion is privileged over another.

---

[6] See further comments below and in footnote 5 in relation to the Siracusa Principles.

[7] This phrase comes from the NSW Public Instruction Act 1880. That the word "secular" did not mean "excluding all religion from schools" is apparent from the fact that from the earliest time local clergy were allowed to provide religious education to children whose parents requested it during school time. See now sections 30 and 32 of the NSW Education Act 1990, prescribing "secular" education from the government teachers, but still making provision for "special religious education" by representatives of religious groups.

[8] B. Kosmin, "Contemporary Secularity and Secularism," in *Secularism and Secularity: Contemporary International Perspectives*, edited by B. Kosmin and A. Keysar (Hartford, CT: Institute for the Study of Secularism in Society and Culture, 2007), p.7.

At the risk of over-simplifying the issues, the end-point of hard secularism is State "freedom *from* religion" whereas the soft secularism leads to "freedom *of* religion".

Australia has, to this point, been a "soft secular" democracy. This "soft secular" principle is reflected in section 116 of the Australian Constitution.

> *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.*

Successive decisions of the High Court have established what this does and does not mean. Section 116 does not prevent the Federal Government from providing funding for faith-based schools.[9] It does not prevent funding of religious chaplains in high schools. The purpose and effect is to prevent the establishment of a State religion, not to exclude religion from the public sphere. According to Constitutional scholars, the limitations on Commonwealth power in s.116 do not amount to separation of church and State.[10] State neutrality to religion does not require the State's exclusion of religion.

Notwithstanding the frequency of the claim to the contrary, there is no law in Australia that specifies that there is a "separation of church and State". To make this claim is to illegitimately transfer US jurisprudence on their first amendment to Australian soil. Rather, s.116 allows constructive partnerships between the State and religious organisations in Australia, provided that no favouritism is shown.[11]

However, it should also be noted that s.116 is merely reflective of the "soft secular" principle, not a guarantee of it. Section 116 applies only to the legislative powers of the Commonwealth, and does not affect most executive and judicial powers and activities. Moreover, it does not extend to any legislative or other action by the States. Australia has no equivalent to the positive protections of religious freedom which are embedded in the American Constitution and Canadian Charter of Rights and Freedoms. The Commonwealth arguably has power under its external affairs power to pass a federal *Religious Freedom Act* (for example) but has not to this point chosen to do so.

Notwithstanding the fact that Australia has historically been a "soft secular" democracy (which we submit has served our national life exceedingly well), public debate in the last decade has been increasingly dominated by those "unreservedly antagonistic to religion" (to pick up Kosmin's phrase) who have argued the "secular" character of our nation means that there should be no government funding of (and no concessional tax treatment for) faith-based agencies, or if there is any funding, that such funding should be tied to compliance with government policy. For reasons to be outlined below, such suggestions if implemented would

---

[9] Attorney-General (Vic) (Ex rel Black) v Commonwealth 1981 (the *Defence of Government Schools* case).

[10] See for example, George Williams, *Human Rights Under the Australian Constitution* (Oxford: 1999), p.111.

[11] This view is reflected very recently in the decision of the NSW Court of Appeal in Hoxton Park Residents Action Group Inc v Liverpool City Council [2016] NSWCA 157 (5 July 2016), which allowed government funding for an Islamic school.

likely have significant implications for faith-based hospitals, nursing homes, retirement homes, welfare providers and educational institutions. The end-point of such a scenario would either be that these agencies cease to function, withdraw from receiving government funds with a concomitant reduction of services, or are forced to comply with policies contrary to their religious beliefs or doctrine – all in the name of "secular Australia".

We need to have a national conversation on what kind of secular nation we want to be, and must not allow a rhetorical redefinition of "secularism" by the voices that have been allowed to dominate the media in recent years. In particular, if Australia is going to make a radical change and redefine itself in accordance with the "hard secular" principle, we must be aware of the impact that this will have on freedom of religion and more broadly on inclusivity, tolerance and civil society generally. "Soft Secularism" is tolerant of diversity and leads to the inclusion of the widest range of voices in the public sphere. "Hard Secularism" is intolerant of diversity and leads to the silencing and exclusion of voices that differ from the currently defined State-sanctioned morality. "Hard Secularism" seeks the complete separation of religion and State, which can only be achieved if all religious voices are barred from participating in the State, or are forced to compromise beliefs and practices fundamental to the exercise of their faith.

This submission is based on the premise that Australia should continue to be a "Soft Secular" democracy, built on diversity and tolerance. Religious organisations should be allowed (and indeed encouraged) to serve the wider community and society, and to be able to do this without having to compromise their religious identity and belief. Individuals should be afforded the broadest possible freedoms of thought, conscience and religion, subject only to limits where there is no alternative way to provide for a competing universal right.

The Positive Contribution made to Civil Society by People of Faith

Faith-based organisations make a significant contribution to our national social good. Of the 25 largest Australian charities, 23 are faith-based.[12] Moreover, many "good works" performed by Christians are carried out with minimal or no government support or funding. It is not an accident of history that Christians – ever since the second century – have led our society in founding hospitals, schools, welfare agencies and other humanitarian organisations. Rather, these things are the direct outworking of Christian faith which seeks to follow Christ, who calls his people to self-sacrificial love and service. To imagine that (say) a Christian welfare organisation would continue to function in this way without Christian staff, or divorced from its Christian purpose, is naive.

[12] This statistic is from Judd, Robinson and Errington, *Driven by Purpose: Charities that Make the Difference* (Hammondcare, Sydney 2012), esp. pp.39, 55. The data is from the BRW list of "Australia's Top 200 charities", compiled by Tony Featherstone and Adele Ferguson in BRW 29 June to 5 July 2006.

The majority of social services now provided by the government had their origins (for decades, if not longer) in services provided by faith-based organisations – in particular the Christian Church. For a faith-based organisation, the promotion of that faith is inherent to, and intertwined with, the practical work it carries out: it drives the initiative to do good works. This, however, does not negate the wider social benefit of the works undertaken. Faith-based organisations contribute significantly to social inclusion and the building of social capital in a wide variety of contexts. It would be a terrible loss to the wider community if faith-based organisations were absent from our national life.

But once the premise is accepted that Christians should be allowed to participate in the national life *as Christians* (and the same goes for people of other faiths and people of no faith),[13] then it necessarily follows that there are going to be points of tension between the free exercise of religion and other rights, and that it is necessary for there to be an appropriate balancing of rights.

The ICCPR and the balancing of competing rights

As noted above, Article 18 of the ICCPR outlines the right to freedom of thought, conscience and religion, and that while the right to *have* a belief is absolute, the right to *manifest* that belief is not. The freedom to manifest belief is qualified by section 18(3), which allows limitations that are "prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others."

Where this right to freedom of religion is in tension with another right (or even in tension with itself, between two different religious faiths), the question – and it is an ideological question, not a legal one – is where to set the balance. It cannot be settled by giving an absolute priority to, for example, individual non-discrimination rights over all other rights, or by an over-simplistic appeal to a public-versus-private dichotomy (which will necessarily result in the supposed "utopia" of hard secularism where all religious activity is banished from the public realm). Instead, we need to develop a framework that provides for an appropriate balancing of competing rights.

We submit the following four principles for consideration by the Committee.

1. **Prioritise specific rights over general rights**

Article 6 of the Religion Declaration provides the following specific rights:

a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;

[13] As guaranteed by ICCPR 25:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 [including 'religion'] and without unreasonable restrictions: (a) To take part in the conduct of public affairs [...and] (c) To have access, on general terms of equality, to public service

b) To establish and maintain appropriate charitable or humanitarian institutions;
c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
d) To write, issue and disseminate relevant publications in these areas;
e) To teach a religion or belief in places suitable for these purposes;
f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

There will be circumstances where a balance must be found between 2 potentially conflicting rights: the *general* right of persons (say) not to be unjustly discriminated against; and the *specific* right of persons to practise their religious beliefs by (say) the establishment of charities with a religious ethos (item [b] above). It is submitted that a specific right must, to the extent of any conflict, prevail over a general right. This means, for example, that Christian welfare agencies and schools ought continue to have the right not to employ someone who is hostile to, or unsupportive of, its mission, vision or values; and also to decide whether some or all of the positions offered by it carry a "faith dimension" requiring the employee to have active Christian faith. It is not appropriate to limit this discretion by means of an "inherent requirements" test.

2. General protection for freedom of conscience for all people

In the future, changes to State legislation around the beginning and end of life are likely to create potential conflicts for many people of faith. For example, it is possible that Christian doctors and nurses in State hospitals may be required to provide abortions or euthanise patients against their conscience and belief.

But it is not just the consciences of people of faith that should be safeguarded. For example, the practice of circumcising male babies is not illegal but is discouraged by medical authorities in Australia. Many paediatricians and obstetricians do not circumcise male babies on conscience grounds, and this freedom of conscience is no less important than the freedom of (say) Jewish parents to have an infant son circumcised.

We submit that there should be a general protection in federal law that protects the individual's freedom of thought, conscience and belief, which will prevent a person being compelled in the course of their employment to perform an action contrary to conscience or religious belief. The nature of our pluralistic and market-driven society should be sufficient to ensure that there will always be alternative service providers who have no conscientious or

religious objections to performing that act or service. If we are contemplating the possibility that there will be no such willing service providers for a State-allowed procedure or service, then this is a sign that the State should not mandate the acceptability of this new procedure or service.

We submit that the scope of the right to freedom of conscience should only protect an individual from being compelled to act, and should not extend to creating "conscience" obligations enforceable against other (e.g., "you must refrain from a given act because it offends my conscience"). Freedom of conscience is not a right that can be claimed on behalf of another person or against another person.

3. The balancing of rights should involve an assessment of relative disadvantage

In seeking to establish the policy setting for the balancing of competing rights, the optimal outcome is one that minimises disadvantage for the most number of people. In the hypothetical examples of euthanasia, abortion and circumcision cited above, neither the Christian medical professional nor the patient suffers a material disadvantage by allowing them the full exercise of their respective rights. The opportunity for a pregnant woman to have an abortion (in accordance with the relevant State law) is not denied by allowing a Christian doctor the right not to perform an abortion against his/her beliefs, given our pluralistic context where there are many other service providers who are willing to provide the abortion. The opportunity for parents to have a son circumcised is not denied by allowing the conscientious objection of a paediatrician against performing the procedure, given the other options open to the parents.

It is submitted that this approach of weighing relative disadvantage should be applied generally to decide the balance between competing rights. Article 18(3) of the ICCPR provides that a person's freedom to manifest their religion or beliefs should be only limited to the extent "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". It is not "necessary" to force people of faith to provide goods or services against their conscience in a circumstance where equivalent goods or services can reasonably be obtained from others.

In recent public debate about same-sex marriage, an overly high premium has been placed on the possible offence caused by the exercise of a conscientious objection to providing goods or services. On this basis, same-sex marriage advocates have argued that civil marriage celebrants must be denied a right to conscientious objection, because of the offence that a potential refusal would cause to a same-sex couple.[14] It is submitted that this is not a reasonable balancing of competing rights, because it privileges the protection against potential offence to the couple over the non-derogable human right to freedom of thought,

[14] See, for example, the submission of Rainbow Families Victoria to the Senate Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Same_Sex_Marriage/SameSexMarriage/Submissions, Submission 65.

conscience and belief. There is no fundamental human right to not be offended.[15] As such, the balancing of rights in this circumstance should surely prioritise the right to freedom of conscience. In a pluralistic liberal democracy, it would be a nonsense for government to insist that every citizen must endorse and approve the actions of all other citizens. The basis of our plurality is grounded on the fact that our laws **allow** behaviour that not all citizens **endorse** or **approve**. We need to allow space for people in public discourse to be able to say "I respect your legal right to perform that action, but I personally disapprove of it, and I do not wish to endorse it by being forced to participate". This will undoubtedly cause some offence to people who seek the full endorsement of the actions in question. This tension is a necessary consequence of diversity. The recent experience of Archbishop Julian Porteous of the Archdiocese of Hobart demonstrates the problems caused by legislation that makes it an offence to "offend".

4. Freedom of religion is limited by what is necessarily "prescribed by law".

Article 18(3) provides that the manifestation of religious freedom may be limited as "prescribed by law and necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others". This means that those limits which are placed on religious freedom must be enacted by the usual law-making process, and not simply by the arbitrary whim of officials. There are four implications that follow from this:

(i) Australian law sets the boundaries of religious freedom by defining those acts which are illegal in this country. This is typically achieved through general prohibitions, often backed by criminal sanction, which apply to everyone and are not specifically tied to religious practice. Certain practices which may have a religious basis in some religions (e.g., polygamy, child-brides, female circumcision) breach these general prohibitions. In these situations, "freedom of religion" should never be construed as able to give permission for such acts. While religious groups should have the right to regulate their own affairs with internal tribunals in, for example, the application of doctrine, discipline and appointments etc., these tribunals and internal courts cannot bypass or abrogate the law of the land.

Within the boundaries established by Australian Law, religious organisations and individuals adherents should be allowed to manifest their religion freely. At present, there is little positive protection for religious freedom in Australian law, and what protection there is framed negatively, through "balancing clauses" in anti-discrimination legislation, which allows religious organisations to act in accordance with their fundamental faith commitments.

[15] Indeed, the possibility of "offence" is a necessary outworking of societal support for free speech. The right to freedom of expression articulated in Article 19 of the ICCPR is broad, and protecting others from "offence" is not one of the restricted set of permissible limitations set out in 19(3) to the general right to freedom of expression.

(ii) The corollary to point (i) is that Australian legislators should be very circumspect in extending the reach of law in ways that enforce a particular State-sanctioned morality. In particular, the State should recognise that making something "legal" does not necessarily make it morally right for the conscience of all people in a society – e.g., abortion, prostitution, euthanasia etc. To legalise an action must not have the consequence that non-support for that action becomes illegal. Our society needs to allow space for "respectful dissent".

(iii) This has implications for the limits to the regulation of speech (hate-speech, anti-vilification law etc.).[16] It is recognised that the way beliefs are expressed should be temperate and not aim to denigrate another person with differing beliefs. However, there is no fundamental human right not to be offended. The wide drafting of Tasmanian Anti-Discrimination law has demonstrated the problems of legislative overreach, however well-intentioned by policy-makers.

The Siracusa Principles provide a helpful framework for balancing competing rights. As noted above, Article 18(3) only allows restrictions on religious freedom where it is "necessary". The Siracusa principles define a "necessary" limitation as one which is based on a ground recognised by the ICCPR, be in response to a pressing public need, pursue a legitimate aim and be proportionate to that aim [see clause 10]. The Siracusa Principles also provides that "when a conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context especial weight should be afforded to rights not subject to limitations in the covenant" [clause 36].

(iv) Within the boundaries prescribed by law, we should be seeking to promote the greatest (not the least) possible freedoms of religion or belief. To this end, it is not prudent for legislation to call on secular courts or tribunals to arbitrate on what is or is not a church doctrine, tenet, belief or teaching. The law should provide for broad – not narrow – conceptions of 'religion' and 'religious organisation'.

Key areas of concern

There are four key areas of concern where the right to religious freedom for Australian Christians is under challenge: (i) the right of Christian organisations to remain Christian in their practice, policies and employment of staff; (ii) the ability of Christian schools to teach Christian morality to their students; (iii) the rights of Christian workers to act in accordance with their conscience and belief in the workplace; and (iv) the religious freedom of those who oppose same-sex marriage in the event that it is legalised in Australia.

[16] See, for example, the impact of Victoria's *Racial and Religious Tolerance Act 2001* (RRTA) in the Victorian and Civil Affairs Tribunal (VCAT) judgment in 'Islamic Council of Victoria vs. Catch the Fire' (CTF).

First, Christian organisations ought to be allowed to remain Christian in their practice, policies, use of their facilities and employment of staff, whether or not they are in receipt of government funding.

Currently, some Christian organisations enjoy exemptions under various State anti-discrimination laws to undertake their mission and employ people who subscribe to their Christian values. Increasingly, this right is being eroded through the narrow interpretations of existing exemption provisions, and broad interpretations of conflicting provisions in other anti-discrimination laws. For example, in the case of *Christian Youth Camps v Cobaw*,[17] the Victorian Court of Appeal upheld a decision of the Victorian Equal Opportunities Tribunal that Christian Youth Camps (CYC) had engaged in unlawful discrimination on the basis of sexual orientation because it had not allowed its camp facility to be used by a support group for same-sex attracted young people. CYC was owned and operated by the Christian Brethren, and it was acknowledged by the court that the Christian Brethren are opposed to homosexual activity as being against biblical teaching. However, the religious freedom exemptions in ss.75-77 of the *Equal Opportunity Act 1995* (Vic) did not apply because the CYC was not "a body established for religious purposes". This judgment has potentially wide ramifications for the provision of goods and services by Christian organisations in Victoria.

While this decision has not yet been replicated in other States, and indeed is arguably contrary in many respects to the earlier decision of the NSW Court of Appeal in OV & OW v Wesley Mission, the judicial precedent is significant. It is likely that there will be increased pressure for public funding for faith-based schools and organisations to be linked to conformity to "equality compliance". In its submission to a Senate inquiry in 2012, Australian Marriage Equality acknowledged that one of the arguments against changes to the Marriage Act is that "religious welfare and child agencies will [be] forced to acknowledge same-sex married partners against their beliefs, and religious schools will [be] forced to teach that same-sex marriages are acceptable against their beliefs." However, their submission concludes, "we do not support exemptions in the Marriage Act for [these] situations", arguing that existing anti-discrimination legislation will provide sufficient protections for religious freedom.[18] At the same time, however, supporters of same-sex marriage were and are actively lobbying for the removal of anti-discrimination exemptions for religious groups. As an example, the NSW Gay and Lesbian Rights Lobby has argued that exemptions for a religious body from anti-discrimination legislation should be "relinquished as soon as that religious organisation accepted government funds, or, as soon as that religious organisation or body started providing social or welfare services."[19]

---

[17] Christian Youth Camps Limited & Ors v Cobaw Community Health Service Limited & Ors [2014] VSCA 75

[18] AME submission to the Senate Legal and Constitutional Affairs Committee Inquiry Into Marriage Equality Amendment Bill 2010, http://www.aph.gov.au/DocumentStore.ashx?id=54fa4902-e594-4335-92e4-a7f2920435aa, pp.60-61.

[19] NSW Gay and Lesbian Rights Lobby, submission to the Australian Human Rights Commission's Consultation on Protection from Discrimination on the Basis of Sexual Orientation and Sex and/or Gender Identity, http://www.humanrights.gov.au/sites/default/files/content/human_rights/lgbti/lgbticonsult/comments/NSW%20Gay%20and%20Lesbian%20Rights%20Lobby%20-%20Comment%2094.doc, p.15.

The question of exemptions for religious organisations from anti-discrimination laws is repeatedly raised in State parliaments. In response to a Bill which was introduced into the NSW Parliament in 2005 the Sydney Anglican Diocese noted that the Bill "threatens the freedom of our schools, colleges, churches and other organisations to be distinctively Christian". In 2016 the Victorian Parliament debated amendments to the Equal Opportunity Act to establish an *Inherent Requirements* test for employment in religious organisations, including schools. This Bill applied *only* to religious organisations and would have had the effect of significantly curtailing the ability of such organisations to employ people who subscribed to the mission of the organisation.[20]

We submit that the culture and mission of a Christian organisation, indeed of any organisation, is established by its vision, mission and underlying values. Christian organisations must therefore be able to retain the capacity to create a culture based on staff who subscribe to the vision and Christian ethos of the organisation.

Second, Christian schools ought to be allowed to teach the morality of the Bible.

The school curriculum has increasingly encroached into prescribing a particular view of morality. This is especially the case regarding contested visions of sexual morality and gender identity. This has been most recently demonstrated in the controversial *Safe Schools* program[21] and the compulsory *Respectful Relationships* program in Victorian schools.[22]

ICCPR article 18(4) recognises the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions. Parents who choose to send their children to Christian schools should have a reasonable expectation that Christian morality will be taught without being overridden by State-prescribed lessons on sexuality. Similarly, parents who choose to send their children to public schools should have the liberty to withdraw their children from lessons which explicitly contradict their religious and moral convictions. In all schools, Christian students (and other faith groups) should have the right of assembly for lunchtime meetings. (In Victoria this has been restricted by the Government, such that meetings can only take place outside designated school time.)[23]

Third, Christian workers should not be required to undertake tasks and duties within the workplace that compromises their conscience. Christians (and those from other faith groups)

---

[20] http://www.schoolgovernance.net.au/2016/06/23/victoria-proposes-to-end-religious-school-exemptions-to-discrimination-law/ date accessed: 3-Feb-17.

[21] We draw your attention to the excellent analysis by Professor Patrick Parkinson on the Safe Schools program – Patrick Parkinson (2016), 'The Controversy over the Safe Schools Program – Finding the Sensible Centre' *University of Sydney Law School. Legal Studies Research Paper No. 16/83*. September, https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2839084

[22] The Respectful Relationships program was made compulsory for all Victorian government and catholic schools from Term 1, 2017. The prescribed resource "Building Respectful Relationships" has lesson plans for children as young as 13 which encourages sexual expression in ways which run counter to the religious convictions of many parents.

[23] http://www.theage.com.au/victoria/anger-over-school-prayer-group-ban-20140730-zylr2.html. Date accessed: 21-Feb-17.

should not be precluded because of their faith from gaining employment and once employed should similarly not be overlooked for promotion.

The application of this principle is increasingly at risk in the delivery of medical services in Australia and in parallel jurisdictions overseas. For example, in Australia, despite the protection of the right for conscientious objection for doctors in the Medical Board of Australia's Good Medical Practice,[24] legislation was subsequently introduced in Victoria requiring all doctors to facilitate (refer or perform) termination of pregnancy when requested.[25] Similarly, in Canada, doctors are legally required to facilitate euthanasia on patient request.[26] Such "referrals" raise the issue of complicity in the act. Even in the absence of legislation, healthcare workers in Australia are at risk of charges of professional misconduct and loss of licence if they decline to provide a procedure or treatment on conscience grounds, on the basis that the individual autonomy of the patient should take priority over all other values, especially if morally or religiously based. It is disturbing that coercive measures such as these are forcing compliance with one side of a divisive moral issue. Changes to society that result from silencing objections to change are rarely "advancements": it is not in the interests of patient wellbeing to rid the medical profession of those who are unwilling to act against their conscience.

Finally, the question of religious freedom in a legal framework permitting same-sex marriage remains unresolved.

This issue was examined by the Select Committee on the Exposure Draft of the *Marriage Amendment (Same-Sex Marriage) Bill*. In its submission and testimony to the Inquiry, the Sydney Diocese argued that the proposed "exemptions" for ministers of religion, celebrants and religious organisations do not go far enough, nor is there sufficient protection for a religious organisation or individual believer to hold and promote a view about marriage in accordance with their beliefs.[27]

If the legal definition of marriage is changed to include same-sex couples, there will remain a very significant proportion of the Australian population who continue to believe that marriage is only between a man and woman. This view of marriage has been repeatedly and overwhelmingly affirmed by the Synod of the Sydney Diocese of the Anglican Church of Australia,[28] as well as the General Synod of the Anglican Church of Australia.[29] Without explicit protection for those who continue to hold and promote that marriage is between a man and a woman, it is likely that anti-discrimination legislation will be used to silence this point of view in the public sphere.

---

[24] *Medical Board of Australia - Good medical practice: a code of conduct for doctors in Australia*. Australian Health Practitioner Regulation Agency

[25] *The Abortion Law Reform Act 2008*

[26] An Act to amend the Criminal Code and to make related amendments to other Acts (Medical Assistance in Dying) S.C. 2016, c. 3

[27] http://www.aph.gov.au/DocumentStore.ashx?id=63a4099a-e3dd-4642-93b5-5a61a89a3fd2&subId=462074

[28] https://www.sds.asn.au/sites/default/files/synod/Synod2016.Ordinary/2016.SynodProceedings.full.pdf, p.48

[29] General Synod resolutions 61-64 of 2004; 52 of 2007; and 156 of 2010.

How the Australian Government can protect and promote freedom of religion

In light of the principles articulated and concerns identified above, we submit that the best way for the Commonwealth to protect and promote freedom of religion in Australia is by introducing specific legislation for the protection of religious freedom as a positive right, rather than as negative "exemption" to other legislation. The existing legislative approach in this country is deeply problematic, in that freedom of religion is only protected by means of an "exemption from" or "exception to" Anti-Discrimination laws. As noted above, these "exemptions" are being progressively eroded and narrowed. Instead of categorising religious freedom as an "exemption" to human rights, our legislative framework needs to recognise that Article 18 of the ICCPR articulates a positive right to freedom of thought, conscience and religion, and that this right needs to be balanced against other rights also articulated in ICCPR, such as Article 26 (non-discrimination on the basis of race, colour, sex, language, religion etc.). The 1998 proposal of the Human Rights and Equal Opportunity Commission for a federal *Religious Freedom Act* provides a helpful starting point for discussion, though some elements of that proposal warrant further refinement to take into account the four principles articulated above.[30]

We thank you for the opportunity to provide this submission and look forward to the results of the Committee's deliberations.

Yours sincerely

The Right Reverend Dr Michael Stead
Chair, Religious Freedom Reference Group

Dr Karin Sowada
Chair, Social Issues Committee

[30]http://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/religion/article_18_religious_freedom.pdf