



Anglican Church Diocese of Sydney

Submission to the Religious Freedom Review

By the Standing Committee of the Synod of the Anglican Church Diocese of Sydney

February 2018

1 Who are we?

The name of our organisation is the Anglican Church Diocese of Sydney (the Diocese). The Diocese is one of twenty three dioceses that comprise the Anglican Church of Australia. This submission is made by the Standing Committee of the Synod of the Diocese. The Standing Committee is the executive of the Synod which is in turn the principal governing body of the Diocese constituted under the *Anglican Church of Australia Constitutions Act 1902 (NSW)*.

The Diocese is an unincorporated voluntary association comprising various bodies constituted or incorporated under the *Anglican Church of Australia Trust Property Act 1917 (NSW)* and the *Anglican Church of Australia (Bodies Corporate) Act 1938 (NSW)*. These bodies, together with the diocesan network of 271 parishes, are accountable to the members of the Church through the Synod of the Diocese.

The Diocese, through its various component bodies and through its congregational life, makes a rich contribution to the social capital of our nation, through programs involving social welfare, education, health and aged care, overseas aid, youth work and not least the proclamation of the Christian message of hope for all people. In addition to the congregational life of the Diocese, the bodies which provide services to the community across the Diocese include large social welfare institutions including Anglicare Sydney, Anglican Youthworks, Anglican Aid and forty Anglican schools.

We welcome the opportunity to make this submission to the Religious Freedom Review and we give consent for this submission to be published.

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2 Executive Summary

Existing legal protections of freedom of religion are very limited. Section 116 of the Constitution provides a measure of protection, as do exemption clauses for religious bodies in anti-discrimination legislation, but these measures cannot protect religious freedom against restrictions imposed by State-based legislation. The Commonwealth has failed to implement any positive protection for ICCPR Article 18 rights, leading to an imbalanced approach when resolving any conflict between the right to freedom of religion or belief and other rights. In some jurisdictions, religious freedom rights can be overridden where “reasonable”. This diverges from the ICCPR and international human rights jurisprudence, which specified that “necessary” rather than “reasonable” is the appropriate threshold. (See further section 3).

Existing legal protections for religious freedom, though once sufficient, are now inadequate. Current exemptions in anti-discrimination legislation do not provide adequate protection for freedom of religion. There is a statutory imbalance in anti-discrimination legislation, because religious freedom is an exception to another right. Furthermore, recent judicial presumptions about Parliament’s intended balance between freedom of belief and anti-discrimination are problematic. These trends are reflective of the rising tide of “hard secularism” in Australia that – inadvertently – threatens to undercut the shared civic virtues that have hitherto allowed freedom and tolerance to flourish in Australia. (See further section 4).

The inadequate legal protection of freedom of religion highlighted in sections 3 and 4 is already beginning to have a real impact on the freedom of “religious institutions” to participate in public life. Through a series of religious bodies corporate, the Synod of the Diocese is involved in providing welfare services, foster care and adoption services, aged care services, overseas aid to developing countries, primary and secondary schooling, running Christian Conference Centres and Outdoor Education programs, and publishing Christian books and resources, including materials for religious education in schools. Recent judicial decisions now make it unclear whether some or all of these bodies and activities are entitled to rely on existing “religious” exemption in anti-discrimination legislation, because of uncertainties about “religious” versus “commercial” activities, and about what qualifies as a “body established for religious purposes”. We highlight twelve examples of current areas of concern. (See further section 5).

We encourage the panel to give consideration to the proper limits of freedom of religion, as articulated in ICCPR Article 18(3). We commend the Siracusa Principles as a helpful framework for balancing competing rights, and for articulating when it is “necessary” to restrict one right for the sake of another. (See further section 6).

Our submission concludes with a series of recommendations, which address the concerns which have been raised. These recommendations are drawn from the submission prepared by Freedom for Faith. (See further section 7).

3 Existing legal protections of freedom of religion are very limited.

By its terms of reference, the review Panel has been asked to examine and report on whether Australian law (Commonwealth, State and Territory) adequately protects the human right to freedom of religion.

The short answer to this question is that the legal protection for freedom of religion in Australia, particularly the freedom to manifest religious belief in the public sphere, is inadequate.

In its *Interim report on the Legal Foundations of Religious Freedom in Australia* released in November 2017, the Human Rights Subcommittee of the Department of Foreign Affairs and Trade examined Australia's compliance with Article 18 of the International Covenant on Civil and Political Rights (ICCPR), and concluded as follows.

- 3.1 "Commonwealth protection for freedom of religion or belief is limited. The Constitution does prohibit Parliament from restricting religion and the free exercise of religion, and there is a set of implied Constitutional rights which combine to offer some further protection in the form of, for example, religious expression and association. These Constitutional protections are not absolute in their effect, nor do they prohibit such restrictions at state or territory level. There is no positive protection of religious freedom." (para 4.76)
- 3.2 "The Commonwealth has failed to implement the range of ICCPR rights despite committing to do so. Although there is legislative protection for some ICCPR rights, notably the Article 26 right to non-discrimination, religious freedom has very little legislative protection and there is a risk of an imbalanced approach to resolving any conflict between the right to freedom of religion or belief and other rights." (para 2.33)
- 3.3 ICCPR Article 18(4) protects the rights of parents and guardians to "ensure the religious and moral education of their children in conformity with their own convictions". This right is not protected (see paras 3.33-3.36).
- 3.4 "The appropriate limitations on the right to manifest a religion or belief are carefully considered in international human rights jurisprudence, including within the ICCPR itself. Among other requirements, any limitations on the right to manifest one's religion or belief must be specifically prescribed in law, must be reasonable and proportionate, and, significantly, must be necessary to achieve a legitimate aim or respond to a pressing public or social need." (para 3.53)
- 3.5 "Two Australian jurisdictions have enacted rights instruments... The ACT was the first to do so, with the *Human Rights Act 2004* (ACT)... Victoria enacted its *Charter of Human Rights and Responsibilities Act* in 2006" (paras 5.6-8). These rights instruments have been criticised because "they do not adequately protect ICCPR

rights including religious freedom. One reason for this concern is a lower threshold for when religious freedom may be limited. The threshold of ‘reasonable’ rather than ‘necessary’ diverges from the ICCPR and international human rights jurisprudence.” (paras 5.49-50)

4 Existing limited legal protections for religious freedom are now inadequate

To this point in our nation’s history, formal legal protections for religious freedom have been limited. Section 116 of the Commonwealth Constitution does provide a measure of protection, but it only constrains the Commonwealth and has not been highly litigated since Federation. Notwithstanding this, our ‘live and let live’ social compact has made space for people of all faiths and none to express their beliefs without fear of discrimination or persecution, and to form religious institutions which seek to manifest their beliefs to society as a whole. But this is now changing, and existing limited legal protections for religious freedom are now inadequate.

A healthy democracy is built on shared civic virtues such as inclusion, tolerance of diversity and respectful disagreement, which allow all individuals to express and live out deeply held views in public and private. However, recent fractious debates around same-sex marriage have highlighted the fragility of these shared virtues, when it comes to conversations about difficult and divisive issues involving a clash of belief systems. The solution to this is NOT (as some are now arguing) to avoid contention debates by relegating matters of faith to the private domain. This would be an abandonment of the virtues of tolerance and respectful disagreement.

4.1 Redefining Australia from “soft secular” to “hard secular”

Arguably better than many other nations, Australia has incorporated the religious diversity that immigration and multiculturalism have brought to our shores, giving “a fair go” to people of all faiths and none. Our positive achievements to date with respect to religious freedom are not primarily because of legal protection, but an outworking of a “soft secular” societal compact that has historically shaped our nation.

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”.¹ 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. At the risk of over-simplifying the issues, the end-point of hard secularism is “freedom *from* religion” whereas the soft secularism leads to “freedom *of* religion”.

¹ 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.

Historically, Australia has been a “soft secular” democracy. The “soft secular” principle is reflected in section 116 of the Australian Constitution. Section 116 prevents the Commonwealth “establishing any religion”, “imposing any religious observance”, “prohibiting the free exercise of any religion” and imposing a “religious test ... as a qualification for any office”. The “establishment” clause prohibits the creation or recognition of a State Church, or the concession of special favours, titles, and advantages to one church which are denied to others.

Successive decisions of the High Court have established what s.116 does and does not mean. Section 116 does not prevent the Federal Government from providing funding for faith-based schools.² It does not prevent funding of religious chaplains in high schools. The purpose and effect are 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.³ The State’s neutrality to religion does not require the State’s exclusion of religion.

Despite the frequency of the claim to the contrary, there is no law in Australia that requires 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.⁴

However, it should also be noted that while s.116 is reflective of the “soft secular” principle, it is no 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.

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 hard secularists who are “unreservedly antagonistic to religion” (to pick up Kosmin’s phrase), who have argued (incorrectly) that 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, with no exemptions or exceptions to anti-discrimination legislation.

An example of this is the submission from the National Secular Lobby (NSL) to the Religious Review Panel.⁵ This submission is an excellent example of a misreading of

² Attorney-General (Vic) (Ex rel Black) v Commonwealth 1981 (the *Defence of Government Schools* case).

³ See for example, George Williams, *Human Rights Under the Australian Constitution* (Oxford: 1999), p.111.

⁴ This view was reflected 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.

⁵ https://www.nationalsecularlobby.org/wp-content/uploads/2018/01/Submission_201801_Religious-Freedoms-Panel.pdf

Australia's historical secular character,⁶ and demonstrates the practical outworking of hard secularism. The NSL submission argues for the need for the State to override the rights of parents guaranteed by ICCPR Article 18(4), and to subordinate freedom of religion to freedom from discrimination,⁷ notwithstanding the fact that this is contrary to the Siracusa Principles and other international Human Rights jurisprudence.⁸ The catalogue of recommendations in this submission paint a stark picture of freedom *from* religion, and are a clear demonstration of the need for Federal protection of freedom of religion.

“Hard secularism” would have significant implications for faith-based hospitals, nursing homes, retirement homes, welfare providers and educational institutions. The end-points of such a scenario would 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.

A shift towards “hard secularism” necessarily leads to a restriction on freedom of religion and more broadly a diminution of inclusivity, increase of intolerance and limitations placed on 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 religious voices and religious institutions are excluded from the public square, or are forced to compromise beliefs and practices fundamental to the exercise of their faith.

Currently, the legal protections for religious freedom are largely reflected in exemptions for religious institutions under a range of Federal and State anti-discrimination laws. One of the mechanisms used by hard secularists to push religious people to the margins of public life is the regular and increasingly strident calls for such exemptions to be limited or even removed altogether. These calls gain traction because religious freedom is framed negatively, as an exemption to another human right. In the next section, we argue that the current framing is inadequate, and that the right to religious freedom requires positive protection rather than grudging concession through a series of exemptions.⁹

4.2 The problems with Australia's anti-discrimination legislation

Australia's implementation of ICCPR Human Rights is lopsided. Five pieces of Federal legislation (partially) implement Australia's obligation under ICCPR Article 26 to guarantee “protection against discrimination on any ground such as race, colour, sex,

⁶ For example, “There is extensive evidence that the Separation of Church and State was a foundational principle shared by those who framed Australia's constitution” (NSL submission, p.2) and “Australia's constitution is founded on secular principles... However, since 1901 there has been an erosion of secular intent” (NSL submission, p.6).

⁷ NSL submission, p.10 and p.8 respectively.

⁸ On the Siracusa Principles, see further section 6.3 below.

⁹ This is discussed at some length in the Freedom for Faith submission to the Review Panel at p.58ff.

language, religion, political or other opinion, national or social origin, property, birth or other status". The Acts are:

Racial Discrimination Act 1975

Sex Discrimination Act 1984

Disability Discrimination Act 1992

Age Discrimination Act 2004

Fair Work Act 2009.

These Acts only provide a partial implementation, because there is no general protection at the Federal level against discrimination on the basis of religion.¹⁰

Furthermore, and more significantly, there is no Federal legislation that provides a positive protection for freedom of thought, conscience and belief, as articulated in ICCPR Article 18. Instead, what little protections as exist are contained in exemptions or exceptions to anti-discrimination legislation.

The effect of framing religious freedom as an "exemption" to a protected human right (rather than a right in its own right) is that it creates a presumption that operates against religious freedom rights when they conflict with other rights. For example, in the *Cobaw* case (see further, below), Justice Maxwell stated that "the purpose of the exemptions is to permit conduct which would otherwise be unlawful" [para 287].

This negative formulation of religious freedom (i.e., as an exemption to anti-discrimination) is easily misrepresented and maligned. No doubt many submissions to this Panel will claim that people of faith are seeking permission to discriminate, and are asking for special privileges for religious people that are not granted to others.

This is a gross distortion of the truth. People of faith do not seek to discriminate against anyone. Rather, we seek to have the right of *all Australians* to freedom of thought, conscience and belief, as mandated by ICCPR Article 18, to be upheld.

Arguably, freedom of thought, belief and conscience is the most fundamental of human rights. It is therefore curious that many of those who have championed ICCPR human rights obligations as the basis for anti-discrimination legislation are not equally vocal for legislation that protects the freedom of thought, conscience and belief. This should especially be the case, given that freedom of thought, belief and conscience is one of the few human rights under the ICCPR which is not derogable even in a time of national emergency.¹¹ It seems that the precedence given to religious freedom under international law is not reflected in Australia's domestic law.

Of course, there is common acceptance of the view that every individual has the right to *private* freedom of thought, conscience and belief. In Australia – for now and for the

¹⁰ At the Federal level, the Fair Work Act 2009 provides a specific protection in relation to employment. However, all State except New South Wales and South Australia include religious belief in the list of protected attributes under state-based anti-discrimination law.

¹¹ Art 4(2) ICCPR.

foreseeable future – everyone is free to believe whatever they want in the privacy of their own minds, and even to manifest that belief in the company of like-minded individuals within the confines of a church, mosque, temple or synagogue. Where the issue arises is when that belief is manifest by individuals or groups of individuals in public – in the “secular” realm – and when that belief shapes the purpose a religious institution which engages with the secular realm.

The issue arises because of a contest between two competing world-views. One is a world-view based on the autonomy of the individual, where each individual is free to choose for themselves and (within the limits of the law) answerable to no-one for their choices – free to choose their gender and sexual orientation, free to choose how they will use their sexuality, free to choose to terminate the life of one’s own unborn child, free even to choose the manner and time of their own dying. This world-view stands in tension at points with the world-view shared by many faith-based systems, which believe that the God – and not the individual – is the final arbiter of what is good, and that some acts of individual choice are morally wrong from the perspective of those who hold to a particular belief system. One world-view seeks individual freedom. The other seeks the common good.

Perhaps also these two world-views have different and irreconcilable understandings of freedom. One sees freedom in individual autonomy and being true to one’s self, the other sees freedom as finding the true self by a turning away from autonomy. These theological and existential questions are beyond the scope of this inquiry. These issues are, however, fundamental to the self-understanding of many Australians. It is not the place of the State to resolve this, but rather to recognize the right of its citizens to hold different positions on these existential issues. A diversity of belief should be welcomed.

Christians do not seek to impose their world-view or moral code on others. Nor, as has previously been said, do they seek to discriminate against others on the basis that they follow a different moral code (or no moral code). Rather, they seek to be able to follow – and for their religious institutions to follow – their faith-based moral code, and the freedom to teach and promote that moral code, without being forced to affirm positions or actions which are in conflict with it. Christians do not seek any special privilege in political or public life, but simply wish to be able to participate – as Christians – in our democratic system, as we seek to we seek manifest the love of Jesus to all and promote a Christian vision of the common good.

The current lopsided shape of anti-discrimination legislation reflects the triumph of a world-view shaped by individual autonomy. It needs to be rebalanced, in recognition of the fact that a world-view determined by individual autonomy is not the only valid or possible option.

Our lopsided anti-discrimination law has led to restrictive judicial interpretation of exemptions in anti-discrimination legislation.

4.3 Restrictive judicial interpretation

There are three particular areas in which judicial interpretation has narrowed the scope of religious freedom exemptions – on the definition of “a body established for religious purposes”, in relation to the determination of the “doctrines of the religion”, and through narrow rather than broad readings of religious freedom exemptions.

4.3.1 A “body established for religious purposes”

As noted above, the *Sex Discrimination Act 1984*, the *Age Discrimination Act 2004* and the *Marriage Act 1961* use the phrase “a body established for religious purposes”. The phrase is not further defined in the respective Acts.

The definition of “a body established for religious purposes” was considered in *Walsh v St Vincent de Paul Society Queensland (No. 2)* [2008] QADT 32.¹² This concerned an anti-discrimination claim in relation to an employee who was dismissed from a senior leadership position in the St Vincent de Paul Society because she was not a Roman Catholic. The Society relied in part on s. 109(1)(d) of the *Anti-Discrimination Act 1991* (Qld) which provides that the Act does not apply in relation to

*“an act by a body established for religious purposes if the act is—
(i) in accordance with the doctrine of the religion concerned; and
(ii) necessary to avoid offending the religious sensitivities of people of the religion.”*

The Tribunal concluded that:

On my reading of the constitution documents, the Society is not a religious body. It is a Society of lay faithful, closely associated with the Catholic Church, and one of its objectives (perhaps its primary objective) is a spiritual one, involving members bearing witness to Christ by helping others on a personal basis and in doing so endeavouring to bring grace to those they help and earn grace themselves for their common salvation. That is not enough, in my opinion, to make the Society a religious body within the meaning of the exemption [in section 109].

The phrase “body established for religious purposes” was also considered by the Victorian Supreme Court in *Christian Youth Camps (CYC) Limited v Cobaw Community Health Service Limited (‘Cobaw’)* [2014] VSCA 75. The Court held that CYC was not a “body established for religious purposes” for the purposes of the *Equal Opportunity Act 2010* (Vic), due to the commercial nature of a campsite business. This was notwithstanding the fact that CYC was established under a Christian Brethren trust, that CYC required its staff to

¹² <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/qld/QADT/2008/32.html>

subscribe to a statement of faith, and the Constitution required CYC to conduct its activities in accordance with Christian Brethren beliefs.

The Court held that “if a body is to satisfy this statutory description it must be able to be said of each of its purposes, or at least of its purposes taken as a whole, that they are religious purposes. In other words, the purpose(s) must have an essentially religious character.” [para 230]. Because CYC operated a commercial activity as a campsite operator with a majority of secular clients, the Court concluded that the entity did not have an essentially religious character.

On the basis of this restrictive definition, it seems likely that many faith-based schools and charities would not be regarded as “bodies established for religious purposes” because their educational or benevolent purposes would disqualify those bodies as having an “essentially religious character”. Following the Court of Appeal decision in *Cobaw*, the Victorian government amended the *Equal Opportunity Act 2010* to extend the definition of a “religious body”.

"religious body" means—

- (a) a body established for a religious purpose; or
- (b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles. [EOA 2010 s 81(b)].

This new definition of “religious body”, however, does not alter the Court of Appeal’s restrictive interpretation of the phrase “body established for religious purposes”.

Furthermore, the situation has become more complicated with the introduction of a statutory definition of a charity in the *Charities Act 2013*, as administered by the Australian Charities and Not-for-profit Commission (ACNC). As highlighted in the Commissioner’s 2016 Interpretation Statement on Public Benevolent Institutions, the practice of the ACNC is that a Public Benevolent Institution (PBI) cannot now be concurrently registered as having the charitable purposes of advancing religion.

The effect of this decision is that almost all PBIs (97%) are not registered with the charitable purpose of advancing religion.¹³ This is notwithstanding the fact that many of the largest PBIs in Australia are faith-based (such as St Vincent's Health Australia Ltd, Mercy Hospitals Victoria Limited, BaptistCare

¹³ Of 8,318 PBIs, only 266 are also registered with the charitable purpose of “advancing religion”. These reflect historic decisions of the ACNC, but are now contrary to current policy.

NSW & ACT, St Vincent's Private Hospitals Ltd, Catholic Healthcare Limited, Ozcare and Mission Australia).

If, as in *Cobaw*, a future court relies on charity law to determine the “purposes” of an institution to interpret the phrase “a body established for religious purposes”, the fact that a faith-based religious charity cannot register its religious purpose because of an administrative decision of the ACNC means that they will be unable to rely on the intended protections of (for example) s.37 of the *Sex Discrimination Act*.

It is not only PBIs in this situation. The Diocese estimates that approximately 50% of ACNC-registered charities are “faith-based”, but only 30% of charities have “advancing religion” as a registered charitable purpose. The remaining 20% – approximately 9500 charities – are faith-based schools, welfare agencies, aged care operators, overseas aid agencies etc. which have registered under another charitable purpose.¹⁴

There is a disturbing lack of clarity about the interrelationship between ACNC charity registration and the definition of “a body established for religious purposes”. Must a charity be registered by the ACNC with the charitable purpose of advancing religion in order to be a “body established for religious purposes”? If this is the case, there are perhaps 9500 faith-based schools and welfare agencies which are not covered by the exemption provisions of s.37 and s.38 of the *Sex Discrimination Act 1984*. Moreover, must “advancing religion” be the only (or dominant) charitable purpose (as per the reasoning in *Cobaw*), in order to be a “body established for religious purposes”? If this is the case, then all faith-based charities with another dominant purpose (e.g., education) will not be entitled to rely on existing exemption provisions.

4.3.2 Judicial determination of what qualifies as “doctrines of the religion”

The judgment in *Cobaw* is also significant for the manner in which the Court approached the determination of doctrine. The exemption in s.75 of the Act applied to conduct which “conforms to the doctrine of the religion”.

The decision at first instance, which was affirmed on appeal, held that “the absence of any reference to marriage, sexual relationships or homosexuality in the creeds or declarations of faith which Christians including the Christian Brethren are asked to affirm as a fundamental article of their faith demonstrates the Christian Brethren beliefs about marriage, sexual relationships or homosexuality are not fundamental doctrines of the religion... I am satisfied that Mr Rowe believes that homosexuality, or homosexual activity is prohibited by the scriptures, and so is against God’s will. I am satisfied that his belief is based on the manner in which he interprets

¹⁴ Sydney Diocesan Submission to the ACNC Review. Available on request.

or applies the doctrine of plenary inspiration. I am satisfied Mr Rowe, Ms Mustafa, Mr Buchanan and Mr Keep's evidence is representative of the range of beliefs held by members of the Christian Brethren in Victoria about marriage, sexual relationships and homosexuality. However, I am not satisfied those beliefs constitute a doctrine of the religion of the Christian Brethren, as I have defined that term".

With all due respect to the judges involved, this passage demonstrates how ill-equipped the courts are to adjudicate in matters of doctrine.

The NSW Courts have also considered the issue of what constitutes the doctrine of a religion in *OV & OW v Members of the Board of the Wesley Mission Council*. [2010] NSWADT 293. In this case, a same-sex couple who had applied to become foster carers were turned down. Wesley successfully relied on the religious exemption in s.56 of the *Anti-Discrimination Act 1977* (NSW), on the basis that a Wesleyan doctrinal belief was that the "monogamous heterosexual partnership within marriage is both the norm and ideal of the family" (para 6). The Court in *Wesley* took a very different approach from that of the Court in *Cobaw* in determining what constitutes the "doctrine of a religion". While we consider the approach taken in *Wesley* was preferable, both cases highlight the difficulties involved in courts being required to adjudicate in matters of religious doctrine.

4.3.3 Narrow Judicial interpretation

A third reason why the judgment in *Cobaw* is notable is the narrow judicial interpretation applied in interpreting the religious freedom exemptions.

The Victorian Court of Appeal rejected the submission of the Victorian Attorney-General, who joined as a party to the appeal, that the religious freedom exemptions in the *Equal Opportunity Act 1995* (Vic) "must be given a 'broad' interpretation" "because their purpose is to protect a human right". [182]

Instead, the Court took a narrow approach to the interpretation of s.75. The Court held that the exemption for conduct that "conforms with" the doctrines of a religion only applied where "conformity with the relevant doctrine(s) of the religion gave the person no alternative but to act (or refrain from acting) in the particular way." The justification given by Justice Maxwell for this narrow reading is that "the purpose of the exemptions is to permit conduct which would otherwise be unlawful" (para 287).

The Court took a similarly narrow approach to the interpretation of the word "necessary" in s.75(b)(2) ["necessary to avoid injury to the religious

sensitivities of people of the religion”] and s.77 [“*necessary* ... to comply with the person’s genuine religious beliefs or principles.”]

To qualify as “necessary”, it had to be shown that “the persons engaging in the discriminatory conduct must have been required or compelled by the doctrines of their religion or their religious beliefs to act in the way they did, or had no option other than to act in the way they did to avoid injuring, or causing real harm to the religious sensitivities of people of the religion.” (para 299). The Court held that it was not “necessary” (in this sense) for Mr Rowe to deny the booking.

The decision of the majority on this point is in sharp contrast to the dissenting judgment of Justice Reddick. Justice Reddick found that “the tribunal erred in its approach to the construction of s 77, ... [b]y adopting a narrow construction of the exemption in light of the purposes of the Act; [b]y applying an objective standard to the question of whether the applicants’ actions were necessary for them to comply with their religious beliefs; and; [b]y narrowing the scope of the exemption in light of the applicants’ participation in the commercial sphere.” (para 440)

The effect of restrictive interpretations of “a body established for religious purposes”, judicial attempts to arbitrate on what qualifies as a “doctrine of a religious” and narrow construction of religious freedom exemptions is that there is now a fundamental imbalance between non-discrimination rights and the right to religious freedom.

4.4 Conclusion

In this section, we have argued that there are three interrelated reasons why exemptions in existing anti-discrimination legislation do not provide adequate protection for freedom of religion. We argue there is a statutory imbalance in anti-discrimination legislation, because religious freedom is an exception to another right. We argue that recent judicial presumptions about Parliament’s intended balance between freedom of belief and anti-discrimination are problematic. And we argue that the root cause of both these imbalances is a rising tide of “hard secularism” in Australia that – inadvertently – threatens to undercut the shared civic virtues that have hitherto allowed freedom and tolerance to flourish in Australia. Whether or not the panel is persuaded by this analysis of secularism in Australia, we trust that the panel will recognise that both the statutory imbalance in anti-discrimination legislation and the trend of restrictive judicial interpretation undercut the legal protection of the right to freedom of religion in Australia.

It is for these reasons that the protection of religious freedom can no longer be taken for granted. What was sufficient in the past is now inadequate. The Federal Government

needs to enact specific legal protections of freedom of religion in order to ensure we comply with Australia's international commitments as a signatory to the ICCPR.

5 Twelve Key Areas of Concern

The inadequate legal protection of freedom of religion highlighted in the previous two sections is already beginning to result in diminutions of those freedoms. In this section, we highlight twelve particular areas of concern to the Diocese. The first seven are in relation to our religious institutions, and the remaining five relate to the freedom of individual Christians.

Through a series of religious bodies corporate, the Synod of the Diocese is involved in

- Providing welfare services to those in need, which is part funded through charitable donations and part funded by government grants
- Providing foster care and adoption services
- Providing aged care services, including residential aged care facilities
- Providing overseas aid to developing countries
- Providing primary and secondary schooling to more than 60,000 children in forty Anglican schools
- Providing Christian Conference Centres and Outdoor Education
- Publishing Christian books and resources, including materials for religious education in schools.

We believe that each of these activities (and many others) is a manifestation of Christian faith as we seek to follow the teaching and example of Jesus, and that ICCPR Article 18 mandates that faith-based organisations should be free to manifest their faith in this way, subject only to limitations that are *necessary*. However, our religious institutions face great uncertainty at the moment in relation to the status and limits of their right to freedom of religion.

Here is just a short sample of the unresolved questions for us, and for similar Christian organisations.

- Will our welfare agencies (being PBIs in receipt of government funding) lose the right to choose staff that support the Christian ethos of that organisation? (cf. *Walsh v St Vincent de Paul*)
- Will we be able to place foster children in accordance with our belief that “monogamous heterosexual partnership within marriage is both the norm and ideal of the family”? (cf. *OV & OW v Wesley*)
- Are our Christian conference centres able to decline hosting a same-sex marriage, or decline the provision of accommodation for a retreat run by an organisation promoting same-sex sexual activity? (cf. *CYC v. Cobaw*)
- Will our Anglican schools be able to continue to preference the employment of Christian staff, or will that be artificially limited to some positions where Christian faith is seen to be an “inherent requirement”?
- Are our Christian publishing activities a commercial enterprise, and on that basis “not a body established for religious purposes” and so not able to employ only Christian staff?

- Do we need to amend (literally) thousands of trust deeds to provide explicit detail as to what constitutes the “doctrine of our religion”, including provision about heterosexual marriage, the biological basis of gender, the sanctity of human life, the unacceptability of prostitution or pornography etc. ?
- What is the status of the standard clause in all Anglican Church Trust Property Licences, that the Licence is not permitted to use the premises “for any illegal or *immoral* purpose”? Can we, for example, turn down a lease for an entity which exists to advocate for late-term abortions in NSW?
- Will our overseas aid entity lose government registration in the future if it continues to partner with Christian aid agencies overseas that do not provide abortion services?

We recognise that the terms of reference of the Panel are limited to the extent of the protection of freedom of religion, but in practice this right is entwined with other rights, most notably freedom of conscience, freedom of expression (freedom of speech) and freedom of association. A solution which properly addresses freedom of religion will also have to protect these particular ICCPR rights.

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5.1 Freedom to “manifest belief” through religious institutions

As noted above, ICCPR article 18 guarantees the right to manifest religious belief “in community with others and in public or private”. This is a particular instance of the more general right to freedom of association (ICCPR Article 21). One key way in which Christians and people of other faiths manifest their belief is associating together to perform good works for the benefit of the society around them, by forming religious bodies such as welfare agencies, schools, hospitals and hospices.

To this point in Australia’s history, there has been a general acceptance (supported by the common law) that these religious institutions should be able to participate in the national life without having to forego their religious character or ethos. It is for this reason that s.351 of the *Fair Work Act 2009* (Cth) provides that the anti-discrimination provisions of the Act do not apply to the actions of “an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed” which were done in good faith “to avoid injury to the religious susceptibilities of adherents of that religion or creed” [s.351(2)(c)]. Similarly, there are explicit exemptions in the *Sex Discrimination Act 1984* (Cth) for religious bodies [s.37] and educational institutions established for religious purposes [s.38]. The intention of these and other similar provisions is to allow those in Christian institutions (schools, hospitals, etc.) to participate in the national life *as Christians*. This is an outworking of our “soft secular” heritage (see 2.1 above) which holds that people of all faiths and none should be equally allowed to participate in public life, provided that there is no special treatment by the state for any particular group.

However, also as noted above, Australia’s “soft secular” heritage is under threat. Hard secularism and soft secularism have fundamentally different – but often unacknowledged – understandings of the role of religious welfare agencies in “secular”

society. Hard secularism does not recognise that religious institutions have an independent role in serving the public good – they regard this to be the role of the government. On this basis, hard secularists maintain that, where the government funds some of the welfare work of a religious institution, the institution receiving government money thereby becomes an agent of the secular state, and can be required by the state to comply with any or all government policies. For 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.”¹⁵ The implication of this view is that religious institutions can only participate in public life to the extent that they are prepared to conform to secular values. This is a direct challenge to the right of people of faith to “manifest belief in public” by means of a religious institution.

5.2 Freedom for religious institutions to select staff on a religious basis

Currently, Christian organisations can rely on exemptions under various anti-discrimination laws to choose to employ people who are Christians and/or who are supportive of the Christian values of the organisation. 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.

We have already seen above that there is now legal confusion about exactly which religious bodies are entitled to rely on these exemptions, and as to who defines the core doctrines, because of the broad interpretation of anti-discrimination law and the narrow interpretation of exemption provisions.

What is even more concerning are proposals at a State government level to limit or remove these exemption provisions entirely.

5.2.1 The Northern Territory Government Anti-Discrimination Proposals

The Government of the Northern Territory has recently proposed that various religious exemptions in anti-discrimination law be removed. Under the heading “Removing Content that Enshrines Discrimination”, its report into proposed modernisation of the *Anti-Discrimination Act 1993* (NT) recommends removal of exemptions for religious educational institutions and for accommodation under the direction or control of a body established for religious purposes. Religious bodies would instead be required to apply to a

¹⁵ 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.

government department and justify why their service requires a particular exemption.

5.2.2 The Victorian *Equal Opportunity Amendment (Religious Exceptions) Bill 2016*

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 not, for example, to political parties (who have a statutory right to discriminate in employment on the basis of political belief).¹⁶ The Bill would have had the effect of significantly curtailing the ability of religious organisations to employ people who subscribed to the mission of the organisation. Christian schools could only actively recruit Christians where Christian faith was an “inherent requirement” of the role (e.g., chaplain). The Bill was strongly backed by the Andrews’ Government and passed in the Legislative Assembly without amendment, and was only narrowly defeated in the Legislative Council. Had this Bill passed, it would have threatened the freedom of schools, colleges, churches and other organisations to be distinctively Christian, by means of the employment of Christian staff.

These State and Territory based legislatures are able to take away the right of religious institutions to employ staff that share the fundamental religious beliefs because there is no overriding Federal legislation that enshrines these rights.

We submit that the proper application of ICCPR principles should mean that Christian welfare agencies and schools have the freedom 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, and to be able to require staff to abide by a code of conduct that reflects the doctrinal tenets of the institution.

5.3 Freedom to operate religious schools according to doctrine

Article 18(4) of the ICCPR articulates the right of parents and legal guardians “to ensure the religious and moral education of their children in conformity with their own convictions.” One way that Christian parents do this is by sending their children to faith-based schools. Faith-based educational institutions make up the majority of the private school sector in Australia. The Federal Government currently provides funding to the private school sector in a manner which does not prevent a faith-based school from teaching the tenets of their faith, including those relating to life, marriage, family, gender and sexuality.

However, we submit that it has become necessary to provide a legislative recognition of the right under Article 18(4) to operate schools that educate children of a particular faith

¹⁶ See, e.g., section 27 of the *Equal Opportunity Act 2010* (VIC).

in conformity with that faith, in light of overseas experience where funding and/or mandatory curricula are being used to require faith-based schools to teach concepts relating to life, marriage, family, gender and sexuality that are in conflict with the tenets of their faith. For example, in Ontario, Canada, a comprehensive sexual education program is compulsory in all schools including faith-based schools, because they are in receipt of government funding. This program requires Christian schools to teach a view of gender and the appropriate expression of human sexuality which is in direct conflict with Christian doctrine.¹⁷

5.4 Freedom to manifest belief in the policies of a religious institution.

There are circumstances where a faith-based organisation may need legislative protection to prevent it from being compelled to act contrary to its religious belief by the application of government policies.

One area where there is likely to be issues is in relation to the controversial sphere of gender identity. There are already instances where State authorities have adopted a clear stance, accepting the contested view that sex and gender do not normatively correspond with each other. This is seen in the affirmations that sex is arbitrarily “designated” or “assigned” at birth and that gender is a matter of a student’s choice.¹⁸ For example, the current policy in Victoria with respect to state schools is that “schools must support and respect a student's choice to identify as their desired gender when this does not align with their designated sex at birth”.¹⁹ In South Australia, schools must allow students to wear the uniform and use the toilet facilities of their identified gender, be allowed to compete in school sports (at a non-elite level) of their identified gender, when attending overnight camps be able to sleep in dormitories that correspond to their identified gender. All staff and students are required to use a student’s nominated pronouns, and are subject to the Sexual Harassment Policy and the school’s Anti-Bullying & Harassment Policy where they deliberately or repeatedly use names or pronouns other than those designated by the student.²⁰

These and other similar policies are not currently binding on independent schools. But, already, the lack of clarity in this area and the fear of litigation and reputational risks means that school principals are fearful of the consequences of establishing school policies and pastoral care practices for transgender students that are shaped by the religious ethos of the school.

And if such State-based policies affirming gender fluidity were to become binding, this would be deeply problematic for faith-based schools that uphold a doctrinal position that

¹⁷ <https://www.ontario.ca/page/sex-education-ontario>,
<http://www.edu.gov.on.ca/eng/curriculum/secondary/health9to12.pdf>

¹⁸ See, for example, https://www.det.nsw.edu.au/media/downloads/about-us/how-we-operate/legal-issues-bulletins/number_55.pdf

¹⁹ <http://www.education.vic.gov.au/school/principals/spag/health/Pages/genderidentity.aspx>

²⁰ See, for example, <https://www.decd.sa.gov.au/sites/g/files/net691/f/transgender-and-intersex-support-procedure.pdf>.

gender aligns with biological sex, and is not determined by an individual. To mandate “support and respect” for a position that is contrary to doctrine does not respect the religious freedom of those who set up and run schools according to the tenets of their religion. Faith-based schools should not be in a position where they can be compelled to allow children to wear a uniform and use toilet facilities that do not correspond to their biological sex, compelled to use language (e.g., gendered pronouns) that affirms a state of affairs contrary to doctrine, or – if a single-sex school – compelled to allow transgender children and teenagers to enrol in a single-sex school that does not correspond to their biological sex. Faith-based institutions should be permitted to implement policies that are based on a person’s biological sex, rather than their identified gender.

In order that religious institutions are free to manifest their belief in their activities, it is necessary for there to be an implementation of ICCPR principles in (say) a Federal *Freedom of Religion Act* in such a way that it provides a countervailing force to regulatory and policy overreach.

5.5 Anti-Detriment in the provision of Government funding

Amendments made to the *Sex Discrimination Act* in 2013 were both unremarkable and, at the same time, deeply problematic.

The amendment added s.37(2), which provides that the religious freedom exemptions in s.37 do not apply if “the act or practice is connected with the provision, by the body, of Commonwealth-funded aged care”. The effect of this rider is that a Commonwealth funded aged-care provider cannot discriminate against, for example, a same-sex couple person in relation to access to those services.

At one level, this was unremarkable, and generally not opposed by the faith-based aged care sector, because it accorded with what was already common practice. Faith-based aged care providers do not – and do not wish to – treat any group or individual in discriminatory ways when it come to the provision of service. (This is generally true of all Christian welfare and aid services.)

However, at the same time, this amendment is also deeply problematic, as it establishes the precedent that government funding can be used as the lever to ensure compliance with a policy.

This kind of financial leverage was used in Ireland against religious institutions. In December 2015, amendments to Section 37 of the *Employment Equality Act* were passed. Section 37 had previously granted a broad anti-discrimination exemption for “religious, educational or medical institutions” “to maintain the religious ethos of the institution”. The amendments significantly curtail this for a body in receipt of government funding, such that the exemption only now applies where “the religion or belief of the employee ... constitutes a genuine, legitimate and justified occupational requirement”.

In each case, the religious institution is entitled to rely on the broad anti-discrimination exemption *unless* they are in receipt of government funding. This is a discriminatory and coercive funding model, which is logically inconsistent. If the religious belief does not warrant the exemption at all, then it should not be exempt. But if the religious belief does warrant the exemption when *not* funded by the government, then it is improper for the government to use a financial lever to coerce a religious institution to act contrary to its religious tenets.

5.6 Charity Status

We have already highlighted particular concerns which relate to the practice of the ACNC not to allow a Public Benevolent Institution to be also registered as having the charitable purpose of advancing religion (see 2.3.1). The concern is that this may mean that faith-based PBIs (and schools and other Christian welfare charities) will not be able to access the religious freedom exemptions in anti-discrimination legislation.

More broadly, there needs to be positive protections in charities law that an organisation will not be denied or lose charitable registration because of religious belief. We make this comment in light of overseas experience. The Charities Commission for England and Wales removed the charitable status of 19 Catholic adoption and foster care agencies because they did not offer adoption and foster care to same-sex couples.²¹ This had the effect of also removing the tax-exempt status of the agencies, and as a result all Catholic adoption agencies in England and Wales have closed or transferred their operations to secular entities. This decision was on the basis of charity law that the purposes of a charity cannot be contrary to public policy. In a number of States in the USA, faith-based adoption agencies have chosen to close their doors rather than be forced to place children with same-sex couples.²² The negative consequences of such closures of faith-based organisations and services are numerous, but here we simply make the point that the circumstances of their closure point to unacceptable impositions on freedom of religion.

In the Australian context, the recent changes to the legal meaning of marriage poses a particular risk for faith-based charities, should Australia follow a similar approach to that taken overseas. Changing the law on marriage without protections for charities exposes those charities which continue to adhere to the traditional view of marriage to the risk of losing their charitable and tax deductible status (as was the case in New Zealand for the Family First charity, now deregistered).

5.7 Professional Associations and Peak-Representative Bodies

Anglican Aid is an overseas aid charity operated by the Diocese. It provides more than

²¹ *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales 2009* UKFTT 376 (GRC) (01 June 2009)

²² <http://www.usccb.org/issues-and-action/religious-liberty/discrimination-against-catholic-adoption-services.cfm>

\$3,000,000 annually to fund overseas relief and development work. Much of this funding comes from donations from Anglicans within the Diocese of Sydney.

The Australian Council for International Development (ACFID) is the peak body which represents over 130 Australian agencies working in the international aid and development sector. On 1 December 2016, ACFID revised its code of conduct. While much in the new code is welcomed and fully supported by Anglican Aid and other faith-based overseas aid and development charities, there are concerns that the commitment in the code to “respect and protect human rights” may (for example) commit Anglican Aid to respecting the “right to sexual and reproductive health” (article 12 of the International Covenant on Economic, Social and Cultural Rights). This is deeply problematic for a Christian charity, because the covenant requires the availability of “safe abortions” and the availability of “medicines for abortion and for post-abortion care”.²³

However, there are significant financial implications that follow if an organisation chooses not to be a signatory to the ACFID code. An organisation that is not a signatory to the ACFID Code of Conduct does not qualify for DFAT accreditation and funding for ANCP (the Australian NGO Cooperation Program).²⁴ It should not be the case that a “voluntary” code of a conduct established by a professional association may result in a religious organisation suffering detriment because the inconsistency between that code and the religious tenets of the organisation

Similarly, religious belief should not be a barrier to the attainment of a professional qualification or the attainment of professional membership for an individual. The most troubling example of this is the Trinity Western University case, which is currently before the Supreme Court of Canada. The University is a faith-based Christian university, and students who choose to attend make a commitment to “abstain from sexual intimacy that violates the sacredness of marriage between a man and a woman.” The Law Societies of British Columbia and Ontario have refused to accredit the law school, on the basis that the University was discriminating against LGBT students by requiring them to sign that commitment.

5.8 Freedom of Conscience, especially in relation to the beginning and end of life

There is a small but growing body of legislation (typically State-based) which creates moral tensions for people of faith, especially in relation to issues relating to the beginning and end of life. Recent developments in Victoria, for example, in relation to abortion and euthanasia illustrate this. Victorian legislation requires all doctors to facilitate (perform or refer) termination of pregnancy when requested.²⁵ This was passed, notwithstanding the code of conduct of the Medical Board of Australia which recognises a doctor’s right

²³ <https://www.escri-net.org/resources/general-comment-no-22-2016-right-sexual-and-reproductive-health>

²⁴ <http://dfat.gov.au/aid/who-we-work-with/ngos/ancp/Pages/accreditation.aspx>

²⁵ *The Abortion Law Reform Act 2008*

of conscientious objection.²⁶ The requirement that a doctor who opposes abortion on conscience grounds must provide a referral to a doctor who will perform an abortion requires them to assist in a process which is against their conscience.

Euthanasia – or assisted dying – is also deeply problematic for those who believe in the sanctity of human life. In November 2017, Victoria became the first Australian state to legalise euthanasia when it passed the *Voluntary Assisted Dying Bill 2017*. Commendably, this Act makes explicit provision for health practitioners who have a conscientious objection to voluntary assisted dying (s.7), however there is no express protection for health care facilities (hospitals, nursing homes etc.).

Many faith-based charitable organisations provide government-funded residential aged care services, with most Christian organisations operating these services clearly motivated by their understanding that all people are made in God’s image which grants a sanctity to all human life. If, as a society, we are prepared to recognise that a Christian doctor, for example, may have a conscientious objection to euthanasia, then surely a religious institution providing residential aged care should also have the right to conduct their operations in keeping with their faith and values, including respecting the sanctity of human life. Other service providers can choose to make their facilities available for this practice, but faith-based providers should, as a legitimate manifestation of their religious freedom, be able to refuse to allow their facilities to be used for the practice of euthanasia in jurisdictions (even if in accordance with a resident’s wishes) where this has been legalised.

These two examples illustrate that there are already points of moral tension for people of faith, and it is foreseeable that what are currently areas of moral tension could in the future become a moral crisis. For example, Quebec has passed the *Act Respecting End-of-Life Care*, which requires that “every institution must offer end-of-life care”, where end-of-life care is defined to include both “palliative care provided to end-of-life patients and medical aid in dying” [ss. 3 and 7].

Bills to legalise assisted dying are likely to be considered in a number of Australian States and Territories in the near future. Now is the time for the Federal Government to comply with its international obligations to protect human rights – in this case, the right to freedom of thought, conscience and religion guaranteed by ICCPR Article 18. Because Article 18 also guarantees the right to manifest religious belief “in community with others and in public or private”, this protection needs to be extended to religious institutions such as hospitals, welfare bodies and aged-care providers.

Freedom of conscience is a necessary protection for all people, not merely people of faith. 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

²⁶ section 2.4.6, *Medical Board of Australia - Good Medical Practice: A Code of Conduct for Doctors in Australia*, <http://www.medicalboard.gov.au/Codes-Guidelines-Policies/Code-of-conduct.aspx>

no less important than the freedom of (say) Jewish parents to have an infant son circumcised.²⁷

In addition to protections for religious institutions, we submit that there should be a general protection in Federal law that protects the individual's freedom of thought, conscience and belief. This could be done by amendments to Employment Law, to create an obligation on employers to provide, where reasonable, an accommodation for conscience and belief, so that people are not 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 religious or other conscientious 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.

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 others (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.

5.9 The right of Parents to withdraw a child from classes which conflict with moral or religious convictions

The right of parents to ensure the religious and moral education of their child in conformity with their own convictions is provided for in Article 18(4) of the ICCPR. This not only entails the existence of religious schools (see 3.3 above), but also requires that this parental right is recognised in state-run schools, such that parents should have a right to withdraw a child from classes where the teaching is in conflict with the religious or moral education that those parents seek to provide for their child. This is unlikely to occur in (say) Maths or Geography lessons, but may occur when programs teach about marriage, family, gender, sexuality and issues touching on the beginning and end of life (e.g., abortion).

The controversy around the Safe Schools program demonstrates the concern that parents have that their children are being exposed to radical sex and gender education without the consent, or even knowledge, of parents. The Safe Schools program is compulsory in all state schools in Victoria. It is at the discretion of each principal whether parents are given the ability to have their children opt-out of the program. This is not in compliance with ICCPR Article 18(4).

²⁷ Male circumcision is to be distinguished from female genital mutilation. The latter is a criminal offence in every jurisdiction in Australia. 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. See further section 7 below.

In order to guarantee Article 18(4) rights for parents, they need a right to receive advance notice of classes covering controversial topics, and the right to withdraw a child from classes with content that contradicts their beliefs.

5.10 Legitimate Disagreement (Freedom of Expression)

In a pluralistic liberal democracy, it would be nonsense for the 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 therefore 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 is what tolerance looks like in practice.

This will undoubtedly cause some offence to people who seek more than tolerance, and expect a full endorsement of their actions. This tension is a necessary consequence of diversity. Democracies are at their best when we embrace this diversity and do not seek to silence the views that we find offensive; when we can echo Evelyn Beatrice Hall’s summary of Voltaire’s views: “I disagree with what you say, but I will defend to the death your right to say it”.

However, the growing trend to make “causing offence” unlawful takes us in the opposite direction. There is a real and justifiable concern that anti-discrimination law and anti-vilification law and anti-bullying policies are going to be increasingly used by activists to attack religious freedom by attempting to silence free speech.

An example of the diminishing space for legitimate dissent is the complaint made against Archbishop Julian Porteous. Archbishop Porteous, of the Catholic Archdiocese of Hobart, was called to answer a complaint before an anti-discrimination body in Tasmania because of the offence caused by the publication of a booklet that promoted a traditional, Catholic view of marriage. That it may be an offence to do nothing more than declare the Catholic (and at that time, the legal) definition of marriage demonstrates how little space there is for dissent and toleration of alternative points of view.

It is deeply problematic when “causing offence” becomes unlawful conduct. We encourage the panel to consider ways that Federal anti-discrimination and anti-vilification law can be framed so that merely causing offence is not discrimination or vilification. This legislation should “cover the field”, and thereby override State-based legislation to the contrary.

We also encourage the panel to recommend the abolition of the common law offence of blasphemy.²⁸ Blasphemy criminalises the publication of offensive words against the

²⁸ Blasphemy has been abolished by Statute in Queensland and WA, but remains an offence in other States and Territories.

Christian religion. Blasphemy law is anachronistic and inappropriate, because freedom of religion entails the freedom to dissent from, and to be critical of, a religion.

5.11 Freedom of Association

5.12 The University of Sydney Union (USU) sought to deregister the Sydney University Evangelical Union in March 2016 because of what was claimed to be a “discriminatory” religious membership test, that office bearers must make a declaration of faith in Christ. Similar threats of deregistration were made to other faith-based groups before a resolution was achieved with USU. To provide freedom of religion to faith-based student groups at schools, universities and other educational institutions, these groups need to be free to choose members and leaders who share a commitment to the religious ethos of the group.

5.13 Anecdotal evidence from a number of university groups indicate that there is a growing level of opposition to (and intolerance of) their activities on campus. A number of groups have chosen to “self-censor”, and do not speak about human sexuality on campus. This is part of a wider trend in the diminution of free speech in Australian Universities. According to an analysis conducted by the Institute of Public Affairs, just under 80% of Australian universities actively restrict free speech on campus.²⁹

5.14 Freedom from Discrimination

There are two Australian states (NSW and SA) where religion is not a protected attribute in anti-discrimination legislation. While there is some protection in employment situations via s.351 of the *Fair Work Act 2009* (Cth), this does not cover discrimination outside the workplace.

We recommend that a Federal law should make it unlawful to discriminate on the basis of religious belief. This should be enacted by means of a general limitations clause, which makes clear that actions which are appropriate and adapted to protect the right of freedom of religion or another legitimate purpose are not an act of discrimination.

6 The Limits of Freedom of Religion

We recommend that the panel, when considering legislative protection for religious freedom, should also give due consideration of the proper limits to the freedom of religion. ICCPR 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 requires that the limits 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.

²⁹ <https://ipa.org.au/wp-content/uploads/2016/12/18May16-ML-FreeSpeechonCampusAudit2016-May2016.pdf>

6.1 Australian law sets the boundaries of religious freedom by defining those acts which are “illegal” (in the sense that a prohibition is backed by a criminal sanction).³⁰ Certain practices which may have a religious basis in some religions (e.g., polygamy, child marriages, female circumcision) are illegal in Australia. “Freedom of religion” should never be construed as able to give permission for such acts.

Furthermore, 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 individual adherents should be allowed to manifest their religion freely.

6.2 The corollary to the previous point 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, adultery, prostitution, euthanasia etc. To legalise an action must not have the consequence that non-support for that action becomes unlawful. Our society needs to allow space for “legitimate dissent”.

6.3 This has implications for the limits to the regulation of speech (hate-speech, anti-vilification law etc.).³¹ 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.

6.4 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

³⁰ Not all unlawful conduct is illegal. Illegal conduct is subject to criminal sanction. Unlawful conduct is not necessarily criminal. For example, s.20C of the *Anti-Discrimination Act 1977 (NSW)* makes racial vilification “unlawful”, while s.20D of the same Act makes it a criminal offence to “incite hatred” on the ground of race. Complaints of unlawful conduct under s.20C are investigated by the Anti-Discrimination Board and/or Tribunal (see parts 8 & 9 of the Act). Breaches of s.20D are subject to criminal prosecution.

³¹ 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).

covenant” [clause 36].³² Article 18 is one of seven non-derogable rights in the ICCPR.

6.5 Within the boundaries prescribed by law, we should be seeking to promote the greatest (not the least) possible freedoms of religion and 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’ (see further recommendation 7.4.5 and Appendix 2).

7 Recommendations

In light of the inadequacy of the current limited protections for religious freedom, the twelve areas of concern highlighted above, and the appropriate limits to religious freedom, we make the following recommendations for the consideration of the panel.

8 The Diocese is in full support of the proposals contained in the submission of Freedom for Faith (FFF). The FFF proposal provides a way to enact the protection of religious freedom that Australia has committed to as a signatory of the ICCPR without seeking special privileges for people of faith, and without compromising the non-discrimination rights of others. Many of the key areas of concern identified above will be addressed if the following proposals outlined in the FFF submission are implemented.

8.1 Reframing anti-discrimination law to move away from treating religious freedom as a grudging exception to discrimination laws and instead recognising a positive right to religious freedom. A slightly modified form of the “General Limitations Clause” approach proposed by Parkinson/Aroney is shown in Appendix 1.

8.2 Extending the coverage of Federal anti-discrimination law so that religious belief is a protected attribute.

8.3 Expansion of the *Fair Work Act* so that employers are under a duty to offer reasonable accommodation of religious belief in the workplace.

8.4 Enacting a Federal *Freedom of Religion Act* (or similar), include the following.

8.4.1 Statutory recognition of the rights and freedoms recognised in ICCPR Article 18, and the associated rights of freedom of expression (Article 19) and of association (Article 21). This should explicitly recognise:

- Freedom to manifest a religion through religious observance and practice;
- Freedom to manifest religious belief “in community with others” through the formation and activities of religious associations, societies and institutions;
- Freedom to appoint people of faith to organisations run by faith communities;
- Freedom to teach and uphold moral standards within faith communities;

³² See <https://www.icj.org/siracusa-principles-on-the-limitation-and-derogation-provisions-in-the-international-covenant-on-civil-and-political-rights/>

- Freedom of conscience to discriminate between right and wrong;
- Freedom to teach and propagate religion;
- Freedom of parents to ensure that their child’s religious and moral education is in accordance with their convictions (see further 7.4.2).

The *Freedom of Religion Act* should also enshrine principles to ensure that any statutory encroachments on religious freedom must always be limited to the minimum degree of interference that is necessary and proportionate to pursue another legitimate purpose. We commend to the Panel the argument in Part VIII of the submission by Associate Adjunct Professor Mark Fowler, that it is not necessary or proportionate to limit freedom of conscience or belief in the context of service supply where there are equivalent services that may be supplied by an alternative provider.

8.4.2 Explicit recognition of parents’ right to educate their children in accordance with their beliefs, and the associated right of religious groups to run faith-based schools and receive Government funding on an equal basis with non-religious schools.

8.4.3 Anti-detriment provisions to protect faith-based organisations from discriminatory action on religious grounds in relation to access to government funding or accreditation.

8.4.4 Interpretation provisions, including a requirement that courts and public servants must interpret and apply legislation in a manner most consistent with the articulated freedom rights listed above.

8.4.5 A statutory definition of “religious bodies” and/or “body established for religious purposes” which addresses the issues identified above in section 2.3. We commend to the consideration of the Panel the approach taken in the amendments to the Smith Bill proposed by Mr Broad, which are reproduced in marked-up form in Appendix 2. This is the same as the approach taken in Part XI of the submission to the Review Panel from Associate Adjunct Professor Mark Fowler.

8.4.6 An express intention that the proposed *Freedom of Religion Act* “covers the field” with respect to these rights, and that it will override any State or Territory law to the extent of any inconsistency.

8.5 Creating a National Religious Freedom Commissioner.

8.6 Amending other legislation to address anomalies not covered by recent changes to the *Marriage Act* (such as religious marriage celebrants, same-sex marriage exemptions for Anglican school chapels, and protection for charities).³³

Appendix 1 – “General Limitations Clause” model (following Parkinson/Aroney)

³³ As detailed in the FFF Submission on pp.43-57, and summarised on pp.102-104.

Note: the amendments to s.4 shown below are in light of Appendix 2. A very similar approach, which achieves the same result, is proposed in Part XI of the Review Panel submission from Associate Adjunct Professor Mark Fowler.

- (1) Discrimination means any distinction, exclusion, preference, restriction or condition made or proposed to be made which has the purpose of disadvantaging a person with a protected attribute or which has, or is likely to have, the effect of disadvantaging a person with a protected attribute by comparison with a person who does not have the protected attribute, subject to the following subsections.
- (2) A distinction, exclusion, preference, 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.
- (3) 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 (2)(a).
- (4) Without limiting the generality of subsection (2), a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of freedom of religion if it is made by a ~~religious body~~ **a body established for religious purposes**, or by an organisation that either provides, or controls or administers an entity that provides, educational, health, counselling, aged care or other such services, and either:
 - (a) it is ~~reasonably necessary in order to comply~~ **consistent** with religious doctrines, tenets, beliefs or teachings adhered to by the religious body or organisation; or
 - (b) it is ~~reasonably necessary to avoid injury to~~ **because of** the religious sensitivities of adherents of that religion or creed; or
 - (c) in the case of decisions concerning employment **or volunteers**, it is reasonable in order to maintain the religious character of the body or organisation, or to fulfil its religious purpose.
- (5) Without limiting the generality of subsection (2), a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of ethnic minorities to enjoy their own culture, or to use their own language in community with the other members of their group, if it is made by an ethnic minority organisation or association intended to fulfil that purpose and has the effect of preferring a person who belongs to that ethnic minority over a person who does not belong to that ethnic minority.

Appendix 2 - Proposed Amendments to the Sex Discrimination Act 1984

37 Religious bodies

- (1) Nothing in Division 1 or 2 affects:
 - (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
 - (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
 - (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
 - (d) any other act or practice of a body established for religious purposes, being an act or practice that ~~conforms to~~ **is consistent with** the doctrines, tenets or beliefs of that religion or is ~~necessary to avoid injury to~~ **because of** the religious susceptibilities of adherents of that religion.
- (2) ...
- (3) **Despite any law (including any provision of this Act and any law of a State or Territory) a body established for religious purposes includes, and shall be deemed to have always included, without limitation, a body:**
 - (a) that is a:
 - (i) **not for profit entity; or**
 - (ii) **charity under the Charities Act 2013, including any public benevolent institution (regardless of whether any of the charitable purposes of the entity is advancing religion);**
 - (b) where that body:
 - (i) **is established by or under the direction, control or administration of a body established for religious purposes; or**
 - (ii) **is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed; or**
 - (iii) **is a body to which subsection (4) applies.**
- (4) **A charity that has a charitable purpose pursuant to the Charities Act 2013 that is not advancing religion may be a body established for religious purposes through advancing that other charitable purpose:**
 - (a) **where that other charitable purpose is an effectuation of, conducive to or incidental or ancillary to, and in furtherance or in aid of, the advancement of its religious purpose; or**
 - (b) **where the advancement of religion is an effectuation of, conducive to, or incidental or ancillary to, and in furtherance or in aid of, that other charitable purpose.**
- (5) **Subsection (4) does not limit the circumstances in which a charity that has a charitable purpose that is not advancing religion may be a body established for religious purposes through advancing that other charitable purpose.**

38 Educational institutions established for religious purposes

- (1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith ~~in order to avoid injury to~~ **because of** the religious susceptibilities of adherents of that religion or creed.
- (2) Nothing in paragraph 16(b) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with a position as a contract worker that involves the doing of work in an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith ~~in order to avoid injury to~~ **because of** the religious susceptibilities of adherents of that religion or creed.
- (3) Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith ~~in order to avoid injury to~~ **because of** the religious susceptibilities of adherents of that religion or creed.

38A Determining when an act or practice is consistent etc.

- (1) For the purposes of paragraph 37(1)(d), an act or practice is consistent with the doctrines, tenets or beliefs of that religion if the body established for religious purposes holds a belief that it is consistent with the doctrines, tenets or beliefs of that religion and that belief is not fictitious, capricious or an artifice.
- (2) For the purposes of paragraph 37(1)(d), an act or practice is because of the religious susceptibilities of adherents of that religion if the body established for religious purposes holds a belief that it is because of the religious susceptibilities of adherents of that religion and that belief is not fictitious, capricious or an artifice.
- (3) For the purposes of section 38, an act or omission is because of the religious susceptibilities of adherents of that religion or creed if the institution holds a belief that the act or omission is because of the religious susceptibilities of adherents of that religion and that belief is not fictitious, capricious or an artifice.
- (4) A body or institution holds a doctrine, tenet or belief if it has adopted that doctrine, tenet or belief. Without limiting the foregoing, a body or institution may adopt a doctrine, tenet or belief by:
 - (a) including the doctrine, tenet or belief in its governing documents, organising principles, statement of beliefs or statement of values; or

(b) adopting principles, beliefs or values of another body or institution which include the doctrine, tenet or belief; or

(c) adopting principles, beliefs or values from a document or source which include the doctrine, tenet or belief; or

(d) acting consistently with that doctrine, tenet or belief.

38B Sections 37, 38 and 38A are intended to “cover the field”

(1) Despite any law, but subject to subsection (3), it is the intention of Parliament that, in order to recognise the protections, rights, privileges and entitlements of a body or institution to which sections 37, 38 or 38A apply, and to ensure that such protections, rights, privileges and entitlements are recognised equally and without discrimination in all States and Territories, sections 37, 38 and 38A operate:

(a) to cover the field in relation to those protections, rights, privileges and entitlements; and

(b) to provide a complete, exhaustive and exclusive statement of the law relating to those protections, rights, privileges and entitlements; and

(c) to exclude and limit the operation of the laws of the States and Territories in relation to those protections, rights, privileges and entitlements.

(2) For the avoidance of doubt, and without limiting subsection (1), but subject to subsection (3), despite any law, if a protection, right, privilege or entitlement granted, or a limitation provided for under section 37, 38 or 38A of this Act, is inconsistent with a protection, right, privilege or entitlement granted, or a limitation provided for, under a law of a State or Territory, this law shall prevail, and the State or Territory law shall, to the extent of the inconsistency, be invalid.

(3) The protections, rights, privileges and entitlements of a body or institution to which sections 37, 38 or 38A apply are in addition to the protections, rights, privileges and entitlements provided under any law of the Commonwealth or a State or Territory. Nothing in subsections (1) or (2) shall exclude or limit the operation of the laws of the Commonwealth or a State or a Territory that are more protective of those protections, rights, privileges and entitlements.