

**ANTI-DISCRIMINATION AMENDMENT (RELIGIOUS FREEDOMS AND
EQUALITY) BILL 2020**

Organisation: Australian Lawyers for Human Rights

Date Received: 21 August 2020



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21 August 2020

Committee Chair
The Hon. Gabrielle Upton MP
Joint Select Committee
on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020
Parliament of New South Wales
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Sydney NSW 2000

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Dear Committee Chair

Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the *Anti-Discrimination Amendments (Religious Freedoms and Equality) Bill 2020 (the Bill)* which proposes certain amendments to the *Anti-Discrimination Act 1977 (NSW)* (the 'Act').

ALHR has made previous substantive submissions to the Commonwealth government in relation to 'religious freedoms' issues in 2018, 2019 and 2020, and we **annex a copy** of our Submission dated 19 November 2018 to the Senate Legal and Constitutional Affairs References Committee with reference to the desirability (or otherwise) of *legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff*.

We note that the Terms of Reference for this enquiry outline that the committee is to have regard to, amongst other things:

1. Existing rights and legal protections contained in the *Anti-Discrimination Act 1977 (NSW)* and Commonwealth legislation; and
2. The interaction between Commonwealth and NSW anti-discrimination laws and the desirability of consistency between those laws, including consideration of the draft *Religious Discrimination Bill 2019 (Cth)*.

About ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

Relevant Materials

We refer the Committee to:

- the *2015 Interim Report* of the (then) Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, concerning children's freedom of/from religion (cited as Bielefeldt (2015));¹
- the *2016 Interim Report* of the (then) Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt;²
- the *2017 Interim Report* of the Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed (cited as Shaheed (2017));³
- *State-Religion Relationships and their Impact on Freedom of Religion or Belief* (2018), Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed (cited as Shaheed (2018)).⁴
- *Freedom of religion or belief and Gender Equality* (2020), Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed (cited as Shaheed (2020));⁵
- *The right to freedom of religion or belief and its intersection with other rights* by Dr Alice Donald and Dr Erica Howard, Middlesex University, for ILGA Europe;⁶

¹ A/70/286 *Interim Report: Elimination of all forms of religious intolerance* (2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/245/07/PDF/N1524507.pdf>,

² A/71/269 *Interim Report: Elimination of all forms of religious intolerance - The broad range of violations of freedom of religion or belief, their root causes and variables* (2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/244/98/PDF/N1624498.pdf>,

³ A/72/365 *Interim Report: Elimination of all forms of religious intolerance*, (2017), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/270/09/PDF/N1727009.pdf>,

⁴ A/HRC/37/49 at: <https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/ReportStateReligionRelationships.aspx>

⁵ A/HRC/\$3/48 (advance unedited version) at: <https://www.ohchr.org/EN/Issues/FreedomReligion/Pages/ReportGenderEquality.aspx>

⁶ ILGA Europe website at http://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights_.pdf.

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Executive Summary - Problems with The Bill – Duty of care or ‘free pass’ to harm?

1. ALHR supports legislation which provides protections against religious discrimination in employment, education, membership of sporting clubs and other areas of public life and is consistent with international human rights law standards.
2. ALHR does not support the Bill. Although its proponents have expressed support for international human rights law and although it is stated that the purpose of the Bill is to:

“extend protections against discrimination beyond existing categories of citizenship and identity in New South Wales to people of religious faith and non-faith,”⁷

the Bill does not follow through on these matters in its drafting and in fact **allows and protects discrimination by organisations against individuals on the basis of religious faith of the organisation.**

This in itself **privileges the religious collective over individual rights and amounts to religious discrimination.**

3. The Bill would privilege religiously-based discrimination by organisations over the rights of individuals to be free from discrimination. **This Bill would protect not only discriminatory behaviour but any wrong-doing short of criminal behaviour, so long as it could be argued to be religiously-based.**
4. ALHR does not believe that Australian society should tolerate every behaviour that is religiously motivated, just by reason of that motivation. ALHR strongly believes that our laws should not protect behaviour that is discriminatory and is likely to most heavily impact already vulnerable groups – and upon persons such as employees and students to whom religious organisations should have a **duty of care, not a free pass to harm. True freedom of religion is incompatible with discrimination.**
5. The ‘right to believe’ is an absolute personal right, exercised internally, **but there is no absolute right under international human rights law to manifest or act upon one’s religious belief externally in a way that impacts upon others.** Religious freedom does not mean freedom to visit harm upon others in the name of one’s own religion. But that is what this Bill would in fact enshrine in NSW legislation. This is not consistent with community expectations.
6. Australian legislation and judicial decisions should adhere to **international human rights standards. The Bill does not reflect Australia’s international legal obligations to protect all human rights equally** and fails to take account of the necessary interrelation between all human rights. The Bill protects organisations, rather than individuals, and fails to balance the rights of individuals to be free from harm against the new organisational rights it creates (to discriminate against individuals who are not of the same religion).
7. Although The Honourable Mark Latham (‘Mark Latham’) appears to have intended to draft a Bill which would protect employees from onerous restrictions on expressing their own beliefs outside the workplace, the ultimate effect of the Bill is to reduce protections for employees in many other ways. The intellectual confusion demonstrated by this Bill proves the point that human rights laws cannot be selectively applied, they are not divisible nor hierarchical. All human rights are of equal importance and human rights laws can only achieve their objectives if

⁷ Second Reading Speech for the Bill, 13 May 2020, Legislative Council, NSW Parliament, at : <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-81731'>

they are applied completely to all human rights. That is not what would occur under the Bill, if passed.

8. ALHR supports legislative reform to improve human rights protections in Australia insofar as legislative reform offers protections to all citizens who may themselves face discrimination on the basis of their religion. However the proposed legislation here is more about giving a right to discriminate than enshrining protection against discrimination.
9. ALHR submits that the human right to freedom of religion in NSW would best be protected by a NSW Human Rights Act and a Federal Human Rights Act.
10. **ALHR submits that the Bill should be rejected in its entirety and should not be passed.**

Introduction

While the Bill demonstrates an understanding of some aspects of international human rights law principles, including the 1984 Siracusa principles (developed by the International Commission of Jurists to address the resolution of conflicting human rights), ALHR submits that those principles have not been appropriately applied in the drafting of the Bill.

It is therefore useful to take a step back and re-examine the international human rights law principles surrounding the nature of 'freedom of religion' and how that freedom should be balanced in the situation where there are other competing human rights.

In this regard, ALHR notes that **the UN Committee on Economic, Social and Cultural Rights (UNCESCR) has called on States to ensure that church-run institutions are not permitted to discriminate against non-ecclesiastical employees on grounds of religious belief, sexual orientation or gender identity.**⁸

ALHR recommends in this regard that reference be made in particular to the UN Reports *State-Religion Relationships and their Impact on Freedom of Religion or Belief* (2018) and *Freedom of religion or belief and Gender Equality* (2020) by the Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed, which analyse the appropriate role of the State in relation to implementing laws that touch upon, or protect, religious activities, while still protecting the rights of women, girls, LGBT+ persons and advocates working to combat gender-based discrimination.

1. Background – the right to religious freedom

General principles

- 1.1 ALHR recognises and calls the Committee's attention to the following fundamental principles of international human rights law:
 - All rights are equally valuable - there is no hierarchy of rights (**the principle of indivisibility**).
 - All rights should be protected together (**the principle of interdependence**).
 - Any interference with a right must have a legitimate aim - the interference or restriction must be proportionate and necessary (**the principle of proportionality**).

⁸ E/C.12/DEU/CO/6.

Freedom of religion

- 1.2 The full title of the right of freedom of religion is the right to “freedom of thought, conscience, religion or belief.” This does not mean ‘freedom’ to follow only the majority religion or belief, and the right includes freedom ‘from’ religion. This interpretation is confirmed by human rights courts internationally and particularly in Europe. Thus, the right means the freedom to:
- Choose between different religions and beliefs,
 - Convert between religions and beliefs,
 - Leave a religion or belief, and
 - Hold no religion or belief - following on from the logical argument that to have freedom of something you must also be able to be free from that thing or not have that thing (as any other situation would amount to compulsory religion). This meaning is acknowledged in the Bill’s definition of ‘religious beliefs.’
- 1.3 Freedom of religion or belief is not limited to traditional religions. It also encompasses agnosticism, atheism, secularism and other systems of belief which hold to a set of values and principles but would not traditionally be thought of as religions. The European Court of Human Rights has, like the UN Human Rights Committee, given a wide interpretation to the meaning of religious beliefs as including non-religious beliefs such as pacifism, veganism and atheism and religious or philosophical convictions or beliefs,
- if they attain a certain level of cogency, seriousness, cohesion and importance; are worthy of respect in a democratic society; are not incompatible with human dignity; do not conflict with fundamental rights; and, relate to a weighty and substantial aspect of human life and behaviour.*⁹
- 1.4 International human rights law has developed a process or set of principles by which conflicts between different rights can be managed, both within the realm of human rights alone and in relation to external issues. When it comes to the right to the right to religious belief and the right to participate in religious activity, it is important to differentiate between:
- The internal right hold a belief (the right to freedom, conscious and religion); and
 - The external right to manifest that belief.
- 1.5 The internal right to a belief is absolute – the right to hold a personal belief cannot be restricted in any circumstances. The right to manifest one’s religious belief externally within society can however be restricted if the restriction is necessary for the protection of public safety, public health or morals or for the protection of rights and freedoms for others. This is recognised in the new interpretative provisions proposed in the Bill as constituting a new section 3 of the Act. However **what the new section 3 does not spell out is that any ‘right’ to manifest one’s religion is not absolute and must always be balanced against other rights, such as the right to be free from discrimination. Religious freedom does not mean freedom to visit harm upon others in the name of one’s own religion.**
- 1.6 Freedom of/from religion has been termed a “gateway” to other freedoms, including freedom of expression and freedom of peaceful assembly and association. That is, there can be no free religious community life without respect for those other freedoms, which are closely intertwined with the right to freedom of religion or belief itself. To quote the current UN Special Rapporteur on Freedom of Religion and Belief, Ahmed Shaheed:

⁹ Donald and Howard, op cit, p 2.

*Freedom of religion or belief is interwoven with the core principles of equality, non-discrimination and non-coercion and overlaps with other rights, including the rights to freedom of opinion and expression, peaceful assembly and association, and education. It must, therefore, be understood in the context of articles 18 to 20 and be read together with core principles enunciated by articles 2 and 5 of the International Covenant on Civil and Political Rights. An abuse of one right can be an obstacle to the enjoyment of all the others.*¹⁰

- 1.7 Shaheed also “notes with concern the increasing trend by some States, groups and individuals, to invoke “religious liberty” concerns in order to justify differential treatment against particular individuals or groups, including women and members of the lesbian, gay, bisexual, transgender and intersex community.”¹¹ He comments also that

*the ability of women, girls and LGBT+ persons to belong to a faith of their choice, or, more often, a faith into which they were born that comprises their social and cultural connections, without being discriminated against, is vital to realizing myriad human rights, including the right to freedom of religion or belief.*¹²

- 1.8 It is submitted that the balancing of competing rights through a human-rights-based process involving ‘reasonable accommodation’ is the best method of managing the practical problems resulting from these issues. Religion should not be used to justify discrimination. There can be no truly free religious life without respect for the freedoms and human rights of others.

2. Where Rights Compete: What Should Prevail?

Rights must be balanced where they conflict

- 2.1 In general terms, no human right ‘trumps’ any other right – all are equally valuable (the principle of indivisibility) and should be protected together (the principle of interdependence).
- 2.2 Some rights are expressed as absolutes, such as the right to be free from slavery, torture, cruel or inhuman or degrading punishment or treatment, or arbitrary deprivation of life, and the right to recognition as a person in law.
- 2.3 Subject to those absolutes, all rights must be **balanced** where they conflict **so as to maximise the practice of other rights to the greatest possible extent**, in ‘an atmosphere of mutual consideration’ and so as to ‘ensure that none is inappropriately sacrificed’ This is sometimes described as a process of providing **reasonable accommodation** to other rights and other persons: ‘a fair balance needs to be struck between the rights of the individual and the rights of others.’ This is similar to the test of proportionate response to the harm in question which is generally used to assess whether or not legislation or policy is too wide in its scope.

Taking account of context and other values

- 2.4 The balancing and reasonable accommodation tests are very much dependent upon context and cannot be used in the abstract. They may also need to call upon other rights and other values (such as reasonableness or proportionality).

¹⁰ Shaheed (2017), par 46.

¹¹ Shaheed (2018), par 39.

¹² Shaheed (2020), par 51.

- 2.5 Human rights can validly be restricted if the restriction is prescribed by law and is necessary for the protection of public safety, public health or morals or for the protection of the rights and freedoms of others.

The good faith of those seeking protection

- 2.6 **Human rights entail both rights and obligations.** Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others. Generally, behaviour should not be protected by Australian law, nor advocated by policy, where that behaviour itself infringes other human rights.
- 2.7 In balancing the competing claims, it is important to minimise any negative impact; to impinge as little as possible upon other rights.
- 2.8 That is, where there is a conflict between human rights and other interests it may be necessary to limit or constrain the other interests if they are to be implemented in a way that limits the free exercise of human rights.

3. Practical problems with privileging religious 'rights'

- 3.1 In practice, the beliefs and hence the activities of different religions will often conflict, because "each person's religious freedom is dependent on and coextensive with everyone else's religious freedom." Thus relevant legislation needs to not only ensure appropriate balances between the religious and the secular, but also between different religions.
- 3.2 Freedom of/from religion also involves the principle of equality amongst religions. No religion should be legally privileged above any other religion, nor above secularism, as that would result in inequality, and hence lack of freedom, of religion. This principle is particularly important in multicultural Australia. Again, relevant legislation needs to ensure there are no blanket exemptions or exceptions that would prevent an appropriate balancing of rights.
- 3.3 It must be remembered that many religions have discriminatory aspects, both in relation to adherents of other religions and in relation to the religion's own adherents. Adherence to a discriminatory religion should not give one the legal right to refuse to interact with others because of those persons' sexual orientation or gender identity (for example), nor to vilify persons because of those persons' sexual orientation or gender identity. Legislation should not privilege the followers of one religion or belief against another, or discriminate between 'religions' or beliefs.
- 3.4 **Nor should a secular democratic government privilege the right to act on 'religious' views above other human rights.** As Professor Grimm explains:

*"... self-determination of religious communities as to the content and requirements of their religion does not mean that the state has to tolerate every behavior that is religiously motivated. Since the transcendent truths or divine revelations that religious groups claim to practice mutually exclude each other, the state must respect a group's creed, but prevent the group from making it binding for society as a whole."*¹³

- 3.5 Similarly, the current UN Special Rapporteur on Freedom of Religion and Belief notes that:

The ever-evolving nature of the relationships between State and religion is of significance to those seeking to promote protections for freedom of religion or belief, because the degree to which States are entangled with various religions or beliefs has

¹³ Dieter Grimm, 'Conflicts between General Laws and Religious Norms', (2009) 30(6) *Cardozo Law Review* 2369 at 2374, <http://cardozolawreview.com/Joomla1.5/content/30-6/GRIMM.30-6.pdf>

*far-reaching implications for their disposition and ability to guarantee human rights, especially those rights exercised by persons belonging to religious or belief minorities.*¹⁴

- 3.6 ALHR does not support the subjugation of rights of other vulnerable groups in Australia, including LGBTI Australians, to the rights of religious Australians, in the manner that the Bill makes possible. **That the Bill can have this result may indeed itself amount to religious discrimination.** To quote again the UN Special Rapporteur:

*Religious discrimination does not only take place when an individual's right to manifest their religion or belief freely is restricted or interfered with by the State or non-State actors. It can also take place when an individual's enjoyment of other fundamental rights — for example the right to health, education, expression — is restricted or interfered with by ... non-State actors in the name of religion, or on the basis of a person's religion or belief.*¹⁵

4. Relevant International Instruments

- 4.1 The right to freedom of religion or belief is reflected in:
- Article 18 of the *Universal Declaration of Human Rights 1948* (UDHR),
 - Article 18(1) of the *International Covenant on Civil and Political Rights 1966* (ICCPR),
 - Article 1.1 of the *International Labour Organisation Discrimination (Employment and Occupation) Convention 1958*, and
 - Article 1 of the *United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief* of 1981 (the '1981 Declaration').
- 4.2 The *Convention on the Rights of the Child* also prescribes that States parties shall "respect the right of the child to freedom of thought, conscience and religion", (article 14.1) and that the State shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child (article 14.2).
- 4.3 It is provided in article 2 (1) of the 1981 Declaration that "no one shall be subject to discrimination by any State, institution, group of persons or person on the grounds of religion or belief", and article 3 of the 1981 Declaration states that: "Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations."
- 4.4 Within the EU, the right to freedom of religion or belief is reflected in:
- Article 9(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* (ECHR), and
 - Article 10 of the *Charter of Fundamental Rights of the European Union* (EUCFR).
- 4.5 Also relevant is Article 26 of the ICCPR under which "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law". Article 26 is a

¹⁴ Shaheed (2018) par 7.

¹⁵ Shaheed (2018) par 37.

‘stand-alone’ right which forbids discrimination in any law and in any field regulated by public authorities, even if those laws do not relate to a right specifically mentioned in the ICCPR.¹⁶

- 4.6 The international instruments relating to employment and non-discrimination are set out in the Schedule to this submission for ease of reference. They are:
- Articles 6 and 7 of the *International Covenant on Economic, Social and Cultural rights* (ICESCR);
 - Article 2 of the *International Labour Organisation Discrimination (Employment and Occupation) Convention*, 1958;
 - Articles 2 and 26 of the ICCPR.

5. Problems with the Bill

Summary of Key Concerns

- 5.1 While the Bill purports to protect individuals from religious discrimination, the purported protections are overshadowed by the exceptions or exemptions that give ‘religious ethos organisations’ the right to discriminate on the basis of religious differences - a right which extends over and above the existing protections for religious bodies in section 56.¹⁷
- 5.2 **ALHR submits that the Bill does not adhere to the international human rights law principles of indivisibility, interdependence and proportionality of human rights, particularly in relation to the following sections:**
- (1) Section 22Z - which risks overriding NSW Government programs and laws;
 - (2) Section 22N(3)-(5), 22S(2)-(4) and 22V(3) – which relate to protected activities and exclusion clauses and demonstrate a lack of consequences for discriminatory conduct;
 - (3) Sections 22K and 22M – which risk creating double standards in employment, education and service delivery;
 - (4) Sections 22K and 3(2) - the combined effect of these sections appears to be to place behaviour based on religion above the law (unless it has a criminal effect) and above other human rights

(1) Section 22Z and the risk of the Bill overriding government programs or State laws

- 5.3 In relation to the proposed section 22Z of the Bill (**s 22Z**), ALHR is concerned that it is drafted in such a manner that it may not only apply to persons, but could enable religious organisations to challenge a NSW program or law if contrary to the religious doctrine of that organisation. This could result in impractical and unprecedented protections by prioritising the rights of organisations over those of individuals, and over the decisions of the State. The

¹⁶ Australian Human Rights Commission (AHRC), *Position Paper on Marriage Equality: Marriage equality in a changing World*, September 2012, available at: < <https://www.humanrights.gov.au/lesbian-gay-bisexual-trans-and-intersex-equality-0>>

¹⁷ It is also relevant to note that manifestations of religious belief need to be considered both within a religion as well as outside the religion. That is, the infringements upon human rights which a religion places on its adherents should be considered just as much as the infringements upon human rights which a religion seeks to place on non-believers. While it might be argued that believers ‘sign up’ to all the restrictions of a religion and willingly accept religiously-based restrictions on their human rights, such an argument ignores the possibility and importance of theological and practical reforms. We have however not pursued that point in this Submission.

provision does not accommodate circumstances where a State program or law is pursuing legitimate policy objectives.

- 5.4 The current human rights legal framework protects the rights of individuals, and in some cases groups of individuals, rather than organisations. While an organisation may be considered an aggrieved person under a unlawful discrimination complaint, s 22Z of the Bill goes beyond existing Commonwealth, State and Territory anti-discrimination laws by affording certain organisations full anti-discrimination protections in their own right. In this way the Bill **privileges the religious collective over individual rights**. Section 22Z is also inconsistent with the explicit protection of individuals' rights in the United Nations human rights treaties including the *International Covenant on Civil and Political Rights (ICCPR)*. This extension risks creating confusion and is counterproductive to the Bill's stated objective to protect individuals' religious freedom. As Shaheed says, "**The State must recognize that, although there are associational rights, freedom of religion or belief is a right that resides with the individual and not with a group per se.**"¹⁸

- 5.5 While ALHR recognises the existing exemption for acts done under statutory authority (section 24 of the Bill), this exemption only covers legislated activities and not the State's administration and implementation of government policy. ALHR is concerned that the Bill as drafted could lead to unintended consequences, for example by allowing one religion's organisations to question the validity of State grants to a (different) religious domestic service provider in response to a local community's needs. This would not be an acceptable result. As Shaheed notes,

*.... the jurisprudence of the Human Rights Committee and the regional human rights courts uphold that it is not permissible for individuals or groups to invoke "religious liberty" to perpetuate discrimination against groups in vulnerable situations, including lesbian, gay, bisexual, transgender and intersex persons, when it comes to the provision of goods or services in the public sphere.*¹⁹

- 5.6 In order of preference, ALHR recommends the following in relation to s 22Z:

- (1) Remove the section in its entirety.
- (2) Remove the reference to "religious ethos organisations" and make it explicit that this protection only applies to individuals/natural persons, not organisations.
- (3) Explicitly add a general limitations defence, which allows the State to discriminate only where there is a legitimate aim, and where reasonable, necessary and proportionate, consistent with the Siracusa Principles referenced in proposed section 3.

(2) Sections 22N(3)–(5), 22S(2)–(4), 22V(3)–(5) - Protected activities and exclusion clauses: a lack of consequences for discriminatory conduct

- 5.7 Sections 22N (discrimination against applicants and employees), 22S (qualifying bodies), and 22V (education) provide protection against discrimination for people engaged in '**protected activities**' (ie, religious activities) outside their workplace or place of education. ALHR is concerned that the potential effect of these provisions is to give protection to employees or students who discriminate against others outside the workplace or place of education on the basis of religion. The provisions would shackle employers, qualifying bodies, and education providers who would otherwise be free to take remedial action to promote safe, diverse, and

¹⁸ (2018) par 84.

¹⁹ (2018) par 40.

inclusive spaces for their employees and students. The sections would appear to override normal work health and safety requirements.

- 5.8 The mechanism by which this effect would be achieved is that each of sections 22N, 22S and 22V makes it unlawful for an employer, qualifying body, or education provider to “restrict, limit, prohibit or otherwise prevent [an employee/person/student] from engaging in a protected activity, or punish or sanction [an employee/person/student] for engaging in a protected activity”. This ‘protection’ also applies to the [employee/person/student] if an associate of theirs engages in the protected activity.
- 5.9 ‘Protected activity’ is defined as “a religious activity performed by the [employee/person/student] or their associate” that occurs outside their workplace or place of education. The relevant activity would not be covered by the Act if it included direct criticism or attacks against the employer, qualifying body, or education provider, or if the activity caused “any direct and material financial detriment” to such persons or bodies. ‘Direct and material financial detriment’ is defined to exclude “any boycott or secondary boycott of the [employer/qualifying body/education provider]”, or “the withdrawal of sponsorship or other financial or corporate support”, because of the protected activity of the employee, person, student, or their associate.
- 5.10 Each of sections 22N, 22S and 22V contains an exclusion clause which protects employers, qualifying bodies, or education providers capable of characterisation as “a religious ethos organisation” or “a body established to propagate religion under section 56” from being subject to the Act’s general restrictions on discrimination. In the explanatory note to the Bill, this protection is described as “provid[ing] that a religious ethos organisation is taken not to discriminate on the ground of religious beliefs or religious activities by engaging in certain conduct because of the doctrines, tenets, beliefs or teachings of the religion of the organisation, so as to recognise that religion is integral to the existence and purpose of these organisations” — a comprehensive protection clause that provides an all-encompassing basis upon which to discriminate against employees or students in particular circumstances. We might, perhaps, think of the exclusion clauses as the ‘sting in the tail’ of the Bill. **ALHR submits that these exclusion clauses promote discrimination by individuals and provide applicable religious organisations with the right, effectively, to discriminate.**

Specific Concern 1: Adverse impact on LGBTIQ people

- 5.11 LGBTIQ people are afforded the right to non-discrimination by virtue of Articles 2(1) and 26 of the ICCPR.
- 5.12 Although One Nation has not explicitly targeted LGBTIQ groups in this Bill, ALHR is concerned that, consistently with One Nation’s current legislative agenda in NSW, these groups will be adversely and disproportionately affected by the provisions contained in the Bill. One Nation recently introduced another Bill into parliament — the *Education Legislation Amendment (Parental Rights) Bill 2020* — which targets trans and gender diverse students. There is a pernicious legislative agenda that seeks to mobilise prejudice and ignorance for the benefit of a party that is not interested in the value of safe, inclusive, and diverse spaces for marginalised groups. ALHR supports the view of Equality Australia that: *“It will be almost impossible for government and non-government employers, educators and professional and licencing bodies to foster inclusive cultures, or meet shareholder, customer or community expectations, when their employees or members use their religion privately to hurt others.”*
- 5.13 Although Mark Latham purports to support anti-discrimination protections afforded to ‘the elderly, disabled, carers, women and the transgender and gay communities’, his disingenuousness regarding the latter two groups is apparent in his subsequent comment that:

*When I refer to the rise of religious discrimination, it is not just in the cases of Mrs [Margaret] Court and Israel Folau. I know of Christians working for the New South Wales Government who say they are scared to admit to their Christianity in the workplace, who feel there is an official policy of inclusion for every letter of the alphabet except C and H. Under this Government, selective diversity policies have been introduced in the public service to ensure certain groups are included. Every letter of the alphabet seemingly has a flag, a network, a special ceremony to affirm and celebrate its identity, except the letters C and H: Christians and heterosexuals. It is a perverse policy of so-called inclusion to exclude other groups but this is the new State-sponsored practice in New South Wales.*²⁰

- 5.14 ALHR is concerned by the language used and the sentiment underlying Mr Latham's comments. As Shaheed notes, it is concerning that there is

*considerable evidence that in all regions of the world, actors citing religious justifications for their actions have advocated to governments and to the broader public for the preservation or imposition of laws and policies that directly or indirectly discriminate against women, girls and LGBT+ persons.*²¹

He adds an additional warning:

*Further, laws identified as intended to protect the right of all individuals to manifest their religion or belief have been applied in a manner that has resulted in discrimination in practice on the same bases. Governments in all regions of the world have also failed to uphold their obligation to protect people from gender-based violence and discrimination perpetrated against them by private individuals or entities claiming a religious justification for their actions and to sanction the perpetrators of such acts. Gender-based violence and discrimination is being perpetuated both in the public sphere and by and within religious communities and entities.*²²

ALHR urges against attempts, such as the Bill, to deny and wind back protections afforded to LGBTIQ individuals which are supported by international human rights instruments to which Australia is a signatory.

Specific Concern 2: Justifying and enabling discrimination generally

- 5.15 Because the scope of the exception or exemption for religious organisations depends on the ambit of the provisions that describe what amounts to religious discrimination, ALHR is concerned that the function of sections 22N, 22S and 22V is effectively to justify and protect the full range of discriminatory behaviours by religious bodies, rather than to provide protection from discrimination. If enacted, the provisions would risk preventing employers, qualifying bodies, and education providers from promoting inclusive and diverse work cultures, because they would be powerless to act against employees, persons, or students seeking to undermine these efforts in their private lives. An example provided by Equality Australia is that "a health disciplinary body may not be able to investigate a doctor or psychologist who promotes LGBT conversion "therapies" through their church, notwithstanding that such opinions carry more weight because of their standing as health professionals".

²⁰ Second Reading Speech for the Bill, 13 May 2020, Legislative Council, NSW Parliament, at : <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-81731'>

²¹ Shaheed (2020) par 8.

²² Shaheed (2020) par 8.

5.16 Sections 22N, 22S and 22V apply a double standard, with employees and students of religious organisations or bodies being unable to access the protections available to employees or students of non-exempt organisations under these provisions, thus rendering them vulnerable to discrimination by applicable employers, qualifying bodies, or education providers. If we enable a situation where:

- (a) religion can be used to discriminate against others without consequences, and
- (b) employees or students are vulnerable to discrimination by employers, qualifying bodies, or education providers who are protected by the exclusion clause

then we are not only fostering double standards in the workplace and in education institutions, but also creating a hierarchy of rights that situates religious beliefs above other beliefs and other rights.

5.17 ALHR notes that the inclusion in the Bill of exclusion clauses is in direct contradiction of the statement made by Mr Lathan that the aim of the Bill is to ensure that: “Bosses do not own the private lives of staff, their beliefs, faith and religious activities. ... Workers must be free to live a life separate to their obligations in the workplace”. The provisions of the Bill would, in effect, elevate religious belief above other human rights and extend special protections to religious activities that might otherwise be in breach of NSW anti-discrimination law, as well as in breach of international human rights law. This is not appropriate, particularly as faith-based schools, charities, and bodies already have the advantage of broad exemptions under the Act.

5.18 Some practical problems also arise from the drafting method of describing what amounts to discrimination and then saying that certain sections do not apply to religious organisations. For example, if s 22V (3) to (5) do not apply in relation to education, does it mean that their opposites hold true? Does it mean that an educational authority **may** –a) restrict, limit, prohibit or otherwise prevent a student from engaging in a protected activity, or (b) punish or sanction a student: (i) for engaging in a protected activity, or (ii) because an associate of the student engaged in a protected activity? Does it mean that it **may** penalise a student for (a) any boycott or secondary boycott of the educational authority by other persons because of the student’s activity, or the activity of their associate, or (b) the withdrawal of sponsorship or other financial or corporate support for the educational authority because of the student’s activity, or the activity of their associate?

5.19 It is submitted that **the drafting method of using the same definition of discrimination to protect victims and to protect perpetrators must be abandoned**. When the same broad definition is used both to identify discrimination by other individuals and to privilege and protect discrimination by religious organisations, it is clear that the apparent protections of the Bill are in reality a sham.

5.20 ALHR submits that, rather than “reconciling conflicting human rights and anti-discrimination provisions, using international conventions and other instruments”, as the Bill purports to do, the Bill instead provides a mechanism for facilitating discrimination, protecting those who would seek to discriminate, and shackling those organisations who are attempting to provide safe, diverse, and inclusive spaces for employees and students. ALHR urges against any legislation, including the Bill, which undermines state based human rights protections and subjugates human rights over others as is the consequence of sections 22N, 22S and 22V.

Recommendation: Remove sections 22N, 22S and 22V of the Bill.

(3) Sections 22K and 22M - Risking double standards in employment, education and service delivery

- 5.21 Sections 22K and 22M are further sections pursuant to which the Bill risks creating double standards in relation to employment, education and service delivery through the introduction of extensive, and excessive, exceptions for religious ethos organisations.
- 5.22 The proposed section 22K defines 'religious ethos organisation' as:
- (a) *a private educational authority that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, or*
 - (b) *a charity registered with the Australian Charities and Not-for-profits Commission under the Australian Charities and Not-for-profits Commission Act 2012 of the Commonwealth that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, or*
 - (c) *any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.*
- 5.23 This category is much broader than the range of organisations which can currently access the general religious exception provided in sub-section 56(d) of the Act. Section 56(d) covers the acts of "a body established to propagate religion" which, although it has been interpreted generously, is nevertheless narrower than a body simply "conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion." The inclusion of para (c) in the definition above is particularly concerning given it could include organisations engaging in commercial activities.
- 5.24 In addition to applying to a wider range of organisations, the new exception proposed in the Bill also includes a much more easily satisfied test. Proposed sub-section 22M(1) provides:
- For the purposes of this Part, a religious ethos organisation is taken not to discriminate against another person on the ground of the person's religious beliefs or religious activities by engaging in conduct if the organisation genuinely believes the conduct-*
- (a) is consistent with the doctrines, tenets, beliefs or teachings of the religion of the organisation, or*
 - (b) is required because of the religious susceptibilities of the adherents of the religion of the organisation, or*
 - (c) furthers or aids the organisation in acting in accordance with the doctrines, tenets, beliefs or teachings of the religion of the organisation.*
- 5.25 Once again, this test departs significantly from the existing test in section 56(d) of the Act, which covers an act or practice "that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion". While proposed sub-sections 22M(1)(a) and (b) are largely consistent in their wording with that approach, sub-section 22M(1)(c) introduces an entirely new, and less onerous, test. The conduct which would otherwise be discriminatory does not even itself need to be in accordance with the religion of the organisation, the criterion is simply that it 'furthers or aids the organisation' to act in this way.
- 5.26 ALHR is significantly concerned by the inclusion of the phrase "genuinely believes" before all three sub-sections (22M(1)(a)-(c)). This phrase introduces an entirely subjective element to the proposed exception: the religious organisation seeking to engage in discrimination will not need to demonstrate the conduct itself was 'consistent with' or 'required' by its doctrines, merely that someone (presumably, the person acting on behalf of the organisation) genuinely

believed it was. This removes any objective assessment, and means the proposed religious exception in section 22K is significantly easier to satisfy than equivalent existing exceptions in the *Anti-Discrimination Act* and *Sex Discrimination Act 1984* (Cth). Beliefs can encourage actions against those not of the same way of thinking. Beliefs can be genuinely held but misguided.

- 5.27 Similarly the concept in section 22M of legal protection for believers' 'religious susceptibilities' will tend to privilege and protect the 'snowflake' extremists who are more likely to take offence at communicating with those of other religions or with those of secular persuasion as opposed to the mainstream religious adherents who are more comfortable with 'robust' social give and take.
- 5.28 Proposed new section 22KB adds the complication of a sort of 'double think' whereby the meaning of religious belief is extended from their own subjective belief to a purportedly objective test of whether the person would be 'thought to hold' such a belief in the present, the future or the past, and the concept of religious activity is introduced, similarly on the basis of whether he person would be 'thought to' engage or not in the activity in the present, the future or the past.
- 5.29 Proposed new section 22L(3) then adds a further layer of protection (because, as mentioned, the definition of religious discrimination is actually used as a protection for discrimination) in that discrimination on the grounds of religion is stated to include discrimination on the basis of a characteristic that appertains generally to persons with those religious beliefs or who engage in those religious activities, or a characteristic that is generally imputed to persons with those religious beliefs or who engage in those religious activities.
- 5.30 Once again, ALHR sees inconsistencies between the Bill's drafting and its stated objectives. The broad definition of 'religious ethos organisation' in the proposed section 22K, and the much less onerous test for the exception in proposed section 22M, combine to undermine the overall purpose of the Bill itself, which is ostensibly "to make discrimination on the ground of a person's religious beliefs or activities unlawful." Instead, the Bill will allow a wide range of organisations to actively discriminate against individuals on the basis of their religious beliefs or lack of belief, and/or their religious activities or refusal to engage in such activities. In practice, this will lead to larger or more established religious faiths – including their service delivery arms across education, health and community services such as housing and domestic violence – lawfully discriminating against employees and people accessing services from minority faiths, as well as against atheists and agnostics.
- 5.31 As with sections 22N(3)–(5), 22S(2)–(4), 22V(3)–(5), the outcome of sections 22K and 22M is contrary to human rights standards. While the Bill purports to support freedom of religion as articulated in Article 18(1) of the ICCPR, it does not apply the appropriate limitations on this freedom which are necessary to protect the fundamental rights and freedoms of others as provided in Article 18(3). In particular, the Bill does not respect the right to be protected against discrimination in Article 26 of the ICCPR, including protection against discrimination on the basis of religion as explained above.

Specific Concern 1: Adverse impact on LGBTIQ people

- 5.32 Because the scope of the definition of religious ethos organisations is much wider than the scope of "bodies established to propagate religion" in the existing general exception, the Bill will, on a practical level, increase the range of situations in which lesbian, gay, and transgender people in NSW will be able to be discriminated against. There are similar implications for other protected attributes often targeted by religion such as sex, marital or domestic status and disability, where specific tenets of an organisation's faith may well conflict with an individual's identity or status.

Specific Concern 2: Justifying and enabling discrimination generally and in particular instances

- 5.33 Significantly, sections 22K and 22M (and the Bill in its entirety) also risk increasing discrimination against other groups currently protected under the Act. For example, as well as permitting discrimination against employees and people accessing services on the basis of their religion generally (such as on the basis that a person is Catholic, Anglican, Jewish or Muslim), the Bill would also permit discrimination on the basis of individual tenets of faith. Specifically, this would allow discrimination against employees who (for example) do not accept homosexuality is sinful, or people accessing services who refuse to acknowledge rainbow families are contrary to god's will – even where those people are homosexual or from rainbow families themselves. It will also allow the imposition of 'purity tests' where employees are required to sign statements against marriage equality as a condition of employment – even if they are in a same-sex marriage.

Conclusion in relation to sections 22K and 22M

- 5.34 Overall, ALHR submits that the definition of 'religious ethos organisation' in proposed section 22K should be removed, as should the exception provided to these bodies in proposed section 22M. We note that the consequence of these changes would be to revert to the present situation that the same general religious exception in sub-section 56(d) would therefore cover all protected attributes under the Act, including Part 2B ('Discrimination on the ground of religious beliefs or religious activities'), because sub-section 56(d) already applies to the entire Act.

Recommendation: Remove the definition of 'religious ethos organisation' in proposed section 22K.

Recommendation: Remove the religious ethos organisation exception in proposed section 22M.

(4) Further concerns in relation to section 22K and section 3(2) - Religion above the law and above other human rights

- 5.35 ALHR echoes the concerns of Equality Australia in that, by failing to provide a definition of 'religion,' and in its broad and circular definition of 'religious activities' and 'religious beliefs', the Bill places religion above the law, except in the case of activity which is so harmful as to justify a jail sentence. 'Religious activity', as defined in s 22K of the Bill, includes:

engaging in religious activity, including an activity motivated by a religious belief, but does not include any activity that would constitute an offence punishable by imprisonment under the law of New South Wales or the Commonwealth.

- 5.36 Under s 22K, 'religious beliefs' include:

- a) *having a religious conviction, belief, opinion or affiliation,*
- b) *not having any religious conviction, belief or affiliation.*

This broad 'definition' gives rise to the scenario that a person who commits an act and asserts that this act was motivated by a religious belief (which, notably, under the definition of 'religious belief' could include a religious belief that is not necessarily based on a 'religious' conviction, belief or affiliation) could – even if that act is otherwise unlawful – find a high degree of protection under this legislation for anything short of a jailable offence. This protection would extend to breaches of certain contract or tort laws and breaches of certain civil obligations such as professional obligations and anti-discrimination and vilification obligations.

- 5.37 Section 3 of the Bill introduces an interpretative principle into the Act which requires parties carrying out functions and making determinations under the Act to prioritise not simply freedom of religion but ‘manifestations’ of religion. Pursuant to this section, decision-makers are instructed to avoid interference with the ‘right’ to ‘manifest’ religion or belief except in limited circumstances. By elevating not just the right to hold a religious belief but the right to act on that belief to a special position above all other human rights, the Bill contravenes the fundamental principle that all human rights are universal, indivisible, interdependent and interrelated.
- 5.38 Section 3(1) of the Bill provides that when assessing any discrimination claims, decision-makers ‘shall have fundamental regard to’ *inter alia* the *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (Religious Discrimination Declaration). While ALHR supports protection of the rights enshrined in the Religious Discrimination Declaration and an increased role for international human rights law in determining discrimination claims, the Bill’s selective approach to human rights protection in favour of religious freedom contradicts the basic principles of international human rights law. Further, mandating that specific regard should be had to freedom of religion when discrimination claims are brought on sex, race or LGBTIQ+ status risks weakening anti-discrimination protections for other protected groups.
- 5.39 As Shaheed says,

*The nature of a State’s obligation to promote and protect the right to freedom of religion or belief must be understood within a wider human rights-based framework that stresses the principles of universality, equality and freedom, and which satisfy the duties to respect, protect and promote all human rights for everyone.*²³

- 5.40 ALHR recommends that section 3 be removed. Alternatively, decision-makers in carrying out their functions and making determinations should have regard to the full panoply of rights protected under international law and the Siracusa Principles should be applied equally to all rights contained in the ICCPR, not solely the (limited) ‘right’ to manifest one’s religion or belief. ALHR recommends that human rights should be protected in a coherent legal framework through the enactment of Human Rights legislation at both the state and federal level.

Recommendation: Remove section 3 of the Bill.

6. Conclusion

Recommendation: The Bill should not be passed and enacted into law.

- 6.1 Australia’s international human rights treaty obligations should be enshrined in human rights legislation. ALHR submits that this cannot be fully or appropriately done on a piecemeal basis – as is demonstrated by the adverse human rights impact that would arise should this flawed Bill proceed. The proposed legislative framework which singles out only selected human rights for special protection does not reflect Australia’s international legal obligations to protect other human rights equally.
- 6.2 Any legislation which impinges upon human rights must be narrowly framed, proportionate to the relevant harm, and provide an appropriate contextual response which minimises the overall impact upon all human rights, democracy and the rule of law. The rights contained in

²³ (2018) par 30.

Article 18 of ICCPR which establish the right to freedom of thought, conscience and religion, are not superior to other human rights.

- 6.3 There is no hierarchy of human rights. Human rights laws cannot be selectively applied. As noted earlier in this submission, fundamental principles of international law clearly establish that human rights are indivisible, interdependent and interrelated. They come as a package. All human rights are of equal importance and human rights laws can only achieve their objectives if they are applied completely to everyone and with interconnection.
- 6.4 Religious freedom for everyone in every religious community is effectively impossible without the support of a human rights framework, because without the existence of a standard provided by human rights, society would be likely to support only the dominant religion and would suppress other religions and secularism, as has historically occurred in societies not based on human rights.²⁴ As Shaheen says,

*limiting the roles of persons within their religious communities and institutions cannot be said to solely involve the private relationship between clergy and congregation, and ... commitments which consider women and girls subordinate and LGBT+ persons unequal in their personhood, implicate much more than the 'self-administration' of a religious community. Feminists and human rights scholars observe that norms which oppress women, girls and LGBT+ persons, regardless of their foundation in religious convictions or expression in communal practices, are a concern for the State and international human rights law.*²⁵

- 6.5 Religious freedom for everyone, whether part of a religious community or of a non-religious community, is similarly impossible without the existence of a secular constitutional state or government, as Professor Grimm notes, saying that:

*The more multireligious a society, the more important it is that the state remain neutral in religious matters. A state that would take sides in religious matters would lose its capability to guarantee liberty for all religious faiths.*²⁶

- 6.6 ALHR submits that the appropriate balance between freedom of religion or belief and other freedoms in NSW would best be served by the passage of a Human Rights Act both in NSW and at the federal level.
- 6.7 In 2008, the National Human Rights Consultation Committee recommended the Federal Parliament adopt a Human Rights Act similar to legislation in place in Victoria and the ACT. Last year, Queensland passed a Human Rights Act. Eleven years later, Australia continues to lag behind the rest of the world and NSW continues to lag behind more progressive states in recognising the need for a legislated human rights mechanism that protects the human rights of all people equally.
- 6.8 We would be happy to provide further submissions on the form that any comprehensive human rights legislation should take.

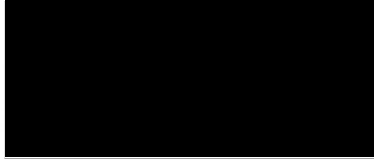
²⁴ Bielefeldt, op cit, pars 28 to 30 and Shaheed, op cit, par 46.

²⁵ (2020) par 50.

²⁶ Grimm, op cit, at 2371 and 2373.

If you would like to discuss any aspect of this submission, please email me at:
president@alhr.org.au.

Yours faithfully



Kerry Weste

President

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Schedule - Relevant International Instruments

Rights relating to Employment

The following instruments deal with the subject of employment:

<p><i>International Covenant on Economic, Social and Cultural rights (ICESR)</i></p>	<p>Article 6: The right to work, which includes the right of everyone to the opportunity to gain a living by work they freely choose to accept, with appropriate safeguards to be taken to protect that right.</p> <p>Article 7(b): The right of everyone to the enjoyment of just and favourable conditions of work which ensure safe and healthy working conditions.</p> <p>Article 7(c): The right of everyone to the enjoyment of just and favourable conditions of work which ensure equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no consideration other than those of seniority and competence.</p>
<p>International Labour Organisation Discrimination (Employment and Occupation) Convention, 1958 (ILO Convention)</p>	<p>Article 2: Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.</p> <p>For the purpose of the ILO convention -</p> <p>The term 'discrimination' includes:</p> <p>(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;</p> <p>(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.</p> <p>Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.</p>

	For the purpose of this Convention the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.
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The Principle of Non-Discrimination

The following instruments deal with the subject of non-discrimination:

<p>Generally</p> <p>ICCPR</p> <p>Article 26 is a 'stand-alone' right which forbids discrimination in <i>any law</i> and in <i>any field regulated by public authorities</i>, even if those laws do not relate to a right specifically mentioned in the ICCPR.</p>	<p>Article 2(1):</p> <p><i>Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status.</i></p> <p>Article 26:</p> <p><i>All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.</i></p> <p><i>The law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</i></p>
Health and work	<p>ICESCR Art 2(2):</p> <p><i>The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.</i></p>
Sexual orientation	<p>In <i>Toonen v Australia</i>, the Human Rights Committee held that the reference to 'sex' in Articles 2 and 26 of the ICCPR includes sexual orientation.</p> <p>Whilst the ICCPR does not reference gender identity specifically, it is the opinion of many (including the Law Council of Australia) that the ICCPR would encompass gender identity under its 'other status' grounds. Similarly the ICEPSR.</p>



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Dear Committee Secretary

Discrimination by faith-based educational institutions

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the Committee's current Inquiry as to the desirability (or otherwise) of

legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff, including on the basis of sexual orientation and gender identity and other attributes covered by the Sex Discrimination Act 1984, with particular reference to proposals for amendments to current legislation, and any related matters.

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Executive Summary

1. **Faith-based educational institutions should not be permitted to discriminate against staff or students. There is no theoretical or practical justification for such an exemption from Australian anti-discrimination legislation.**
2. **Lack of practical justification:** Discrimination is rightly made illegal because it is harmful. Discrimination is still harmful even if carried out by a faith-based institution. The harm is not diminished.
3. **Discrimination against children is reprehensible. It is also inconsistent with the UN *Convention on the Rights of the Child*.** Children are particularly vulnerable to faith-based discrimination, not only because of their comparative defencelessness but also because children are not usually free to pick their own religion (or non-religion) but are subject to the religious choices, including their schooling, that their parents make for them.
4. LGBTI children are particularly vulnerable children due to the risk of homophobic or transphobic bullying in schools. **Homophobic and transphobic bullying is perpetuated where permissible discrimination is able to exist in faith based institutions.**
5. Even if children who are students are not directly discriminated against by the faith-based institution in which they have been placed, they are **effectively taught (where discrimination by such institutions is permitted) that faith-based discrimination is legally and socially acceptable.** They may observe discrimination against other students or against staff. Discriminatory teachings and behaviour on the part of the institution foster an atmosphere of fear, inequality and division, not of safety, equality and inclusion. Discriminatory teachings set a path for both those discriminating and those discriminated against as to the way they may conduct themselves and see themselves as adults.
6. **Lack of theoretical justification:** There is no theoretical justification for such proposed exemptions. The right to express one's religious beliefs is a limited right which must be balanced against other types of rights and other peoples' rights. It does not 'trump' other rights, such as the right to be free from discrimination. **True freedom of religion is incompatible with discrimination. 'Religious freedom' does not mean freedom to visit harm upon others in the name of one's own religion.** A religion which does not respect the human rights of others does not reflect true religious freedom.¹
7. **The role of Government should be to remain neutral in religious matters and foster pluralism and tolerance as a means of promoting and preserving democracy.** A secular Australian democratic government should not privilege the right to act on 'religious' views which are discriminatory. It should remain neutral in religious matters, and should not support harmful religious behaviour. Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others. Discrimination - by definition - does not respect the rights of others. Faith-based exemptions undermine diversity and detract from an inclusive democracy.
8. **Exemptions discourage theological reform:** Privileging the right to religiously-based discrimination encourages such harmful discrimination to continue and to become entrenched in a religion rather than encouraging beneficial theological reform.
9. **Human rights provide an appropriate standard and framework which should be applied:** Without the support of a human rights framework which provides the principles and procedures for the balancing of competing interests, religious freedom for everyone in Australia in every religious community is effectively impossible (because of the conflicts in tenets of different religions). Human rights entail **both rights and obligations.** Hence in so far as we are ourselves entitled to the

¹ Heiner Bielefeldt, A/71/269 *Interim Report: Elimination of all forms of religious intolerance - The broad range of violations of freedom of religion or belief, their root causes and variables* (2016), par 33, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/244/98/PDF/N1624498.pdf>.

protection of human rights, we must also respect the human rights of others.² An extrinsic standard is also required so that society does not support only the dominant religion and does not suppress secularism, atheism or other religions. A human rights framework can provide that standard.³

In the words of the current UN Special Rapporteur on Freedom of Religion or Belief, Ahmed Shaheed⁴

all believers — whether theistic, non-theistic, atheistic or other — should join hands and hearts in articulating ways in which “faith” can stand up for “rights” more effectively, so that each enhances the other. Rejecting expressions of hatred within one’s own community and extending solidarity and support across faith or belief boundaries are honourable and meaningful actions.

10. In ALHR’s view, laws which allow faith-based educational institutions to discriminate against staff or students are counter to the human rights framework established by the rules-based international legal order and have no practical nor theoretical justification.

1. Introduction

- 1.1 This document focuses on the lack of theoretical justification for faith-based exemptions from anti-discrimination legislation. **The lack of practical justification is so clear that, in ALHR’s view, it does not need to be discussed in any detail.** We refer to some relevant statistics in section 9 below (see paragraphs 9.8 and 9.9).
- 1.2 Religious activities may themselves give rise to breaches of other human rights. ‘Religious’ practices often involve:
 - breaches of human rights of the group’s adherents; and
 - attempts to restrict the human rights of persons outside the religious group.Discriminatory treatment of children, women, LGBTIQ persons and other religious and ethnic minorities on the part of religious groups are obvious examples.
- 1.3 It is submitted that the balancing of competing rights through a human rights-based process involving ‘reasonable accommodation’ is the best method of managing the practical problems resulting from these issues. There can be no truly free religious life without respect for the freedoms and human rights of others.⁵
- 1.4 Adopting a human rights-based framework will also assist religions to develop, to progress towards a situation where they respect both the rights of their own members and the rights of those outside their religion.
- 1.5 While the ‘right to believe’ is a personal right which is exercised internally, the right to manifest or act upon one’s religious belief externally so as to impact upon others is never absolute. Religious freedom does not mean freedom to visit harm upon others in the name of one’s own religion.
- 1.6 When considering ‘religious’ freedom in the context of human rights, it needs to be stressed that manifestations of religious belief need to be considered both within the religion as well as outside the religion. That is, the infringements upon human rights which a religion places on its

² See generally, United Nations Human Rights Office of the High Commissioner, “What are Human Rights?” available at <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>>, accessed 10 February 2018.

³ Bielefeldt (2016), op cit, pars 28 to 30 and Shaheed, op cit, par 46.

⁴ A/72/365 Interim Report: Elimination of all forms of religious intolerance (2017), par 78, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/270/09/PDF/N1727009.pdf>.

⁵ Bielefeldt (2016), par 33.

adherents need to be considered just as much as the infringements upon human rights which a religion seeks to place on non-believers.

- 1.7 Freedom of/from religion also involves the principle of equality amongst religions. No religion should be legally privileged above any other religion, nor above secularism, as that would result in inequality, and hence lack of freedom, of religion.⁶ This principle is particularly important in multicultural Australia.
- 1.8 There is a great range of differentiation within traditional religious beliefs and organisations and it can be erroneous to attribute any specific views to religious communities as a whole. Even amongst traditional religions, the messages and behavioural requirements are not just different but often irreconcilable.⁷ In Australia the Private Schools Directory website <http://www.privateschoolsdirectory.com.au> lists roughly twenty possible choices of religious school in addition to Catholic, Quaker, government, and non-denominational or multi-faith schools, being: Anglican, Anglican Uniting Church, Armenian Orthodox, Assemblies of God, Assyrian, Baptist, Brethren, Church of Christ, Church of England, Coptic Orthodox, Dutch Reform, Ecumenical, Free Reformed, Greek Orthodox, Hare Krishna, Islamic, Jewish, Lutheran, Pentecostal, Presbyterian, Seventh Day Adventist and Uniting Church.
- 1.9 Thus Bielefeldt notes that when States are designing policies against harmful religious practices, it should be borne in mind that such practices “are usually contested between and within religious communities”. “Awareness of such internal diversity” he notes, “is important, to avoid stigmatizing overgeneralizations and [to] muster support from within religious communities.”⁸
- 1.10 Shaheed notes that legislation may be required to protect against discrimination and vilification which is purportedly justified on the basis of religion, in order to allow all groups a ‘free’ space in which to practice their own religion, or to not practice any religion at all.⁹

2. International Instruments

- 2.1 The right to freedom of religion or belief is reflected in:
 - Article 18 of the *Universal Declaration of Human Rights* 1948 (UDHR),
 - Article 18(1) of the *International Covenant on Civil and Political Rights* 1966 (ICCPR),
 - Article 1.1 of the International Labour Organisation *Discrimination (Employment and Occupation) Convention* 1958, and
 - Article 1 of the United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief* of 1981 (the 1981 Declaration).
- 2.2 The *Convention on the Rights of the Child* also prescribes that States parties shall “respect the right of the child to freedom of thought, conscience and religion”, (article 14.1) and that the State shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child (article 14.2). Australia’s obligations under the Convention and other international instruments to protect the rights of children are discussed in more detail in Section 9.
- 2.3 It is provided in article 2 (1) of the 1981 Declaration that “no one shall be subject to discrimination by any State, institution, group of persons or person on the grounds of religion or belief”, and article 3 of the 1981 Declaration states that: “Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations.”

⁶ See Dieter Grimm, ‘Conflicts between General Laws and Religious Norms’, (2009) 30(6) *Cardozo Law Review* 2369, at 2374, <http://cardozolawreview.com/Joomla1.5/content/30-6/GRIMM.30-6.pdf>

⁷ Bielefeldt (2016), op cit, par 11.

⁸ Bielefeldt (2015), op cit., par 14.

⁹ Shaheed, op cit, par 34.

2.4 Article 2(1) of the ICCPR sets out the principal of non-discrimination as follows:

Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status.

2.5 Also relevant is Article 26 of the ICCPR under which “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law”. Article 26 similarly states that “the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 26 is a ‘stand-alone’ right which forbids discrimination in *any law* and in *any field regulated by public authorities*, even if those laws do not relate to a right specifically mentioned in the ICCPR.¹⁰

2.6 In *Toonen v Australia*, the Human Rights Committee held that the reference to ‘sex’ in Articles 2 and 26 of the ICCPR includes sexual orientation.¹¹ Whilst the ICCPR does not reference gender identity specifically, it is the opinion of many (including the Law Council of Australia) that the ICCPR would encompass gender identity under its ‘other status’ grounds.¹²

2.7 Within the EU, the right to freedom of religion or belief is reflected in:

- Article 9(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* 1950 (ECHR), and
- Article 10 of the *Charter of Fundamental Rights of the European Union* (EUCFR).

2.8 The *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (1981) prohibits unintentional and intentional acts of discrimination and defines discrimination in article 3 as:

Any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

2.9 Article 6 of the 1981 Declaration stipulates that the religious community's joint or shared expression of its beliefs is protected equally with the individual's right and protects manifestation of religion or belief including, but not limited to:

- worshipping and assembling, and maintaining places for this purpose
- establishing and maintaining charitable or humanitarian institutions
- practising religious rites and customs
- writing and disseminating religious publications
- teaching of religion and belief
- soliciting voluntary financial support
- training and appointment of religious leaders in accordance with the requirements and standards of the religion or belief
- observing religious holidays and ceremonies

¹⁰ Australian Human Rights Commission (AHRC), *Position Paper on Marriage Equality: Marriage equality in a changing World*, September 2012, available at: < <https://www.humanrights.gov.au/lesbian-gay-bisexual-trans-and-intersex-equality-0> > .

¹¹ *Toonen v Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/92

¹² Law Council of Australia, Comment 132 (being a submission to the Australian Human Rights Commission *Consultation on the Protection from Discrimination on the Basis of Sexual Orientation and Sex and/or Gender Identity*, 2010), available at: <<https://www.humanrights.gov.au/publications/comments-consultation-protection-discrimination-basis-sexual-orientation-sex-and-or>>

- communicating with individuals and communities on matters of religion and belief.

3. Is religious freedom possible without human rights?

- 3.1 In discussing the intersections of religious freedom with other human rights, it is important to distinguish between personal belief and religious community membership, in that “an individual has a personal sphere of religious liberty, whereas the very existence of religious communities is a public matter and has an external dimension, which means that some sort of relationship with the State is needed.”¹³
- 3.2 Religious freedom for everyone in every religious community is effectively impossible without the support of a human rights framework, because without the existence of a standard provided by human rights, society would be likely to support only the dominant religion and would suppress other religions and secularism, as has historically occurred in societies not based on human rights.¹⁴
- 3.3 Religious freedom for everyone, whether part of a religious community or of a non-religious community, is similarly impossible without the existence of a secular constitutional state or government, as Professor Grimm notes, saying that:

*The more multireligious a society, the more important it is that the state remain neutral in religious matters. A state that would take sides in religious matters would lose its capability to guarantee liberty for all religious faiths.*¹⁵

4 Freedom of/from religion supports other human rights

- 4.1 Freedom of/from religion has been termed a “gateway” to other freedoms, including freedom of expression and freedom of peaceful assembly and association. That is, there can be no free religious community life without respect for those other freedoms, which are closely intertwined with the right to freedom of religion or belief itself. To quote the current UN Special Rapporteur on Freedom of Religion and Belief:

*Freedom of religion or belief is interwoven with the core principles of equality, non-discrimination and non-coercion and overlaps with other rights, including the rights to freedom of opinion and expression, peaceful assembly and association, and education. It must, therefore, be understood in the context of articles 18 to 20 and be read together with core principles enunciated by articles 2 and 5 of the International Covenant on Civil and Political Rights. An abuse of one right can be an obstacle to the enjoyment of all the others.*¹⁶

- 4.2 There are also many parallels between the treatment of free speech and the treatment of religion which in many cases support and reinforce each other (and are not in opposition, contrary to popular misconceptions), including in terms of protection of a person’s inner realm of thinking and believing (see par 5.2.1 (c)).
- 4.3 Freedom of religion also supports theological reform. While it might be argued that believers ‘sign up’ to all the restrictions of a religion and willingly accept religiously-based restrictions on their human rights, such an argument ignores the possibility and importance of theological and practical reforms. Most major religions are aware of the need for theological reform, which may in some cases even be essential for the religion’s survival. Theological reform affects power

¹³ Sylvie Langlaude, “Indoctrination, Secularism, Religious Liberty and the ECHR” (2006) *International and Comparative Law Quarterly*, 55(4), 929 at 941-942.

<https://pure.qub.ac.uk/portal/files/675413/Article%20ICLQ%20by%20Sylvie%20Langlaude.pdf>

¹⁴ Bielefeldt (2016), op cit, pars 28 to 30 and Shaheed, op cit, par 46.

¹⁵ Grimm, op cit, at 2371 and 2373.

¹⁶ Shaheed, op cit, par 46.

structures within religions, sometimes with progressive outcomes, sometimes with retrogressive outcomes.

- 4.4 ALHR believes that viewing religiously-based restrictions both upon believers and non-believers through a human rights lens, and restricting faith-based exemptions from discrimination law, will assist theological reform and reform of religious practices and procedures in a positive way.

5. The balancing of indivisible and interdependent human rights

- 5.1 What happens where manifestations of different religions conflict and parties wish to exercise competing 'religious' rights or to be free from the religious practices of others? Human rights law has developed a process or set of principles by which such conflicts can be managed.

Rights must be balanced where they conflict

- 5.2 In general terms, no human right 'trumps' any other right – all are equally valuable (the principle of indivisibility) and should be protected together (the principle of interdependence).
- 5.3 Some rights are expressed as absolutes: the right to be free from slavery, torture, cruel or inhuman or degrading punishment or treatment, or arbitrary deprivation of life, and the right to recognition as a person in law. The protection of one's internal beliefs is also expressed to be an absolute right as an aspect of both freedom of speech and freedom of religion (see par 5.2.1 (c)).
- 5.4 Subject to those absolutes, all rights must be **balanced** where they conflict so as to maximise the practice of other rights to the greatest possible extent, in 'an atmosphere of mutual consideration'¹⁷ and so as to 'ensure that none is inappropriately sacrificed'.¹⁸ This is sometimes described as a process of providing **reasonable accommodation** to other rights and other persons: 'a fair balance needs to be struck between the rights of the individual and the rights of others.'¹⁹ This is similar to the test of proportionate response to the harm in question which is generally used to assess whether or not legislation is too wide in its scope.

Taking account of context and other values

- 5.5 The balancing and reasonable accommodation tests are very much dependent upon context and cannot be used in the abstract. They may also need to call upon other rights and other values.
- 5.6 For example, where manifestations of different religions conflict – where both parties involved wish to exercise competing 'religious' rights - a balance must also be sought by reference to other rights such as the right to freedom of speech or the right not to be discriminated against, and to other values and considerations (such as reasonableness or proportionality).
- 5.7 The right to manifest one's religion or belief can validly be restricted, according to Articles 9(2) of the ECHR and 18(3) of the ICCPR, if the restriction is prescribed by law and is necessary for the protection of public safety, public health or morals or for the protection of the rights and freedoms of others.

The good faith of those seeking State protection

- 5.8 Human rights entail **both rights and obligations**. Hence in so far as we wish the State to protect our own human rights, we must also act with *good faith* and respect the human rights of others. **Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others** Generally, behaviour should not be protected by Australian law where that behaviour itself infringes other human rights.
- 5.9 In balancing the competing claims of human rights against each other, it is important to minimise any negative impact; to impinge as little as possible upon other rights. As the Special

¹⁷ Grimm, op cit, 2382.

¹⁸ Donald and Howard, op cit, p i.

¹⁹ Donald and Howard, op cit, p i.

Rapporteur on Freedom of Religion or Belief has said, ‘the purpose of reasonable accommodation is not to ‘privilege’ religious or belief-related minorities, at the expense of the principle of equality.’²⁰ Therefore it will be very important to consider whether a particular expression of a human right by one person or group respects the rights of others or, conversely, causes harm or unreasonably impacts upon others.

- 5.10 That is, where there is a conflict between different human rights it may be necessary to limit or constrain one ‘freedom’ or right if it is misused or abused in a way that limits the free exercise of any human rights by other people. Where harm or unreasonable impact results from any behaviour claiming to involve ‘religious freedom’, it is generally undesirable for the State to protect such behaviour by law. As Shaheed says:

*It is also clear that the right to freedom of religion or belief does not give the individual — as a rights holder — the power to marginalize, suppress or carry out violent acts against other individuals.*²¹

- 5.11 This brings us again to the distinction between the right to hold or change a belief or have no belief (which is unlimited, having no impact on others), and the right to manifest one’s beliefs (which, because of potential impact upon others, must be balanced against other rights). Thus it has been held that although public and private teaching of the particular faith is seen as a primary duty for members of many religions, there are many contexts in which that teaching would not be appropriate and can validly be restricted. One such valid restriction is where the recipient is in a vulnerable position, for example due to poor health, or the teaching involves violence or brainwashing.²² The right to manifest one’s ‘religion’ or belief must be balanced with the right of others to be free from interference with one’s own ‘religion’ or belief or to be free from any ‘religion’ or belief.

6. Protecting and respecting the believer not the belief

- 6.1 Following from the principles above, proponents of intolerant religions which in practice restrict human rights cannot, therefore, expect tolerance for the expression of their beliefs nor State protection for their actions. Their right to hold whatever belief system they wish to hold in private can be respected. Their ‘right’ to act on that belief system depends, however, upon the impact it has on others. Donald and Howard describe this principle as **‘respecting the believer rather than the belief.’**²³
- 6.2 Freedom of/ from religion should not involve State protection of the various truth claims, teachings, rituals and practices of all religions or belief systems (or no belief systems), both because of the distinction that needs to be made between personal belief (which can be respected) and ‘religious’ practices (which must be subject to the ‘harms’ or ‘impact’ test) but also because to do so would be impossible in practice. Even amongst traditional religions, the messages and behavioural requirements can be irreconcilable.²⁴
- 6.3 Similarly, it is important to note that freedom of/from religion does not restrict the free speech rights of people to criticise the tenets of a religion. “[C]riticism of religion, religious leaders or doctrine is not a violation of the right to freedom of religion or belief” notes Shaheed.²⁵ This is one of the reasons that the offence of blasphemy is inconsistent with the human right of freedom of/from religion.

²⁰ Interim Report of the Special Rapporteur on Freedom of Religion or Belief A/69/261 (2014) cited in Donald and Howard, op cit, pp 15-16, at <<http://www.ohchr.org/Documents/Issues/Religion/A.69.261.pdf>>.

²¹ Shaheed, op cit, par 46.

²² Donald and Howard, op cit, pp 8-9.

²³ Donald and Howard, op cit, p 17.

²⁴ Bielefeldt (2016), op cit, par 11.

²⁵ Shaheed, op cit, par 46.

- 6.4 **Lastly, freedom of/ from religion does not give any person or organisation the right to be exempt from anti-discrimination law. Rather, freedom from discrimination and freedom of/from religion (as fully understood in a human rights framework) support each other.**

7. Religious practices which discriminate

- 7.1 Many religions restrict and/or attempt to compel the behaviour of persons by not extending tolerance to, or actively discriminating or inciting violence against, adherents of other religions (or of no religion) and against other categories of people chosen on a discriminatory basis (such as women and LGBTIQ persons) ‘under the guise of manifesting their religion or protecting the “moral high ground.”’²⁶
- 7.2 Indeed, as one writer says, *“some of the most spectacular expressions of religious fervor come from groups that promote violence, intolerance, misogyny and homophobia ... Whether it is the American religious right that demonizes LGBT and other people, the Buddhist groups in Burma who kill Muslims, or the Muslim Brotherhood in Egypt that used state power to attack democracy, the harm done by organizations in the name of religion is often horrific.”*²⁷
- 7.3 Exclusionary behaviour on the part of religious organisations is legislatively protected throughout many countries by inclusion of exemptions for religious organisations in anti-discrimination legislation. The International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* recognises two exemptions from its religious anti-discrimination provisions in the employment context: the first where a particular religion is an inherent requirement of the job, and the second where having a particular religion for a particular job is required by the tenets and doctrines of the religion, and the requirement is not arbitrary and is consistently applied (article 1.2).
- 7.4 Another common employment exemption is where having a particular religion is not an inherent requirement of the job (for example, an administrative role within a church rather than a religious role) but is regarded as necessary so as to avoid injury to the religious susceptibilities of members of that religion.
- 7.5 **ALHR believes that exclusionary behaviour would be discouraged and theological reform encouraged if religiously-based exemptions were removed from anti-discrimination legislation. That the law permits ‘religious’ individuals to discriminate against others (for example on the basis of sexual orientation or gender identity) is an affront to the victims and perpetuates negative stereotyping.**²⁸
- 7.6 ALHR rejects the suggestions that were made in the context of the Marriage Equality ‘debate’ that anti-discrimination law conflicts directly with the right to freedom of/from religion or that anti-discrimination law itself involves religious persecution (the argument being that anti-discrimination law is somehow unfair in that it restricts persons holding religious views from discriminating against others in the name of manifesting their own religion).²⁹
- 7.7 There is no ‘right of conscientious objection’ under human rights law for persons holding discriminatory ‘religious’ beliefs. In particular, adherence to a discriminatory religion should not give one the legal right to refuse to interact with others because of those persons’ sexual

²⁶ Shaheed, op cit, par 46.

²⁷ Larry Cox, “Human rights must get religion,” 14 April 2014, <https://www.opendemocracy.net/openglobalrights/larry-cox/human-rights-must-get-religion> accessed 10 February 2018.

²⁸ See Donald and Howard, op cit, p 13, citing R. Wintemute, ‘Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to serve others,’ (2014) 77 (2) *Modern Law Review*, 223 and M. Malik, ‘Religious Freedom in the 21st Century,’ Westminster Faith Debates, 18 April 2012: <http://faithdebates.org.uk/debates/2012-debates/religion-and-public-life/what-limits-to-religious-freedom/> accessed 10 February 2018.

²⁹ Donald and Howard, op cit, p 1.

orientation or gender identity, nor to vilify persons because of those persons' sexual orientation or gender identity.

- 7.8 Legislation should not privilege the followers of one religion or belief against another, or discriminate between 'religions' or beliefs. And a secular democratic government should not privilege the right to act on 'religious' views above other human rights. As Professor Grimm explains:

"... self-determination of religious communities as to the content and requirements of their religion does not mean that the state has to tolerate every behavior that is religiously motivated. Freedom of religion is not an absolute right, and religious communities are not extraterritorial. Like all fundamental rights, religious freedom may be limited by the state. The need for limitations follows, firstly, from the fact that freedom of religion is equal freedom for all individuals and all religious groups. Since the transcendent truths or divine revelations that religious groups claim to practice mutually exclude each other, the state must respect a group's creed, but prevent the group from making it binding for society as a whole.

*This requires a distinction between the internal and the external sphere. Claims based on an allegedly absolute truth may be raised within the religious group only. They may not be imposed on the external world."*³⁰

8. Children, discrimination and religious education

- 8.1 All children, irrespective of their actual or perceived sexual orientation or gender identity, have a right to a safe and healthy childhood that is free from discrimination.³¹ Each exposure of a child to discrimination by faith-based educational institutions inter-relates with and reinforces each other incident. Children are taught through observation, and perhaps also through classroom education, that it is legal and socially acceptable to discriminate against others if your religion so allows, even if the discrimination is on the basis of an inherent personal characteristic over which the victim has no control. They may see teachers and other children being harmed through discrimination, and they may experience harm themselves.

- 8.2 In the context of children's rights to freedom of/from religion, Bielefeldt recommends that:

Religious communities should discuss the issue of how to better ensure respect for the freedom of religion or belief of children within their teaching and community practices, bearing in mind the status of the child as a rights holder and the need to respect the evolving capacities of each child; [and]

*... Religious community leaders should support the elimination of harmful practices inflicted on children, including by publicly challenging problematic religious justifications for such practices whenever they occur.*³²

- 8.3 The situation of minor children in relation to religious discrimination needs to be considered as an important human rights issue, not least because children are not usually free to pick their own religion (or non-religion) but are subject to the religious choices that their parents make for them and are thus particularly vulnerable where a faith-based educational organisation is permitted to discriminate against its own students.
- 8.4 Protection for children is particularly important in that, as the former Special Rapporteur on Religious Freedom has pointed out, "attitudes, customs, norms and practices ... are unfortunately still widespread, whereby children are treated as if they were the property of

³⁰ Grimm, op cit, p 2374.

³¹ *Eliminating Discrimination Against Children and Parents Based on Sexual Orientation and/or Gender Identity*, UNICEF Current Issues Vol 9 November 2014 p.1

³² Bielefeldt (2015), op cit., p22.

their parents, families or communities, without having rights in their own capacity.”³³

- 8.5 “Given the child’s dependency on an enabling family environment, albeit with recognition of the variety of family forms,” says Bielefeldt, “parents have the primary responsibility for supporting the child in the exercise of his or her human rights” and should provide “appropriate guidance and direction.”³⁴ He continues:

23. ... the need of the child for an enabling environment must not lead to the wrong conclusion that parents or other family members can simply override, ignore or marginalize the rights of the child. The status of the child as rights holder must always be respected and should, inter alia, be reflected in the manner in which parents provide guidance and direction to the child. The decisive term employed in the Convention on the Rights of the Child is “the evolving capacities of the child” ...

25. Adequate consideration of “the evolving capacities of the child” presupposes that the child, once capable of forming personal views, can express such views freely, with a chance of being heard and taken seriously. Article 12, paragraph 1, of the Convention confirms that right, while furthermore requiring that the views of the child be “given due weight in accordance with the age and maturity of the child”. Thus, the child should in the course of time assume a more and more active position in the exercise of his or her rights.”³⁵

- 8.6 Bielefeldt concludes that “parents cannot be obliged by the State to remain religiously “neutral” when raising their children” because that would be an unjustifiable infringement of parental rights.³⁶ However in the area of education, he notes that pressure should not be exerted on children to conform to the socially dominant religion;³⁷ identifying a number of appropriate restrictions which would avoid violations of children’s freedom of/from religion and are particularly relevant to Australian public schools:

48. When religious ceremonies, such as public prayers, are performed in school, specific safeguards are needed to ensure that no child is forced to participate against his or her will, or the will of his or her parents. The same principle applies to religious instruction in schools, ... given on the tenets of a particular religion or belief. Such instruction must not be a mandatory requirement and it should always be connected with the option of receiving a low-threshold exemption (see, for example, [CCPR/C/82/D/1155/2003](http://www.osce.org/odihr/29154)). Requests for an exemption must not lead to any punitive consequences and must not influence the assessment of the general performance of students in school. ...

49. “Religious instruction” given in school differs conceptually from “information about religions and beliefs”. While religious instruction aims to familiarize students with a particular faith, information about religions and beliefs serves the purpose of broadening children’s knowledge and understanding of the diversity of faith systems and practices. Unlike religious instruction, which should never be given against the will of the child or his or her parents, information about religions and beliefs can become part of the mandatory curriculum, provided it is taught in a spirit of fairness and neutrality.”³⁸

- 8.7 These principles are very similar to those espoused by the Victorian and NSW *Religions in School* organisation.³⁹ Bielefeldt adds, following the *Toledo Principles*, that education about religions

³³ Bielefeldt (2015), op cit, par 16.

³⁴ Bielefeldt (2015), op cit, par 22, discussing the Convention on the Rights of the Child.

³⁵ Bielefeldt (2015), op cit, pars 23 and 25,

³⁶ Bielefeldt (2015), op cit, pars 36 and 37.

³⁷ Bielefeldt (2015), op cit, par 13. This is relevant to the school chaplaincy programme referred to below at 8.7.3.

³⁸ Bielefeldt (2015), op cit, pars 48 and 49, recommending the *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools* (<http://www.osce.org/odihr/29154>) as a useful instrument for assessing and improving the quality of religious education teaching.

³⁹ <http://religionsinschool.com>

and beliefs should be of high quality, based on solid research, and take into account internal diversity within various religions.⁴⁰ As the first of the *Principles* states: “students should learn about religions and beliefs in an environment respectful of human rights, fundamental freedoms and civic values.”⁴¹

9. Australia’s international obligations in relation to the rights of children

9.1 Australia is a party to the *UN Convention on the Rights of the Child (CRC)* and will appear before the United Nations Committee on the Rights of the Child in August 2019. The four core principles which guide the interpretation and implementation of all CRC rights are the principles of:

- non-discrimination,
- devotion to the best interests of the child;
- the right to life, survival and development; and
- respect for the views of the child.

9.2 The principle of non-discrimination has been identified by the UN Committee on the Rights of the Child (UNCRC) as a general principle of fundamental importance to the implementation of the whole CRC. The UNCRC, when considering the right to health has also stated:

“In order to fully realize the right to health for all children, States parties have an obligation to ensure that children’s health is not undermined as a result of discrimination, which is a significant factor contributing to vulnerability. A number of grounds on which discrimination is proscribed are outlined in article 2 of the Convention, including the child’s, parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. These also include sexual orientation, gender identity and health status.”⁴²

9.3 Any law which heightens the risk of harm to children is therefore clearly counter to the principles established in the CRC⁴³ and consequently inconsistent with Australia’s international legal obligations.

9.4 Further, as mentioned in Section 2, Australia’s international obligations under the *Universal Declaration of Human Rights (UDHR)*, the *International Covenant on Civil and Political Rights (ICCPR)*, the *International Covenant on Economic, Social, and Cultural Rights (ICESCR)*, and the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* apply to Australia’s children. These instruments establish that all students have:

- the right to protection from mental or physical harm;
- the right to freedom from discrimination based on their sexual orientation or gender identity;
- the right to an education; and
- the right to freedom of expression.

9.5 Article 29 of the CRC firmly establishes Australia’s obligation to ensure that Australian schools promote, support and protect the core value of the CRC: the human dignity innate in every child and his or her equal and inalienable rights, taking into account the child’s special developmental needs and diverse evolving capacities.

⁴⁰ Bielefeldt (2015), op cit, par (i), page 21.

⁴¹ First Key Principle, *Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools* (<http://www.osce.org/odihr/29154>, p 16.

⁴² UN Committee on the Rights of the Child (CRC), *General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24)*, 17 April 2013, CRC/C/GC/15, available at: <http://www.refworld.org/docid/51ef9e134.html>.

⁴³ UNICEF op cit.

- 9.6 The ICCPR and the CRC guarantee children and adolescents the right to freedom of expression - a right which encompasses the "freedom to seek, receive, and impart information and ideas of all kinds."⁴⁴ The United Nations Human Rights Committee (**UNHRC**) has confirmed that States may not show less respect for this right on the basis of a person's status as a child or adolescent.⁴⁵
- 9.7 Australia has therefore committed to taking all appropriate measures to ensure children are protected against all forms of discrimination, irrespective of their gender or sexuality. In ALHR's submission, laws which allow faith-based educational institutions to discriminate against staff or students are counter to the human rights framework established by the rules based international legal order.
- 9.8 Australia has also agreed to be bound by the *International Labour Organization Convention No. 111* (ILO 111). This international agreement prohibits discrimination in employment on the grounds of race, colour, sex, religion, political opinion, national extraction and social origin. Parties to this convention can include additional grounds for domestic purposes, and in 1989 Australia added several grounds including 'sexual preference.'⁴⁶
- 9.9 LGBTI youth remain amongst some of our most vulnerable to abuse, harassment and violence. A La Trobe University study of 3,134 same-sex-attracted and gender questioning young people, *Writing Themselves In 3*, found that:
- 10% of young people reported that their school did not provide any form of Sexuality Education at all;
 - 40% attended a school with no social or structural support features for sexual difference;
 - only 19% of young people attended a school that was supportive of their sexuality; and
 - over a third described their school as homophobic.⁴⁷
- 9.10 A survey of 564 LGBTI individuals in 2015 by the Bully Zero Australia Foundation reported that:
- over 50% of same-sex-attracted or gender diverse young people in Australia have experienced verbal abuse;
 - over 15% of same-sex-attracted or gender diverse young people in Australia have experienced physical abuse; and
 - over 70% of these homophobic and transphobic incidents take place in schools.⁴⁸
- 9.11 In ALHR's submission, laws which allow faith-based educational institutions to discriminate against staff or students will only serve to perpetuate these kind of statistics.

⁴⁴ ICCPR, art. 19(2); Convention on the Rights of the Child, art. 13(1).

⁴⁵ *General Comment 17, Rights of the Child (Article 24)*, para. 2, Human Rights Committee, 35th sess., 1989, in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1, p. 23 (1994).

⁴⁶ *Australian Human Rights Commission Act 1986* (Cth), Schedule 1 and see <https://www.humanrights.gov.au/publications/section-4-human-rights-and-discrimination-basis-sexual-orientation-or-gender-identity>

⁴⁷ Hillier, L., Jones, T., Monagle, M., Overton, N., Gahan, L., Blackman, J., & Mitchell, A. 2010. *Writing themselves in 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people*, 79.

⁴⁸ Bully Zero Australia Foundation. 2017. "What is Homophobic Bullying?" <http://bzaf.org.au/homophobic-bullying/>

10. Conclusion

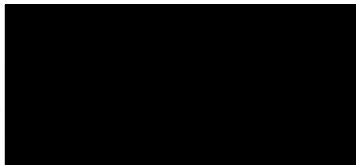
We submit that there is no practical justification for faith-based exemptions to Australian anti-discrimination legislation, but much practical justification for the removal of all existing exemptions.

Similarly there is no convincing theoretical justification for faith-based discrimination, but persuasive theoretical justification for the Australian government to remain neutral in this debate and adopt a human-rights-based framework for analysing and assessing competing 'freedoms' claims with a view to minimising potential harm.

In accordance with that framework, in relation to children, no faith-based exemptions should be permitted to anti-discrimination legislation and in relation to adults, only the narrowest of employment exemptions from anti-discrimination legislation should be permitted in cases where adherence to a particular faith is essential to the performance of the relevant duties, and not merely desirable.

If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au.

Yours faithfully



Kerry Weste
President
Australian Lawyers for Human Rights

About ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

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