

**SUBMISSION OF THE WILBERFORCE FOUNDATION IN
RESPONSE TO THE INTERIM REPORT OF AUSTRALIAN LAW
REFORM COMMISSION - *TRADITIONAL RIGHTS AND
FREEDOMS—ENCROACHMENTS BY COMMONWEALTH LAWS*
(REPORT PAPER)**

INTRODUCTION

1. The Wilberforce Foundation is a coalition of lawyers committed to the preservation and advancement of common law values, rights and freedoms.
2. The Wilberforce Foundation proffers this submission in response to the Report. This submission focusses on the Freedom of Expression and Religious Freedom.

FREEDOM OF EXPRESSION

3. The Report says:

Anti-discrimination law may also benefit from more thorough review in relation to implications for freedom of speech. In particular, s 18C of the RDA has been the subject of considerable recent controversy. Concerns about the operation of antidiscrimination law in relation to freedom of religion may also raise related freedom of speech issues¹
4. The Wilberforce Foundation respectfully supports this conclusion. As submitted in the Foundations' Submission,² the *Sex Discrimination Act 1984* (**SDA**) should be especially and carefully considered.
5. In this context any review should critically evaluate some of the submissions noted in the Report. We refer to two of them:

The NSW Gay & Lesbian Rights Lobby referred to the academic work of Professor Carolyn Evans and Leilani Ujvari who argued:

‘The message that such exemptions can give is that discrimination is relatively minor in comparison to other forms of harm against which the law protects and from which most religious schools have no exemptions. Law has a legitimating as well as a regulating function and when religious schools are permitted to avoid discrimination laws, it may serve to legitimate discrimination, conveying to a group of impressionable children that equality is a goal of limited value; something which can be avoided if desired.’

Some stakeholders also asked whether it is appropriate to exempt religious organisations that receive public funding from discrimination legislation. For instance, PIAC argued that where a religious organisation is in receipt of public

¹ Report [3.191].

² Submission 29.

funding or performing a service on behalf of government, it should not be permitted to discriminate in a way that would otherwise be unlawful³

6. These submissions are noted in the Report in the context of religious freedom, but as the Report concludes that “the operation of anti-discrimination law in relation to freedom of religion may also raise related freedom of speech issues,”⁴ it is appropriate that they be commented on here.
7. The comments fail to understand a number of fundamental matters:
 - 7.1. That as law has a “legitimizing function,” restricting the promulgation of a world view, incorporating spiritual, moral, sexual and social behaviour based on the doctrines of a religion, in the name of non-discrimination has the effect of “conveying to a group of impressionable children” that the religiously inspired world view is of limited value. In effect the alleged victim of discrimination becomes the discriminator;
 - 7.2. The practice of, for example a homosexual lifestyle, is itself, to some measure, the product of a world view. The law should not dictate which world view is to have priority in the public space;
 - 7.3. That a person’s religious convictions are “a central tenet of their identity”⁵ and should not be deemed in law to be any less worthy of protection than any other protected attribute;
 - 7.4. Religious faith is a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity. Since religious belief is such an integral part of a person, a religious person can only flourish when they are freely able not only to worship but to live their faith. As Laycock and Berg argue:

[C]ommitted religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. For religious believers, the conduct at issue is to live and act consistently with the demands of the Being that they believe made us all and holds the whole world together.⁶

No religious believer can change his understanding of divine command by any act of will...Religious beliefs can change over time...But these things

³ Report [4.67]-[4.68].

⁴ See [3] and n 1 above.

⁵ *Christian Youth Camps Ltd v Cobaw Community Health Services Limited* [2014] VSCA 75 per Redlich J [56].

⁶ Douglas Laycock and Thomas Berg “Same-Sex Marriage and Religious Liberty” 99 *Virginia Law Review* [2013] 1 3.

do not change because government says they must, or because the individual decides they should ... [T]he religious believer cannot change God's mind.⁷

- 7.5 78% of Australians claim a religious affiliation.⁸ These people are taxpayers and are entitled to have their views reflected in the use of public funds. The argument that where public funds are used, there should be no accommodation for religious views, has as an unstated but obvious premise that those who have religious convictions do not contribute to public funds. The proposition has only to be exposed to be shown to be wrong.
- 7.6 A policy which seeks to utilise, to the benefit to society, the “good works” of religious believers but to prosecute believers who express their beliefs in public is incoherent. The positive contributions to Australian society from those who act on their religious beliefs and turn faith into action is manifest. The Catholic Archbishop of Sydney, Archbishop Anthony Fisher's observations in relation to the contribution of the Catholic Church to contemporary Australian society make good this point, but persons of other faith traditions make equally powerful contributions to our society:

The [Catholic] Church in Australia now has over 10,000 hospital beds, 20,000 aged care places, 700,000 school desks, and assists countless people through parishes, CatholicCare and St Vincent de Paul. Five and a half million Catholics, in 1300 parishes and every walk of life, contribute in myriad ways to our nation. Democracies, economies and societies don't just happen; they depend upon a complex of ideals, priorities and institutions and in this country these are largely a Judeo-Christian inheritance, however under-appreciated that often is.⁹

The complaints to Tasmania's Anti-discrimination Commissioner by Martine Delaney against the Catholic Archbishop of Hobart, Archbishop Julian Porteous, in relation to the distribution of the Catholic Bishops of Australia's pastoral letter on the 'Same-sex Marriage' Debate *Don't Mess with Marriage*, in Tasmanian Catholic schools and parishes, illustrates the inconsistency of approach in which certain manifestations of religious faith may be deemed appropriate and beneficial whilst others are not. This approach seeks to demand from religious believers that they truncate and limit their religious freedom and the extent to which they “live and act consistently with the demands of the Being that they believe

⁷ Ibid 4.

⁸ <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4102.0Main+Features30Nov+2013> accessed 18 September 2015.

⁹ Anthony Fisher, Catholic Archbishop of Sydney, Archbishop, homily delivered at his installation mass on Wednesday 12 November 2014 <http://www.xt3.com/library/view.php?id=17926>

made us all and holds the whole world together” to use Laycock and Berg’s terminology¹⁰

- 7.7 The manifestation of religious belief is protected as the foundation of human rights. While Australia’s *Constitution* was written before the main international human rights instruments and does not copy more modern versions of freedom to manifest religion, that our framers denied the Commonwealth the power to pass any law interfering with the “free exercise of religion” confirms that they intended manifestation of religious belief should be protected. At the very least, free exercise of religion includes the right to speak in public about issues of religious interest including when those issues have a social dimension
8. Any review should explore the fundamental concepts discussed above and amendments to the anti-discrimination laws should be fashioned accordingly.

FREEDOM OF RELIGION

9. The Report says:

Anti-discrimination provisions in international human rights law may constitute a permissible limitation on religious freedom. Articles 2, 4, 21 and 26 of the ICCPR provide that the protection of individual’s rights must not be ‘without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, property birth or other status.’¹¹

10. The Wilberforce Foundation observes that the above proposition is tautologous as one of the bases that the cited portion of the ICCPR says there may be no distinction drawn, is that of religion. Yet that is in effect what the anti-discrimination statutes achieve, *de facto* if no *de jure*, by restricting conduct based on religious convictions. Further, with respect, the above quote paragraph seems to be in error- the inclusion of the word “not” must be a mistake. It is also incorrect in seeming to imply that religious freedom may *always* be qualified in the interests of anti-discrimination laws. Article 21, for example, concerns the right of peaceful assembly and contains no direct reference to either religious freedom or discrimination laws. Article 2 is a general non-discrimination provision, but is dependent

¹⁰ Douglas Laycock and Thomas Berg “Same-Sex Marriage and Religious Liberty” 99 *Virginia Law Review* [2013] 1 3.

¹¹ Report [4.112].

for its operation on the precise terms of the other rights mentioned in the Covenant.

11. Article 4 makes it clear that the right to freedom of thought, conscience and religion (Article 18) is a non-derogable right in in a time of public emergency:

“No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.”

By contrast, Article 26 (All persons are equal before the law and are entitled without any discrimination to the equal protection of the law) is not a non-derogable right in such a time. Further, Article 26 itself again prohibits, *inter alia*, discrimination on the ground of religion. The question is why is it necessary to limit some Australians’ freedom of thought, conscience and religion, self-evidently matters fundamental to their identity, to accommodate the identity of other Australians, when an accommodation of both is possible? Why is it right to say one identity right has priority over the other?

12. The Wilberforce Foundation respectfully submits that focus of human rights discourse on anti-discrimination, has caused both a misunderstanding of the effect of the ICCPR and a skewing and imbalance of legislation in favour of anti-discrimination, to the devaluation of the other fundamental rights and (as in the case of the right of freedom of religion) higher order rights than the right to non-discrimination.
13. This review should right that imbalance.

CONCLUSION

14. The Wilberforce Foundation thanks the Law Reform Commission for the opportunity to make this submission.

Dated 21 September 2015

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