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**Submission to the Australian Law Reform Commission**

**in response to Freedoms Inquiry - Interim Report 127**

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# Executive Summary

The Australian Christian Lobby (ACL) welcomes this opportunity to take continue taking part in the Australian Law Reform Commission’s Freedom Inquiry by responding to Interim Report 127.

ACL has chosen to address a number of the paragraphs of Interim Report 127 and speak to issues that may benefit from further clarification.

ACL has chosen to focus on issues relating to freedom of thought, conscience and religion.

We trust that the issues our submission seeks to raise are given thoughtful consideration by the Commission and we look forward to ongoing involvement in this discussion.

**Defining Religious Freedom**

**Paragraph 4.1** of the report states:

*Generally speaking, Australians enjoy significant religious freedom, particularly by comparison to other jurisdictions. Australians enjoy the freedom to worship and practice religion, as well as the freedom not to worship or engage in religious practices.*

The report rightly acknowledges the freedom Australians enjoy with respect to religious liberty in worship and practices. Yet, some challenges to that freedom do exist in Australia and they are not typically related to questions of worship or freedom of belief itself, but questions of freedom of conscience in a commercial or service provision setting, the integrity of religious education, and the manifestation of belief in other ways, all of which fall outside liturgical and worship settings.

**Paragraph 4.7** of the interim report provides a comprehensive and helpful exploration of the definition of ‘religion’ under common law. Starting with the common law definition of religion, however, means that the chapter ‘Freedom of Religion’ looks at the freedom in a narrow manner. To explore a contrasting approach, it will be helpful to consider that the rights enumerated under article 18 of the *International Covenant on Civil and Political Rights* are much broader and tie the right to ‘freedom of thought, conscience and religion or belief’ together into the one article.

Narrowly focusing on religion as a starting point without acknowledging the interconnectedness of freedom of thought and conscience this inquiry misses out on a fulsome discussion of fundamental freedoms. ACL submits that it is desirable that the title of the chapter be revised to include freedom of thought and conscience.

It is important to note further that the enmeshing of these rights is not foreign to Australia’s common law. Mason ACJ and Brennan J have said:

 *Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society.[[1]](#footnote-1)*

They went on to explain:

*What a man feels constrained to do or to abstain from doing because of his faith in the supernatural is prima facie within the area of his legal immunity, for his freedom to believe would be impaired by restriction upon conduct to which he engages in giving effect to that belief. The canons of conduct which he accepts as valid for himself in order to give effect to his belief in the supernatural are no less a part of his religion than the belief itself.[[2]](#footnote-2)*

More recently, Redlich J has opined:

*The precepts and standards which a religious adherent accepts as binding in order to give effect to his or her beliefs are as much a part of their religion as the belief itself… 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 tenant of their identity.[[3]](#footnote-3)*

Freedom of religion has long been comprehended as one of an intimately enmeshed set of rights with free conscience, thought and belief. It speaks to what a person is compelled to do or to abstain from doing in accordance with his or her conscience and therefore belongs, *prima facie*, within the realm of a person’s legal immunity. When the government enters into a citizen’s conscience and compels them to act against it, such acts are potentially acts of state tyranny.

It is from this full understanding of religion and religious freedom that an understanding of the paramount need for its protection flows.

**Paragraph 4.38** states:

*Freedom of religion is infringed when a law prevents individuals from practicing their religion or requires them to engage in conduct which is prohibited by their religion. Alternatively, the freedom will also be infringed when a law mandates a particular religious practice.*

ACL submits that a robust discussion of the issues around freedom of religion should not be limited to conduct explicitly prohibited by the canons of a person’s religious belief, but should also extend to matters which a person comes to consider contrary to their conscience.

Whilst not on a commonwealth level, two notable examples of legislation which threaten freedom of conscience on a state and territory level are the *Abortion Law Reform Act 2008* (Vic) and the *Reproductive Health (Access to Terminations) Act 2013* (Tas). The Victorian law requires any doctor with a conscientious objection to abortion to refer a woman seeking abortion to another doctor who does not object. This forces a doctor to be complicit in abortion even though he finds it unethical or morally objectionable. Such an act is injurious to the conscience of the doctor, curtailing his or her religious freedom.

It is possible that a doctor who has a conscientious objection to abortion may do so on grounds that are not linked to both a ‘belief in a supernatural Being, Thing or Principle; and the acceptance of canons of conduct’. If this were so, such a person would not be doing so out of a religious belief under the common law definition provided by the joint judgement of Mason ACJ and Brennan J *in Church of the New Faith v The Commissioner of Pay Roll Tax.[[4]](#footnote-4)* Nonetheless, the objection would be part of the doctor’s fundamental beliefs and therefore worthy of protection by way of his right to freedom of thought, conscience and belief. ACL submits that the discussion of matters in the interim report need to also address the rights and freedoms of such conscientious objectors. Widening the discussion of freedom of religion to also include freedom of thought and conscience would allow such a discussion to take place. It would also minimise the artificial isolation of freedom of religion from its related rights under international and common law.

**Religious Freedom and Anti-discrimination law.**

The development of anti-discrimination legislation in Australia has followed a path of legal reform that does not adequately reflect the balance struck by international law. An overly expansive understanding of unjust discrimination has had the related effect of locating fundamental rights below the right to non-discrimination.

The right to be free from discrimination is but one of many rights and freedoms enumerated under the *International Covenant on Civil and Political Rights* (ICCPR). Despite this, rights and freedoms have regrettably come to be viewed almost exclusively through a prism of non-discrimination in Australia – evidenced by the existence of four Commonwealth non-discrimination Acts as the Commonwealth’s only rights-enumerating statutes. This ballooning of a single right in Commonwealth legislation is fundamentally at odds with international law.

Regarding the actual limits to discrimination, the United Nations Human Rights Committee specifically notes that the scope of the right to be free from discrimination is intended to be carefully defined. It is not intended to displace other rights and freedoms under the Covenant. The Committee’s General Comment 18 states, at paragraph 13:

*Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the covenant.*

That is to say that non-discrimination’s approximate limits lie at the point where differentiations of treatment occur in the reasonable and objective pursuit of other fundamental rights, including freedom of thought, conscience and religion or belief (article 18).

This is not reflected in Australia, where anti-discrimination law has become the dominant lens through which rights are viewed. The more fulsome conception of discrimination envisaged by international treaties is not given expression in Australian law.

There is a need to correct the imbalance in current anti-discrimination law to bring it closer to the ICCPR construction. The right to not be discriminated against based on religion must be compatible with the right to freely practice religion. In addition, the preaching and teaching of religion, which may on occasion cause offence to adherents of other religions, must be protected.

An alternative approach to resolve the issues around anti-discrimination and religious freedom is recommended.

The simplest solution to the troubling direction being taken by Australia’s laws on rights and freedoms is to ensure that “discrimination” under Commonwealth Anti-Discrimination Acts is defined in such a way as to be in accordance with its internationally accepted definition.

ACL recommends that Australian anti-discrimination legislation be amended to add a general limitations clause that would ensure that the manifestation of a fundamental right or freedom, including religious freedom and other rights under the ICCPR, is not necessarily defined as discrimination. This would also allow for the removal of exceptions for religion since such exceptions would no longer be necessary. The drafting of this clause was made available in ACL’s previous submission and can be made available again on request should that be necessary.

**Paragraph 4.48** discusses the exemptions to Commonwealth anti-discrimination law available for religious organisations and religious educational institutions.

The Interim report helpfully discusses the exemption provisions in section 38 of the *Sex Discrimination Act 1984* (Cth) (SDA) that mean that religious organisations may permissibly act in a way that would normally be considered discrimination under the act so long as it is in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

The *Fair Work Act 2009* (Cth) contains similar provisions as follows:

*(2)  However, subsection (1) does not prevent a matter referred to in paragraph (1)(f) from being a reason for terminating a person's employment if:*

*(a)  the reason is based on the inherent requirements of the particular position concerned; or*

*(b)  if the person is a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--the employment is terminated:*

 *i)  in good faith; and*

*(ii)  to avoid injury to the religious susceptibilities of adherents of that religion or creed.* [emphasis added]

The *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (Since repealed and replaced) also contained exemption provisions that were similar in drafting. Excluded from the definition of discrimination under the Act was:

*…any distinction, exclusion or preference:*

*(c)  in respect of a particular job based on the inherent requirements of the job; or*

*(d)  in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.[[5]](#footnote-5)*[emphasis added]

The similar phrasing of these acts are significant. In *Griffin v The Catholic Education Office,[[6]](#footnote-6) ‘*injury to the religious susceptibilities’ was not enough to protect the Catholic Education Office from a negative finding by the Human Rights and Equal Opportunity Commission, although the Commission has no legal enforcement powers in this case. The complainant wasa lesbian activist who applied to the Catholic Education Office (CEO) to be classified as a teacher. The woman was suitably qualified, but her public profession of support for the homosexual lifestyle was in contradiction to Catholic Church teaching. The CEO declined her application for classification and the woman claimed discrimination on the grounds of sexual preference. Despite the fact that religious institutes were granted an exemption under the Act, the Commission held that declining the complainant’s application was not necessary to avoid injury to the susceptibilities of adherents to the official teachings of the Catholic Church. The commissioner stated in his report[[7]](#footnote-7) ‘It would be not an injury to their religious susceptibilities but an injury to their prejudices’.

The similarity between the *Sex Discrimination Act 1984* (Cth), the *Fair Work Act 2009* (Cth) and the since repealed *Human Rights and Equal Opportunity Commission Act 1986* (Cth) that was applied in *Griffin v The Catholic Education Office,* means that commonwealth exemptions forreligious organisations do not provide a high level of confidence for religious bodies that desire to ensure the integrity and ethos of their organisations can be maintained without legal disputes.

**Paragraph 4.50** of the interim report states:

*One of the most challenging issues in the interaction between religion and law is the accommodation or ‘special treatment’ of those who observe religious beliefs.*

ACL submits that the misapprehension of the nature of religious freedom as ‘special treatment’ is grounded in some of the problems alluded to above. First, the language and structure of exemptions and second, the separation of belief and conduct and of belief, conscience and religion.

First, when legislation frames religious freedom as an exception, it conveys the message that special treatment is afforded to a certain group. In actuality, the rights to non-discrimination and religious freedom exist concurrently and within prescribed limits or accommodations. In the Australian context, where the single right of non-discrimination has been over-legislated, most other freedoms start to look like special pleading to an established rule. This includes infringements on freedom of speech by laws like section 18C of the *Racial Discrimination Act 1975* (Cth) and section 17(1) of the *Anti-Discrimination Act 1998* (Tas) as much as freedoms like conscience, religion and association. This is a fundamentally incorrect narrative that is not supported in international human rights law or common law.

Second, not all people have a religious belief, but all people have beliefs, conscience and thought. Further, not all people act and speak out of a faith-based conscience or belief, but all people do act and speak out of their conscience and beliefs, thought informed by other means. The *International Covenant on Civil and Political Rights* bundles these together in a single article for this reason, and approval for that structure exists in Australian common law. If Australian law conveyed a more fulsome understanding of human rights apart from non-discrimination, it would be less concerning to the public that freedom of conscience is protected through religious exemptions. It is ACL’s preference to not have religious exemptions in most laws, but rather limitations clauses, which would ameliorate this problem among others.

ACL submits that the correct framing of the issues around religious organisation exemptions is vital to ensure a correct perspective is given to the significance of religious freedom as a fundamental human right, rightfully placed amongst other fundamental human rights. The alternative would be to incorrectly view religion as an encroachment on law.

The language of exemptions sends a message of “special pleading” or preferential treatment towards religious bodies. Rather than being the rule, or the assumption, freedom of religion is relegated to being the exception, or the special accommodation. This is a reversal of the place of fundamental freedoms in a free society such as Australia. If the narrative promoted by the relevant legislation clearly articulated the limits of discrimination law and the assumption of freedom, such resentment or confusion could be ameliorated.

**Paragraph 4.68** states that:

*PAIC argued that where a religious organisation is in receipt of public funding of performing a service on behalf of government, it should not be permitted to discriminate in a way that would otherwise be unlawful.*

The fact that this topic is raised as an issue for discussion may be as a result of a misunderstanding of the notion of separation of church and state and its applicability to Australia.

Church and state are separated in Australia by way of Section 116 of the Constitution, which has been read narrowly by the High Court and restrains the Commonwealth from establishing a religion or prohibiting a religion. The Commonwealth is not barred from making service contracts with religious bodies and does so in a number of charitable areas, not the least of which includes religious schools. Further, the Commonwealth is not quarantined from the democratic participation of churches and faith-motivated citizens and the related promotion of their vision of a good society. ACL believes that people of faith have a legitimate contribution to make in this regard and should be heard, along with other citizens whose belief systems do not emanate from a particular faith.

To remove the freedoms that religious organisations currently enjoy in the name of funding would itself be a form of discrimination against those organisations, as a refusal to grant funds to certain bodies on the basis of their religious beliefs. Discrimination on the ground of religion is prohibited by Articles 2, 4 and 26 of the ICCPR.

At the heart of this discussion is a fundamental question: ‘What vision of social life should we embrace as a society?’ Religious bodies have a particular worldview that often drives their adherents to devote their time and energy to worthy social projects and charities. Such groups contribute to the common good of society. Supporting such groups does not mean the government endorses their worldview. Instead, it is an acknowledgment of the enormous contribution that they make to the community as well as an acknowledgement that a pluralistic society sees charitable and social engagements operating in diverse ways for the collective good.

Of particular concern is the right of religious charities and bodies to hire staff who share their values. Forcing religious charities and bodies to adhere to laws that prevent them from eliminating job applicants who don’t share in their worldview is likely to change the ethos and vision of the organisation. For many of those who are motivated by religious values and principles, working for a charity with a secular identity would be unlikely to have the same strength of appeal since they might feel the expression of their identity and values would be too restricted.

Religious organisations receiving taxpayer funds should be able to determine their own identity without government interference. It is not the role of government to interfere in a religious organisation’s mission or vision.

**Justifications for laws that interfere with freedom of religion**

**Paragraph 4.89** states:

*It is generally recognised that freedom of religion is not absolute. Instead ‘it is subject to powers and restrictions of government essential to the preservation of the community’. Legislatures and the courts will often have to strike a balance between so-called ‘equality’ rights like anti-discrimination, and other freedoms like freedom of religion*

ACL submits that this paragraph could benefit from being amended to acknowledge that under international norms the right to freedom of thought, conscience and religion is absolute whilst the manifestation of that religion or belief is subject to defined limitations.

Article 18 of the International Covenant on Civil and Political Rights draws distinction between belief (the right to freedom of thought, conscience and religion) and the manifestation of that religion or belief (in teaching Practice, worship and observance.)

This is explained succinctly in General Comment 22 paragraph 3 which states:

*Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice. These freedoms are protected unconditionally, as is the right of everyone to hold opinions without interference in article 19.1.*

This distinction between belief itself and the manifestation of belief is further drawn out in paragraph 8 of General Comment 22 which highlights that whilst the manifestation of religious belief is subject to defined limitations, (as has already been explored), the right to be free from coercion of belief itself can never be restricted in any way.

*Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted.[[8]](#footnote-8)*

It is also important to note that the right to non-discrimination is similarly a right that has a defined scope. In this regard, religious freedom is not uniquely subject to restrictions or outer limits, as discussed above.

**Paragraph 4.11** states that

*Article 4 of the ICCPR provides that some ICCPR rights may be derogated from in time of public emergency.*

Yet article 18 of the ICCPR, which contains the clause relating to religious liberty, is expressly excluded from the operation of article 4.

Article 4 (2) states:

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

To fail to acknowledge that article 18 may not be derogated from under the provisions of article 4, after having raised the issue, may cause some readers to be misled into thinking that the operation of article 4 also applies to article 18. ACL submits that this paragraph needs to be amended to more accurately reflect the framework of the ICCPR.

**Paragraph 4.112** states:

*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(sic) be ‘without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, property birth or other status’.*

The above is a true characterisation of article 2, but not of articles 4, 21 and 26. The object of the quoted text articles 4 and 26 is not specifically ‘the protection of individual’s rights’. The quoted text does not appear at all in article 21.

Article 21 of the ICCPR states:

*The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.*

The limitations on religious freedom that are permissible under the ICCPR are narrow in scope. They also need to be understood in light of the fact that other rights are also subject to limitations and a defined scope, including the right to non-discrimination and equality before the law.

UNHRC General Comment 22 at Paragraph 8 states:

*Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted. In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant*[[9]](#footnote-9)[emphasis added]

The grounds on which freedom of religion may be restricted are therefore to be limited to those that are set out in Article 18 paragraph 3. In summary, they are:

1. if the limitation is prescribed by law; and
2. are necessary to protect public safety; or
3. order; or
4. health; or
5. morals; or
6. fundamental rights and freedom of others.

The clarification makes it clear that these limitations must be “strictly interpreted” and that no other grounds other than those just articulated are permissible grounds on which to limit a person’s freedom to manifest religion or belief.

Meanwhile, the UNHRC’s general comment 18, quoted earlier in this document, defines the scope of the Covenant’s right to non-discrimination and equality before the law. At paragraph 13 it notes that a differentiation of treatment that occurs with the aim of achieving a purpose which is legitimate under the Covenant. In this way, the Committee notes that the reasonable and proportionate pursuit of other fundamental rights and freedoms, including religious freedom, is a legitimate basis for differentiations of treatment that therefore will not be considered unlawful discrimination.

In addition, religion is itself a protected attribute in respect of non-discrimination and equality before the law under articles 2, 4 and 26.

For these reasons it is not immediately clear that the right to non-discrimination is a permissible burden on freedom of religion. In certain circumstances it doubtless is, but the criteria for such circumstances are complex and ought to be carefully balanced without swiftly subjecting fundamental freedoms to non-discrimination.

ACL suggests that a discussion of the Siracusa Principles at some point in the report may also be of assistance to understand what conditions and grounds would be necessary for permissible limitations and derogations enunciated in the International Covenant.

**Conclusion**

On behalf of the Australian Christian Lobby I would like to thank the Law Reform Commission for considering our submission. Please do not hesitate to contact ACL should you require further clarification.

Yours sincerely



**Martyn Iles**

**Chief of Staff**

**Australian Christian Lobby**

1. *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 at [6]. [↑](#footnote-ref-1)
2. Ibid at [14]. [↑](#footnote-ref-2)
3. *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 at [561]. [↑](#footnote-ref-3)
4. (Vic) [1983] HCA 40; (1983) 154 CLR 120. [↑](#footnote-ref-4)
5. *Human Rights and Equal Opportunity Commission Act 1986* (Cth)"discrimination" Section 3 [↑](#footnote-ref-5)
6. Report of Inquiry into a Complain of Discrimination in Employment and Occupation Discrimination on the ground of sexual preference HRC Report No.6 [↑](#footnote-ref-6)
7. Ibid. [↑](#footnote-ref-7)
8. Human Rights Committee, General Comment 22, Article 18 (Forty-eighth session, 1993). Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994). <http://www.refworld.org/docid/453883fb22.html> [↑](#footnote-ref-8)
9. UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion) 30 July 1993 accessed 02 October 2015, <http://www.refworld.org/docid/453883fb22.html> [↑](#footnote-ref-9)