Submission to Australian Law Reform Commission (ALRC) *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws Interim Report* (July 2015)

Presbyterian Church of Queensland

1. The Presbyterian Church of Queensland welcomes the opportunity to make submissions to the Australian Law Reform Commission (ALRC) *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws Interim Report* (July 2015) (the Interim Report). Our submissions are made in respect of Chapter 4 of the Interim Report, which pertains to religious freedom, and specifically, to the ALRC’s call for submissions on the following matters:

QUESTION 3-1

What general principles or criteria should be appointed to help determine whether a law that interferes with freedom of religion is justified?

QUESTION 3-2

Which Commonwealth laws unjustifiably interfere with freedom of religion, and why are these laws unjustified?

1. As set out in these submissions, we consider that there are a number of ways in which existing Commonwealth laws encroach upon the right to freedom of religion. In addition we are also deeply concerned with various proposals put in certain of the submissions recorded at Chapter 4 to the Interim Report which call for an expansion of the various existing encroachments. We set out our concerns under the following headings:
   1. The State should not arrogate to itself the ability to define religious doctrine.
   2. The receipt of funding or charitable endorsement should not be a ground to limit religious freedom.
   3. Religious belief should be recognised as a protected attribute for the purposes of Commonwealth anti-discrimination law.
2. Mason ACJ and Brennan J summarised the centrality of the freedom of religion in *Church of the New Faith v Commissioner for Pay-Roll Tax*[[1]](#footnote-1) where they held:

Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.[[2]](#footnote-2)

It is submitted that this statement provides a suitable recognition of the foundational importance of religious freedom within Australian society and a suitable standard against which to demonstrate the extent of incursion upon that freedom within current Commonwealth law.

* 1. *The State should not arrogate to itself the ability to define religious doctrine.*

1. We first concern ourselves with the interplay of the right to religious freedom with anti-discrimination law. Various Commonwealth laws that grant exemptions to religious institutions from anti-discrimination laws require those institutions to demonstrate that either the conduct is either:
   1. Necessary to avoid injury to the religious susceptibilities of adherents; or
   2. In accordance with the doctrines, beliefs or principles.[[3]](#footnote-3)

A further test focusses on the inherent requirements of the position in question, a matter to which we return below.[[4]](#footnote-4)

1. We first note that any consideration of the recognition of the religious freedom rights of religious organisations must take place in the century’s old and ongoing dialogue concerning the separation of Church and State evidenced in the Western tradition. This is necessary as it is often within the contemporary expression of that dialogue where the purported ability of the State to incur upon the religious freedom of its citizens is asserted. However, the historical expression of that dialogue provides a record of the disastrous consequences of State incursions upon the individual’s religious conscience that must not be overlooked. In the British common law that dialogue traces back to the Magna Carta of 1215 AD, and further than that, the dialogue streams back to Emperor Constantine and the Edict of Milan in 313 AD. It leads us to consider whether the State should impose a religious belief on its citizens and the extent (and ability) of the State’s power to regulate the Church’s ability to act in accordance with its beliefs.
2. The history of the endeavours of the established church to enforce religious observance in the English tradition is well documented. Indeed the modern (as opposed to medieval) conception of separation of church and State was adopted as an attempt to preserve the conscience of religious minorities against State efforts to enforce religious uniformity and in light of the disastrous consequences of State attempts to impose sanctioned forms of religion and morality upon the populace in breach of individual conscience. Consistent with and drawing upon this history, in recent centuries the courts have disclosed a reticence to determine matters of doctrine for religious institutions. Any attempt by the State to circumscribe the bounds of permissible religion through anti-discrimination law flies in the face of such lessons. To do so risks the allegation of wilful historical amnesia. Furthermore, modern anti-discrimination law, in requiring determinations of permissible religious doctrine runs the risk of ennobling a modern State sanctioned form of religion.
3. Any regime that requires a court to make determinations as to the nature of religious truth is further complicated by the difficulty in determining whether a system of belief comprises a religion, which is a necessary precursor to any determination of worth. Chief Justice Malcolm notes:

the courts have recognised that our language has a strictly limited capacity to capture the nature of “religious belief”. Indeed, one judge has ventured the opinion that: “… in no field of human endeavour has the tool of language proved so inadequate in the communication of ideas as it has in dealing with the fundamental questions of man’s predicament in life, in death or in final judgement and retribution.”[[5]](#footnote-5) The courts have also been influenced by the essentially unknowable nature of “religious truth”[[6]](#footnote-6), and by an awareness of the lessons of history in relation to religious persecution and intolerance.

1. Justices Wilson and Deane have held that the question of whether a belief is “religious” should be “approached and determined as one of arid characterisation not involving any element of assessment of the utility, the intellectual quality, or the essential ‘Truth’ or ‘worth’ of tenets of the claimed religion.”[[7]](#footnote-7) It is arguable that this common sense approach reflects a post-Enlightenment preference for State neutrality in matters spiritual and an aversion to State endorsed determinations of what comprises truth in light of the religious wars of the sixteenth and seventeenth centuries. Instead, as typified by the judgement of Wilson and Deane JJ, the courts have wisely, in our view, preferred a relationship with religious institutions that have permitted them to determine their own enunciations of truth.
2. Several further practical policy imperatives have driven the courts’ reticence to wade into determining matters spiritual. We include in this the concern to avoid accusations of preferring one religious belief over another.[[8]](#footnote-8) The courts’ reticence to sanction one religious entity over another is also properly seen as an expression of the doctrine of separation of Church and State, as reflected in the Australian Constitution. That reticence is required as a natural extension of the Constitutional prohibition on the Commonwealth establishing a religion or restricting the flourishing of a religion by giving preference to any one religion over another pursuant to section 116.
3. Courts have also displayed a strong appreciation of the dangers involved in tailoring legal protection according to the views of the prevailing majority.[[9]](#footnote-9) As highlighted in ex curial commentary by Malcolm CJ:

One of the problems with claims to necessity is that what is considered necessary usually depends on the experience and values of those who impose the relevant restriction. In these circumstances, as Brennan J observed in *Goldman v Weinberger*[[10]](#footnote-10)*,* one of the tasks of the courts must be: “… to protect the rights of members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar.”

In making this reference to the “quiet erosion” of the right freely to exercise a religion, Brennan J highlights the ever-present potential of the majority, indirectly and unthinkingly, to discriminate against the religious practices of a minority. Regulations and restrictions which are not intended to discriminate against religious practice, and are applied uniformly, may nevertheless in their effect discriminate to the extent of imposing an intolerable burden on the adherents of a particular religion.[[11]](#footnote-11)

This is particularly pertinent within contemporary Australia, where various recent polls demonstrate that those holding a traditional Christian view on sexuality find themselves in the minority.

1. An illustration of the practical consequences of legislation that requires courts to weigh the nature of religious truth can be found in the following determinations, each of which provide examples of judicial or executive bodies purporting to hold the curious ability to declare to religious adherents the nature of their doctrines or beliefs:
   1. Justice Maxwell in *Christian Youth Camps v Cobaw*,[[12]](#footnote-12) who found the doctrine of plenary inspiration (that each word within the Bible is divinely inspired) could not be relied upon to support the argument that the doctrines of the Christian Brethren teach that homosexuality is contrary to God’s will on the basis that 'the applicability of that doctrine to individual passages in the Bible was shown by the evidence to be quite variable, and to have changed over time … [and] that there was even some diversity between Christian Brethren congregations as to which parts of the Bible were to be applied literally.’[[13]](#footnote-13) Justice Maxwell also found that even if the doctrines were to hold that homosexuality is contrary to God’s will, such was ‘a rule of private morality’ and the refusal of a booking to a group of same sex attracted individuals by a camping ground operator was not necessary for the operator to conform with those doctrines.
   2. In Report of Inquiry into a Complaint of Discrimination in Employment and Occupation,[[14]](#footnote-14) the Human Rights and Equal Opportunity Commission (HREOC) upheld the complaint of discrimination by a teacher who was a co-convenor of the Gay and Lesbian Teachers and Students Association and who was refused employment in Catholic schools on the basis that her ‘public lifestyle’ as a lesbian activist was at variance with the values and principles of Catholic teachings. Curiously, notwithstanding clear evidence on the traditional position of the Catholic Church concerning sexuality, the HREOC found that ‘the known or public stance of Ms Griffin in relation to homosexuality does not conflict with the official teachings of the Catholic Church.’[[15]](#footnote-15)
   3. The complexities of defining religious doctrine is also demonstrated by the range of judicial determinations made in the various proceedings concerning a complaint against the Wesley Mission for refusing to consider a homosexual couple’s application to become foster carers.[[16]](#footnote-16) The matter underwent seven differing hearings. Each judicial body reached a differing conclusion. Ultimately, after being ordered to reconsider the matter, the New South Wales Administrative Decisions Tribunal held that ‘while there is no relevant doctrine of the Uniting Church which would bind the Wesley Mission the Mission itself is entitled to propagate its own doctrines on the subject of homosexuality and may do so by teaching or other means not necessarily amounting to the formal pronouncement of a “doctrine”.’[[17]](#footnote-17) However, it did so begrudgingly, calling upon Parliament to reconsider the legislation.
2. We conclude that courts are not the appropriate vehicles to determine what should be considered to be the doctrine of religious institutions. If theologians of a particular denomination are not able to conclusively determine foundational doctrines, how can we realistically expect that secular courts could have the resources to so determine?
3. Instead, the Courts should adopt an approach that permits the religious institution and religiously convicted individual the maximum scope to define their own doctrine. The law should permit religious institutions a wide scope of appreciation in which to extend their own interpretation of the applicable doctrine. The comments of Lord Nicholls in *R (on the application of Williamson) v Secretary of State for Education and Employment* are considered to be informative in this respect:

It is necessary first to clarify the court's role in identifying a religious belief calling for protection under article 9. When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith: 'neither fictitious, nor capricious, and that it is not an artifice', to adopt the felicitous phrase of Iacobucci J in the decision of the Supreme Court of Canada in *Syndicat Northcrest v Amselem* (2004) 241 DLR (4th) 1, 27, para 52. But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual. As Iacobucci J also noted, at page 28, para 54, religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising. The European Court of Human Rights has rightly noted that 'in principle, the right to freedom of religion as understood in the Convention rules out any appreciation by the state of the legitimacy of religious beliefs or of the manner in which these are expressed': *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 306, 335, para 117. The relevance of objective factors such as source material is, at most, that they may throw light on whether the professed belief is genuinely held.

1. Indeed, it might be said that the foundational enactment of the Presbyterian Church in Australia reflects the wisdom of such an approach. The Schedule to the *Presbyterian Church of Australia Act 1900* (Qld) sets out the Basis of Union and Articles of Agreement of the Presbyterian Church. The Act, in accepting at face value the pronunciation of doctrine offered by the Presbyterian Church for enactment, reflects the State’s recognition of the Church’s autonomy in determining its statement of truth.

Employment and Religious Institutions

1. One of the key areas in which anti-discrimination law has the potential to impact upon the religious freedom of religious institutions is in the area of employment of staff and engagement of volunteers. Several submissions call for the removal of exemptions in these areas, however such calls fly in the face of traditional protections key to religious freedom for millennia within the Western tradition. The first clause of the 1215 Magna Carta states, ‘*quod Anglicana ecclesia libera sit’* (‘the English Church shall be free’). In its historical context, this clause was directed at preserving the Church’s rights to determine appointments to bishoprics, and hence the right to independently determine doctrine. These are not historical curiosities, the wisdom of such State / Church settlements continue to resonate today. The analogy to modern day discrimination law was not lost on United States Chief Justice Roberts when in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (2012) he observed:

Controversy between church and state over religious offices is hardly new. In 1215, the issue was addressed in the very first clause of Magna Carta. There, King John agreed that “the English church shall be free, and shall have its rights undiminished and its liberties unimpaired.” The King in particular accepted the “freedom of elections,” a right “thought to be of the greatest necessity and importance to the English church.” J. Holt, Magna Carta App. IV, p. 317, cl. 1 (1965).[[18]](#footnote-18)

1. In that decision the U.S. Supreme Court unanimously upheld the right of a religious school to determine appointments to its staff as a fundamental expression of the right to religious freedom. The ability to proclaim truth is central to the ongoing survival of truth within the conscience of the members of a community. Where a religious body operates an institution for the education of children, any removal of the ability to determine and teach doctrine in accordance with its teaching would be a restriction on these historically hard won liberties, which arguably are characteristic of the Western legal tradition.
2. The principle same applies not only to governing bodies and 'frontline’ staff but also to ‘back office’ roles. We noted above the presence of an ‘inherent requirements’ test in existing exemptions from anti-discrimination laws. Such a test risks encroaching upon religious freedom by failing to account for several foundational and distinct attributes unique to religious institutions.
3. First, the test potentially ignores the importance of ‘mission fit’ to associations generally. No suggestion is made that an organisation with purposes to promote indigenous culture should be required to employ persons from a differing culture. Nor is it suggested that an environmental organisation should be required to employ a climate change denier. No one would argue that a sitting member of a mainstream political party should be required to offer employment to a member of an opposing party in the interests of promoting equality. Whilst the suggestion of any of these proposals would be treated rightly as absurd, the submissions to the Interim Report calling for the removal of associational freedoms from religious organisations extend the same reasoning. There is no logical reason to limit such a withdrawal of exemptions from religious institutions from indigenous cultural organisations, environmental organisations, political parties or any other form of associational engagement. All of these associational bodies are defined by their unifying attributes, being adherence to a legitimate common philosophy, worldview, culture or cause. Parkinson outlines the relevant principle: ‘A right of positive selection is rather different from discrimination … Selection based in part on a characteristic which is relevant to the employment is not discriminatory.’[[19]](#footnote-19)
4. To the contrary, the historical analysis provided above supports the conclusion that there are very real concerns that religious institutions are uniquely subject to the lure of questionable State regulation. That history should enliven a concern that demands to remove the ability of religious institutions to determine their membership, their representatives and their leadership are to be resisted. That history demonstrates the divisive consequences where protection is not afforded to religious institutions as aggregators of expressions of religious conviction.
5. The assertion that only those roles that are inherently ‘spiritual’ should be afforded the exemption suffers from a fundamental misunderstanding of the nature of religious conviction, including as understood within the Christian tradition. Belief is transformative and, if sincere, is demonstrated in action.[[20]](#footnote-20) The gardener working within a Christian school should be enabled to consider their work as a vocation, a calling in which their inner convictions are expressed in the quality of their work efforts and their interactions with their fellow human beings. The gardener in particular should be free to pursue her work cultivating the earth as an image bearer of God, the Creator of all nature. Equally, the receptionist should be free to express his convictions concerning the obligations of love in human relationships through his employment.
6. In the Christian tradition, such persons do not see themselves, nor are they appreciated solely, as individuals. They are members of a community, and should be free to consider the role they may play and the contribution they may offer to the unique expression of the community ethos. The same applies to the gardener, to the office receptionist, or to the typist. Each participant within the organisation has a contribution to make to the organisational character of the organisation.

The Right to Religious Freedom Applies to Individuals and Groups

1. It is also important to note that the right to religious freedom does not operate solely at the individual level, it is also expressed and nourished by religious communities, which in themselves are to be accorded religious freedom rights. Furthermore, the right of religious communities to define their character is foundational to the preservation of the religious freedoms of the individual. This principle has been recognised by the European Court of Human Rights in *Hasan v Bulgaria* as follows:

Religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of divine origin ... Participation in the life of the community is thus a manifestation of one's religion protected by art 9 of the Convention. Where the organisation of the religious community is at issue, art 9 must be interpreted in the light of art 11 of the Convention which safeguards associative life against unjustified State interference. Seen in this perspective, the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which art 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by art 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.[[21]](#footnote-21)

1. As noted by Parkinson, the modern tendency that ‘the only human rights that should be given any real significance are individual ones, and not group rights … can make adherents disregard the competing claims of groups which would justify a right of positive selection in order to enhance the cohesion and identity of the group.’[[22]](#footnote-22)

Religious Freedom Should not be Limited to an Exemption to Another Right

1. Styling the freedom of religious expression as an exemption to the requirements of anti-discrimination law is not consistent with the fundamental nature of the right to religious freedom, including, as is further outlined below, the protection of that right in international human rights law. It assumes that the only real human rights are anti-discrimination rights, with the remaining rights being cast and secondary in recognition. As noted by Neil Foster:

The danger is that in a “secular” Western society where religion is often perceived as archaic and anachronistic, freedom of religion rights will be restrictively construed, ignored or reduced to a merely formal principle and automatically subordinated to other rights and interests.[[23]](#footnote-23)

The presumption behind this practice is that religious freedom is not as legitimate a right as other rights, and should always be ‘trumped’ by those other rights. As noted by Parkinson ‘The concern is that in a situation where the prevailing intellectual fashions of the day tend towards a disregard for religious freedom, a narrow interpretation may be given to what it means to practice religion, confining it to private belief and worship. In Communist countries of the old Soviet bloc, that amount of respect for freedom of religion was also given.’[[24]](#footnote-24) The correct interpretation however is that religious freedom is a right independent and equal to other rights, and that where the right to religious freedom conflicts with another right, the relevant boundary between the two rights is to be determined by reference to the appropriate reach of each right. This focus should be on the maximum preservation of each right, not the subjugation of one right to the other. Arguably the focus on recognising religious freedom through the vehicle of exemption fuels the current calls for removal of exemptions, as are reflected in certain of the submissions recorded in the Interim Report.

International Human Rights Instruments

1. It is arguable that those submissions calling for removal of exemptions for religious institutions from anti-discrimination law, call for Australia to breach its obligations under international human rights instruments. Article 18(1) of the *International Covenant on Civil and Political Rights* (ICCPR) provides ‘Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.’ The right to religious freedom under Article 18 of the ICCPR is not limited to religious institutions or their employees, it applies to all. Article 18(3) provides that the ‘Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.’
2. Article 4(2) of the ICCPR reflects the fundamental aspect of the right to religious freedom, listing it amongst a limited suite of the freedoms that may not be infringed upon in a time of ‘public emergency which threatens the life of the nation’. This has led the Human Rights Committee in General Comment 22 to describe the right to religious freedom as a ‘fundamental’ right, ‘which 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, such as national security.’
3. The United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights[[25]](#footnote-25) provides that ‘all limitation clauses shall be interpreted strictly and in favor of the rights at issue’. The Principles provide ‘Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:

(a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,

(b) responds to a pressing public or social need,

(c) pursues a legitimate aim, and

(d) is proportionate to that aim.’

A proportionate approach to the resolution of the boundary of competing rights requires investigation of means to accommodate competing rights without unduly burdening the right to religious freedom.

1. In its General Comment 18, the United Nations Human Rights Committee has explained that conduct is not discriminatory if it is for a purpose that is legitimate under the ICCPR:

‘the Committee observes that 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.’

This statement is not qualified by necessity, nor does it require that the purported differentiation is the most appropriate means of achieving the purpose, rather the test is to achieve a legitimate purpose and be determined by reasonable and objective criteria.

1. Furthermore, in respect of education, removal of any exemption from anti-discrimination regimes may breach Article 18(4) which provides for the right of parents to educate their children in these terms:

The State Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The ability to model faith is essential to the teaching of faith. The distinction between belief and practice underpinning the treatment of religion within many modern legal regimes is not a presumption that accords with a Christian understanding of the role of faith in practice.

* 1. *The receipt of Government funding or charitable endorsement should not be a ground to limit religious freedom.*

1. Various submissions recorded in the ALRC’s Interim Report argue for the limiting or total removal of existing exemptions granted to religious institutions in anti-discrimination law. The use of such exemptions, it is argued, are particularly egregious where an institution receives government funding. However such arguments are misguided, and fail to account for several foundational aspects unique to religious institutions which are to govern their treatment at law.
2. To adopt one of the examples provided at paragraph 1.18, few would argue that an indigenous cultural organisation should be required to employ persons from a differing culture on the basis that the organisation receives government funding. The mere receipt of funding does not alter or limit the legitimacy of the rationale for the separate treatment of the organisation. This is because the proper treatment to be accorded to the indigenous cultural organisation is determined with respect to the purposes that are carried out by the organisation. In the allocation of government funding the correct questions are then twofold:
   1. is this an end that the government should be supporting in the form of subsidy or direct funding?
   2. is the chosen path the most appropriate means (having regard to efficiencies, economies of scale, community networks and the location of existing resources) to achieve that end?
3. A further criteria in determining the appropriateness of the application of exemptions to religious bodies in receipt of government funding is whether the withdrawal of religious organisations from the provision of services would detrimentally impact upon the autonomy of the recipients of services. Where religious institutions are one of a number of service suppliers, the autonomy and choice of the recipient is enhanced. They are free to choose to receive services from an entity that is not religiously motivated or one that is.[[26]](#footnote-26) To enforce the withdrawal of religious institutions from the service provider offering is to limit the choice available to individuals within wider society. Conversely, the existing framework does not limit the choice of those who do not wish to receive services from religiously inspired institutions.
4. There is also a danger in limiting religious freedom to only those religious entities that do not engage in the commercial sphere. The right to religious freedom (both as classically understood and under contemporary international instruments) is not limited to religious institutions, it applies to all. All Australian jurisdictions that prevent discrimination, including the Commonwealth, have enacted provisions that endeavour to “balance” religious freedom with the right to freedom from discrimination. However, Professor Foster concludes that, “the only major provision in anti-discrimination legislation designed to provide protection for religious freedom for general citizens (as opposed to religious organisations or ‘professionals’) is contained in the law of Victoria”.[[27]](#footnote-27) Even this provision has been construed very narrowly. In 2014 the Victorian Court of Appeal ruled that a Christian Youth Camp had breached Victorian law by refusing to take a booking from a group of same sex attracted individuals.[[28]](#footnote-28) Central to the decision was Maxwell J’s determination that, due to the commercial nature of the operations undertaken by Christian Youth Camps, it could not rely upon the exemption:

The conduct in issue here was an act of refusal in the ordinary course of the conduct of a secular accommodation business. It is not, in my view, conduct of a kind which Parliament intended would attract the attention of s 75(2). Put simply, CYC has chosen voluntarily to enter the market for accommodation services, and participates in that market in an avowedly commercial way. In all relevant respects, CYC’s activities are indistinguishable from those of the other participants in that market. In those circumstances, the fact that CYC was a religious body could not justify its being exempt from the prohibitions on discrimination to which all other such accommodation providers are subject. That step — of moving from the field of religious activity to the field of secular activity — has the consequence, in my opinion, that in relation to decisions made in the course of the secular undertaking, questions of doctrinal conformity and offence to religious sensitivities simply do not arise.[[29]](#footnote-29)

1. The decision is to be contrasted with the 2014 decision of the United States Supreme Court in *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al*, where the Court held that closely held corporations can assert religious freedom rights, proclaiming “[f]urthering their religious freedom also ‘furthers individual religious freedom’”.[[30]](#footnote-30)
2. The right to religious freedom (including as recognised under Article 18 of the ICCPR) is not limited in its application, it applies to ‘everyone’, not just religious ministers. The Victorian Court of Appeal decision highlights the concern that discrimination law within Australia fails to ensure that sufficient recognition of religious freedom rights are provided to not only religious institutions but also individuals. Such is inconsistent with the extension of religious freedom rights to all within a community.
3. Freedom to act in accordance with one’s conscience (including as informed, or burdened, by religious conviction) is at the root of the post-Enlightenment vision of the modern liberal State. Antidiscrimination law proposes the breach of this fundamental citizen State compact in the interests of preserving convenience of access to services or in the interests of protecting other citizens against ‘offence’. Should a right against offence be equated with or greater than an individual’s right to act in accordance with their conscience? The State risks abdicating its hard-won post-Enlightenment role as the champion of the individual conscience by proposing that the deeply-held convictions of religious persons may be compromised in the interests of preventing offence or in maintaining convenience of service supply.
4. As noted above, a policy that purports to limit religious freedom must, amongst other factors, be shown to be a proportionate means to fulfil the aim. Whilst not exhausting the factors which would be proportionate, where there are equivalent services that may be supplied by an alternative provider the limitation should be presumed to be disproportionate. In addition, the foundational aspect of the conscience of the religious individual must be relevant to whether the expression is proportionate. The law should contain a presumption that any action which requires an individual to act against their conscience is disproportionate, and that presumption might only be displaced where the conscience of another individual is similarly impacted upon so as to require a course of conduct against their own conscience. Rights cannot operate in a vacuum. They must relate to the rights of others. Where rights compete, they must then be conversant within a realm that prioritises a vision of the common good, or the good life for the community.

Charitable Endorsements

1. In its recent decision, *Obergefell v Hodges*,[[31]](#footnote-31) the United States Supreme Court held that any U.S. State that holds a traditional view of marriage is acting unlawfully. Chief Justice Roberts in dissent stated that, as a result of the decision, the tax exempt status of U.S. religious institutions that opposed same-sex marriage ‘would be in question,’ based on the reasoning of the Court in *Bob Jones University v United States*.[[32]](#footnote-32) That earlier decision drew upon the common law of charities, as applies in Australia, including as enunciated by the House of Lords in *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531.
2. There are sufficient reasons to consider that an Australian charity’s position on sexuality may also be relevant to a determination of whether it meets the requirement of a charity at law. To demonstrate the salience of the interplay between antidiscrimination law, religious freedom and charitable status, under the subheading of ‘unlawful activity’, the Australian Charities and Not-for-profits Commission (ACNC) recently released public information guidance on ‘Advocacy by Charities’ that contained the following example:[[33]](#footnote-33)

Examples – likely to be unlawful purposes

A charity that has a charitable purpose of advancing social or public welfare by providing aged care and accommodation routinely refuses to provide these services to same-sex couples. Such a refusal amounts to unlawful discrimination, and a regular pattern of this behaviour or activity may disclose a purpose of engaging in unlawful activities.

Failure to allow for religious freedom within the context of Commonwealth anti-discrimination law may then impact detrimentally upon a religious institutions recognition as a charity at law.

1. Furthermore the ACNC has been given considerable powers over registered religious institutions, including the power to give directions, to instigate investigations, and suspend, remove and replace the leadership of religious institutions. The power to give directions also extends to giving directions to individuals in leadership, requiring them to not participate in making decisions that affect a substantial part of the business of the organisation.[[34]](#footnote-34) These powers mean that a situation could arise where the ACNC, as a government body, has power to remove the eldership or senior pastor or other leader of a Church, and appoint another person in their place. It could prevent those in leadership from engaging in activities that influence the behaviour of others in the organisation. Elizabeth Shalders has argued that the ACNC could issue directions requiring the religious body to do, or refrain from doing, theoretically anything.[[35]](#footnote-35) It is not necessary for it to obtain prior Court approval for the exercise of the powers, representing a significant break from the position prior to the establishment of the ACNC, where for example the Attorney-General was given power to bring concerns before a Court.[[36]](#footnote-36) We consider these powers to be significant incursions upon the right of religious freedom under Commonwealth law.

*(c) Religious belief should be recognised as a protected attribute for the purposes of Commonwealth anti-discrimination law.*

1. Notwithstanding the bold sentiments expressed by Mason ACJ and Brennan J concerning the centrality of the freedom of religion in *Church of the New Faith v Commissioner for Pay-Roll Tax*[[37]](#footnote-37) extracted in the opening paragraphs of this submission, the weight of Australian authority has held that, to the extent such a protection exists, the doctrine of Parliamentary sovereignty will permit Parliament to infringe upon any common law right to religious freedom where there is a clear intention in legislation to do so. The South Australian Supreme Court has held that there is no inalienable right to religious freedom at common law.[[38]](#footnote-38) In a separate case involving the lawfulness of a Commission of Inquiry established to determine whether the ‘secret women’s business’ claims of Ngarrrindjeri women which were relevant to the construction of the Hindmarsh Island Dam, Chief Justice Doyle held that ‘I accept that freedom of religion is one of the fundamental freedoms which entitles Australians to call our society a free society. I accept that statutes are presumed not to intend to affect this freedom, although in the end the question is one of Parliamentary intention.’[[39]](#footnote-39) On the basis of this case, Neil Foster concludes that:

it is unlikely that there is a common law freedom of religion principle. If there were, it would not operate as a constitutional constraint on law making by Parliaments, but it could function (as in the recent past the freedom of speech principle has functioned) as a “presumption” which would inform courts when interpreting legislation. The “principle of legality” means that a court, when reading an Act, will assume unless there are clear words to the contrary that Parliament does not intend to infringe a fundamental common law right. So if it could be argued that “freedom of religion” is, or perhaps has now become, a fundamental common law right, as “the essence of a free society”, then it may provide guidance for courts interpreting legislation.[[40]](#footnote-40)

1. Protection against discrimination on the ground of religion is protected under international law, being explicitly guaranteed by Article 26 of the ICCPR. As a result of the ratification of the ICCPR, the Commonwealth has legislative power to protect religious freedom by enacting a similar protection. It has however failed to do so. All State jurisdictions excepting New South Wales and South Australia have enacted provisions to protect religious belief from discrimination. Given the wide-range of protected attributes within Commonwealth anti-discrimination law there is no reason why religion should be precluded from those attributes. Given the paucity of protections at common law there are very real reasons why such a protection should be legislated. This is particularly the case in light of the preponderance of religious minorities within contemporary, multicultural Australia. The protection should be extended to religious belief (or conviction, which terms we consider to be interchangeable), affiliation, and expression, practice and activity and should cover both direct and indirect discrimination.
2. We take the opportunity to thank the Commission for the opportunity to offer submissions in respect of the Interim Report. Should you have any further questions or comments you may liaise with Ron Clark on 07 3716 2800.

Presbyterian Church of Queensland, submitted by Ron Clark the Assembly Clerk on behalf of the Assembly.

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1. *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 57 ALJR 785. [↑](#footnote-ref-1)
2. Ibid 787. [↑](#footnote-ref-2)
3. Similarly styled exemption clauses may be found in the *Age Discrimination Act 2004* (Cth) s35; *Sex Discrimination Act 1984* (Cth) s37; *Fair Work Act 2009* (Cth) s351(2)(c)(i). [↑](#footnote-ref-3)
4. See, eg, *Anti-Discrimination Act* *1991* (Qld) s24 that imposes a ‘genuine occupational requirements’ test. See also *Fair Work Act 2009* (Cth) s351(2)(b); *Sex Discrimination Act 1984* (Cth) s35. [↑](#footnote-ref-4)
5. *United States v Seeger,* 380 US 163 (1965), 858 (Clark J). [↑](#footnote-ref-5)
6. See, e.g. *United States v Ballard et al.,* 322 US 78 (1944), 889-890 (Jackson J). [↑](#footnote-ref-6)
7. *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120, 174. [↑](#footnote-ref-7)
8. See, eg, *Thornton v Howe* (1862) 54 ER 1042 for an application of such reasoning to the determination of charitable endorsements. [↑](#footnote-ref-8)
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13. Ibid 278. [↑](#footnote-ref-13)
14. 'Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the ground of sexual preference' (HRC Report No 6, Human Rights and Equal Opportunity Commission, March 1998) 92-928. [↑](#footnote-ref-14)
15. Ibid. [↑](#footnote-ref-15)
16. Culminating in the decision in *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293. [↑](#footnote-ref-16)
17. Ibid 33. [↑](#footnote-ref-17)
18. *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (2012) 565 U.S. \_\_\_; ibid. [↑](#footnote-ref-18)
19. Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 83, 94. [↑](#footnote-ref-19)
20. The words of the Apostle Paul in the Epistle of James summarise this position:

    ‘14 What does it profit, my brethren, if someone says he has faith but does not have works? Can faith save him? 15 If a brother or sister is naked and destitute of daily food, 16 and one of you says to them, “Depart in peace, be warmed and filled,” but you do not give them the things which are needed for the body, what does it profit? 17 Thus also faith by itself, if it does not have works, is dead. 18 But someone will say, “You have faith, and I have works.” Show me your faith without your works, and I will show you my faith by my works. 19 You believe that there is one God. You do well. Even the demons believe—and tremble! 20 But do you want to know, O foolish man, that faith without works is dead? 21 Was not Abraham our father justified by works when he offered Isaac his son on the altar? 22 Do you see that faith was working together with his works, and by works faith was made perfect? 23 And the Scripture was fulfilled which says, “Abraham believed God, and it was accounted to him for righteousness.” And he was called the friend of God. 24 You see then that a man is justified by works, and not by faith only. 25 Likewise, was not Rahab the harlot also justified by works when she received the messengers and sent them out another way? 26 For as the body without the spirit is dead, so faith without works is dead also.’ (New King James Version) [↑](#footnote-ref-20)
21. *Hasan and Chaush v Bulgaria* (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000) [62]. [↑](#footnote-ref-21)
22. Parkinson, above n 19, 88. [↑](#footnote-ref-22)
23. Neil Foster, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (Paper presented at the Magna Carta and Freedom of Religion or Belief Conference, St Hugh’s College, Oxford, 21-24 June 2015) <http://works.bepress.com/cgi/viewcontent.cgi?article=1150&context=neil\_foster> 3. [↑](#footnote-ref-23)
24. Parkinson, above n 19, 102. [↑](#footnote-ref-24)
25. UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, E/CN.4/1985/4 (28 September 1984). [↑](#footnote-ref-25)
26. Further consideration of these principles is given by Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' 40(2) *Monash University Law Review* 413. [↑](#footnote-ref-26)
27. Foster, above n 23. He notes that a more limited exception exists in Tasmania: *Anti-Discrimination Act 1998* (Tas) s52(d). [↑](#footnote-ref-27)
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