**SUBMISSION OF THE WILBERFORCE FOUNDATION IN RELATION TO AUSTRALIAN LAW REFORM COMMISSIONS ISSUES PAPER NO 46 *Traditional Rights anD Freedoms—Encroachments by Commonwealth Laws* (issues 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 Issues Paper. This submission focusses on the Freedom of Expression and Religious Freedom.

*FREEDOM OF EXPRESSION*

1. The Issues Paper invites submissions “identifying those Commonwealth laws that limit free speech and that are not justified, and explaining why these laws are not justified.”[[1]](#footnote-1)
2. The Wilberforce Foundation submits that section 18C of the *Racial Discrimination Act 1975* (**RDA**) is an unjustified burden on the freedom of expression.
3. Section 18C provides:

“(1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.”

1. Section 18D provides a defence saying:

“Section 18C does not render unlawful anything said or done reasonably and in good faith:

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.”

1. While section 18C may have a laudable intent, its subjective nature means that it improperly burdens the freedom of expression.
2. The Issues Paper recognises the value of the freedom of expression as an integral common law right.[[2]](#footnote-2) However, it fails to emphasise that the value of the freedom lies in hearing opinions and views with which one disagrees or even finds distasteful. As John Stuart Mills said:

“The peculiar evil of silencing the expression of opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more those who hold it. If the opinion is right, they are deprived of the opportunity to exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”[[3]](#footnote-3)

1. In this regard Professor James Allan has said: “

“In essence, then, the point to having lots of free speech is to ensure that views we dislike, find distasteful, and even despise get an airing. Anyone can be in favour of allowing speech he likes. But allowing others to hear what you agree with accomplishes next-to-nothing; it delivers no good consequences, at least none other than allowing adherents of this view to feel good about themselves, to feel puffed-up and self-righteous. No, the value in lots of scope for people to speak their minds is so that we can hear views we dislike and think wrong. It is hearing those views that has such good long-term consequences for society. It creates a cauldron of competing views where over time the idiotic ones will be found out. We’ll get closer to truth than when government overseers (and that includes judges) are in place to tell us what we can hear.”[[4]](#footnote-4)

1. The flaw in section 18C is that it essentially makes speech and acts unlawful as a result of a subjective response of another or a group or others. While the section requires there to be a reasonable likelihood of offence being caused, this is judged from the standpoint of the person or group who claims to have been offended.
2. In *Eatock v Bolt* Bromberg J said:

“I intend to adopt that approach, as the reasoning to which I have referred appears apposite for s 18C (1) (a). Where allegedly offensive conduct is directed at both an identified person and a group of people and the claim made is that both the identified person or persons and the group of people were offended, the conduct should be analysed *from the point of view of the hypothetical representative in relation to the claim that the group of people were offended, and in relation to each of the identified persons where a personal offence claim has been made*. If no claim of personal offence is made and only a claim of group offence is made, the conduct is to be analysed *from the point of view of the hypothetical representative of the group*, despite the fact that the conduct is directed at both identified individuals and the group of people of which they form part.”[[5]](#footnote-5)

1. The flaw is compounded by the defence section -18D, which does not make truth a defence. Thus if something that is true is said, but from the standpoint of the person who claims to be offended it may be reasonably likely to offend, the speech is unlawful. One can readily consider that mention of the Armenian genocide may be offensive to Turkish people. Should that bar the issue being aired?
2. In Canada a similar section –section 13 of the *Canadian Human Rights Act 1985,* has been repealed, the Canadian Parliament realising the stifling effect it had on the freedom of expression. The Commonwealth Parliament should adopt that same approach.

*FREEDOM OF RELIGION*

1. The Issues Paper recognises the critical importance of the freedom of religion.[[6]](#footnote-6) It should be emphasised that this freedom, as Mason ACJ and Brennan J said in *The Church of the New Faith v Commissioner for Pay-roll Tax (Vic)[[7]](#footnote-7)* is “the paradigm of freedom of conscience, is of the essence of a free society”.[[8]](#footnote-8)
2. The Wilberforce Foundation submits that the *Sex Discrimination Act 1984* (**SDA**) by making unlawful discrimination on the grounds of sex, sexual orientation, gender identity and intersex status[[9]](#footnote-9) and only providing narrow exemptions for religious bodies and educational establishments established for religious purposes,[[10]](#footnote-10) and in providing no exemptions for organisations like aged care facilities founded and run by religious bodies, improperly burdens the freedom of religion by making it subservient to the freedom from discrimination. There is no warrant in the common law, the *Constitution*, or in the International Covenants for this ranking of rights.
3. Section 37 provides:

“(1) Nothing in Division 1 or 2 affects:

(a) the ordination or appointment of priests, ministers of religion or members of any religious order;

(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;

(c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or

(d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

(2) Paragraph (1) (d) does not apply to an act or practice of a body established for religious purposes if:

(a) the act or practice is connected with the provision, by the body, of Commonwealth funded aged care; and

(b) the act or practice is not connected with the employment of persons to provide that aged care.”

1. It will readily be seen that subsections (1) (a) to (c) apply “within the temple” as it were. It is really subsection (1) (d) which may give the exemption any meaningful work in the public square. The exemption does not provide any relief to a person of religious conviction who operates in the public square.
2. In *Christian Youth Camps Ltd v Cobaw Community Health Services Limited,*[[11]](#footnote-11) a similar Victorian provision was interpreted narrowly, the majority finding that the exemption only applied to conduct which was mandated by the teachings of the religion and that activities in the commercial sphere were unlikely to be protected. The authorities in New South Wales however have taken a wider view of a similar provision.[[12]](#footnote-12)
3. Whatever view is taken on the breadth of the SDA provision, the case has shown that in anti-discrimination legislation, the freedom from discrimination may be prioritised above the freedom of religion. This is a misconceived approach to resolving any competition between these two freedoms.
4. In the *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)[[13]](#footnote-13)* Mason ACJ and Brennan J said:

“Religious belief is more than a cosmology; it is a belief in a supernatural Being, Thing or Principle … Religion is also concerned, at least to some extent, with a relationship between man and the supernatural order and with supernatural influence upon his life and conduct … What 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.”[[14]](#footnote-14)

1. It has rightly been said that:

“[T]he broad right to ‘practice’ or ‘manifest’ (to use the wording of the European Convention on Human Rights) one’s religion or belief would seem to embrace a huge variety of activity if one takes the view — as many religions do — that all life is inspired by or generated by faith and belief. The most mundane of human behaviours can be ‘spiritualized’ and take on a religious connotation. One is practising one’s religion when one eats, drinks, works, plays and gardens, as much as when one reads scripture, prays or meditates. In Christianity, ‘the righteous will live by faith’, ‘everything that does not come from faith is sin’, and ‘whether you eat or drink or whatever you do, do it for the glory of God’. On this view there is no activity which is not generated by one’s obedience (or disobedience) to God. Countless schools, hospitals, orphanages and shelters have been run by religious organizations as part of their religious mission. Running a café, gymnasium or bookshop could equally be part of one’s religious calling.”[[15]](#footnote-15)

1. As Redlich JA (the dissentient in *CYC v Cobaw*) noted, the major religions reject any separation of religious duty by requiring that conduct in the marketplace carries with it moral responsibility.[[16]](#footnote-16) This is because religious faith is just as much a central tenet of the identity of a person of faith as the SDA postulates that sexual orientation and gender identity are.
2. A large number of Australians seriously profess a faith which affects their lives. Their faith is a central tenet of their identity. Creating a priority of rights, in the way the SDA does, in effect, gives priority to one group of Australians over another, which is profoundly undemocratic and contrary to the spirit of the *Constitution*.
3. The first object of the SDA is

“to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of **other relevant international instruments**”.[[17]](#footnote-17)

The prioritising of rights is contrary to this objective.

1. There is a trend in overseas jurisprudence to recognise the equal footing of these freedoms.[[18]](#footnote-18)
2. The way forward is for the SDA to be amended to make clear that both freedoms are treated equally.
3. It is suggested that there be an overriding clause that the SDA is to be interpreted consistently with the rights to freedom of thought, conscience and religion, which are guaranteed by Article 18 of the International Covenant on Civil and Political Rights (**ICCPR**).
4. It is respectfully submitted that in dealing with this co-equal right by means of an exemption, it is necessarily subordinated to the right to non-discrimination.
5. A clause such as, “*Nothing in this Act applies to discrimination by a person against another person on the basis of that person’s, sex, sexual orientation, lawful sexual activity, marital or relationship status parental status or gender identity if the discrimination is reasonably necessary for the first person act in accordance with the doctrines, beliefs or principles of their religion or their conscientious beliefs and the Act is to be interpreted according to this principle*” will give the Courts a direction that the freedoms are to be treated equally.
6. Concurrently the SDA should provide that discrimination is only unlawful and actionable if the service which has been denied on the basis of the right of religious freedom or conscientious beliefs is not reasonably obtainable elsewhere by the person who has been denied the service.
7. A provision of this nature will ensure that the right of religious freedom is on an equal footing with the right of non-discrimination. If the service may reasonably be obtained elsewhere, there should be no reason for the person exercising their right of religious freedom to be made a law breaker. Peace between the two co-equal rights will have been made.[[19]](#footnote-19)
8. There is a trend towards such “conscience clauses” overseas.[[20]](#footnote-20) Their rationale is sound. No person should be required to do publicly anything that will afflict their conscience and that should not be a carved out exception but a fundamentally recognised right for all whether their conscience is religiously or secularly informed. The Christian baker should not have to decorate with gay slogans any more than the gay baker with anti-gay messages. The synagogue should not be forced to hire its hall to the neo Nazi rally. While each of these may on their face seem to be instances of intolerance in isolation it is only by the protection of conscience that a climate of general toleration can be engendered in the knowledge that all points of view held in good conscience are respected by the law. Any other approach involves the State in taking a partisan approach between validly competing interests and forgoing its neutrality.
9. Alternatively, the current exemption should be broadened so that it applies to any person, not just a religious body. As Redlich J said in *CYC v Cobaw*:

“Engagement in commercial activity will not ordinarily support an imputation that the person does not in that setting rely upon their religious beliefs or principles…”[[21]](#footnote-21)

1. As part of that reform the carving out of the current exemption of aged care facilities must be revoked. Those providing aged care as an outworking of their religious convictions should not be forced to abandon or subjugate those convictions to the right of non-discrimination, which is only a co-equal right.
2. On this alternate approach, there should also be an amendment to section 38 of the SDA to include inter-sex status within the exemption. The definition of inter-sex is

“intersex status means the status of having physical, hormonal or 1 genetic features that are:

(a) neither wholly female nor wholly male; or 3

(b) a combination of female and male; or 4

(c) neither female nor male.”

1. It will be impossible for any group, religious or otherwise, to discern in day to day activities whether a person is an intersex person,[[22]](#footnote-22) against whom it cannot discriminate, or a person who is a transgender person (for example), against whom it can discriminate.
2. It is recommended that the exemption be extended to intersex persons so that this impossibility of application is addressed.

*CONCLUSION*

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

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The Wilberforce Foundation

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1. Issues Paper [2.27]. [↑](#footnote-ref-1)
2. [2.3]-[2.7]. [↑](#footnote-ref-2)
3. John Stuart Mill, *On Liberty* (Modern Library, first published 1859, 2002 ed)

   18–19. [↑](#footnote-ref-3)
4. James Allan “Free Speech is far too important to be left to Unelected Judges” [2013] *West Australian Jurist* 5 at 9-10. [↑](#footnote-ref-4)
5. [2011] FCA 1103 per Bromberg J at [250]. [↑](#footnote-ref-5)
6. [3.3] and [3.14]. [↑](#footnote-ref-6)
7. (1983) 154 CLR 120. [↑](#footnote-ref-7)
8. Ibid at [130] Issues Paper [3.3]. [↑](#footnote-ref-8)
9. Sections 5, 5A, 5B and 5C. [↑](#footnote-ref-9)
10. Sections 37 and 38. [↑](#footnote-ref-10)
11. [2014] VSCA 75. [↑](#footnote-ref-11)
12. *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 and *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293. However, section 49ZT of the *Anti-Discrimination Act 1977* (NSW) has been held to validly outlaw criticisms of certain homosexual conduct apparently inspired by a religious motive in cases like *Sunol v Collier (No 2)* [2012] NSWCA 44. These cases may be seen as another example of the creation of a hierarchy of rights rather than treating the rights on non-discrimination and religious freedom co-equal. [↑](#footnote-ref-12)
13. (1983) 154 CLR 120. [↑](#footnote-ref-13)
14. Ibid at 134-5. [↑](#footnote-ref-14)
15. Rex Adhar and Ian Leigh, *Religious Freedom in the Liberal State*, Oxford University Press (2005), 155. [↑](#footnote-ref-15)
16. *CYC v Cobaw* at [563]. [↑](#footnote-ref-16)
17. Section 3(a). [↑](#footnote-ref-17)
18. *Eweida & Ors v The United Kingdom* [2013] IRLR 243 at [82]; see Lady Hale the Annual Human Rights Lecture for the Law Society of Ireland 13 June 2014 p.20; [↑](#footnote-ref-18)
19. Patrick Parkinson “Reforming Anti-Discrimination Law in Australia: Rediscovering the Middle Ground between Regulation and Freedom.” *Sydney Law School Legal Studies Research Paper* 13/11 February 2013. [↑](#footnote-ref-19)
20. Claire Marshall *“The Spread of Conscience Clause Legislation”* *Human Rights Magazine* (2013) Vol. 39, No. 2- Religious Freedom <http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/january_2013_no_2_religious_freedom/the_spread_of_conscience_clause_legislation.html> accessed 26 February 2015.; [↑](#footnote-ref-20)
21. *CYC v Cobaw* at [557]. [↑](#footnote-ref-21)
22. The definition requires invasive searches or tests to prove a person is intersex. [↑](#footnote-ref-22)