



**Submission to the
Australian Law Reform Commission's *Freedom's Inquiry***

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Introduction

The Australian Christian Lobby (ACL) welcomes this opportunity to submit to the Australian Law Reform Commission's Freedoms Inquiry. ACL commends the ALRC for undertaking this important inquiry into the state of fundamental freedoms in Australia.

ACL has made a number of previous submissions to human rights inquiries, most recently the Human Rights Commission's *Rights & Responsibilities 2014* inquiry.¹ In addition, ACL has contributed to proposed amendments to the *Sex Discrimination Act*² and the *Racial Discrimination Act*,³ various state level inquiries including the review of the Victorian *Charter of Rights and Responsibilities*, and, significantly, two rounds of inquiries during the proposed consolidation of Commonwealth anti-discrimination legislation in 2012 and 2013.⁴

ACL represents Australian Christians from a broad range of denominations from Catholic, Orthodox, and Protestant traditions. There is a growing concern within the church of a gradual encroachment upon fundamental rights and freedoms which will unjustly affect the church, especially in areas where one set of rights clashes with another set of rights.

The rights to freedom of conscience, including religion and thought, as well as freedom of speech or expression and freedom of association are intimately related. Without adequate protections for each one, all of the others are threatened or violated.

Article 18 of the International Covenant on Civil and Political Rights (ICCPR) protects the "right to freedom of thought, conscience and religion". Part of this right is the freedom, "either individually or in community with others and in public or private, to manifest... religion or belief in worship, observance, practice and teaching".

Necessarily, this requires freedom of association, which is a separate right under Article 22 of the ICCPR, in order to form religious communities. It also requires freedom of speech, in order to manifest religion through worship and through teaching, and to participate in community with others of the same religion. Indeed, it is through speech that people share their religious convictions and come to adopt religious beliefs. Freedom of speech is central to any discussion of the truth claims religion makes, and is essential to test those claims and engage in religious community.

Given the indivisibility of the rights to freedom of religion, conscience, and thought, freedom of speech and expression, and freedom of association, this submission will present ACL's concerns and considerations regarding these freedoms as a whole, though primarily from a consideration of religious freedom in particular. Where necessary it will distinguish between the freedoms.

¹ ACL (October 2014), Submission to the Australian Human Rights Commission's Rights & Responsibilities 2014 Discussion Paper, <http://www.acl.org.au/wp-content/uploads/2014/11/141031-ACL-Submission-to-the-Rights-Responsibilities-2014-Discussion-Paper.pdf>.

² ACL (April 2013), Submission to the Senate Legal and Constitutional Affairs Committee on the Sex Discrimination (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013, <http://www.acl.org.au/wp-content/uploads/2013/05/130426-ACL-Submission-on-the-Sex-Discrimination-Amendment- Sexual-Orientation-Gender-Identity-and-Intersex-Status -Bill-2013.pdf>.

³ ACL (April 2014), Submission to the Human Rights Policy Branch on amendments to the *Racial Discrimination Act 1975*, <http://www.acl.org.au/wp-content/uploads/2014/05/140430-ACL-submission-to-the-Freedom-of-Speech-Repeal-of-S.-18C-Bill-2014.pdf>.

⁴ See ACL (January 2012), Submission to the Attorney-General's Department, International Human Rights and Anti-Discrimination Branch, <http://www.acl.org.au/wp-content/uploads/2012/04/120130-ACL-Submission-to-the-Consolidation-of-Anti-Discrimination-Laws.pdf>; and ACL (December 2012), Submission on the Human Rights and Anti-Discrimination Bill 2012 Exposure Draft Legislation, <http://www.acl.org.au/wp-content/uploads/2013/02/121221-ACL-Submission-on-the-Human-Rights-and-Anti-Discrimination-Bill-2012.pdf>.

It is significant that, along with a small number of other rights in the ICCPR, freedom of religion is a right from which no derogation is permitted even in a time of public emergency.⁵ This emphasises the fundamental importance of freedom of religion, a freedom which must be placed among the top levels of any human rights hierarchy.

In a pluralistic society such as Australia, it is inevitable that human rights will come into conflict from time to time. It is therefore necessary to find a balance between competing human rights. This is an essential part of any discussion of rights and freedoms and is addressed in the submission.

A thorough understanding of fundamental rights and freedoms in a strong, liberal democracy is necessary. This review is a timely and vital part of a broader discussion Australian must engage in.

Executive Summary

Of the 18 categories of freedoms and rights identified in the Issues Paper, this submission will focus on four: freedom of speech, freedom of religion, and freedom of association, with a brief comment on the burden of proof.

As a Christian lobby organisation, ACL will focus this submission primarily on freedom of religion. However, freedom of speech and freedom of association are inseparable from freedom of religion. Thus, the first three freedoms will be discussed together, and a comment on the burden of proof will follow.

The submission will first address present some basic general principles relating to religious freedom. It will then turn and address specific concerns, beginning with the lack of adequate protection for freedom of religion, both with the absence of a positive freedom of religion and the lack of religion as a protected attribute. A discussion of religious exceptions in anti-discrimination law will follow, arguing that these exceptions are inadequate, and presenting a model for defining discrimination in a way that protects religious freedom.

It will then outline some of the specific legislative threats to religious freedom, as well as freedom of speech and freedom of association. Some examples are given of the clash between freedom of religion and other rights.

A clash of rights

ACL is concerned that freedom of religion is not afforded the respect it is due, as one of a core group of fundamental human rights. As rights increasingly clash in modern society, freedom of religion is being trumped by other rights more and more.

Because a hierarchy of rights is not widely recognised or defined in Australia, it is increasingly the case that conflicts are resolved at the expense of fundamental rights such as religion, conscience, speech and association. This is particularly so in the case of perceived rights such as non-discrimination or the right not to be offended.

This trend continues, despite Australia being a signatory to the relevant international human rights instruments that uphold these freedoms.

⁵ Article 4 (2), International Covenant of Civil and Political Rights.

Courts and legislatures need to acknowledge the supremacy of the fundamental rights of freedom of religion, conscience, speech, and association. ACL submits that these most basic human rights should usually not be trumped without compelling public interest reasons to do so.

A more detailed discussion of this principle follows.

Freedom of Religion

Freedom of religion is a fundamental human right. As mentioned, it is a non-derogable right found in Article 18 of the ICCPR, as well as in other international human rights instruments including Article 18 of the Universal Declaration of Human Rights. It is a pillar of liberal democratic society.

High Court Chief Justice Anthony Mason and Justice Gerard Brennan phrased it this way:

*Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society.*⁶

They went on to say:

*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.*⁷

Religion as an inherent part of identity

This passage was cited by Redlich J in his dissenting judgement in the 2014 case *Christian Youth Camps Limited v Cobaw Community Health Services Limited*.⁸ Redlich J considered at length the centrality of religious belief to a person's identity, and his activity in the public sphere. He said:

*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. The obligation of a person to give effect to religious principles in everyday life is derived from their overarching personal responsibility to act in obedience to the Divine's will as it is reflected in those principles. **Religious faith is a fundamental right** because our society tolerates pluralism and diversity and **because of the value of religion to a person whose faith is a central tenet of their identity**. The person must, within the limits prescribed by the exemptions, be free to give effect to that faith.*⁹

This centrality of a person's religion is why religious freedom is given special consideration within the ambit of freedom of conscience. It is why Mason CJ and Brennan J called freedom of religion the "paradigm freedom of conscience".

Exercising freedom of religion

The right contained in Article 18 of the ICCPR includes the right to "manifest one's religion", not merely individually, but also "in community with others". As mentioned, no derogation may be

⁶ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, para [6].

⁷ *Ibid*, para [14].

⁸ *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75.

⁹ *Ibid*, para [561].

made from this right even in time of public emergency. The right is subject only to limitations that are “necessary” to protect public safety, order, health, or morals or the fundamental rights of others.

Manifesting one’s religion extends beyond private individual worship and includes public worship with others. But it also extends beyond private or public worship to include “observance, practice and teaching”. This encompasses a person’s or a group’s public engagement.

For example, Christian communities have long united to establish schools and hospitals which serve the broader community. The freedom to manifest religion includes the freedom to establish public as well as private organisations in accordance with the tenets and beliefs of that religion. Many Christian organisations seek to create an essential ethos or character which may depend on the religious adherence of its staff, volunteers, or the people it serves.

For example, some Christian schools will employ people of other faiths or no faith and admit students of any faith. Other Christian schools seek to establish a distinctly Christian character which may require them to employ staff or admit students who commit to upholding that character.

As another example, people of faith may wish to provide goods and services to the general public, but may be bound by their conscience in some aspect of their services. For instance, Muslim and Jewish butchers will not want to provide meat that is not halal or kosher. Professionals in fields related to the wedding industry may hold marriage to be a sacred union and may not wish to violate their conscience if asked to, say, photograph a same-sex wedding ceremony. Many people of various faiths will refuse to operate on Saturdays or Sundays in honour of their Sabbath day.

In most instances the manifestation of religion by Christian organisations and individuals is uncontroversial. In the remaining instances, for example if a school refuses to admit a student who is not a Christian, or a photographer declines to photograph a same-sex union, there are other options for the student or the couple in the community. In a few cases, the right to exercise religion and the perceived right for people not be offended by the exercise of that religion may clash.

While the manifestation of religion is not an absolute right, it has prominent hierarchical status. Article 18 anticipates this, and in section 3 provides that it “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”. This sets a very high threshold for limiting religious freedom.

General Principles

Against this background, Questions 2, 3, and 4 are now considered together.

Question 2–1: What general principles or criteria should be applied to help determine whether a law that interferes with freedom of speech is justified?

Question 3–1: What general principles or criteria should be applied to help determine whether a law that interferes with freedom of religion is justified?

Question 4–1: What general principles or criteria should be applied to help determine whether a law that interferes with freedom of association is justified?

This submission addresses three areas of concern for religious freedom:

1. The lack of a positive freedom of religion in Commonwealth legislation

A critical and enduring issue for freedom of religion in Australia has been the lack of an appropriate recognition of the freedom which might protect it from diminution by other legislated rights. These legislative frameworks ought to contain recognition of fundamental freedoms which they cannot abrogate. Article 18 of the ICCPR is the obvious yardstick for determining interference with the freedom, particularly in light of Australia's ratification of the ICCPR.

2. The lack of religion as a protected attribute in Commonwealth anti-discrimination legislation

What stands out as remarkable in any survey of the freedom at Commonwealth level is that religion is not even a protected attribute in Commonwealth anti-discrimination legislation. The lack of general protection against discrimination on grounds of religion in Commonwealth legislation is no longer supportable. Specific legislative enactment is proposed, with criteria modelled on those that apply under ICCPR Articles 2 and 26, the European Convention, and other international measures.

3. Inadequate religious exceptions in anti-discrimination legislation

The existing religious exceptions in anti-discrimination legislation are important but inadequate. They are not well balanced, resulting in inadequate recognition for the freedom of religion. In workplace and related areas of discrimination, occupational requirements criteria are proposed for religious exceptions. In other areas an extension of existing exceptions is proposed to reflect the role of religious freedom.

These areas of concern are addressed in turn.

1. Positive freedom of religion: Article 18

There is no right in Commonwealth legislation that equates to the right under Article 18 of the ICCPR. The ICCPR does not have direct effect within domestic law, and Australia's ratification of the ICCPR confers no rights on the individual, or obligations towards the individual.¹⁰

The full text is extracted here as a reminder of the importance and scope of this right, which is non-derogable, and not subject to limitations other than the right of external manifestation:

Article 18

¹⁰ *Dietrich v the Queen* (1992) 177 CLR 292; *Victoria v the Commonwealth (Industrial Relations Case)* (1996) 187 CLR 416.

1. *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.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *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.*
4. *The States 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.*

Article 18(1) embodies the fundamental freedom and, subject to the limits specified in Article 18(3), the right to manifest religion or belief. Article 18(2) covers freedom from coercion. The Article as a whole embraces both the individual and collective dimensions of religious practise which are more fully exemplified in the 1981 UN Declaration on the elimination of religious intolerance (1981 Declaration).¹¹

Religious schooling is also supported generally within Article 18(1). More specific support exists in Article 18(4) in the right of parents to ensure the religious and moral education of their children in conformity with their own convictions, a right which is also found in various other United Nations instruments.¹² As the Human Rights Committee explains in General Comment 22, it is related to the guarantee of the freedom to teach a religion or belief stated in Article 18(1).¹³ These texts are obviously directly relevant to exceptions in anti-discrimination legislation concerning religious schools.

Some have suggested that a bill or charter of rights would address these concerns. However, such instruments are not the answer. A bill of rights is controversial for a number of reasons, including the fact that it transfers power from the elected representatives in parliament, accountable to the people, to unelected judges. This occurs because of the substantial reinterpetive power that judges gain over legislation.

More importantly, Australia has had a lengthy debate on a bill of rights and it has been soundly rejected through democratic processes. ACL made a submission to that debate at the time which reflected this position.¹⁴

ACL submits that instead there should be a clear statement of legislative intent to protect freedom of religion. Statutory protection should be modelled on Article 18 of the ICCPR, with the assistance

¹¹ UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Res. 36/55 of 25 November 1981, UN Doc.A/36/51 (1982).

¹² International Covenant on Economic, Social and Cultural Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967), art 13 (3); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families GA Res 45/158 of 18 December 1990, art. 12 (4); 1981 Declaration art 5.

¹³ UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, para 6 observes that the liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, in art 18(4), is related to the guarantees of the freedom to teach a religion or belief stated in article 18(1).

¹⁴ See ACL (June 2009), Submission to the National Human Rights Consultation, <http://www.acl.org.au/wp-content/uploads/2015/02/090615-ACL-NHRC-submission.pdf>.

of the Human Rights Committee's interpretive guidance in the form of General Comment No 22, cited above and extracted at Annex 1. This is especially so given Australia's ratification of the ICCPR.

Guidance on the use of limitation provisions is also available in the form of the Siracusa principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights, which are set out at Annex 2.

Article 18 warrants recognition in Commonwealth legislation in its own right, even if some of its elements are supported by other key fundamental freedoms. For example, the right to teach and proclaim publicly the doctrines of a religion (which is enjoyed as part of the right of religious manifestation) exists independently of but in combination with freedom of expression. The associative rights within Article 18 are emphasized by the UN's 1981 Declaration and exist independently but concurrently with the freedom of association. The key difference between the freedom of religion and other fundamental freedoms lies in the inviolate nature of certain aspects of the freedom of religion and the fact that where it is subject to limitation, the limitation provisions for Article 18 differ from those of other Articles.

A broadly similar model to Article 18 is found in Article 9 of the European Convention on Human Rights.¹⁵ As with Article 18 of the ICCPR Article 9 also contains the freedom of religion and promotes it as indispensable for pluralism in a democratic society.

2. Lack of protection for freedom of religion

In addition to the lack of freedom of conscience as a positively protected freedom, another significant shortcoming in Australia's scheme of human rights protection is the failure to protect against discrimination on grounds of religion, except in the limited context of the *Fair Work Act 2009*. Religion as a prohibited ground of discrimination, as well as freedom of religion as a positive right, have prominence in all significant international human rights documents. There is no satisfactory reason why religion has so far been given so little protection in Commonwealth legislation, especially given Australia's ratification of the ICCPR.

This lack of legislative support for the freedom at Commonwealth level should be a central issue of this Inquiry. It gives way to restrictions on the freedom without the need for justification.

Section 116 of the Constitution predates the development of the freedom of religion in international fora. It has self-evident limitations and has been given notoriously narrow judicial application. Even the free exercise component of section 116 is of little value.¹⁶ No one would seriously contend that it reflects freedom of religion in any sense understood by international measures.

The most prominent recognition that exists for freedom of religion in Commonwealth legislation is in the religious exceptions to anti-discrimination laws.¹⁷ It is not appropriate that legislative provisions which exist in order to support fundamental human rights, such as freedom of religion, should operate merely as "exceptions" to a general prohibition against differentiation of treatment. Freedom of religion is not an exception; it should be the norm.

¹⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5.

¹⁶ For a law to infringe the free exercise aspects of s 116, the prohibition on free exercise of a religion must be its end or object (*Kruger v Commonwealth* (1997) 190 CLR1).

¹⁷ Sex Discrimination Act ss 23(3)(b) (accommodation); 37 and 38 (for religious bodies and educational institutions established for religious purposes), the *Age Discrimination Act 2004* ss.35, and *Fair Work Act* (ss. 153, 194-5, 351, 772).

The lack of legislative recognition means freedom of religion suffers when it overlaps or conflicts with other freedoms.

A fundamental principle of statutory construction is that the task “must begin with a consideration of the text itself”, combined with an emphasis on “the general purpose and policy of a provision” and “the mischief it is seeking to remedy”.¹⁸ In the context of anti-discrimination or equal opportunity legislation, it is well settled that the provisions of such legislation should as far as possible be construed so as to eliminate discrimination.¹⁹ Thus, when arising in the context of an exception within anti-discrimination laws, freedom of religion is often at a decisive disadvantage.

Even if there has been recent recognition that certain exceptions serve the purpose of protecting freedom of religion,²⁰ there is little judicial appreciation of the content of that freedom. In one recent case, it was described as “an abstract concept, of uncertain scope”.²¹ It was noted that in broad terms the freedom of religion may be subject to restrictions necessary to protect the freedoms of others; further analysis was abbreviated in light of the fact that the ICCPR is “silent as to how ...a balancing of rights is to be effectuated”.²² This approach will always leave freedom of religion dead in the water in an exception to discrimination.

The more basic failure to appreciate the nature of the freedom other than as an abstract concept also has serious implications for the freedom to the extent it is recognised at all at common law.

Only certain states include religion among protected attributes in anti-discrimination legislation and even then only in limited contexts. It is difficult to justify the failure of Commonwealth legislation to promote equality before the law on the basis of religion and to render unlawful generally discrimination against people on the basis of their religion. To the extent that there is no positive right of freedom of religion, or protection from discrimination on the basis of religion, there is a failure to meet the requirements set out in Articles 2 and 26 of the ICCPR.

ACL submits that religion should be a protected attribute under specific Commonwealth anti-discrimination legislation, to demonstrate the value of religious diversity in Australian society.

3. Inadequate religious exceptions in anti-discrimination law

As long as anti-discrimination or anti-vilification laws continue to operate, adequate protections for fundamental freedoms including freedom of religion are essential. Exemptions for religious organisations and individuals need to be clear and comprehensive.

However, ACL submits that the language of exemptions and exceptions are not the best way to protect religious freedom. Religious freedom should not be considered as a concession to more fundamental freedoms from non-discrimination.

¹⁸ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at para [47].

¹⁹ *IW v City of Perth* [1997] HCA 30; (1997) 191 CLR 1.

²⁰ *Christian Youth Camps v Cobaw Community Health Services Limited* [2014] VSCA 75, at 180-188 per Maxwell P.

²¹ *Ibid*, at 198, per Maxwell P.

²² *Ibid*, at 196.

In its initial submission to the anti-discrimination consolidation inquiry, in January 2012, ACL supported a general limitations clause as an alternative to the current method of providing exemptions or exceptions. ACL argued thus:²³

The Australian Christian Lobby considers that the language of ‘exceptions’ needs to be removed from the legislation, and instead the limitation clause, together with specific applications of that limitation, should be included in the section or Part of the Act that defines what is, and is not, discrimination.

The Australian Christian Lobby does not agree that legislative provisions which exist in order to support fundamental human rights should be classified as merely “exceptions” to a general prohibition that exists to promote freedom from discrimination. The existing religious exceptions (such as those for religious bodies) should not be seen as compromising a strict entitlement to a discrimination prohibition. Those exceptions give modest and very confined recognition to the fundamental right to freedom of religion, guaranteed under article 18 of the ICCPR. If construed restrictively, the exceptions are inadequate to protect fundamental and non-derogable rights. Different human rights are often in tension with one another and need to be appropriately balanced. The Commonwealth should ensure that an appropriately generous zone of protection is given, through the limitation clause, to those human rights that are identified in the ICCPR as both “fundamental” and non-derogable. Defining them in terms of “exceptions” does not accord them the appropriate status that they rightly they have in international law.

A central feature of the concept of discrimination under the ICCPR is that the term “discrimination” has its own limits, described by the UN Human Rights Committee in paragraph 13 of General Comment 18 in the following terms:

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 approach builds into the framework of human rights a foundational acknowledgement of religious freedom.

There is a material difference between discrimination as applied under the ICCPR and in Commonwealth legislation. Under the ICCPR, discrimination *does not occur at all* if the conduct meets the limitation criteria. That is, the behaviour complained of does not constitute “discrimination” within its legal meaning. Currently in Australian legislation discrimination is defined and prohibited in very general terms. Particular exceptions do not operate as part of the definition of what is and is not discrimination but operate only to exempt from the legal prohibition.

This is a substantial difference. It is submitted that the approach under the ICCPR is the appropriate one.

Adopting the ICCPR model would achieve conformity with the ICCPR articles 2, 18 and 26 and provide a means of resolving conflict across a range of fundamental rights and freedoms that

²³ ACL, (January 2012), submission to the Attorney-General’s Department International Human Rights and Anti-Discrimination Branch on the Consolidation of Anti-Discrimination laws, <http://www.acl.org.au/2012/01/acls-submission-on-the-consolidation-of-anti-discrimination-laws/>.

coexist. Questions of conflict between freedom of religion and non-discrimination could be resolved in the same way.

The term “discrimination” under Article 14 of the European Convention similarly excludes from scope differences in treatment which have objective and reasonable justification in pursuit of a legitimate aim and where there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised.²⁴

A proposed definition of discrimination that accords with this approach is given below.

Religion as an exception in anti-discrimination/equal opportunity legislation - Criteria to be revised

As discussed, ACL opposes the continued characterisation of religious freedom as prohibited forms of discrimination that are tolerated by way of exception or exemption. Religious exceptions should not be seen as compromising a strict entitlement to non-discrimination. As noted above, there is no such entitlement under the ICCPR. Discrimination does not occur at all if the criteria for such differentiation are reasonable and objective etc.

Statutory exceptions in any event give modest and very confined recognition to only certain aspects of the freedom of religion.

The religious exceptions in Commonwealth legislation are in need of revision. The exceptions in the *Sex Discrimination Act 1984* (for religious bodies²⁵ and educational institutions established for religious purposes),²⁶ the *Age Discrimination Act 2004*,²⁷ and *Fair Work Act 2009* (sections 153, 194-5, 351, 772)²⁸ do not do justice to the range and complexity of issues that arise when freedom of religion intersects with discrimination. Their first notable feature is reliance on the misplaced formulae, “religious susceptibilities” and “conformity with doctrine”.

²⁴ See the European Court of Human Rights *Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v Belgium (merits)* (1968) 1 EHRR 252, [10].

²⁵ Section 37(1)(d): “Nothing in Division 1 or 2 affects 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”.

²⁶ Section 38(1): “Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.”

(3) Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.”

²⁷ Section 35: “This Part does not affect an act or practice of a body established for religious purposes that:

(a) conforms to the doctrines, tenets or beliefs of that religion; or
(b) is necessary to avoid injury to the religious sensitivities of adherents of that religion.”

²⁸ Section 351: (1) “An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

(2) However, subsection (1) does not apply to action that is:

(c) if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed--taken:

(i) in good faith; and

(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.”

The employment context

A more apt alternative to both formulae in the employment context for religious bodies and religious education institutions would be a focus on “genuine occupational requirements”. This would avoid some of the more harmful dialogue which currently focuses in litigation on a religious body’s teaching when the issue is primarily one of suitability for a given role in a religious context, measured by reference to commitment to that particular religion.

The existing religious exceptions are to be contrasted with the European model under the Council Directive establishing a general framework for equal treatment in employment and occupation, which lays down a minimum framework in the area of discrimination and which applies generally.²⁹ Article 4 states:

1. Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.
 Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.³⁰

ACL considers this a valuable reference point for the drafting of the inherent requirements/genuine occupational qualifications text.

Reasonable accommodation

The *Age Discrimination Act 2004* and *Disability Discrimination Act 1992* both make provision for positive discrimination to assist people who experience a disadvantage because of their relevant attribute. The latter applies reasonable adjustment requirements in relation to people with disabilities. There are some circumstances in which it is necessary to make reasonable accommodation for religious requirements. As noted by Arcot Krishnaswami, when UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities,

²⁹ This Directive was implemented in the UK by the *Equality Act 2010*.

³⁰ *Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*, Official Journal L 303, 2 December 2000, pp 16-22, art 4(1). Emphases added.

“since each religion or belief makes different demands on its followers, a mechanical approach to the principle of equality which does not take into account the various demands will often lead to injustice and in some cases discrimination”.³¹

The absence of such reasonable accommodation would cause hardship in a range of circumstances.

An example of the text sought is section 28(3) of the *New Zealand Human Rights Act 1993* which reads:

Where a religious or ethical belief requires its adherents to follow a particular practice, an employer must accommodate the practice so long as any adjustment of the employer's activities required to accommodate the practice does not unreasonably disrupt the employer's activities.

A proposed definition of discrimination:

During the anti-discrimination consolidation inquiry, Professor Patrick Parkinson and constitutional law scholar Professor Nicholas Aroney proposed a definition of discrimination:³²

A proposed comprehensive definition

(1) Discrimination means any distinction, exclusion, preference, restriction or condition made or proposed to be made which has the purpose of disadvantaging a person with a protected attribute or which has, or is likely to have, the effect of disadvantaging a person with a protected attribute by comparison with a person who does not have the protected attribute, subject to the following subsections.

(2) A distinction, exclusion, preference, restriction or condition does not constitute discrimination if:

(a) it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or

(b) it is made because of the inherent requirements of the particular position concerned; or

(c) it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or

(d) it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.

(3) The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate objective within the meaning of subsection (2)(a).

³¹ Arcot Krishnaswami, ‘Study of Discrimination in the Matter of Religious Rights and Practices’, U.N. Doc. E/CN.4/Sub.2/200/Rev.1.

³² Proposed in Prof Patrick Parkinson and Prof Nicholas Aroney (January 2013), submission to the Attorney-General’s Department International Human Rights and Anti-Discrimination Branch on the Consolidation of Anti-Discrimination laws, p 5. Available here: <http://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20-%20Discussion%20Paper%20-%20Prof%20Patrick%20Parkinson%20and%20Nicholas%20Aroney%20-%2021%20Jan%202012%20-%206%20Feb%202012.PDF>.

(4) Without limiting the generality of subsection (2), a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of freedom of religion if it is made by a religious body, or by an organisation that either provides, or controls or administers an entity that provides, educational, health, counselling, aged care or other such services, and either:

(a) it is reasonably necessary in order to comply with religious doctrines, tenets, beliefs or teachings adhered to by the religious body or organisation; or

(b) it is reasonably necessary to avoid injury to the religious sensitivities of adherents of that religion or creed; or

(c) in the case of decisions concerning employment, it is reasonable in order to maintain the religious character of the body or organisation, or to fulfil its religious purpose.

(5) Without limiting the generality of subsection (2), a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of ethnic minorities to enjoy their own culture, or to use their own language in community with the other members of their group, if it is made by an ethnic minority organisation or association intended to fulfil that purpose and has the effect of preferring a person who belongs to that ethnic minority over a person who does not belong to that ethnic minority.

(6) ...[the exercise of other protected human rights the exercise of which do not amount to discrimination against others, or the enumeration of other legitimate objectives that ought to be given specific legislative expression]

ACL supports their proposed definition. A definition such as this would ensure that people of faith and religious organisations would be free to continue providing services and forming communities that uphold a particular ethos and character.

Again, in the absence of this kind of definition, safeguards in the form of adequately broad exceptions in the anti-discrimination and anti-vilification laws, as discussed above, must be provided.

Restrictions on freedom of religion, conscience, and thought

Question 2–2 Which Commonwealth laws unjustifiably interfere with freedom of speech, and why are these laws unjustified?

Question 3–2 Which Commonwealth laws unjustifiably interfere with freedom of religion, and why are these laws unjustified?

Question 4–2 Which Commonwealth laws unjustifiably interfere with freedom of association, and why are these laws unjustified?

The following discussion will consider these three related questions together. Having discussed the basic principles above, a number of specific flaws in existing laws will be addressed.

A significant source of the tension between competing freedoms and rights comes from anti-discrimination law. Anti-discrimination law purposes to prevent unjust discrimination on irrelevant grounds, which is an important objective. However, without adequate safeguards it can result in the

right to non-discrimination trumping other fundamental rights, including freedom of religion and freedom of speech.

Sex Discrimination Act

At the end of its term, the previous government amended the *Sex Discrimination Act 1984* by adding the protected attributes of sexual orientation, gender identity, and intersex status. It also removed exemptions for certain aged-care providers preventing them from preferencing a married couple over an unmarried couple. This has created concern for some aged care providers. Many such organisations seek to maintain a particular ethos, allowing people to choose to spend their old age in a community of people who share their particular faith and expression of that faith. This amendment removes that choice. As ACL noted in its submission, such organisations are not seeking to discriminate but are seeking to maintain a particular ethos.

Racial Discrimination Act

The somewhat notorious “Andrew Bolt case” demonstrated the tension between fundamental freedoms and the perceived right to not be offended. Section 18C of the *Racial Discrimination Act* (RDA) prohibits an act which may “offend” or “insult” another person on the basis of race. In the Bolt case, this clashed with Mr Bolt’s freedom to speak on issues of race and ethnicity.

ACL’s submission regarding the amendments to the RDA argued that the standard in section 18C is set far too low. Most public discourse, especially on controversial issues, is likely to be offensive or insulting to somebody. The RDA’s purpose of preventing discrimination or hostility towards people based on race does not require the prevention of offensive or insulting speech.

Freedom of speech is directly threatened by this section. The potential this section has to stifle free speech extends far more broadly than the issues discussed by Mr Bolt.

State based anti-discrimination legislation

In NSW, Wesley Mission was the subject of a complaint from a same-sex couple who sought to become foster parents under Wesley Mission’s foster programme. The couple complained under the *Anti-Discrimination Act 1977*, and at first instance the Administrative Decisions Tribunal found that the discrimination was unlawful under the Act.³³ The decision was ultimately overturned and it was determined that Wesley Mission could rely on the exemptions in the Act.³⁴ Nevertheless, this case demonstrates the threat that anti-discrimination laws do pose if there are no adequate protections for freedom of religion.

In the ACT, after the passage of the invalid Marriage Equality (Same Sex) Act 2013, Attorney-General Simon Corbell wrote a letter to ACL Managing Director Lyle Shelton arguing that there would be no impact on the religious freedom of churches or sanctions for people who did not agree with the Act. However, Mr Corbell admits that:

any right to express contrary opinions is balanced under sections 7 and 20 of the *Discrimination Act 1991* (ACT). **It would be unlawful for those who provide goods, services**

³³ *OV and anor v QZ and anor (No 2)* [2008] NSWADT 115

³⁴ See *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 and *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293.

and facilities in the wedding industry to discriminate against another person on the basis of their sexuality or their relationship status.³⁵

Anti-vilification laws

Another potential clash with freedom of religion arises from anti-vilification laws. Both anti-vilification and anti-discrimination laws seek to redress social ills including racial and religious intolerance. However, they tend to have the effect of creating more racial and religious controversy than harmony.

Legal academic Professor Patrick Parkinson from the University of Sydney argued in a 2007 essay that vilification laws in Australia “pose a danger to the future of multiculturalism”.³⁶ Parkinson identifies the “collateral damage” to religious freedom stemming from anti-vilification laws,³⁷ arguing the main danger of such laws is the “chilling effect on legitimate religious activity even where the outcome of a complaint is to declare the religious expression to have been lawful.”³⁸ The punishment lies not in the penalties but in the necessity to defend against claims of a breach. The prospect of a costly litigation against a claim can have a more crippling effect than the law itself, even when litigation would fail because the act was lawful.

As an example, Parkinson refers to *Fletcher v Salvation Army Australia (Anti-Discrimination)*,³⁹ a case which was summarily dismissed as “quite hopeless” and yet required the engagement of two different barristers for the defence.

The laws therefore not only threaten free and open debate on religion, they have the potential to scare people into remaining silent rather than risk a lawsuit:

The possibility of a lawsuit may intimidate religious leaders of whatever faith from teaching and expressing what they believe their faith requires or from expressing a point of view which might offend others.⁴⁰

Free and open debate is essential in a democratic society. In a diverse multicultural society, there is going to be disagreement on controversial issues, and people will take offence at the opinions of others. But whether the disagreement is about religion, politics, ethnicity, or anything else, it is essential that the law protects the rights of people to hold their opinions “without interference”.

Parkinson uses the religious vilification laws as an example of how “hate speech” laws have a chilling effect on people of faith generally. He gives the example of an Anglican Bishop in England who was questioned by police after a complaint of criminal conduct was brought because of comments the Bishop had made about sexuality. The police did not lay charges because “current public order legislation does not provide specific offences based on sexuality”. Parkinson comments that whatever one’s view about the Bishop’s comments, the complaint of criminal conduct was “patently

³⁵ Letter from Simon Corbell to Lyle Shelton, 23 November 2013. Emphasis added.

³⁶ Patrick Parkinson (2007), ‘Religious vilification, anti-discrimination laws and religious minorities in Australia: The freedom to be different’, *Australian Law Journal*, Vol 81, No 12, pp 954-966, p 954.

³⁷ *Ibid*, pp 958-960.

³⁸ *Ibid*, pp 959.

³⁹ *Fletcher v Salvation Army Australia (Anti-Discrimination)* [2005] VCAT 1523.

⁴⁰ Parkinson (2007), ‘The freedom to be different’, p 959.

absurd. Yet, when perspective is lost in the pursuit of ideologically driven goals, the unimaginable and unthinkable become reality”.⁴¹

Another source of collateral damage identified by Parkinson is “folklaw”, that is, what people believe the law to be, even if wrongly. Highly publicised cases like those examples given by Parkinson in his essay, or Andrew Bolt’s case, may distort the law as it is written and as it is interpreted by the courts in the public. This is an additional stifling effect on free speech in public discourse and extends the unintended effects of the law even further. A similar effect occurs when organisations employ “risk-averse management”, interpreting narrowly drafted laws much more widely to avoid going anywhere near the boundary. This may constrain speech far beyond the original intention of the law.⁴²

Parkinson notes that while vilification legislation is intended to promote tolerance and social cohesion, its effect can be the very opposite. He warns that “courts and tribunals will be dragged into great political controversies”. Victory in a lawsuit would be a “tactical win for one side or the other”, and the “legal system just becomes another theatre of conflict which it cannot possibly resolve”.⁴³

Parkinson then cites former Australian Treasurer Peter Costello, who argues:

*I do not think that we should resolve differences about religious views in our community with lawsuits between the different religions... I think religious leaders should be free to express their doctrines and their comparative view of other doctrines.*⁴⁴

Articles 19 and 20 of the ICCPR

Article 20 of the ICCPR forbids “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.

Immediately preceding Article 20, Article 19 establishes one of the most fundamental rights in a free, democratic society, the right to freedom of expression:

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*

This right is not absolute. Section 19(3) clarifies that it carries “special duties and responsibilities”, and states that it may be subject to certain restrictions, but only those which are necessary for respecting the rights and reputations of others or for the protection of national security, public order, or public health or morals.⁴⁵

There is no right not to be offended by others. Unless speech or conduct “constitutes incitement to discrimination, hostility or violence”, it does not fall within the scope of Article 20. And unless is

⁴¹ Ibid, p 959-960.

⁴² Ibid, p 960.

⁴³ Ibid, p 961.

⁴⁴ Peter Costello (May 29, 2004), Speech, ‘Address to National Day of Thanksgiving Commemoration’, Scots Church, Melbourne, <http://www.petercostello.com.au/speeches/2004/2062-address-to-national-day-of-thanksgiving-commemoration-scots-church>.

⁴⁵ Section 19(3), *International Covenant on Civil and Political Rights*.

necessary to curtail speech for the protection of the rights of others or national security, doing so contravenes Article 19 and undermines one of the most basic human freedoms.

Anti-discrimination and anti-vilification law that goes beyond the ICCPR standard of “incitement” to discrimination or hostility is in danger of overreaching its purpose, with perspective being “lost in the pursuit of ideologically driven goals”, as Parkinson says. Section 20 of the ICCPR, coming as it does directly after section 19, must be understood to be a narrow restriction on a fundamental freedom.

Threats to freedom of conscience

Two notable examples of legislation which threaten freedom of conscience are the *Abortion Law Reform Act 2008* in Victoria and the *Reproductive Health (Access to Terminations) Act 2013* in Tasmania. 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 essentially forces a doctor to be complicit in abortion even though he finds it unethical or morally objectionable.

Similarly, the Tasmanian law imposes sanctions on doctors unless they provide a list of pro-abortion service providers.

These laws may appear to protect the conscience of doctors by allowing them to refuse to perform an abortion, but by forcing them to refer women to another doctor who will perform an abortion the doctors are unable to treat women in the way they believe is best.

Threats to freedom of speech and freedom of association

The Tasmanian law goes further and threatens freedom of speech and of association by penalising any kind of protest within 150 metres of an abortion clinic, with large monetary penalties and jail time for those who breach the law. The law aims to prevent harassment of people associated with the abortion clinic, but such a broad restriction encompasses peaceful protests and could capture protests that do not target people but are held within a large radius of the clinic.

In summary, anti-discrimination and anti-vilification laws present a significant threat to religious freedom in Australia. The purpose of such laws is good, but too often there are inadequate protections such as exemptions for religious organisations and individuals. Additionally, freedom of conscience is being threatened by laws compelling medical staff to participate in practices they object to as unethical.

Although some of the examples provided are not Commonwealth examples, the principles remain the same and the lessons from each are important for this discussion.

Examples of religious freedom being restricted or prohibited

The section above discusses the sources of restrictions or prohibitions on religious freedom. Some examples of Christians who have had their religious freedom restricted are given to demonstrate the effect these laws are having in Australia.

There are many other examples, both in Australia and throughout the world, of religious freedom being restricted or prohibited. Many of these cases have arisen due to the clash between religious teaching and sexual minorities, specifically the right to express and practice religion and the desire to be free from discrimination based on sexuality. Others have arisen as a direct result of the

redefinition of marriage. Some have arisen from other sources such as a lack of protection for religious expression generally.

Many of these examples are the result of legislation or court decisions, while some are the result of pressure being applied in the marketplace. All of them demonstrate the growing hostility towards religion and a diminishing respect for religious freedom.

The most recent prominent case is that of florist Barronelle Stutzman from Washington state in the USA. In April 2013, Stutzman, declined to provide flowers for a same-sex wedding. Stutzman's held no animosity or prejudice against homosexual people, and the couple were long-time customers of her business, Arlene's Flowers and Gifts. Rather, Stutzman could not violate her conscience by participating in a same-sex wedding, and politely advised the couple of this. As a result, Washington's attorney-general sued both her business and her personally.⁴⁶ In February 2015, a federal court ruled against Stutzman.⁴⁷

Some of the other more prominent and recent examples include:

- Ministers Donald and Evelyn Knapp have run their privately owned Hitching Post Wedding Chapel in Coeur d'Alene, Idaho for 25 years. They had been warned by city officials that if marriage were redefined in the state, a city non-discrimination ordinance would require them to perform same-sex ceremonies in their chapel. In October, they politely refused to marry a same-sex couple just two days after the state's redefined marriage laws came into operation. They were informed that they face up to 180 days in jail and up to \$1,000 in fines *for each day* that they decline to perform the ceremony.⁴⁸
- This occurred just days after the city of Houston, Texas issued subpoenas to five pastors, demanding any speeches, writings, or sermons on "gender identity, homosexuality, or mentioning the mayor, Annise Parker", who identifies as a lesbian. The case involved a city non-discrimination ordinance, the Houston Equal Rights Ordinance, and a petition raised against the ordinance which was found invalid.⁴⁹ After international controversy the city refined its requests, before withdrawing the subpoenas altogether.⁵⁰ Nevertheless, this case demonstrates the clash of anti-discrimination laws with the freedom of religion and freedom of speech.
- In July, a New York State Division of Human Rights decision found Robert and Cynthia Gifford guilty of "sexual orientation discrimination", fined them \$13,000, and ordered them to re-educate their staff to teach the state's view on marriage. The Giffords used their private farm as a venue for events including weddings. They were sued after declining to allow a

⁴⁶ Lornet Turnbull (April 9, 2013), 'State sues florist over refusing service for gay wedding', *The Seattle Times*, http://seattletimes.com/html/localnews/2020743969_floristlawsuitxml.html.

⁴⁷ Sarah Kaplan (February 19, 2015), *Washington Post*, <http://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/relationship-with-jesus-doesnt-justify-florists-refusal-to-serve-gay-couple-judge-rules/>.

⁴⁸ Alliance Defending Freedom (October 20, 2014), 'Two Ministers Told to Perform Same-Sex Wedding Face Jail, Fines', <http://blog.alliancedefendingfreedom.org/2014/10/20/two-ministers-ordered-to-perform-same-sex-wedding-face-jail-fines/>; see also Jeff Jacoby (October 26, 2014), 'Idaho ministers shouldn't be forced to officiate gay marriages', *Boston Globe*, <http://www.bostonglobe.com/opinion/2014/10/25/idaho-ministers-shouldn-forced-officiate-gay-marriages/Jz4egIBlQwTzZOD0553zRJ/story.html>.

⁴⁹ Alliance Defending Freedom (October 15, 2014), 'Houston We Have A Problem... And A Constitution!', <http://blog.alliancedefendingfreedom.org/2014/10/15/houston-we-have-a-problem-and-a-constitution/>.

⁵⁰ Jacob Gershman (October 29, 2014), 'Houston Mayor Retreats on Fight Over Pastor Subpoenas', *Wall Street Journal*, <http://blogs.wsj.com/law/2014/10/29/houston-mayor-retreats-on-fight-over-pastor-subpoenas/>.

lesbian couple to use their farm for a wedding ceremony, even though they would allow the reception.⁵¹

- In May this year, Colorado's Civil Rights Commission upheld an earlier ruling finding baker Jack Phillips guilty of breaching non-discrimination laws. The Commission requires Mr Phillips, owner of Masterpiece Cakeshop, to create cakes for same-sex celebrations, as well as forces him to "re-educate" his staff and file regular "compliance reports".⁵² Mr Phillips has appealed the decision, but currently has been forced to stop selling wedding cakes rather than violate his religious convictions about marriage.⁵³
- In 2006, New Mexico photographer Elaine Huguenin declined to photograph a "commitment ceremony" between two women.⁵⁴ One of the women filed a complaint, and the case went before the New Mexico Human Rights Commission, who found Mrs Huguenin guilty of discrimination and fined her over \$6,000.⁵⁵ The New Mexico Supreme Court upheld the decision⁵⁶ and earlier this year the US Supreme Court refused to allow an appeal.⁵⁷
- In the United Kingdom, Peter and Hazelmary Bull ran a bed and breakfast out of their private home. As Christians, they had a policy of not letting out double rooms to unmarried couples, regardless of the sexual orientation of the couple. This policy was made public. Nevertheless, when they refused to let out a double room to a homosexual couple, they were found guilty of breaking the law and ordered to pay the couple £3,600.⁵⁸ Their appeal failed.⁵⁹
- In 2013, the European Court of Human Rights found against marriage registrar Lillian Ladele, who was forced to resign because she refused to conduct same-sex civil partnership ceremonies. Miss Ladele had been working as a registrar for years before civil partnerships were introduced in 2004.⁶⁰

These are only a few examples of anti-discrimination law clashing with religious freedom. There are many further examples from Europe, the US, and Canada. In Australia, a Toowoomba GP, Dr David van Gend, was forced to attend mediation before the Anti-Discrimination Commission Queensland after expressing views about family which offended a homosexual man, who filed a complaint under

⁵¹ Alliance Defending Freedom (October 2, 2014), 'NY farmers to court: honor our religious freedom', <http://www.adfmedia.org/News/PRDetail/9332>.

⁵² See Alliance Defending Freedom (July 17, 2014), 'Colo. Cake Artist Appeals Govt 'Re-education' Order', <http://www.alliancedefendingfreedom.org/News/PRDetail/8700>.

⁵³ See CBS Denver (May 30, 2014), 'Bakery Will Stop Making Wedding Cakes After Losing Discrimination Case', <http://denver.cbslocal.com/2014/05/30/bakery-will-stop-making-wedding-cakes-after-losing-discrimination-case/>.

⁵⁴ At the time, marriage was defined as between a man and a woman, so the two women could not have a wedding ceremony.

⁵⁵ Sara Israelsen-Hartley (February 11, 2012), 'Colliding causes: Gay rights and religious liberty', *Deseret News*, <http://www.deseretnews.com/article/700224421/Gay-Liberty.html>. See also Adam Liptak (November 18, 2013), 'Weighing Free Speech in Refusal to Photograph Lesbian Couple's Ceremony', *New York Times*, http://www.nytimes.com/2013/11/19/us/weighing-free-speech-in-refusal-to-photograph-ceremony.html?_r=0.

⁵⁶ *Elane Photography, LLC v Vanessa Willock* 2013, Supreme Court of the State of New Mexico, <http://www.nmcompcomm.us/nmcases/nmsc/slips/SC33,687.pdf>.

⁵⁷ Jeri Clausing (April 7, 2014), 'Supreme Court Declines To Hear New Mexico Gay Wedding Photography Case', *Huffington Post*, http://www.huffingtonpost.com/2014/04/07/supreme-court-gay-wedding-photography_n_5104699.html.

⁵⁸ The Telegraph (January 18, 2011), 'Gay couple awarded damages after Christian hotel owners refused to let them share double room', <http://www.telegraph.co.uk/news/uknews/law-and-order/8266097/Gay-couple-awarded-damages-after-Christian-hotel-owners-refused-to-let-them-share-double-room.html>.

⁵⁹ Owen Bowcott (November 27, 2013), 'Christian guesthouse owners lose appeal over right to bar gay couples', *The Guardian*, <http://www.theguardian.com/world/2013/nov/27/christian-guesthouse-owners-appeal-gay-couples>.

⁶⁰ BBC (January 15, 2013), 'Christian discrimination claims heard by Europe court', <http://www.bbc.com/news/uk-19467554>.

the Queensland *Anti-Discrimination Act*. The case was withdrawn, but only after significant personal cost to van Gend.⁶¹ Other examples from Australia have been cited already.

The examples given in this section demonstrate threats to religious freedom from the law. In some cases, societal pressure from a vocal minority is used just as effectively to stifle religious freedom. For example, former Olympian Peter Vidmar, chosen as US chef de mission for the London Olympic Games, was pressured to resign after being criticised for supporting marriage between a man and a woman;⁶² Brendan Eich was pressured to resign as CEO of Mozilla because he donated in support of Proposition 8, which defined marriage as between a man and a woman;⁶³ and in Australia, Professor Kuruvilla George was pressured to resign from the board of Victorian Equal Opportunity and Human Rights Commission after stating views in favour of man-woman marriage.⁶⁴

These and many other cases are well documented. These fundamental human rights – freedom of religion and conscience, and freedom of expression and speech – are being thwarted by anti-discrimination laws all around the world. Furthermore, they are not being protected by the law when they are thwarted by societal pressure.

⁶¹ See Angela Shanahan (October 15, 2011), 'Discrimination police indulging in gay abandon', *The Australian*, <http://www.theaustralian.com.au/opinion/discrimination-police-indulging-in-gay-abandon/story-e6frg6zo-1226167016741>.

⁶² Juliet Macur (May 11, 2011), 'For Some Sports Figures, Opinions Have a Price', *New York Times*, <http://www.nytimes.com/2011/05/12/sports/olympics/gay-marriage-stance-costs-vidmar-olympic-role.html>.

⁶³ Nick Bilton and Noam Cohen (April 3, 2014), 'Mozilla's Chief Felled by View on Gay Unions', *New York Times*, http://bits.blogs.nytimes.com/2014/04/03/eich-steps-down-as-mozilla-chief/?_php=true&_type=blogs&_r=0.

⁶⁴ Farah Farouque (May 15, 2012), 'Anti-gay marriage professor quits equal opportunity board', *The Age*, <http://www.theage.com.au/victoria/antigay-marriage-professor-quits-equal-opportunity-board-20120515-1yo4i.html>.

Question 9–1: What general principles or criteria should be applied to help determine whether a law that reverses or shifts the burden of proof is justified?

Question 9–2 : Which Commonwealth laws unjustifiably reverse or shift the burden of proof, and why are these laws unjustified?

Burden of Proof

During the inquiry into the consolidation of Commonwealth anti-discrimination legislation, and the subsequent Human Rights and Anti-Discrimination Bill 2012, there was some discussion about placing the burden of proof on the respondent in a discrimination case.

ACL commented at the time:

...the principle that an accused is innocent until proven guilty is a fundamentally important part of the law which applies not only to strictly criminal matters, but also to aspects of the law which provide for the imposition of civil penalties, involve respondents in considerable cost and can result in determinations that cast serious aspersions upon the character and reputation of the respondent. This is not to say that such penalties, costs and reputational implications are not warranted where cases of unlawful discrimination are established, but it does serve to underscore the importance of maintaining the principle that a respondent ought to be free of a finding of unlawful discrimination against them until all the elements of unlawful discrimination have adequately been proved.

For these reasons, the Australian Christian Lobby would oppose any proposal that the burden of proof shift to the respondent once a complainant merely alleges that an act of unlawful discrimination has occurred...

... Once it is recognised that the law relating to discrimination has to strike an appropriate balance between all of the rights involved, it becomes clear that a complainant ought to continue to bear the full onus of establishing causation, just as a respondent bears the onus of establishing that an exception applies. Requiring both complainants and respondents to bear the full onus of proof in these respects is necessary to ensure that the law gives due weight to the human rights that are at stake on both sides of the equation. The onus on the respondent should only arise once proof on the part of the complainant to the requisite standard has been established...

The bill then placed the burden of proof in a discrimination case on a person relying on an exception in cases where the complainant produced evidence from which the court “could” decide that discrimination had occurred. ACL argued that the bill be amended to make explicit “that this burden only arises once these elements of unlawful discrimination have all clearly been made out on the balance of probabilities”.

In other words, the burden of proof on a respondent relying on an exception clause should only have the burden to prove otherwise if the evidence suggests that discrimination has actually occurred, on the balance of probabilities.

Although this particular example of an unjustified reversal of the burden of proof is no longer current, in a discussion of discrimination law and exceptions to discrimination law, it is worth raising

this topic, given it was raised during the consolidation debate in 2012. ACL reiterates its position and would, again, oppose any similar shift in the burden of proof in discrimination law should it arise again.

Conclusion

This submission has considered three of the fundamental rights identified in the Discussion Paper. The submission has focused on freedom of religion, but the other two freedoms are intimately related and at times are indivisible from one another.

Examples of threats to religious freedom in Australia have been given, and many cases of people of faith having their freedom quashed, often by legislation or judicial courts, have been canvassed.

ACL believes that there is a concerning trend away from these fundamental human rights in favour of less traditional rights, such as the right to non-discrimination. This is not merely a theoretical threat. It is not only an abstract policy consideration for the future. It is a very real, present reality for a growing number of people around the world, including in Australia. The longer this problem goes unaddressed, the more difficult it will be to solve.

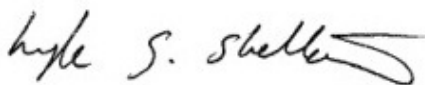
There is, then, an urgency about addressing these concerns. ACL does not believe that simply adding extra layers of legislation will be adequate, although strengthening legislative protections as discussed is necessary in the short term. Rather, a structural change is needed. To this end, ACL supports the approach of Professors Parkinson and Aroney and an approach to discrimination law which contains within it an acknowledgement that differentiation of treatment is not always unlawful discrimination. This is a key part of the submission.

The lack of a positive protection of the fundamental freedom of religion has been highlighted. The ICCPR has been proposed as a model for protecting the freedom of religion. The need for greater protections for freedom of religion has been identified, and methods for doing so have been suggested. Another key consideration is how to incorporate more adequate protections in the exceptions within anti-discrimination laws, including the concept of genuine occupational requirements.

Similar approaches to provide for freedom of conscience for doctors, for example, and for peacefully assembling and expressing certain views are also needed to balance laws like that abortion laws in Tasmania.

ACL commends the Australian Law Reform Commission for undertaking this consultation, and for identifying the rights that it has as fundamental to a free society. It is hoped that this submission will contribute to the Commission's process and to the public discussion of human rights.

Yours Sincerely



Lyle Shelton
Managing Director
Australian Christian Lobby

ANNEX 1

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).

1. The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant.

2. Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.

3. 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. In accordance with articles 18.2 and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief.

4. The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.

5. The Committee observes that the freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief. Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18.2. The same protection is enjoyed by holders of all beliefs of a non-religious nature.

6. The Committee is of the view that article 18.4 permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18.4, is related to the guarantees of the freedom to teach a religion or belief stated in article 18.1. The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.

7. In accordance with article 20, no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. As stated by the Committee in its General Comment 11 [19], States parties are under the obligation to enact laws to prohibit such acts.

8. 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, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint. States parties' reports should provide information on the full scope and effects of limitations under article 18.3, both as a matter of law and of their application in specific circumstances.

9. The fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26. The measures contemplated by article 20, paragraph 2 of the Covenant constitute important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed towards those groups. The Committee wishes to be informed of measures taken by States parties concerned to protect the practices of all religions or beliefs from infringement and to protect their followers from discrimination. Similarly, information as to respect for the rights of religious minorities under article 27 is necessary for the Committee to assess the extent to which the right to freedom of thought, conscience, religion and belief has been implemented by States parties. States parties concerned should also include in their reports information relating to practices considered by their laws and jurisprudence to be punishable as blasphemous.

10. If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it.

11. Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites States parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under article 18 and on the nature and length of alternative national service.

ANNEX 2

United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985).

I. LIMITATION CLAUSES

A. General Interpretative Principles Relating to the Justification of Limitations*

1. No limitations or grounds for applying them to rights guaranteed by the Covenant are permitted other than those contained in the terms of the Covenant itself.
2. The scope of a limitation referred to in the Covenant shall not be interpreted so as to jeopardize the essence of the right concerned.
3. All limitation clauses shall be interpreted strictly and in favor of the rights at issue.
4. All limitations shall be interpreted in the light and context of the particular right concerned.
5. All limitations on a right recognized by the Covenant shall be provided for by law and be compatible with the objects and purposes of the Covenant.
6. No limitation referred to in the Covenant shall be applied for any purpose other than that for which it has been prescribed.
7. No limitation shall be applied in an arbitrary manner.
8. Every limitation imposed shall be subject to the possibility of challenge to and remedy against its abusive application.
9. No limitation on a right recognized by the Covenant shall discriminate contrary to Article 2, paragraph 1.
10. 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.

Any assessment as to the necessity of a limitation shall be made on objective considerations.

11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.
12. The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state.
13. The requirement expressed in Article 12 of the Covenant, that any restrictions be consistent with other rights recognized in the Covenant, is implicit in limitations to the other rights recognized in the Covenant.
14. The limitation clauses of the Covenant shall not be interpreted to restrict the exercise of any human rights protected to a greater extent by other international obligations binding upon the state.

* The term "limitations" in these principles includes the term "restrictions" as used in the Covenant.

B. Interpretative Principles Relating to Specific Limitation Clauses

i. "prescribed by law"

15. No limitation on the exercise of human rights shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.

16. Laws imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable.

17. Legal rules limiting the exercise of human rights shall be clear and accessible to everyone.

18. Adequate safeguards and effective remedies shall be provided by law against illegal or abusive imposition or application of limitations on human rights.

ii. "in a democratic society"

19. The expression "in a democratic society" shall be interpreted as imposing a further restriction on the limitation clauses it qualifies.

20. The burden is upon a state imposing limitations so qualified to demonstrate that the limitations do not impair the democratic functioning of the society.

21. While there is no single model of a democratic society, a society which recognizes and respects the human rights set forth in the United Nations Charter and the Universal Declaration of Human Rights may be viewed as meeting this definition.

iii. "public order (ordre public)"

22. The expression "public order (ordre public)" as used in the Covenant may be defined as the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public).

23. Public order (ordre public) shall be interpreted in the context of the purpose of the particular human right which is limited on this ground.

24. State organs or agents responsible for the maintenance of public order (ordre public) shall be subject to controls in the exercise of their power through the parliament, courts, or other competent independent bodies.

iv. "public health"

25. Public health may be invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat to the health of the population or individual members of the population. These measures must be specifically aimed at preventing disease or injury or providing care for the sick and injured.

26. Due regard shall be had to the international health regulations of the World Health Organization.

v. "public morals"

27. Since public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the community.

28. The margin of discretion left to states does not apply to the rule of non-discrimination as defined in the Covenant.

vi. "national security"

29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

30. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.

32. The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing opposition to such violation or at perpetrating repressive practices against its population.

vii. "public safety"

33. Public safety means protection against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.

34. The need to protect public safety can justify limitations provided by law. It cannot be used for imposing vague or arbitrary limitations and may only be invoked when there exist adequate safeguards and effective remedies against abuse.

viii. "rights and freedoms of others" or the "rights or reputations of others"

35. The scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognized in the Covenant.

36. When a conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context especial weight should be afforded to rights not subject to limitations in the Covenant.

37. A limitation to a human right based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism.

ix. "restrictions on public trial"

38. All trials shall be public unless the Court determines in accordance with law that:

- a) the press or the public should be excluded from all or part of a trial on the basis of specific findings announced in open court showing that the interest of the private lives of the parties or their families or of juveniles so requires; or
- b) the exclusion is strictly necessary to avoid publicity prejudicial to the fairness of the trial or endangering public morals, public order (ordre public), or national security in a democratic society.

II. DEROGATIONS IN A PUBLIC EMERGENCY

A. "Public Emergency which Threatens the Life of the Nation"

39. A state party may take measures derogating from its obligations under the International Covenant on Civil and Political Rights pursuant to Article 4 (hereinafter called "derogation measures") only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that:

- a) affects the whole of the population and either the whole or part of the territory of the State, and
- b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and project the rights recognized in the Covenant.

40. Internal conflict and unrest that do not constitute a grave and imminent threat to the life of the nation cannot justify derogations under Article 4.

41. Economic difficulties per se cannot justify derogation measures.

B. Proclamation, Notification, and Termination of a Public Emergency

42. A state party derogating from its obligations under the Covenant shall make an official proclamation of the existence of the public emergency threatening the life of the nation.

43. Procedures under national law for the proclamation of a state of emergency shall be prescribed in advance of the emergency.

44. A state party derogating from its obligations under the Covenant shall immediately notify the other states parties to the Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and the reasons by which it was actuated.

45. The notification shall contain sufficient information to permit the states parties to exercise their rights and discharge their obligations under the Covenant. In particular it shall contain:

- a) the provisions of the Covenant from which it has derogated;
- b) a copy of the proclamation of emergency, together with the constitutional provisions, legislation, or decrees governing the state of emergency in order to assist the states parties to appreciate the scope of the derogation;
- c) the effective date of the imposition of the state of emergency and the period for which it has been proclaimed;
- d) an explanation of the reasons which actuated the government's decision to derogate, including a brief description of the factual circumstances leading up to the proclamation of the state of emergency; and
- e) a brief description of the anticipated effect of the derogation measures on the rights recognized by the Covenant, including copies of decrees derogating from these rights issued prior to the notification.

46. States parties may require that further information necessary to enable them to carry out their role under the Covenant be provided through the intermediary of the Secretary-General.

47. A state party which fails to make an immediate notification in due form of its derogation is in breach of its obligations to other states parties and may be deprived of the defenses otherwise available to it in procedures under the Covenant.

48. A state party availing itself of the right of derogation pursuant to Article 4 shall terminate such derogation in the shortest time required to bring to an end the public emergency which threatens the life of the nation.

49. The state party shall on the date on which it terminates such derogation inform the other state parties, through the intermediary of the Secretary-General of the United Nations, of the fact of the termination.

50. On the termination of a derogation pursuant to Article 4 all rights and freedoms protected by the Covenant shall be restored in full. A review of the continuing consequences of derogation measures shall be made as soon as possible. Steps shall be taken to correct injustices and to compensate those who have suffered injustice during or in consequence of the derogation measures.

C. "Strictly Required by the Exigencies of the Situation"

51. The severity, duration, and geographic scope of any derogation measure shall be such only as are strictly necessary to deal with the threat to the life of the nation and are proportionate to its nature and extent.

52. The competent national authorities shall be under a duty to assess individually the necessity of any derogation measure taken or proposed to deal with the specific dangers posed by the emergency.

53. A measure is not strictly required by the exigencies of the situation where ordinary measures permissible under the specific limitations clauses of the Covenant would be adequate to deal with the threat to the life of the nation.

54. The principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present, or imminent danger and may not be imposed merely because of an apprehension of potential danger.

55. The national constitution and laws governing states of emergency shall provide for prompt and periodic independent review by the legislature of the necessity for derogation measures.

56. Effective remedies shall be available to persons claiming that derogation measures affecting them are not strictly required by the exigencies of the situation.

57. In determining whether derogation measures are strictly required by the exigencies of the situation the judgment of the national authorities cannot be accepted as conclusive.

D. Non-Derogable Rights

58. No state party shall, even in time of emergency threatening the life of the nation, derogate from the Covenant's guarantees of the right to life; freedom from torture, cruel, inhuman or degrading treatment or punishment, and from medical or scientific experimentation without free consent; freedom from slavery or involuntary servitude; the right not to be imprisoned for contractual debt; the right not to be convicted or sentenced to a heavier penalty by virtue of retroactive criminal legislation; the right to recognition as a person before the law; and freedom of thought, conscience and religion. These rights are not derogable under any conditions even for the asserted purpose of preserving the life of the nation.

59. State parties to the Covenant, as part of their obligation to ensure the enjoyment of these rights to all persons within their jurisdiction (Art. 2(1)) and to adopt measures to secure an effective remedy for violations (Art. 2(3)), shall take special precautions in time of public emergency to ensure that neither official nor semi-official groups engage in a practice of arbitrary and extra-judicial killings or involuntary disappearances, that persons in detention are protected against torture and other forms of cruel, inhuman or degrading treatment or punishment, and that no persons are convicted or punished under laws or decrees with retroactive effect.

60. The ordinary courts shall maintain their jurisdiction, even in a time of public emergency, to adjudicate any complaint that a non-derogable right has been violated.

E. Some General Principles on the Introduction and Application of a Public Emergency and Consequent Derogation Measures

61. Derogation from rights recognized under international law in order to respond to a threat to the life of the nation is not exercised in a legal vacuum. It is authorized by law and as such it is subject to several legal principles of general application.

62. A proclamation of a public emergency shall be made in good faith based upon an objective assessment of the situation in order to determine to what extent, if any, it poses a threat to the life of the nation. A proclamation of a public emergency, and consequent derogations from Covenant obligations, that are not made in good faith are violations of international law.

63. The provisions of the Covenant allowing for certain derogations in a public emergency are to be interpreted restrictively.

64. In a public emergency the rule of law shall still prevail. Derogation is an authorized and limited prerogative in order to respond adequately to a threat to the life of the nation. The derogating state shall burden of justifying its actions under law.

65. The Covenant subordinates all procedures to the basic objectives of human rights. Article 5(1) of the Covenant sets definite limits to actions taken under the Covenant:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

Article 29(2) of the Universal Declaration of Human Rights sets out the ultimate purpose of law:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

These provisions apply with full force to claims that a situation constitutes a threat to the life of a nation and hence enables authorities to derogate.

66. A bona fide proclamation of the public emergency permits derogation from specified obligations in the Covenant, but does not authorize a general departure from international obligations. The Covenant in Article 4(1) and 5(2) expressly prohibits derogations which are inconsistent with other obligations under international law. In this regard, particular note should be taken of international obligations which apply in a public emergency under the Geneva and I.L.O. Conventions.

67. In a situation of a non-international armed conflict a state party to the 1949 Geneva Conventions for the protection of war victims may under no circumstances suspend the right to a trial by a court offering the essential guarantees of independence and impartiality (Article 3 common to the 1949 Conventions). Under the 1977 additional Protocol II, the following rights with respect to penal prosecution shall be respected under all circumstances by state parties to the Protocol:

- a) the duty to give notice of charges without delay and to grant the necessary rights and means of defense;
- b) conviction only on the basis of individual penal responsibility;
- c) the right not to be convicted, or sentenced to a heavier penalty, by virtue of retroactive criminal legislation;
- d) presumption of innocence;
- e) trial in the presence of the accused;
- f) no obligation on the accused to testify against himself or to confess guilt;
- g) the duty to advise the convicted person on judicial and other remedies.

68. The I.L.O. basic human rights conventions contain a number of rights dealing with such matters as forced labor, freedom of association, equality in employment and trade union and workers' rights which are not subject to derogation during an emergency; others permit derogation, but only to the extent strictly necessary to meet the exigencies of the situation.

69. No state, including those that are not parties to the Covenant, may suspend or violate, even in times of public emergency:

- a) the right to life;
- b) freedom from torture or cruel, inhuman or degrading treatment or punishment and from medical or scientific experimentation;
- c) the right not to be held in slavery or involuntary servitude; and,
- d) the right not to be subjected to retroactive criminal penalties as defined in the Covenant.

Customary international law prohibits in all circumstances the denial of such fundamental rights.

70. Although protections against arbitrary arrest and detention (Art. 9) and the right to a fair and public hearing in the determination of a criminal charge (Art. 14) may be subject to legitimate limitations if strictly required by the exigencies of an emergency situation, the denial of certain rights fundamental to human dignity can never be strictly necessary in any conceivable emergency. Respect for these fundamental rights is essential in order to ensure enjoyment of non-derogable rights and to provide an effective remedy against their violation. In particular:

- a) all arrests and detention and the place of detention shall be recorded, if possible centrally, and make available to the public without delay;
- b) no person shall be detained for an indefinite period of time, whether detained pending judicial investigation or trial or detained without charge;
- c) no person shall be held in isolation without communication with his family, friend, or lawyer for longer than a few days, e.g., three to seven days;
- d) where persons are detained without charge the need of their continued detention shall be considered periodically by an independent review tribunal;
- e) any person charged with an offense shall be entitled to a fair trial by a competent, independent and impartial court established by law;
- f) civilians shall normally be tried by the ordinary courts; where it is found strictly necessary to establish military tribunals or special courts to try civilians, their competence, independence and impartiality shall be ensured and the need for them reviewed periodically by the competent authority;
- g) any person charged with a criminal offense shall be entitled to the presumption of innocence and to at least the following rights to ensure a fair trial:
 - the right to be informed of the charges promptly, in detail and in a language he understands,
 - the right to have adequate time and facilities to prepare the defense including the right to communicate confidentially with his lawyer,
 - the right to a lawyer of his choice, with free legal assistance if he does not have the means to pay for it,
 - the right to be present at the trial,
 - the right not to be compelled to testify against himself or to make a confession,
 - the right to obtain the attendance and examination of defense witnesses,
 - the right to be tried in public save where the court orders otherwise on grounds of security with adequate safeguards to prevent abuse,
 - the right to appeal to a higher court;
- h) an adequate record of the proceedings shall be kept in all cases; and,
- i) no person shall be tried or punished again for an offense for which he has already been convicted or acquitted.

F. Recommendations Concerning the Functions and Duties of the Human Rights Committee and United Nations Bodies

71. In the exercise of its power to study, report, and make general comments on states parties' reports under Article 40 of the Covenant, the Human Rights Committee may and should examine the compliance of states parties with the provisions of Article 4. Likewise it may and should do so when exercising its powers in relevant cases under Article 41 and the Optional Protocol relating, respectively, to interstate and individual communications.

72. In order to determine whether the requirements of Article 4(1) and (2) have been met and for the purpose of supplementing information in states parties' reports, members of the Human Rights Committee, as persons of recognized competence in the field of human rights, may and should have regard to information they consider to be reliable provided by other inter-governmental bodies, non-governmental organizations, and individual communications.

73. The Human Rights Committee should develop a procedure for requesting additional reports under Article 40(1)(b) from states parties which have given notification of derogation under Article 4(3) or which are reasonably believed by the Committee to have imposed emergency measures subject to Article 4 constraints. Such additional reports should relate to questions concerning the emergency insofar as it affects the implementation of the Covenant and should be dealt with by the Committee at the earliest possible date.

74. In order to enable the Human Rights Committee to perform its fact-finding functions more effectively, the committee should develop its procedures for the consideration of communications under the Optional Protocol to permit the hearing of oral submissions and evidence as well as visits to states parties alleged to be in violation of the Covenant. If necessary, the states parties to the Optional Protocol should consider amending it to this effect.

75. The United Nations Commission on Human Rights should request its Sub-Commission on Prevention of Discrimination and Protection of Minorities to prepare an annual list of states, whether parties to the Covenant or not, that proclaim, maintain, or terminate a public emergency together with:

- a) in the case of a state party, the proclamation and notification; and,
- b) in the case of other states, any available and apparently reliable information concerning the proclamation, threat to the life of the nation, derogation measures and their proportionality, non-discrimination, and respect for non-derogable rights.

76. The United Nations Commission on Human Rights and its Sub-Commission should continue to utilize the technique of appointment of special rapporteurs and investigatory and fact-finding bodies in relation to prolonged public emergencies.