**SUBMISSION TO THE**

**AUSTRALIAN LAW REFORM COMMISSION**

**TRADITIONAL RIGHTS AND FREEDOMS – ENCROACHMENT BY**

**COMMONWEALTH LAWS**

**GENERAL PRINCIPLES AND RELEVANT COMMONWEALTH LAWS**

**FEBRUARY 2015**

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**FREEDOM OF RELIGION**

**Introduction**

Fundamental human rights are founded on the idea that human beings acquire rights by virtue of their humanity and are an end in themselves. They are based on the idea that individuals should have the civil liberty to pursue their own objectives.

These rights are freedom of speech and expression, freedom of conscience, freedom thought, freedom of association freedom of religion,

They are closely related and indivisible. When one is breached the others are breached.

**GENERAL PRINCIPALS**

**The Meaning of Religious Freedom**

The argument for religious freedom rests on the claims of conscience, not on ‘conscientious objection’ in the sense of a conviction held with earnest passion, or a religious moral teaching that can be reduced simply to ‘beliefs’, but in the sense explained by John Paul II in *Veritatis Splendor*: ‘conscience as an understanding ordered to a body of objective moral truths.’

In 2013 Cardinal Pell delivered the Annual Lecture on Religious Freedom at the School of Law at the University of Notre Dame Sydney. In that lecture he addressed religious freedom in the West as follows:

*The Second Vatican Council's landmark*[*declaration on religious freedom*](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html) *takes us quickly to the essential meaning of religious freedom.*

*It means freedom from coercion in matters of religious belief and conscience. Everyone is "to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to forced to act in a manner contrary to his own belief, whether privately or publicly, whether alone or in association with others, within due limits."*

*Unless it is tempered by solidarity, freedom can quickly come to be a radical assertion of the self against others.*

*The Universal Declaration of Human Rights (1948) did not stop at declaring, "All human beings are born free and equal in dignity and rights."*

*The very next sentence bound this claim for freedom and legitimate personal autonomy to solidarity, declaring that we "are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."*

*What this means for religious freedom is that, like other rights, it is not unlimited.*

*This is acknowledged in the major international human rights instruments, and also in [Dignitatis Humanae](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html).*

*We are to exercise our rights, all rights, not just the right to religious freedom - with "respect both for the rights of others and for [our] own duties towards others and for the common welfare of all."*

*It is also acknowledged, as Dignitatis Humanae puts it, that "society has the right to defend itself against possible abuses committed on the pretext of freedom of religion."*

*At the same time, as the United Nations Human Rights Council emphasised in 2010, "restrictions on the freedom to manifest one's religion and belief" must be non-discriminatory and "applied in a manner that does not vitiate the right to freedom of thought, conscience, and religion."*

*With these principles in mind we can identify* ***four basic points*** *to show what religious freedom means in practice:*

***Four Basic Principles ( Pell )***

1. ***Freedom of religion is not just freedom to go to church on Sundays or pray at home.***

*It also means being free to act on your beliefs in the public square, to speak about them and seek to persuade others.*

*It means not being coerced or bullied into silence by speech-control and equality laws or by accusations of "Homophobe!" "Discrimination!" "Anti-Choice!" or "I'm offended!"*

1. ***Freedom of religion means being free to provide services that are consistent with the beliefs of the sponsoring religion.***

*Neither the government nor anyone else has the right to say to religious agencies*

*"we like your work with vulnerable women; we just need you to offer them abortion as well" or*

*"we really like your schools, but we can't allow you to teach that marriage between a man and a woman is better or truer than other expressions of love and sexuality."*

*Our agencies are there for everyone without discrimination, but provide distinctive teachings and operations. In a wealthy, sophisticated country like Australia, leaving space for religious agencies should not be difficult.*

1. ***Religious freedom means being able to employ at least a critical mass of employees who support the ethos of the sponsoring religion.***

*All Catholic works are first and foremost works of religion.*

*Our hospitals, schools, universities, welfare agencies, services for the refugees, the disabled and the homeless are established because this is what our faith in Christ the Lord impels us to do.*

*The good people happy to help us in these works as staff or volunteers do not all need to share the faith, but they need to be happy to support it and work within it.*

*It is also essential that a preference can be exercised for people who are actively committed to the religious convictions at the heart of these services. It is not enough for just the CEO or the religion teacher to be Catholic.*

*It is not unjust discrimination to prefer committed Catholics to staff Catholic services, but it is coercion to attempt to interfere in or restrict our freedom to do so.*

*No one would dream of suggesting that, for example, the ALP must employ some activist members of the Liberal Party.*

1. ***Religious freedom and government funding.***

*The secular state is religiously neutral and has no mandate to exclude religion, especially when a large majority of the population are Christians or followers of other major religions.*

*Church members also pay taxes. Substantial levels of government funding are no reason to prohibit religious schools, hospitals and welfare agencies from offering services compatible with their beliefs, and provide no sufficient reason to coerce them to act against their principles.*

*The separation of church and state provides important protections for religious communities against the intrusions of governments.*

*In a free society like our own, different groups have a right to make distinctive offerings, provided they are not damaging the common good.*

*We need to foster a tolerant pluralism, not intolerant secularism.*

***Protecting Religious Freedom***

During the course of his lecture, Cardinal Pell made suggestion concerning the protection of religious freedom as follows:

* ***Protections not exemptions.***

*Federal and state anti-discrimination laws usually include a range of "exemptions" or "exceptions" for religious organisations (and other groups).*

*The purpose of these exemptions is to protect other rights, but the language of exemptions creates the impression that they are simply concessions or special permissions to discriminate granted by the state for political reasons.*

*This is completely misleading and helpful to no one, except those who want to misrepresent the situation and remove protections for religious freedom.*

*The language of exemptions should be replaced with the language of protections, clearly identifying the human right that is being protected.*

[*Nicholas Aroney and Patrick Parkinson*](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) *have suggested that the prohibition of unlawful discrimination ought to be drafted in such a way that when a right to freedom of religion, association or cultural expression is being legitimately exercised, this cannot be seen or judged to be unlawful discrimination.*

*Treating such rights as exemptions reinforces the strong impression that anti-discrimination is more important than other rights and will always trump them.*

[*John Finnis*](http://researchonline.nd.edu.au/solidarity/vol2/iss1/1/) *has observed that anti-discrimination law is concerned with whether differential treatment is justified. Using the language of "discrimination" is dangerous because it suggests that differential treatment is not justified, even when it is "exempted."*

* ***Protection for individuals as well as groups.***

*Individuals are the bearers of rights, and it is strange that protections for religious freedom in anti-discrimination laws focus on groups and institutions rather than on individuals.*

*As always, the rights of others to goods and services have to be protected, but there should be explicit scope to provide protections for individuals so that they are not coerced to act against their beliefs in their work or businesses.*

* ***Legislate conscience protections.***

*Rather than coercing people to act against their religious or conscientious convictions, as the Victorian Abortion Law Reform Act does, the states and commonwealth should legislate protections for them, perhaps along the lines of the resolution adopted by the Parliamentary Assembly of the Council of Europe in 2010.*

*While requiring states to ensure timely access to "lawful medical care," it also holds that "No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist, or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason."*

Cardinal Pell also made these observations:

*‘Last year the first lady of the United States, Michelle Obama, summed up very well what religious freedom means in practice.*

*She told a* [*conference of the African Methodist Episcopal Church*](http://www.whitehouse.gov/the-press-office/2012/06/28/remarks-first-lady-african-methodist-episcopal-church-conference)*:*

*"Our faith journey isn't just about showing up on Sunday. It's about what we do Monday through Saturday as well - especially in those quiet moments, when the spotlight's not on us, and we're making those daily choices about how to live our lives. Jesus didn't limit his ministry to the four walls of the church. We know that. He was out there fighting injustice and speaking truth to power every day. He was out there spreading a message of grace and redemption to the least, the last, and the lost. And our charge is to find Him everywhere, every day by how we live our lives ... This is how we practice our faith."*

*As* [*Pope Benedict XVI*](http://www.vatican.va/holy_father/benedict_xvi/speeches/2011/january/documents/hf_ben-xvi_spe_20110110_diplomatic-corps_en.html) *said in 2011, "the Church seeks no privileges, nor does she seek to intervene in areas unrelated to her mission." All we claim is the right to carry out that mission with freedom. In the end, this is what religious freedom is all about.”*

**COMMONWEALTH LAWS UNJUSTIFIABLY INTERFERING WITH RELIGIOUS FREEDOM**

The relevant Commonwealth laws are:

The Sex discrimination Act; and

The Racial Discrimination Act.

Reference has also been made to the Human Rights and Anti-Discrimination Bill 2012 since it was vigorously pursued by the previous federal government and is a good example of oppressive overreaching legislative intent in this area.

In a paper [Exceptional religious freedom (2013 Conference Paper: The Scope and Limits of Religious Freedom in Australia)](http://www.freedom4faith.org.au/resources/News/Patrick%20Parkinson_Exceptional%20Religious%20Freedom_15%20March%202013.pdf) Professor Patrick Parkinson says:

‘*The reach of anti-discrimination law has been extended greatly over recent years to apply to many more personal characteristics and choices than in the past, including issues of sexual practice and relationship status.*

*This has led to potential conflict with churches and other faith groups, to the extent that religious beliefs and moral values are inconsistent with non-discrimination norms.*

*These potential conflicts have been dealt with by use of exceptions for religious groups to the general prohibitions against discrimination. However those exceptions are increasingly under attack, with some calling for their complete removal.*

Professor Parkinson goes on to suggest the means by which these problems with anti- discrimination legislation may be ameliorated. He says:

*‘This paper explores the basis for these religious exceptions and considers how we can ensure respect for different values and beliefs in a multicultural society, while also promoting norms of non-discrimination and equality.*

*It is argued that the solution to these problems lies in identifying more clearly what are the ‘commons’ in which governments must insist on non-discrimination norms, and the areas outside of the commons which should, in principle, not be subject to such regulation.*

***It is argued that it is better to define carefully who should be regulated and why, rather than stating broad prohibitions and then carving out sometimes complex exceptions.*** *(emphasis added)*

*Voluntary associations of the like-minded should not be seen as part of the commons because there is a free market in such voluntary associations. Religious bodies are voluntary associations. People may choose whether or not to belong to a faith community.*

*When religious organisations provide services to the general public, different considerations apply and there are particular issues when the organisations receive public funds.*

*The distinction that needs to be made is between situations where governments are ‘purchasing’ services to be delivered through non-government agencies to the general community in a given locality, and situations where the government is providing funding support to a diverse range of bodies which are delivering services, giving the consumer some choice.*

*In the first situation, for government to permit discrimination would be an abdication of its duties to provide services to the whole community in that area.*

*In the second situation, there is room for diversity on contested moral and social issues provided that everyone can access a service that is lawful.’*

Professor Parkinson‘s paper provides a wide ranging review of the relevant issues, particularly their impact on **community identity**, especially **the right of freedom of association within the community** - for example Jewish community organisation which are based on race and religion, and **education**.

He also considers interaction of anti- discrimination legislation with **‘Gender, sex and faith’**; **‘Gender, marital status and religious leadership’**; **‘Sexual practice’ …** ‘in Australia’s federation of cultures.’

Professor Parkinson’s paper is a learned and extensive review of the problems with anti- discrimination legislation. I refer the enquiry to the full paper.

***The Human Rights and Anti-Discrimination Bill 2012 (Exposure draft).***

The bill was controversial and was ultimately withdrawn, but gives an insight to the thinking and attitude of the political party which represents the alternative government in Australia.

The following analysis was provided by Mr Simon Breheny, director,IPA Legal Rights Project ( fact sheet 21 December 2012.

*“The bill if enacted would have made a number of significant changes to anti-discrimination law in Australia, including****:***

* 1. *broadening the definition of discrimination to include conduct that ‘offends’ and ‘insults’ (clause 19-2)*
  2. *making it easier for a person to claim they were discriminated against, by requiring them to establish only that they were personally offended, not that a reasonable person would have been offended (cl 19-2)*
  3. *expanding the range of personal characteristics against which it is unlawful to discriminate, to include not only matters such as disability, race, and religion, but also ‘political opinion’ and ‘social origin’ (cl 17-1)*
  4. *reducing the legal protection of a person accused of discrimination, by:*
* *declaring them guilty unless they prove their innocence, i.e. the ‘onus of proof’ is reversed (cl 124-1);*
* *restricting their right to legal representation (cl 110-4) ;*
* *requiring them to pay all the costs of their own defence even if they are found to be innocent (cl 133).*

***Impact on freedom of speech and thought***

*Almost any comment about anything has the potential to offend someone under the Bill. There would be a chilling effect on freedom of speech and thought if someone could claim the expression of a political viewpoint insulted them and was therefore discriminatory.*

*The consequences of the Bill go beyond restricting speech. Flying the Australian flag would be unlawful if a person felt such an action insulted them on the basis of their political opinion.*

***Impact on freedom of religion***

*The Bill would make it unlawful for a person to publicly express their religious belief (for example, by wearing a crucifix) if another person was offended because of that other person’s religion.*

*The Bill would also make it unlawful to debate religion and religious practices if another person was offended because of their religion.*

***Government officials gain enormous power***

*Both the potential grounds of discrimination in the Bill—such as a person’s political opinion or their social origin—and the defences against claims of discrimination—such as the conduct being ‘in good faith’ and having a ‘legitimate aim’ (cl 23-3)—are unclear and vague. These ambiguous terms give bureaucrats and judges broad discretionary power to determine the boundaries of lawful behaviour.*

*Discrimination on the grounds of political opinion and social origin is unlawful if it is in connection with ‘work and work-related areas’ (cl 22-3).*

*These terms are so broad as to potentially apply to spheres of activity well beyond the workplace. Furthermore, the government intends to take a ‘broad’ interpretation of what constitutes ‘work-related areas’ (Explanatory Notes, p 31).*

***Process and penalties***

*An accusation of unlawful discrimination starts a legal process that could last years. Complaints are heard by the Australian Human Rights Commission, the Federal Magistrates Court, or the Federal Court of Australia. Penalties for unlawful discrimination range from a forced apology, to the payment of monetary damages, to court-ordered censorship (cl 125).’*

The Bill would have effectively eliminated freedom of religion in Australia. Public expression of religious belief would have been unlawful if someone was offended by such expression.

Individuals accused of unlawful behaviour were presumed guilty unless they could prove their innocence, they would have no automatic right to legal representation, and would have to pay all the costs of their defence even if they were found to be innocent.

**SEX DISCRIMINATION ACT**

The Sex Discrimination Act 1984 was amended by the previous federal government by the addition of the ‘protected attributes of sexual orientation, gender identity, and intersex status’.

Exemptions for certain aged-care providers were removed preventing them from preferencing a married couple over an unmarried couple.

Many aged care providers who seek to maintain a particular culture are affected by the amendment and the provision now prevents people from merely choosing to spend their old age in a community which shares their particular faith and expression of that faith.

During the course his 2013 lecture on religious freedom, Cardinal Pell in referring to the Sex Discrimination Act, said:

“*After the federal government conceded that it had overreached in its efforts to produce a consolidated anti-discrimination law earlier in the year, it moved to amend the Sex Discrimination Act in some significant ways.*

*One of these amendments removed the protection for religious providers of Commonwealth-funded residential aged care services to provide services in accordance with their beliefs; for example, by providing shared rooms to married couples only.*

*They are now being coerced to act against their religious beliefs. When it came before the Parliament the Opposition voted against it in the Senate, but when it came back to the House of Representatives it was passed on the voices.*

*The importance of this amendment lies not so much in the particular matter it addressed (the number of unmarried or homosexual couples seeking a shared room in a Catholic nursing home is unlikely to be large), as in the precedent it establishes for withdrawing religious freedom protections in anti-discrimination legislation.*

*Interestingly, one week after this amendment passed in the federal parliament, a NSW upper house MP proposed amending the NSW Anti-Discrimination Act to remove the religious freedom protections for religious schools.*

*These protect the right of the communities which established these schools to conduct them in accordance with their beliefs and teachings, and to ensure that those they employ and enrol will be happy to support the ethos and witness of these schools.”*

**RACIAL DISCRIMINATION ACT**

To the extent that section 18C covers conduct that “offends”, “insults” and humiliates” it is a restriction on the fundamental human right to freedom of speech. To the extent that it covers conduct that “intimidates” it duplicates a range of more appropriate Commonwealth and State laws against intimidation. The criminal codes of every Australian state and territory have laws against intimidation.

Section 18C also creates a legal test based on emotional states. No such test should exist anywhere in the law. Permitting “hurt feelings” to be the basis of legal claims creates impossible legal obligations. It asks judges to assess liability based on sentiment.

The Andrew Bolt case demonstrated the conflict between fundamental freedoms and the perceived right to not be offended.

In the Bolt case, perceived offence and/or insult clashed with Mr Bolt’s freedom to speak on issues of race and ethnicity.

Most public debate, especially on controversial issues, is likely to be offensive or insulting to somebody.

Freedom of speech is directly threatened by Section 18C and it adds to the complexity of Australia’s legal system. It should be repealed in full, and state and territory criminal codes relied upon as appropriate protections against intimidation.

**ANTI-VILIFICATION LAWS GENERALLY**

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 and complexity rather than harmony.

Professor Parkinson has written extensively on this subject in a paper [Religious vilification, anti-discrimination laws and religious minorities: the freedom to be different (2007](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1144962)

*The Abstract of the paper says:*

*“Australian laws concerning religious vilification and the prohibition of discrimination on the basis of religious belief pose a danger to the future of multiculturalism.*

*They have a chilling effect on legitimate expressions of religious freedom because of the impact that 'folklaw' and risk-averse management have on people's behaviour.*

*They may also create conflict by establishing a new forum for disputes that courts can never resolve.*

*Communities who share values based on faith need the freedom to argue their understanding of truth and to discriminate between right and wrong as they see it.*

*A new approach to multiculturalism is proposed that balances the different interests involved and which may benefit other minorities as well.”*

In his paper Professor Parkinson says:

*“The main danger of religious vilification laws is that they will have a chilling effect on legitimate religious activity even where the outcome of a complaint is to declare the religious expression to have been lawful.*

*The punishment imposed by religious vilification laws does not lie in the penalties imposed by courts or tribunals for breaches of the law, but in the necessity to defend oneself from plausible claims that he law has been breached.*

*The cost of defending such cases, employing an appropriately qualified legal team, can run into the hundreds of thousands of dollars – far beyond the capacity of small religious communities or organisations.*

*A religious organisation may be put to considerable expense even if the claim is utterly unmeritorious and is summarily dismissed.*

*In Fletcher v Salvation Army Australia,41 a Victorian prisoner who attended a program introducing the Christian faith, known as Alpha, complained that the program vilified witchcraft because it implied that witches are Satanists.*

*Justice Morris summarily dismissed the application, regarding the complaint as ‘quite hopeless.” Nonetheless, it took a hearing to determine this.*

*While the respondent appeared in person (by video link from jail), two different barristers were instructed by the two defendants, and a third appeared for Corrections Victoria.*

*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.*

*Certainly, the Catch the Fire case has caused great concern to many Christians.42 Because of the costs associated with litigation, and its stress and unpredictability, the threat of litigation is a dangerous weapon even if it is unlikely to be successful.*

*A gun does not have to be loaded to be terrifying. It is enough that a person towards whom the gun is pointed believes that it is loaded, or fears that it might well be.*

*This is where the law in action can be so different from the law as Parliament intended it to be. Anyone can start a court case. There is no requirement or reasonableness in so doing.*

*Of course, a poorly conceived case may lead to summary dismissal. That may in turn have costs consequences which may be a deterrent to some, but not to those who self-represent and against whom a costs order would be futile.*

***Furthermore, whatever words a parliamentary draftsman uses, there is likely to be a penumbra of uncertainty surrounding their application.***

***The parliamentarian in proposing or voting for a Bill may have in mind the prohibition of the most appalling and indefensible conduct. However, it is not only the most appalling forms of conduct that end up before civil courts.***

***The process of adversarial litigation forces courts and tribunals to define the boundaries of the meaning of words. As a consequence, while legislators may be focussed on the epicentre of a word, judges have to explore its penumbra, and this may lead, at least in the early years of an enactment, to unmeritorious cases being given much more attention than the merits of the case deserve****. (emphasis added )*

*Knowledge that such cases are being entertained in the courts is likely to add to the chilling effect of such laws.”*

Professor Parkinson gives a range of other examples of ant- vilification cases in various jurisdictions which have had a chilling effect on people of faith.

There are many other examples both in Australia and throughout the world, too numerous to mention, of religious freedom being restricted or prohibited. One of these cases is *[Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors](http://www.austlii.edu.au/au/cases/vic/VSCA/2014/75.html" \t "_blank)* .

In her paper **In Defence of the ‘ Four Freedoms** ‘ M/s Chelsea Pietsch says:

*‘Perhaps one of the most obvious threats to religious freedom in Australia comes from changes to anti-discrimination laws across the country.*

*There is an active constituency arguing to reduce or eliminate ‘religious exceptions’ that exist to safeguard legitimate expressions of religious freedom. This constituency seemingly has little understanding of, or respect for, the rights of religious communities to maintain their identity.*

*For example, the Sex Discrimination Amendment Act, which was passed in the final days of the Labour government, was amended to remove exemptions for Commonwealth aged-care providers.*

*As a result of this, it is no longer lawful for a Commonwealth-funded religious aged care facility to preference a married couple over an unmarried couple – whether heterosexual or homosexual.*

*Of course the government has a duty to ensure that all people, irrespective of their sexuality, have access to aged-care facilities. The problem is that the previous government sought to achieve this end by prohibiting people who share in one faith, and share similar expressions of that faith, from choosing to live together in their old age.*

*This was followed almost immediately by the NSW Anti-Discrimination Amendment (Private Educational Authorities) Bill 2013, which seeks to prevent private educational institutions from being able to discriminate against its students on the basis of attributes relating to their sexuality or relationship status.*

***However, such a proposal fails to recognize that many private educational institutions are religious communities established with the object of professing, practicing and teaching a particular religious faith. This involves much more than including prayers at school or college assemblies, or mentioning God in the curriculum.***

***Religious educational institutions are interested in the formation of the whole person, and often seek to establish a community that upholds the full teaching of the faith, including teachings on sex and sexuality.***

***Many religions, including orthodox Christian denominations, teach that sex is the celebration of a union between a man and a woman who have given themselves exclusively to one another in marriage.***

***In fact almost every major Australian Christian denomination has a doctrinal statement to this effect. As a result of this, Christian educational institutions may expect their students to uphold particular standards in relation to sexual practice.***

***This applies to heterosexual as much as to homosexual practices. It is not about being “anti-gay” or “anti-anything”, rather it is about proposing a way of life, and seeking to establish a community that upholds this way of life. ( emphasis added)***

*Threats to religious freedom don’t just stem from anti-discrimination measures. Limitations are also imposed by legislation that limits freedom of conscience and speech, both of which go hand in hand with religious freedom.*

*For example, the Victorian Abortion Law Reform Act (2008) requires medical practitioners who have a conscientious objection to abortion to provide a referral to another health professional who does not have such an objection.*

*Doctors and nurses are compelled to assist in abortion where there is a threat to the life of the woman, again irrespective of any conscientious objection they may have to the procedure.*

*Very recently, Tasmania passed the Reproductive Health (Access to Terminations) Act 2013 which similarly limits the right of conscientious objection in relation to the issue of abortion by requiring medical practitioners who conscientiously object to abortion to provide their patients with a list of those who do not hold such an objection.*

*The Tasmanian Reproductive Health (Access to Terminations) Act 2013 also limits freedom of speech and assembly by preventing members of the public from engaging in ‘prohibited behaviour’ within 150 metres of abortion clinics. The Act defines ‘prohibited behaviour’ to include engaging in ‘a protest’ that can be ‘seen or heard’ by a person accessing the clinic.*

*Abortion is an extremely sensitive issue, and no woman approaching an abortion facility should be harassed or threatened. However, the difficulty is that the definition of ‘prohibited behaviour’ is so broad that it has the possibility of imposing a hefty fine, or even a prison sentence, on those who engage in even the most peaceful of protests.*

*In 2001, the Victorian parliament introduced legislation called the Racial and Religious Tolerance Act which proved to be controversial in its application.*

*Section 8 of the Act states: ‘A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.’*

*In Islamic Council of Victoria (ICV) v Catch the Fire Ministries (CFM),1 the ICV claimed that CFM and two pastors had vilified Muslims in a church publication and seminar they had given on the topic of Islam.*

*At first instance, the Victorian Civil and Administrative Tribunal (VCAT) found against CFM and the pastors and ordered them to make a public apology in the Age and the Herald Sun acknowledging, amongst other things, that they had vilified “all Muslim people, their God, their prophet Mohammed and in general Muslim beliefs and practices”.*

*On appeal,2 however, the Court found that the Tribunal had incorrectly interpreted and applied the Act and referred the matter back to VCAT to be reheard in light of the Court of Appeal’s determination. The hearing never eventuated as the matter was settled through mediation.*

*However, the proceedings had come at a great emotional and financial cost to the pastors and also had the effect of stifling reasonable public discussion on the topic of religion.*

*This case provides evidence of how legislation can be used as a vehicle to promote hostility and division as opposed to mutual tolerance and respect.*

*We warn against creating or expanding legislation in a way that encourages litigation as the preferred method of dispute resolution.*

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 legislation, including the re-definition of marriage or the result of pressure being applied in the marketplace. Some have arisen from other sources such as a lack of protection for religious expression generally.

No employer, secular or with a religious ethos, should be expected to employ someone who acted and spoke with an ethos contrary to that of the employer and showed disrespect for the employer and its ethos generally. There should be no legislation to compel the employer to employ such a person.

The various cases referred to above are well documented. It is very concerning that Freedom of religion and conscience, and freedom of expression and speech are being seriously restricted by antidiscrimination laws in many countries.

In our society, there will be disagreements on controversial issues, and some offence will be taken at the opinions of others in a range of matters including those concerning religion.

Citizens , Religious Organisations , and Entities with a religious ethos must have the liberty to express their opinions and conduct their affairs free from overreaching, interfering ‘hate speech’ and anti- discrimination statutes. As a start of the necessary reform, Section 18C and the 2013 amendments to the Sex Discrimination Act should be repealed.

**PROTECTION OF FREEDOM OF RELIGION**

Article 18 of the International Covenant on Civil and Political Rights recognises that freedom of religion is not merely an individual right, but also a group right that enables people to form genuine faith-based communities.

The existing religious exceptions provide only a modest, confined recognition to the fundamental right to freedom of religion, guaranteed under article 18 of the ICCPR.

Freedom of religion is not adequately protected. It should not be classified as merely as an “exception” to a general prohibition that exists to promote freedom from discrimination. The use of this device is inadequate to protect fundamental and non-derogable rights.

Different human rights are frequently in conflict with one another and need to be appropriately balanced. There should be an appropriately generous zone of protection given, through the limitation clause, to those human rights that are identified in the ICCPR as both ‘fundamental’ and non-derogable.

**The Human Rights Committee in General Comment 18(Non-Discrimination), reads:**

**‘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.’**

The device of ‘exceptions’ does not grant freedom of religion the status that it has in international law.

A general limitations clause is the best means of giving effect to this principle and provides a framework for a foundational acknowledgement of religious freedom.

***A proposed definition of discrimination*:**

Professor Parkinson and legal scholar Professor Nicholas Aroney have proposed a definition of discrimination as follows:

*(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).*

*(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]*

A provision such as this is now essential. It would enable people of faith, religious organisations and communities to continue providing services and forming communities which maintain a particular ethos and character.

**CONCLUSION**

Freedom of religion and related freedoms are being undermined in Australian society due to an inordinate focus on other, sometimes conflicting rights, such as the right to non- discrimination. A re-balancing of rights needs to occur in favour of traditional rights.

Examples of threats to religious freedom in Australia have been provided, and instances of people of faith having their freedom quashed, often by legislation or legal proceedings, have been canvassed.

The threats are not merely theoretical but are a very real, present reality for increasing numbers of people. The problems of religious freedom and related freedoms must be addressed now before more difficulties develop.

The problems besetting freedom of religion will not be resolved by simply adding extra layers of legislation or strengthening legislative protections such as exemptions. Structural change is required.

The definition of discrimination proposed by Professor Parkinson and Aroney which contains within it an acknowledgement that certain activity is not legal discrimination needs to be adopted without delay.

In relation to anti-discrimination law generally, religious organisations and people of faith need the following :

1. Provisions which allows religious entities to employ staff using criteria which derive from the mission and identity of the organisation;
2. The right to give preference in some kinds of service provision to those for whom the service was established; and
3. Freedom to uphold moral standards within faith communities.
4. Improved protection for the human rights of the faithful in a new environment of hostility to religious faith. In particular, there is a need to extend the notion of reasonable accommodation to cover issues of conscience in the workplace. (Items 1-4 have been adapted from M/s Pietsch’s paper )

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February 2015