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Justice Stephen Rothman AM
Supreme Court of New South Wales

[redacted]

March 3, 2023

Dear Justice Rothman:

Submission in Response to the Australian Law Reform Commission Consultation Paper: Religious Educational Institutions and Anti-discrimination Laws, January 2023

Introduction:

Part 1: How to Respect Diversity in Relation to Discrimination and Equality.

Though rarely discussed as such, it is important to recall that, analytically, diversity and context are, or should be, *prior* to any analysis of equality or discrimination.[1] This is obvious when one considers any of the usual categories of discrimination. Age, sex, disability and, on occasion, race (Jewish and Indian for example), are all categories where, depending on context, discrimination is allowed and considered justifiable. Children are not allowed to drive cars in public or purchase alcohol or tobacco or get tattooed; those suffering from blindness can not fly planes; women are not qualified by their sex to be leaders in various traditions; women (and men) are allowed to have clubs or organisations that exclude men (or women) from membership and so on. Due to their function we exclude people from facilities such as prisons based on their sex as well.

Yet all these are discriminations on grounds usually prohibited in human rights frameworks (age, race, disability, sex, religion). We allow justifiable restrictions for these obvious cases due to context. It is not so at the margins where, for example, less physical aspects of the person are involved. This is where, for example, beliefs are at issue. Yet, even here, we allow, discriminations in certain circumstances and it is important to characterise accurately both the setting and the nature of the conflicts. Should either be inaccurate, what will follow will not satisfy the demands of justice which is that people and communities should be rendered "what is due" to them. This assessment of what is "due" is in part an aspect of our

[1] Iain T. Benson, "The Necessity for a Contextual Analysis for Equality and Non-discrimination" in Jane F. Adolphe, Robert L. Fastiggi and Michael A. Vacca (eds) *Equality and Non-discrimination:* (Eugene: Pickwick Publications, 2019) 63 – 75. ISBN: 978-1-5326-3721-6 (attached) 63-67 particularly in relation to why religion and sexual orientation are both "equality" rights so it is inappropriate to view a supposed conflict between "religion and equality" (as is often done in debates of this sort).

political theories and commitments and that, in turn, is based upon our conception of the human person, communities, our belief systems and traditions and the role of the State and its laws.[2]

Conscience and belief are not physical so not so easily characterised where distinctions are based upon these. Yet even here distinctions may not constitute discriminations which call upon laws for redress. This is because we understand, or have understood, that diversity and context are prior to any analysis of discrimination and recognise that if this priority is not maintained there is a risk that diversity and difference, both essential to pluralism, will be threatened by a quest for inappropriate uniformity. Difference is key to human freedoms since we allow people to choose between different options.

The theory of a liberal democratic society places a very high premium on respect for and maintenance of diversity - - which is to say, various forms of living. This includes diverse belief systems. It is an earmark of totalitarian and authoritarian regimes that it minimises rather than advances the scope for alternative viewpoints to those of the State or Dictator. Moves towards homogenisation of belief are, simply put, undemocratic and need to be recognised and avoided as much as possible.

The question of the application of anti-discrimination laws takes us into the heart of our conception of what it means to live in an open society in which belief systems, sometimes about the most central matters, are in conflict. Should marriage be such and such, should religious leaders be of such and such a belief system? Should the sex or beliefs of a person on matters such as sexuality and sexual conduct have any relevance at all for different communities of belief? What place does "gender" have in relation to sex? These are ideas about which different people and communities are in strong and sometimes irreconcilable disagreement. Are the moral beliefs of religions of any relevance to the nature of the community and how should a community adjust to those who, while they may not share the full tradition of such a community, still want to have some level of involvement? How much can an individual student and that student's parents insist that the community bend to their own beliefs? Should, in a sense, the "tail wag the dog"? These sorts of questions are amongst the most central and now contested aspects of human societies and are raised in relation to the application of discrimination to religious schools.

The Consultation Paper, with respect, fails to deal properly or even adequately with many of these questions.

Having reviewed, in detail, the Consultation Paper, it is this author's view that the approach taken fails to accord sufficient respect to diversity and pluralism. Religious communities are treated in a cardboard fashion in which their distinctive belief propositions, while legal, are going to become illegal or threatened and stigmatised under the guise of the application of "discrimination". Differences of belief do not constitute discriminations which the laws regarding human rights should overturn: yet this is the approach and the result of what will happen should the Final Report reflect the approach of the Consultation Paper *without significant adjustments*. More detailed reasoning, and a variety of the author's writings in this area, constitute the rest of this submission. The Conclusion includes the suggestion of the need for a Statement of Conduct in Relation to all Schools Public and Religious and this should be put together in consultation between civil society (particularly religious leaders) and the government.[3]

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[2] Iain T. Benson PhD Thesis, p. 141 ff especially the "right to be different" at f.n.# 402 citing the South African Constitutional Court decision of Justice Albie Sachs in *Fourie* (which cites the author's paper on "secularism") and the threats that inattention to genuine diversity it poses to appropriate analysis.

[3] The *Constitution of South African* at Section 234 anticipated the role that civil society could play to enhance the culture of democracy. The Author was one of the drafters of that country's *Charter of Religious Rights and Freedoms* (2010) which was the first use of Section 234. The Charter dealt with, inter alia, religious education (Sections 7 & 8) and the rights of parents and was signed by every religion (and many civil society organisations) in 2010. A similar approach, involving a significant "grass-roots" consultation could be adopted in Australia with, it is submitted, a considerable advance of relationships and understanding within and between religious communities and the surrounding society. The late Jean

Disagreements about Human Sexuality (Conduct and Identity) are Moral and Religious

As detailed above, the erroneous presuppositions in the Consultation Paper (set out in the Propositions), and the approach in the Recommendations, despite expressions that give the appearance of protections, will result in significant threats to the freedom of religious schools and restrictions on the free exercise of religion. The Consultation Paper fails to recognise that forced inclusion of those who, by example, disagree with the moral and religious views of religions, will weaken, unless carefully protected, the shared ethos and esprit des corps of religious communities.

This is because the freedom of religion includes not only the right to hold a belief but the right to *manifest*, *teach* and *disseminate* such beliefs. The Consultation Paper, which threatens all three of these, would, if implemented, significantly impair free exercise. Removal of the exemptions for religious exercise would send a message to religious schools, all of which have a different understanding of human sexuality than that advocated by the Consultation Paper: "you and your views are not welcome in our society". Such a message, embodied in the de facto forced inclusion of those who by their practices reject religious norms and morals, require association within religious communities with those who do not accept the norms. We might wish it were otherwise but sexual beliefs, like religious beliefs, cannot rightly be the subject of legal requirements. Religious communities differ, even amongst themselves, about what is and what is not acceptable in relation to "sexual orientation" and such things as the meaning and nature of marriage, "male" and "female" and what practices are acceptable and/or against the religious law.

Yet the Consultation Paper focuses only on the exclusion that those who disagree in practice with the religious viewpoints will suffer: it gives no real weight to the marginalisation which the religious will face if they are required to accept what their religion precludes them from accepting.

The law, and this needs stating, *allows* the viewpoints of the religious to continue. Yet this avoidance of giving any weight to the religious viewpoint is done under supposed advocacy of "non-discrimination" and "equality". Religious communities and their members, children and parents, would be stigmatized as excluded from the social contract and would watch their schools steam-rolled by ideologies they do not and cannot accept given their traditions and instantiated ontological commitments. These traditions teach respect and compassion but they also teach that creation involved a dyadic union of men and women emerging out of a cosmology that was created by a Divinity.

The religions teach respect but they also teach that there are "rights" and "wrongs" respecting marriage and human sexual conduct. All this is obvious yet reading the Consultation Paper one might think one is in a kind of parallel universe in which the only beliefs that matter and have any *practical* weight at all are those of people who hold views at variance, sometimes stark variance, with what the schools and their religious traditions hold to be, literally, sacred.

The Dilemma Stated: Why Should Religious Teachings be Allowed at all?

If religious schools cannot exclude by hiring or selecting those who, by their example, advocate beliefs at stark variance with the teaching of the particular religious tradition and school, it needs to be asked what the logic could be for allowing religions to *teach* alternative beliefs at all? Surely for students who are so sensitive that the very exclusion of a teacher or other student because of activity at variance with the school ethos would cause them damage, the *teachings* of that religion would be just as dangerous! The logic is clear: first the forced inclusion of those who disagree (and show it by practice) then, logically, challenges to the teachings themselves as discriminatory and objectionable.

Bethke Elshtain has written of the importance of "dialogue" and "public deliberation". See: Iain T. Benson "Foreword" (attached) f.n.#12

Not to see this is disingenuous and it appears to be directed to an endgame that is, whether it be admitted or not, anti-religious. The removal of religious exemption protections (for they *are* protections) presages the removal of any right to teach the religious world-views and beliefs themselves. The concerns of many religious leaders and parents and many schools themselves point to the fact that *some* religions feel threatened by these developments. That some places are not so threatened (Tasmania and Victoria feature frequently in this respect) is beside the point. We do not hold those who do not have fears against those who do. The response to that threat will not add to respect and peace - - it will likely exacerbate tensions - - the opposite, one would have thought, of what the Government should be seeking.[4]

Human sexuality is, in a sense, one of the battlefields of this contemporary period of history. People rightly do not want war, they want peace, they seek a modus vivendi. But such peace must be achieved fairly, with due respect for "the other" and not obliterating the beliefs and traditions of religious communities to the recent gains by advocates for alternative beliefs. That is what is at issue in this conflict: how can citizens in Australia live together with peace and harmony and with their more or less voluntary "life-worlds" intact and not colonised or parasitised by the coercive "systems" of law and politics.[5]

Religions Need to be Encouraged not Marginalised:

Because religions play an important role in relation to the maintenance of the sentiments and character necessary for free and democratic respectful societies and citizens, the attack on religions, albeit a cleverly veiled attack using the language of "inclusivity", "anti-discrimination" and "equality", poses a threat to the society as a whole. The approach in the Consultation Paper is ill conceived and poorly executed. Religions play, and have for millennia played a key role in the forming and protection of free societies. They will continue to do so, even if driven underground despite the depredations of these so-called "reforms" should they be enacted. Consider for a moment how the removal of exemptions will cause yet further social dislocation and litigation and other battles not conducive to respect and understanding of those with divergent sexual identity and practice beliefs (whether students, teachers or parents).

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[4] The goal of maintaining " a pluralistic and socially cohesive society" is spelled out in the Consultation as Principle 4 (p. 9).

[5] While not included here, Jürgen Habermas' helpful huristic of "life-worlds" and "systems" is analysed elsewhere. Habermas develops a theory in which "systems" (law and politics") have a tendency to colonise and parasitise "life-worlds". Religious communities are one of the many forms of life-worlds we inhabit. The central difference between a life-world and a system is that life-worlds are typified by "voluntary action" and systems are coercive. In the Consultation Paper the life-worlds of religious communities are being coercively colonised by the systems. Exemptions provided a *modus vivendi* - - the Consultation Paper recommends their removal. In result, therefore, the Consultation Paper recommends the effective sub-ordination of the beliefs of religious schools and communities to those of alternative approaches which further the State mandate ("system") that will inevitably attack the beliefs of the religious "life-worlds" themselves. See: Iain T. Benson, *"Pluralism lifeworlds, civic virtues and civil charters",* Conference Proceedings, *Religious Freedom and Religious Pluralism in Africa: Prospects and Limitations,* in M. Christian Green and Pieter Coertzen, (eds) *Religious Pluralism in Africa—Prospects and Limitations* (Stellenbosch: SUN Press, 2016) 287-306. ISBN: 978-1-928357-03-2. See, also, Raymond Wacks, *Understanding Jurisprudence* (Oxford: Oxford U.P., 4th ed., 2015) 218-221 referred to in Benson, "Foreword" at f.n. 20.

The Difference between Denominational and non-Denominational Schools:

Imagine a non-denominational school teaching that religious viewpoints on sexuality were wrong and unacceptable. Imagine a non-denominational school teaching not only that sexually divergent people should be respected but that they have a superior view of human sexuality! Some no doubt do imagine this. What should our response be to this? One would hope that any proper sense of neutrality in relation to the appropriate public sphere would cry "foul" to the usurpation of a neutral public school by a one-size fits all approach to human sexuality.

Imagine a school set up to further the LGBT+ ideology. Could that school practice "discrimination" in relation to hiring and retention and selection of students? Could it develop its own ethos and live by it? One would hope so. Yet the removal of exemptions would pose a strange result for such a school. If, say, one of its teachers were to convert to a fundamentalist form of religion after being hired in the LGBT+ school that school would not be able to exclude him or her. Imagine the conflicts, imagine the frustrations and hurt and exclusions that would be caused. Yet if sexual orientation and religion are, as they are, both "equality" categories then this scenario could happen. It is unlikely though. Why is it unlikely? Because it could be said that the LGBT+ ideology does not seek to establish its own schools and traditions - - it seeks to infiltrate and obliterate the traditions of other communities. That is hardly consistent with respect or diversity or, in fact, equality properly construed. What is put forward in this view of things (that of many religious communities) is the opposite of respect, concern and accommodation. Making the religious believers feel uncomfortable is no solution to those who feel uncomfortable for other reasons. The identity of religious people and their communities ought not to be sacrificed on the altar of making others feel more comfortable.

What Can be Done to Maximize Proper Respect for Different Beliefs Regarding Human Identity and Sexuality?

Assuming, as one should, that there are genuine concerns about the well-being of students with divergent beliefs regarding identity and sexuality in schools (non-denominational as well as denominational) what can be done to maximize *living together with disagreement* without threat to the ethos of the community and its beliefs both public and private and individually and in community? In an ethos specific community the beliefs of the community (its traditions and teaching and practice and dissemination) will be contrary to the beliefs of others. Those who wish to send their children to religious schools must take them as they find them and not try to change the ethos as that is not for them to change (outside, that is, the normal democratic aspects of the development of school rules etc.). This is a case of "if you do not like what is on offer, do not take it". With respect to education, that means, simply, go elsewhere.[6] Go to where you are accepted and where what is taught is what you as parents seek in relation to your rights in guiding the moral and religious education of your children (ICCPR and other documents).

An approach such as that which seems to have been embodied in the Consultation Paper suggests to students and parents implicitly or explicitly that they have a "right" to change the organic ethos of a

[6] On the equities of balancing in this area and why it is not appropriate to take the sort of approach recommended in the Consultation Paper see: Alvin A.J. Esau, "Freedom of Religion, Competing Rights and Spatial Priority Presumptions" in Iain T. Benson and Barry W. Bussey (eds.) *Supreme Court Law Review*, Second Series, Vol. 79 (2018). ISBN: 978-0-433-49514-6 (v.79) at 287 ff. Professor Esau argues that in the private sphere (not public) religious freedom rights should trump competing claims in most cases. To have shared public space in a pluralistic, liberal democracy requires that we also have limited government (and law) that preserves private space for individual and collective associational autonomy. Esau notes the minimal exclusion to the person who loses a job opportunity due to a religious exemption test and that such a person has not lost his or her religion or gender or sexual orientation but to force and exclusivist communitarian religious organisation to accept people of incompatible faiths into the community is a direct assault on that organisation's religion "at its very core".

denominational school. This is, in fact, an egregious form of disrespect. Unfortunately, this form of disrespect seems to be deeply embedded in the Consultation Paper itself. The Consultation Paper suggests that religious teaching may continue but since that must not cause any "upset" to a student, what is left for religious ontology of male and female and "tradition" once it is put through the abstract mill of "gender" and "transgenderism" (rejected by most traditional forms of religion) can scarcely be imagined.

Instead of the grounds for respect having been adequately established in the Consultation Paper, what has been established is, in fact, a grinding form of "convergence" in which under the constant "reforms" of an increasingly anti-religious state and powerful activism in society and government, religions will be backed over the regulatory cliff. [7] The approach suggested by the Consultation Paper will cause more exclusion, discrimination and inequality than it will solve.

Inappropriate entanglement with Religious Doctrine:

In fact, what the approach outlined by the Consultation Paper will usher in is just the sort of "entanglement" in the affairs of religion cautioned against by the Supreme Court of Canada in the famous sukkot decision where Justice Iacobucci in giving the majority decision of that court held as follows:

> [T]he State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of the subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. *Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.*[8]

Given that the matters at issue with respect to religious exemptions and their application and scope, are, without debate, related to "commandments", obligations, custom and ritual (and others), not only courts, but politics and legislatures are invited, by the approach taken in the Consultation Paper, to invade and scrutinise the very inner sanctum of religious bodies on matters that are not (as are such things as female genital mutilation, cannibalism or human sacrifice) ruled out by laws of general and complete application (such as in the criminal codes). It is legal to hold religious views on marriage, sexual conduct appropriateness and what conceptions related to sexual identity are acceptable, morally licit, kosher, haram and so on.

So what *can* be done?

PART II A Better Approach for Australia, Human Rights and Associational Liberty: The Creation, With the Assistance of Religions Themselves, of a Code of Conduct for Education - - public and private, non-religious and religious.

The goal of any sound government policy being to provide maximal respect for all citizens irrespective of their lawful belief -systems, the government should make this clear to everyone. The current Consultation Paper is confusing and unclear about its scope and what is and is not "allowed". This will cause anxiety at the least and anger at the most unfortunate end of the spectrum.

What is needed is an approach that is clear, sensible and respects the principles set out in this submission. Ideally, the government would develop a "code of conduct" in discussion with the denominational sector

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[7] The failure of many courts to develop a satisfactory vision of social harmony based on genuine accommodation and acceptance of difference rather than "uniformity" is commented upon by Dean Mary Anne Waldron: see, Benson "Foreword" f.n. #19. The Consultation Paper fails to develop more than a "window-dressing" version of accommodation.

[8] *Syndicat Northcrest v. Amselem* [2004] S.C.J. No. 46 at para. 50 emphasis added.

itself. It must provide to religious communities and the parents who will send their children to denominational schools, a clear statement about how respect is not the same thing as agreement. This needs to be stated for the good of all citizens. It should address both denominational and non-denominational schools:[9]

Public schools:

Such a statement must make it clear that public schools must respect both sides of issues involving identity and sexuality and not stigmatise traditional beliefs as hateful in themselves and stand strongly against bullying for any reason. They should highlight that religions also support compassion, mercy, forgiveness and respect but have their own views about what constitutes the good and faithful life for their own communities in relation to the nature of "male" and "female" and the meaning of "gender" and with respect to questions of sexual identity. [10] The public schools must also do their part to inculcate respect for religions and different positions.[11]

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[9] This terminology, denominational and non-denominational is preferable to public and religious. The philosophy of why this is relates to the fact that religion is allowed both in private and in public and religious citizens may live in both spheres. While the public/private distinction is important, it is also useful to remind ourselves that the public is made up of believers of all sorts - - religious and non-religious. Using the language of "denominational" and "non-denominational" makes clearer what we are speaking about.

[10] In an important and finely grained analysis of different approaches to human rights, cautioning against making human rights into an idol, Michael Ignatieff has noted that: "…in the wake of the Holocaust human rights should face an enduring intellectual challenge from a range of religious sources, Catholic, Protestant and Jewish, all of whom make the same essential point: that if the purpose of human rights is to restrain the human use of power, then the only authority capable of doing so must lie beyond humanity itself, in some religious source of authority" Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001) 81-82. Harold Laski noted the importance of freedom to a society and law's role in this respect but also4 that the *mores* of society are outside the sphere within which law can [legitimately] operate. See: Benson, "Foreword" p. xxxviii, f.n.#40.

[11] This is important due to the fact that "secularism" has, since its earliest origin in the work, mid nineteenth century of George Jacob Holyoake and later secularists, a focus on minimising the public relevance of religion. Such an antagonistic stance towards religion needs to diminish for religions to have the respect they deserve in "secular" societies: see, "Considering Secularism" in Douglas Farrow ed., *Recognizing Religion in a Secular Society* (Montreal: McGill/Queens Press, 2004) at pp. 83 - 98 [cited with approval by the Constitutional Court of South Africa in *Minister of Home Affairs and Another v Fourie and (Doctors for Life International and Others,* amici curiae); *Lesbian and Gay Equality Project and Others v Minister of Home Affairs* 2006 1 SA 524 (CC) and reference paras 94–98 on not subsuming one sphere of beliefs to another. In relation to the co-existence of different belief systems, Justice Jamie Campbell of the Nova Scotia Court of Appeal rejected the concept of "deep equality", favouring instead "deep diversity" and held:

> There is no test for "aberrant" attitudes or "correct thinking". Lawyers are entitled to believe what they want. They are entitled to form associations of like-minded lawyers. There is no requirement to disaffirm religious or other beliefs that are out of step with equality values. There is no requirement to leave those beliefs at the door of the church, synagogue, temple, mosque or meeting hall, even if those beliefs result in discrimination being systematically practiced by the institution of which the lawyer is a member.

Trinity Western University v. Nova Scotia Barrister's Society [2016] N.S.J. No. 292, (para.258). Freedom of thought, belief, expression and manifestation of beliefs are essential for teachers as well as lawyers and the reasoning of Justice Campbell applies *mutatis mutandis*. See, Iain Benson "Foreword" p. xxxix f.n. #41.

Denominational Schools:

Denominational schools should make it clear that religious schools must respect (but not agree with) both sides of issues involving identity and sexuality and not stigmatise non-traditional beliefs as hateful in themselves and stand strongly against bullying for any reason. They should highlight that religions support compassion, mercy, forgiveness and respect but have their own views about what constitutes the good and faithful life for their own communities particularly in relation to such questions as the nature of "male" and "female" and the meaning of "gender", the nature and purpose(s) of marriage and the understanding of human sexuality and identity.

Harold Berman, noted scholar of law and religion, once observed:

> …law and religion stand or fall together; and if we wish law to stand, we shall have to give new life to the essentially religious commitments that give its ritual, its tradition and its authority – just as we shall have to give new life to the social, and enhance the legal dimensions of religious faith.[12]

There is much involved in anything that diminishes the role and scope of religious communities. There is little sense in the Consultation Paper that religions are entitled to respect as *communities*; rather, there is a focus throughout on the protection of the dissenting student or parents or teachers against the organic ethos of the religious community itself.[13] As such the Consultation Paper is corrosive, furthers the well-identified crisis of liberalism that it is unduly individualistic and as such it is inconsistent with encouragement and affirmation of diverse religious beliefs and communities and the importance this plays in Australian society and the development of just law itself: this needs to be recognised and criticised and corrected in the Final Report.

It is useful to recall the cautionary words of liberal theorist Michael Ignatieff:

> We need to stop thinking of human rights as trumps and begin thinking of them as a language that *creates the basis for deliberation*. In this argument, the ground we share may actually be quite limited: not much more than the basic intuition that what is pain and humiliation for you is bound to be pain and humiliation for me. But this is already something. In such a future, shared among equals, rights are not a universal credo of a global society, not a secular religion, but something much more limited and yet just as valuable: the shared vocabulary from which our arguments can begin, and the bare human minimum from which differing ideas of human flourishing can take root.[14]

This being so, I would strongly suggest that the Consultation Paper's approach be rethought and rejected or at least strongly qualified in line with the comments above.

The Consultation Paper fails to respect "differing ideas of human flourishing" and its few consultations and meetings demonstrates that it is not in any way adequately reflective of Australian society in its width and depth. Of greater concern, the Consultation Paper assumes implicitly (though it tries to deny this explicitly) the eradication or minimalization of alternative viewpoints on human sexuality and identity in how it loads the analysis. It fails to understand religious schools as "organic" and "ethos permeated" institutions. The approach it takes allows for and recommends the balkanization of staff hiring and

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[12] Benson "Foreword" p. xxxvii f.n. 35 and ff.
[13] Iain T. Benson, PhD Thesis 138 ff. Chapter 6 of the thesis contains two proposals to protect religious diversity while at the same time ensuring that claims for religious respect are warranted. One of these is a requirement that job rules be properly advertised, fairly administered and that they satisfy the "integrity hurdle" and the other is a rebuttable presumption in favour of diversity (at 160-167).
[14] Michael Ignatieff, *Human Rights as Politics and Idolatry*, 95.

student enrolments.[15] While some of its goals and aspirations are important (mutual co-existence, respect for pluralism and social cohesion), the manner of the proposed implementation of this goal (removal of exemptions) is seriously flawed and will tend to further the divisions already present in society rather than work to their amelioration.

Whether the Final Report can correct these manifold errors of direction and emphasis remains to be seen but it is clear that some serious efforts are needed in relation to the deficits identified in this submission if the suggested proposals are not to make worse an increasingly difficult situation in Australian society.

Drawing, as the suggestions above have done, on the experience of other societies, there is a need for greater deliberation, constructive engagement and creative suggestions. I have attempted some of these in relation to establishing a Joint Code of Conduct but no doubt others could be imagined.

THE FOREGOING IS RESPECTFULLY SUBMITTED,

Iain T. Benson,

Attachments:

1) Iain T. Benson, PhD Thesis "An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion." (University of the Witwatersrand, 2013, unpublished); (attached).

2) Iain T. Benson 'The Necessity for a Contextual Analysis for Equality and Non-discrimination' in Jane F. Adolphe, Robert L. Fastiggi and Michael A. Vacca (eds) *Equality and Non-discrimination* (Eugene: Pickwick Publications, 2019) 63 – 75. ISBN: 978-1-5326-3721-6 (attached)

3) Iain T. Benson, *"Two Errors in Relation to Respecting Religious Rights: Driving a Wedge Between Religion and Ethics/Morals and Treating All Kinds of Religious Employers the Same"* Canadian Diversity/ Diversité Canadienne, (2012). Volume 9:3 Summer pp 20 – 24 [Invitation piece for the Ontario Human Rights Commission] (attached)

4) Iain T. Benson, "Foreword: The Limits of Law and the Liberty of Religious Associations", Iain T. Benson and Barry G. Bussey, (eds). *"Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: Lexis Nexus, 2018) xx-xli. ISBN: 978-0-433-49562-8 and republished as an edited special issue Iain T. Benson and Barry G. Bussey (eds), *Supreme Court Law Review*, Second Series, Vol. 79 (2018). ISBN: 978-0-433-49514-6 (v.79) (Supreme Court Law Review version attached)

[15] Iain Benson, PhD Thesis (attached) deals with the idea of a permeated ethos and how to properly respect such settings at Chapter 5, pages 127 ff. The entire chapter may be of assistance to the Commission and the distinctions made are, it is suggested, more finely grained than the assumptions of the Consultation Document. The rationale for religious exemptions is on page 135 and footnote #391 sets out the nub of the problem of the role of law in relation to the independence of associations.

5) Iain T. Benson, "Should There be a Legal Presumption in Favour of Diversity? Some Preliminary Reflections" in Iain T. Benson and Barry G. Bussey, (eds). *"Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: Lexis Nexus, 2018) 3 – 25. ISBN: 978-0-433-49562-8; and republished as an edited special issue Iain T. Benson and Barry G. Bussey (eds), *Supreme Court Law Review*, Second Series, Vol. 79 (2018). ISBN: 978-0-433-49514-6 (v.79). (**not attached** but available in the Supreme Court Law Review version at #4 above).

6) Iain T. Benson "Getting Religion and Belief Wrong by Definition: A Response to Sullivan and Hurd" in Iain T. Benson, Michael Quinlan and A. Keith Thompson (eds) *Religious Liberty in Australia: A New Terra Nullius?* (Connor Court/Shepherd Street Press, 2019) 332-357. ISBN: 9781925826623 (attached).

End of Submission