# Submission

for the

# Religious Freedom Roundtable

to the

# Australian Human Rights Commission

Mr Tim Wilson
Human Rights Commissioner
Level 3, 175 Pitt Street
Sydney NSW 2000
**Telephone:** 02 9284 9600
**Facsimile:** 02 9284 9611
**Email:** rights@humanrights.gov.au
**Website:** http://www.humanrights.gov.au/

by

# FamilyVoice Australia

4th floor, 68 Grenfell St, Adelaide SA 5000
**Telephone:** 1300 365 965
**Fax:** 08 8223 5850
**Email:** office@fava.org.au
**Website:** www.fava.org.au

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# 1. Introduction

On 1 September 2015, Human Rights Commissioner Tim Wilson called for submissions on religious freedom to inform discussions on the issues that should be considered and prioritised as part of a Religious Freedom Roundtable. The roundtable will be ongoing, with the inaugural meeting to be held in November 2015.[1]

FamilyVoice Australia is a national Christian voice – promoting true family values for the benefit of all Australians. Our vision is to see strong families at the heart of a healthy society: where marriage is honoured, human life is respected, families can flourish, Australia's Christian heritage is valued, and fundamental freedoms are enjoyed.

We work with people from all mainstream Christian denominations. We engage with parliamentarians of all political persuasions and are independent of all political parties. We have full-time FamilyVoice representatives in all states.

FamilyVoice has had a longstanding interest in freedom of religion in Australia. We have made numerous submissions to inquiries touching on this right, particularly in relation to antidiscrimination and antivilification laws and proposals for bills or charters of rights.

# 2. Terms of Reference

The Commissioner has indicated he is particularly interested in receiving submissions that touch on the following issues:

- Government laws and regulations that limit the right to religious freedom.
- Preserving religious freedom when an organisation receives taxpayer's money to provide a public service.
- Balancing the right to religious freedom and equality before the law – what are the areas of shared agreement?
- Developing mechanisms to support religious inclusion and social cohesion.[2]

The Commissioner has also stated that feedback is welcome on the '*Statement of purpose and Guiding principles*' and any other area of law or policy.

FamilyVoice has received an extension for its submission to 2 October 2015.

# 3. Freedom of Religion

## 3.1. The nature of freedom of religion

The concept of *freedom of religion* arises from the capacity of humans to order their lives by thought, belief and reason, rather than by instinct. Governments acknowledging the humanity of their citizens will recognise their inalienable right to freedom of thought, belief and opinion, including the right to change religion or belief.

Christians understand the capacity of humans for thought, belief and reason to arise from being made in the image of God. As the *Stanford Encyclopedia of Philosophy* explains:

> *One of the chief features of the divine image in human beings, then, is the ability to form beliefs and to acquire knowledge. As Thomas Aquinas puts it, "Since human beings are said to be in the image of God in virtue of their having a nature that includes an intellect, such a nature is most in the image of God in virtue of being most able to imitate God".*[3]

Freedom of religion includes three distinct elements:

- the freedom to form, hold and change opinions and beliefs without government interference;
- the freedom to manifest those beliefs and opinions in public or private through speech and actions;
- the freedom of parents to raise their children in accordance with their opinions, beliefs and practices.

The International Covenant on Civil and Political Rights recognises these rights in Article 18:

> *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.*[4]

The Australian Constitution, section 116, enshrines the principle of non-interference by government in religious belief or practice:

> *The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*[5]

Consequently, the Commonwealth Parliament:

- cannot establish a State church;[6]
- cannot enforce religious observance;[7, 8, 9]
- cannot prohibit religious observance;[10] and
- cannot impose a religious test for public office.[11]

The High Court of Australia has confirmed, in its judgement on the "Scientology case", that the legal definition of religion involves both belief and conduct.[12] Justices Mason and Brennan held that "for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that

belief…"[13] Consequently, freedom of religion in Australia involves both freedom of belief and freedom of conduct giving effect to that belief.

As Augusto Zimmermann, a senior law lecturer at Murdoch University, has stated:

> *…religion is not an isolated component of life, because religion has broad, holistic implications for the lives of its adherents as a worldview that shapes the way individuals think and act.*[14]

The most pressing human rights issues associated with freedom of religion in Australia today are the increasing denial of religious conscience and religious practice. This denial of religious freedom is often due to the application of antidiscrimination laws.

Many parts of antidiscrimination laws represent a direct assault on religious freedom by prohibiting some conduct that may be required to give effect to religious beliefs. Religious beliefs generally make moral distinctions between right and wrong, between good and bad, whereas antidiscrimination laws may declare conduct giving effect to such moral distinctions to be unlawful.

## 3.2. Justifiable limitations

Given that thought, belief and opinion are such fundamental parts of being human, freedom of belief, conscience or religion can be justifiably limited only to prohibit *serious* harm to other individuals or society.

The ICCPR recognises this when it states in Article 18(3) that limitations are justifiable only "to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

Religiously motivated violence, such as the siege of the Lindt Café in Sydney by Man Haron Monis,[15] that threatens public safety and order, is clearly unacceptable and may be justifiably prohibited. Even in the face of harsh mockery, such violence is never justified, as political commentator John Stonestreet aptly noted:

> *What happened in Paris [with Charlie Hebdo] was despicable. No matter how offensive the magazine's cartoons might have been, nothing justifies murder.*[16]

Limitations are also justified to protect individuals from serious harm. For example, in some parts of the world, abhorrent religious practices occur. Ritual child sacrifice, perpetrated by animistic witchdoctors on behalf of some people seeking fame and fortune, is still known in parts of sub-Saharan Africa.[17,18] Female genital mutilation is practised in some Islamic countries and promoted by some Islamic authorities.[19,20] With increasing migration from countries where these practices are known to occur, Australia must be vigilant prohibiting these harms to individuals.

## 3.3. Unjustifiable limitations

Antidiscrimination laws commonly include exceptions or exemptions for religious beliefs, practices or organisations. However such exemptions have often proved to be inadequate and have denied people the right to act according to their conscience informed by their beliefs.

A recent example is the case of Christian Youth Camps v Cobaw Community Health (Cobaw) in the Victorian Court of Appeal.[21] A brief summary of the case from the Queensland University of Technology follows:

> *This case involved a consideration of the interaction of the rights to freedom from discrimination and freedom of religion. The respondent (Cobaw) is an organisation concerned*

> *with the prevention of youth suicide. The appellant (CYC) had a camp facility established by the Christian Brethren Trust, connected with a church known as the Christian Brethren. The Christian Brethren are opposed to homosexual activity as being against biblical teaching. Cobaw wished to hire a camp facility from the appellants for the use of same sex attracted young people. CYC (by its camp manager) refused.*
>
> *It was held in the Victorian Civil and Administrative Tribunal (VCAT) that the refusal amounted to unlawful discrimination on the basis of the sexual orientation of those who would be attending the proposed camp. Before the Tribunal, CYC contended that if, contrary to their principal submission, the refusal would otherwise have constituted unlawful discrimination, the exemption provisions in the Equal Opportunity Act 1995 (Vic) (the EO Act) concerning religious freedom were applicable, such that there had been no contravention. These exemptions apply to conduct 'by a body established for religious purposes' (section 75(2)) and to discrimination by a person which is necessary for that person 'to comply with the person's genuine religious beliefs or principles' (section 77). The Tribunal held that neither exemption was applicable.*
>
> *On appeal to the Court of Appeal, CYC disputed the finding that its refusal was unlawful discrimination, maintaining that there was a fundamental distinction between an objection to 'the syllabus' to be taught at the proposed camp — that is, to beliefs or opinions which would be expressed by Cobaw to those attending the camp — and discrimination on the basis of the sexual orientation of those attending. The Tribunal's decision was upheld by a majority of the Court of Appeal in this judgment.*[22]

The Cobaw case, and other similar cases both in Australia and overseas, amount to a conflict between two systems of belief. The complainant, namely the person who initiated the discrimination complaint, considered certain behaviour morally acceptable. The respondent, against whom the complaint was made, believed that behaviour to be morally unacceptable. The effect of the Tribunal's decision, upheld by the Appeal Court, was to impose the complainant's belief system on the respondent, thereby denying the latter's freedom of conscience.

Since the Cobaw organisation was able to book an alternative venue for its camp, its freedom to act in accordance with its beliefs was not compromised by the decision of CYC camp manager to decline the Cobaw organisation's request.

The supposed exemptions for religious beliefs and religious organisations, in this case and most other similar cases, proved to be inadequate and ineffective. They have failed to protect the freedom of conscience of the respondent. Instead, the law has enabled the complainant to trample on the freedom of religion of the respondent.

How can mutually contradictory systems of belief be given equal respect in society? The solution is free and voluntary exchange. Former Nobel Prize winner Milton Friedman argued that:

> *freedom of exchange … enables people to co-operate voluntarily in complex tasks without any individual being in a position to interfere with any other… It provides for co-operation without coercion; it prevents one person from interfering with another.*[23]

The current law, as interpreted by the Tribunal and the Appeal Court, empowers one person to interfere with another. It has the deleterious effect of enabling the buyer of a service to coerce the seller of the service. The outcome undermines cooperation, breeds disharmony and resentment, and is socially counterproductive.

This Act, and similar legislation in other jurisdictions, should be amended to require free and voluntary exchange in situations involving a conflict of beliefs between the provider and recipient of goods and services.

# 4. Areas of Particular Interest to the Commissioner

## 4.1. Government laws and regulations that limit the right to religious freedom

### *4.1.1. Sex Discrimination Act 1984*

Some of the grounds on which discrimination is prohibited in the *Sex Discrimination Act 1984* directly contradict moral values of the Christian faith and other faiths.

In particular, sections 5A, 5B and 6 prohibit discrimination on the grounds of *sexual orientation*, *gender identity* and *marital or relationship status* respectively. Yet all of these matters are highly controversial, with different sections of the community having strongly held mutually contradictory beliefs about their moral acceptability or otherwise.

**Sexual orientation**

The ground of *sexual orientation* raises the question of the morality of *homosexual behaviour*. This matter is addressed in the following definitive statement by the Catholic Church:

> *The community of faith today, in unbroken continuity with the Jewish and Christian communities within which the ancient Scriptures were written, continues to be nourished by those same Scriptures...*
>
> *Providing a basic plan for understanding this entire discussion of homosexuality is the theology of creation we find in Genesis. God, in his infinite wisdom and love, brings into existence all of reality as a reflection of his goodness. He fashions mankind, male and female, in his own image and likeness. Human beings, therefore, are nothing less than the work of God himself; and in the complementarity of the sexes, they are called to reflect the inner unity of the Creator. They do this in a striking way in their cooperation with him in the transmission of life by a mutual donation of the self to the other...*
>
> *The Church, obedient to the Lord who founded her and gave to her the sacramental life, celebrates the divine plan of the loving and live-giving union of men and women in the sacrament of marriage. It is only in the marital relationship that the use of the sexual faculty can be morally good. A person engaging in homosexual behaviour therefore acts immorally.*[24]

Many Protestant leaders express similar views. For example, Matt Slick, president and founder of the Christian Apologetics and Research Ministry (CARM), writes:

> *Homosexuality is clearly condemned in the Bible. It undermines God's created order where He made Adam and Eve, a man and a woman, to carry out his command to fill and subdue the earth (Gen. 1:28). Homosexuality cannot carry out that mandate. In addition, it undermines the basic family unit of husband and wife which is the God-ordained means of procreation. And, believe it or not, it is also dangerous to society.*[25]

## Gender identity

The ground of *gender identity* raises questions about gender dysphoria (or gender identity disorder) and "sex change" operations.

The reality is that "sex change" is a myth. Neither hormone treatment nor surgery can actually change a person's sex. Australian resident Alan Finch, who decided at age 19 years to transition from male to female and had genital surgery in his 20s, later regretted this action which he described as "genital mutilation". At age 36, he told the *Guardian* newspaper in 2004:

> *transsexualism was invented by psychiatrists… You fundamentally can't change sex … the surgery doesn't alter you genetically. It's genital mutilation. My 'vagina' was just the bag of my scrotum. It's like a pouch, like a kangaroo. What's scary is you still feel like you have a penis when you're sexually aroused. It's like phantom limb syndrome. It's all been a terrible misadventure. I've never been a woman, just Alan … the analogy I use about giving surgery to someone desperate to change sex is it's a bit like offering liposuction to an anorexic.*[26]

The degree of regret among those who have had "sex-change" surgery is largely hidden, as commentator Stella Morabito explains:

> *The transgender lobby actively polices and suppresses discussion of sex-change regret, and claims it's rare (no more than "5 percent.") However, if you do decide to "de-transition" to once again identify with the sex in your DNA, talking about it will get you targeted by trans activists…*
>
> *Finch went on to sue the Australian gender identity clinic at Melbourne's Monash Medical Center for misdiagnosis. He also was involved in starting an outreach to others called "Gender Menders." The reaction from the transgender community was fast, furious, and abusive...*[27]

Not only is "sex-change" delusional, both Catholic and Protestant theologians consider it immoral. CARM president Matt Slick comments on sex-change operations as follows:

> *The Bible does not address this issue because it was not around at the time. But, no, sex change operations are not okay. God created people as male and female (Gen. 1:27)... Therefore, to change the gender of a person through an operation is a violation of the natural birth gender that God has ordained for the person. It also violates the distinction of those attributes which designate a male from a female.*[28]

Regius Professor of Moral and Pastoral Theology at the University of Oxford, theologian Oliver O'Donovan, has argued:

> *"If I claim to have a 'real sex', which may be at war with the sex of my body and is at least in a rather uncertain relationship to it, I am shrinking from the glad acceptance of myself as a physical as well as a spiritual being, and seeking self-knowledge in a kind of Gnostic withdrawal from material creation."*[29]

## Marital or relationship status

The ground of *marital or relationship status* raises the question of the moral status of homosexual unions, which is addressed in the following statement by the Catholic Church:

> *Society owes its continued survival to the family, founded on marriage. The inevitable consequence of legal recognition of homosexual unions would be the redefinition of marriage, which would become, in its legal status, an institution devoid of essential reference to factors linked to heterosexuality; for example, procreation and raising children. If, from the legal*

> *standpoint, marriage between a man and a woman were to be considered just one possible form of marriage, the concept of marriage would undergo a radical transformation, with grave detriment to the common good. By putting homosexual unions on a legal plane analogous to that of marriage and the family, the State acts arbitrarily and in contradiction with its duties.*
>
> *The principles of respect and non-discrimination cannot be invoked to support legal recognition of homosexual unions. Differentiating between persons or refusing social recognition or benefits is unacceptable only when it is contrary to justice. The denial of the social and legal status of marriage to forms of cohabitation that are not and cannot be marital is not opposed to justice; on the contrary, justice requires it.*[30]

Matt Slick asks: "Would Jesus okay same sex marriage?" His answer is:

> *No, Jesus would not approve of same sex marriage. He taught about marriage being between a man and a woman, never anything else. You just can't read into his words a pro-homosexual interpretation. Homosexuality was known to him, particularly since it's clearly condemned in the Old Testament (Leviticus 18:22; 20:13).*[31]

The fact that many Christians, as well as adherents of other faith traditions, hold strong beliefs that are antithetical to these protected attributes means that conflict over these attributes is almost inevitable. The effect of the Act is to empower those who have espoused one value system to impose their beliefs on those with contrary beliefs. Far from fostering social harmony, the Act is likely to exacerbate social divisions.

## Religious exemptions

The religious exemptions set out in sections 37 and 38 of the Act are completely inadequate. Section 37 applies only to religious bodies on limited matters such as the selection, training or appointment of priests, ministers or members of religious orders. Section 38 applies only to educational institutions established for religious purposes on limited matters related to the employment of teachers or the provision of educational services.

The exemptions generally apply only in relation to "an act or practice that conforms to the doctrines, tenets or beliefs of that religion". The consequence of this provision is that antidiscrimination tribunals and courts are required to determine the "religion" in question and its "doctrines, tenets or beliefs", which may be understood by adherents but not carefully defined in writing.

Moreover, the exemptions are further restricted to actions done "in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed". The "doctrines, tenets or beliefs" of a religion and the "susceptibilities of adherents" are matters more theological than judicial. Courts, tribunals and judges are ill-equipped to determine such matters, as Justice Nettle observed in his *Catch the Fire* judgement: "In my view it was calculated to lead to error for a secular tribunal to attempt to assess the theological propriety of what was asserted at the Seminar."[32]

Antidiscrimination tribunals have an appalling record of determining such things as "religion", "doctrines, tenets or beliefs" and "susceptibilities of adherents". In the *Catch the Fire* case in the Victorian Court of Appeal, Justice Nettle determined that the Victorian Civil and Administrative Tribunal had erred in nineteen findings.[33] In the *OV & OW v Wesley Mission* case, the NSW Supreme Court found that the NSW Antidiscrimination Tribunal had wrongly identified the "religion" (at 41), wrongly determined the question of "doctrinal conformity" (at 45) and was wrong about "religious susceptibilities" (at 46).[34] The huge costs incurred by respondents in seeking to defend their religious freedom are grossly unjust.

Courts and tribunals should not be asked to determine such things as the "doctrines, tenets or beliefs" or "injury to the religious susceptibilities of adherents" of a religion or creed. Indeed, the Australian Constitution s 116 provides that: "The Commonwealth shall not make any law … for prohibiting the free exercise of any religion…" To comply with the Australian Constitution, the *Sex Discrimination Act* should not prohibit the free exercise of religion.

No exemptions are provided for other corporate bodies or natural persons who adhere to religious beliefs and practices. This is a flagrant failure to take religious belief seriously. Religious exemptions should be recognised for any legal person – natural or corporate – who holds a genuine and conscientious belief that some of the protected attributes are morally unacceptable.

The Act is commonly interpreted to give freedom from discrimination a wide scope but only a narrow scope to exemptions. The result is that freedom of association and other fundamental freedoms are suppressed.

As a further example, in 1998 the Catholic Education Office (CEO) of the Archdiocese of Sydney refused an applicant classification as a teacher because of her "'high profile as a co-convenor of the Gay and Lesbian Teachers and Students Association and her public statements on lesbian lifestyles".[35]

The CEO claimed a religious exemption under the *Sex Discrimination Act 1984* on the basis that homosexual behaviour ran contrary the "doctrines, tenets, beliefs and teachings of the Church", which a teacher would be required to uphold. The matter was decided by the Australian Human Rights Commission (at that time the Human Rights and Equal Opportunity Commission).

The AHRC found against the CEO, not only acting as arbiter of what constituted Catholic teaching, but ruling that Catholic beliefs ran in favour of the complainant, Jacqui Griffin. In its ruling, the AHRC went so far as to say:

> *If the employment of Ms Griffin would injure the religious susceptibilities of these students and their parents, the injury would be founded on a misconception. Indeed it would be not an injury to their religious susceptibilities but an injury to their prejudices.*[36]

Such arbitrary use of anti-discrimination provisions demonstrates how severely restricted freedom of religion has become.

A general religious exemption from provisions of the Act should be modelled on the provision in the *Defence Act* for exemption from military service:

> *(1) The following persons are exempt from service in the Defence Force in time of war…*
>
> *(h) persons whose conscientious beliefs do not allow them to participate in war or warlike operations;*
>
> *(i) persons whose conscientious beliefs do not allow them to participate in a particular war or particular warlike operations;*[37]

Sections 37 and 38 should be replaced by a simple provision for exemption from the Act for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act.

In the case of a complaint, the role of a tribunal or court would then be limited to determining whether the person held conscientious beliefs that did not allow them to comply with the Act.

***Recommendation 1***

***The Sex Discrimination Act 1984 unjustly interferes with freedom of religion. It should be amended by replacing sections 37 and 38 with a simple provision for exemption from the Act for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act.***

### 4.1.2. Age Discrimination Act 2004

The *Age Discrimination Act 2004* outlaws discrimination on the grounds of age in a number of areas detailed from section 18 – 30 and including: employment; education; the provision of goods, services and facilities; and accommodation.

The Act provides an exemption in section 35 for bodies "established for religious purposes", which is more general than the provisions in the *Sex Discrimination Act* (sections 37 and 38) that apply only to priests, ministers and members of religious orders, and to educational institutions.

However, the exemption only applies if an act or practice conforms to the doctrines, tenets or beliefs of the religion or is necessary to avoid injury to the religious sensitivities of the adherents.[38]

The Catholic Church has rules governing the age of bishops and priests. Clause 1031 of the Church's Code of Canon Law stipulates that the minimum age of a deacon is 23 years and a priest 25 years,[39] while clause 538 requires that a priest submit his resignation at the age of 75 to the local bishop for consideration.[40]

Are these matters "doctrines, tenets or beliefs", or are they policy matters? Arguably, in the case of the Catholic Church, given the age requirements are stipulated in its Code of Canon Law, they can be considered to come within the exception. But what of a religion which places such restrictions but that does not have such an explicit code? Would it be covered? Does it make a difference if the decision is made by a lay parish council as opposed to a council of clerics?

Clearly, the exception for bodies "established for religious purposes" is too narrow and the test may result in inconsistent outcomes for different religions. Further, the test requires courts to consider what are "doctrines, tenets and beliefs" of a particular religion. But courts may be ill equipped to make sound judgements about such theological matters. A solution is to extend the exemption to any person natural or corporate whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act.

***Recommendation 2***

***The Age Discrimination Act 2004 unjustly interferes with freedom of religion. A simple provision should be added for an exemption from the Act for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act.***

### 4.1.3. Disability Discrimination Act 1992

The *Disability Discrimination Act 1992* prohibits discrimination on the grounds of disability in a number of areas laid out in sections 15 - 29, including: employment; access to premises; goods, services and facilities; and accommodation.

The definition of disability is defined broadly in section 4 and includes (emphasis added):

> a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in **disturbed behaviour**.[41]

Division 5 of the Act lists a number of exemptions, including for some charitable activities, however, there is **no religious exemption**.

Priests and ministers exercise important positions of authority within a Church. For very good reasons a religion may not wish to engage a person who has a mental illness and displays disturbed behaviour. Such behaviour would adversely affect a Church service, which is sacred in nature.

Providing counselling to parishioners is also a large part of the role of a religious leader and that person must be respected, otherwise they will not be sought out for advice. While there are exemptions in the Act for inherent requirements (section 21A) and unjustifiable hardship (section21B), they are not broad enough. A person who displays disturbed behaviour may still be able to perform the inherent requirements of the role and there may not be "sufficient hardship." Such a concept, in any event, is vague and subjective.

***Recommendation 3***

***The Disability Discrimination Act 1992 unjustly interferes with freedom of religion. A simple provision should be added for an exemption from the Act for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act.***

### 4.1.4. Fair Work Act 2009

The *Fair Work Act 2009* contains a number of provisions that interfere with freedom of religion:

- section 153, which states that a "modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin."[42]
- section 195(1), which details discriminatory terms in enterprise agreements "the employee's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin."[43]
- section 351(1), which states that 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 orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin."[44]

- section 772(1)(f), which provides that a person's employment may not be terminated on the basis of "race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin."[45]

These provisions are as problematic as other antidiscrimination laws because they adversely affect the ability of religious organisations to engage staff who conform to the same beliefs. Each of these sections contain an almost identical religious exemption, however, each is too narrow and subjective. For example, the exemption in section 153 relating to awards states:

> *(2) A term of a modern award does not discriminate against an employee:*
> *(a) if the reason for the discrimination is the inherent requirements of the particular position held by the employee; or*
> *(b) merely because it discriminates, in relation to employment of the employee as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:*
> *(i) in good faith; and*
> *(ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.*

But what is a "doctrine, tenet or belief"? Do they need to be in writing? Is it enough that they are understood by some rather than all of the adherents of a religion? And what is a religious susceptibility? Courts are not in a position to make sound judgments about such matters.

***Recommendation 4***

***The Fair Work Act 2009 unjustly interferes with freedom of religion. The religious exemptions in the Act contained in sections 153, 195, 351 & 772 should be replaced with a single exemption from the Act for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the Act, or with particular provisions of the Act.***

## 4.2. Preserving religious freedom when an organisation receives taxpayers' money to provide a public service

Government-imposed conditions on religious organisations, that prevent them from operating in accordance with their values, limit their freedom of conscience unjustifiably.

Cardinal George Pell put it this way:

> *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.*[46]

Consider a hospital that is committed to respecting human life from "womb to tomb", in accordance with its religious values. Forcing it to offer vulnerable women abortions denies its freedom to act in

accordance with its religious beliefs. Furthermore, since other hospitals that offer abortions are available, women seeking abortions are not denied the opportunity to obtain an abortion.

Likewise, consider a school committed to teaching its students that marriage is the union of a man and a woman, and that homosexual behaviour is immoral. Requiring a school to include contrary values in its curriculum would deny the freedom of the school to act in accordance with its beliefs.

Any Commonwealth law used to impose such conditions would be arguably contrary to s 116 of the Australian Constitution: "The Commonwealth shall not make any law for ... prohibiting the free exercise of any religion..."

## 4.3. Balancing the right to religious freedom and equality before the law – what are the areas of shared agreement?

The concept of *equality before the law* has ancient origins. As early as 431 BC, the Athenian leader Pericles said in his funeral oration:

> *If we look to the laws, they afford equal justice to all in their private differences; if no social standing, advancement in public life falls to reputation for capacity, class considerations not being allowed to interfere with merit; nor again does poverty bar the way.*[47]

In the Judaeo-Christian tradition, the concept of *equality before the law* arises from mankind being made in the image of God:

> *So God created mankind in his own image,*
> *in the image of God he created them;*
> *male and female he created them.*[48]

The concept of *equality before the law* in Judaeo-Christian culture predates that of ancient Greece and is evident since before 1000 BC in such commands as: "There shall be one law for the native and for the stranger who sojourns among you."[49]

Professor Geoffrey Walker, in his book *The Rule of Law*, writes that one of the fundamental requirements for the rule of law is the trilogy: certainty, generality and equality.[50] Regarding the latter, he writes:

> *The equality principle is the main basis for protecting the general interest against inroads by pressure groups and other special interests. It restrains, or should restrain, a legislature from enacting bills of attainder or other laws which unilaterally benefit or injure particular individuals or groups... People are much more likely to comply with a legal precept if they know it is the same for everybody.*[51]

This principle is the rock on which all antidiscrimination laws stumble, because they all grant benefits to particular groups – defined, for example, by age, race or sex. A serious problem with "group rights" is that they are antithetical to individual rights:

> *When we give rights to individuals, we provide them with moral shields that protect them from the excesses of power, including the excesses of collective power. But, if we ascribe rights to groups as well as to individuals, we might find that the rights of individuals are met and overtaken by those of groups, so that rights lose their potency as safeguards for individuals.*[52]

That is precisely the problem with all Commonwealth discrimination acts: they elevate so-called "group rights" above individual rights. Some individuals find their fundamental rights, such as

freedom of religion, crushed by others belonging to a group with protected attributes. The perverse result is that antidiscrimination laws sabotage equality before the law, not strengthen it.

## 4.4. Developing mechanisms to support religious inclusion and social cohesion

### *4.4.1. Repeal antidiscrimination legislation*

The most important step that can be taken to support religious inclusion and social cohesion is to repeal antidiscrimination laws, which marginalise people of religious faith and restrict debates about important matters.

A diverse group of eminent leaders – Charles J. Chaput (Roman Catholic Archbishop of Philadelphia), William E. Lori (Roman Catholic Archbishop of Baltimore), Albert Mohler, Jr. (President of the Southern Baptist Theological Seminary), Russell Moore (President of the Ethics and Religious Liberty Commission, Southern Baptist Convention) and Russell P. George (McCormick Professor of Jurisprudence, Princeton University) – put it eloquently:

> *When basic moral convictions and historic religious wisdom rooted in experience are deemed "discrimination," our ability to achieve civic harmony, or even to reason clearly, is impossible.*[53]

### *4.4.2. Cease legislating to restrict religious freedom*

Religious freedom is more than just worship. As the High Court held in the "Scientology case", religion involves both belief and conduct.[54] But antidiscrimination laws fail to take account of the second part of the definition of religion by prohibiting some conduct that may be required to give effect to religious beliefs. All laws that pass the Commonwealth parliament should be consistent with the High Court's definition of religion (which includes conduct) and section 116 of the Australian Constitution (which prohibits the Commonwealth making any law prohibiting the free exercise of any religion).

### *4.4.3. Affirm the right of religious organisations to provide services with taxpayer assistance*

In order to support religious cohesion and social inclusion, religious organisations must be able to provide services with taxpayer assistance consistent with the religion's values. Among Australian taxpayers are many people of faith.

Religious organisations make a tremendous contribution to Australian society in a number of areas including health, education and welfare. To prevent religious organisations from receiving taxpayer assistance for any or all of the services they provide marginalises people of faith and excludes religion from the public sphere.

# 5. Statement of Purpose and Guiding Principles

## 5.1. Guiding principle 1

> *Religious freedom is fundamental to the Australian way of life, and should be treated equally to all other human rights and freedoms.*

The guiding principle is problematic as it does not identify what are "all other human rights and freedoms." How can participants be expected to "recognise" that freedom of religion is equal to another right if they do not know what the other right is? And how are rights to be "treated equally" if they conflict? Such a statement is nonsensical.

***Recommendation 5***

***Guiding principle 1 should be amended to read:***

***Religious freedom is fundamental to the Australian way of life, and should be limited only when necessary to protect public safety, order, health or morals, or the religious freedom of others.***

## 5.2. Guiding principle 2

> *Religious freedom is a fundamental human right that should be respected and not limited unless it infringes on the rights of others.*

The second guiding principle suggests that freedom of religion is a secondary right – one which is defined by what is leftover by other rights. It implies that whenever there is conflict between freedom of religion and another's rights, that freedom of religion should be the loser.

***Recommendation 6***

***Guiding principle 2 should be combined with the amended guiding principle 1:***

***Religious freedom is fundamental to the Australian way of life, and should be limited only when necessary to protect public safety, order, health or morals, or the religious freedom of others.***

## 5.3. Guiding principle 3

> *Religious freedom has an essential and important role in public life or civic affairs to contribute to the moral and spiritual guidance of our nation; and faith is as legitimate basis for participation in public life and civic affairs as any other.*

***Recommendation 7***

***This principle is supported.***

## 5.4. Guiding principle 4

> *Constitutionally, Australia is a pluralist, multi-faith society with a secular State.*

The principle is false. Australia was founded as Christian nation and is a Christian nation today. The preamble to the Australian Constitution acknowledges Almighty God – a term used throughout the

Old and New Testaments of the Bible. These foundational facts are evidenced today through federal Parliament's daily commencement of business in prayer. Senior Lecturer Augusto Zimmermann, states:

> *…the inclusion of the words, "humbly relying on the blessing of Almighty God", in the Constitution exemplifies Australia's religious, and specifically Christian, heritage. It can, at the very least, be said that Judeo-Christian values were so embedded in Australia so as to necessitate the recognition of God in the nation's founding document.*[55]

In 1898, Sir John Downer, a member of the constitutional and drafting committees[56], put it so:

> *The Commonwealth of Australia will be, from its first stage, a Christian Commonwealth.*[57]

While section 116 of the Australian Constitution provides that the Commonwealth cannot establish any religion, it is not the same thing as stating that Australia is a secular state. What that section of the Constitution evidences is that Australia is tolerant, even though it is undeniably built on Christian foundations, as the preamble highlights.

At the 2011 census, 61% of Australians identified as Christian, an overwhelming majority. The next largest group was "No religion", with only 22%.[58]

***Recommendation 8***

***Guiding principle 4 should be amended to read:***

***Constitutionally, Australia is a Christian nation that is tolerant of religious diversity.***

## 5.5. Guiding principle 5

> *Pluralism necessitates respect for a diversity of beliefs, both within and between religious faiths, those with no beliefs, as well as other attributes associated with an individual's identity.*

This principle is vague and ambiguous. What is meant by "respect"? Does it mean respecting the sincerity of the beliefs held or respecting the actual belief? There is a huge difference. This principle has the potential to stifle debates about important matters, such as the wearing of the burqa and halal.

And as to "other attributes associated with an individual's identity"? That could mean anything and everything. For example, does it mean a religious school should be forced to hire a homosexual teacher, whose lifestyle is inconsistent with the teachings of the religion?

***Recommendation 9***

***Guiding principle 5 is inappropriate and should be deleted.***

## 5.6. Guiding principle 6

> *No Australians should be unnecessarily excluded from participation in public life or civic affairs because of their faith, age, disability, gender, race, sexual orientation, or other irrelevant personal attribute.*

Why is the principle phrased "excluded from participation in public life or civic affairs" when this Roundtable is with respect to freedom of religion? Likewise, why does sexual orientation get a mention on the same level as faith when this Roundtable is about religious freedom and the world's religions have teachings on human sexuality which are overwhelmingly at odds with homosexuality?

Further, what does "unnecessarily" mean in this context? What constitutes "exclusion", "public life" and "civic affairs"? Does a religious school come within "public life"? What about a religious university? What are irrelevant as opposed to relevant attributes? Who decides?

The principle wording suggests the Roundtable is not about furthering religious freedom but curtailing it. It is a blatant attempt to stifle people of religious conviction from holding their ideas in public life. Participants cannot seriously be expected to "recognise and respect" such a dangerous principle.

***Recommendation 10***

***Guiding principle 6 should be amended to reflect s 116 of the Constitution and read:***

***No Australian should be excluded from public office on the basis of a religious test.***

## 5.7. Guiding principle 7

> *Mutual respect is necessary for a functioning pluralist society to advance the rights of all Australians.*

What is meant by "mutual respect"? Does it mean respecting the sincerity of the beliefs held, or respecting the actual beliefs? Does it mean that one religion cannot point out flaws in another? And who gets to decide whether the conduct is mutually respectful or not?

***Recommendation 11***

***Guiding principle 7 is inappropriate and should be deleted.***

## 5.8. Guiding principle 8

> *When considering issues that affect the rights of others, it is necessary to provide equal opportunities to engage and consider their perspectives with the objective of accommodating and enlarging the human rights of all.*

The principle is at odds with the nature of freedom of religion. It suggests that religions have some type of positive obligation to continually look at and update their teachings, as if they are a government department mandated to review procedures and policies. The principle fundamentally misunderstands religion and what gives it strength – the timelessness of teachings. The state can be

fickle. What is moral today may be immoral in thirty years, and moral again in another thirty after that. But with the teachings of many religions, what was immoral a thousand years ago is immoral today and will be in another thousand. The guiding principles wording is inconsistent with religious freedom as it suggests that freedom of religion is a malleable right which can and should be eroded for other newly invented and inconsistent "rights."

> ***Recommendation 12***
>
> ***Guiding principle 8 is inappropriate and should be deleted.***

## 5.9. Guiding principle 9

> *All Australians should be treated equally before the law and government.*

As noted in section 4.3 above, the rule of law requires laws to embody certainty, generality and equality. As Professor Geoffrey Walker writes in his book *The Rule of Law*, "The equality principle is the main basis for protecting the general interest against inroads by pressure groups and other special interests." This principle requires all *individuals* to be treated equally without reference to particular groups, denoted for example by race, sex, age or religion.

> ***Recommendation 13***
>
> ***Guiding principle 9 should be amended to read:***
>
> ***Australian laws should treat all <u>individuals</u> equally without reference to particular groups.***

## 5.10. Guiding principle 10

> *Individuals and communities of faith will continue to constructively work with government and other public agencies to uphold the law and improve Australia's moral and spiritual guidance.*

Uphold is defined to mean confirm or support.[59] This begs the question: can a religious community support a law which is in direct conflict with its values? It is one thing to abide by a law, it is another thing entirely to be forced to support one. This principle places a positive obligation on religions to support laws that may contradict their beliefs and practices. It is therefore an attack on freedom of religion.

> ***Recommendation 14***
>
> ***Guiding principle 10 is inappropriate and should be deleted.***

## 5.11. Guiding principle 11

> *Individuals and communities should be free to exercise religious freedom within the framework of Australian law.*

Section 116 of the Australian Constitution states that (emphasis added): "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or **for prohibiting the free exercise of any religion**…"[60]

But this guiding principle turns section 116 on its head. Rather than emphasising that the Commonwealth should not prohibit the free exercise of any religion, the principle implies that religion should only be as free as the state permits it to be, and that the state can impose any constraints it wishes upon religion. That is an erroneous view of the nature of freedom of religion and one which is inconsistent with the Constitution.

***Recommendation 15***

***Guiding principle 6 should be amended to reflect s 116 of the Constitution and read:***

***Section 116 of the Australian Constitution protects freedom of religion to the extent that the Commonwealth Parliament cannot establish a religion or enforce or prohibit religious observance.***

# 6. Conclusion

Religious freedom is a principle enshrined in the Australian Constitution's restriction on the government making laws which prohibit the free exercise of any religion (s 116). [61] The High Court decision in the "Scientology case" defines religion to include both belief and conduct – making clear that freedom of religion involves more than mere private worship. [62] Consequently, the only justifiable limitation on freedom of religion is to prevent serious harm to others.

As detailed in this submission, various antidiscrimination laws directly interfere with freedom of religion by prohibiting conduct that is required to give effect to religious beliefs and need addressing.

All but one of the 11 guiding principles are problematic. These principles, taken together with questions on which the Commissioner has sought feedback, lend themselves to a concern that the Roundtable may focus not on freedom of religion, but rather freedom from religion.

# 7. Endnotes

[1] Religious Freedom Roundtable – call for submissions, Australian Human Rights Commission, 1 September 2015: https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/religious-freedom-roundtable-call-submissions

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[3] "Religion and Science", 3.1 Concord, *Stanford Encyclopedia of Philosophy* (27 May 2010).

[4] International Covenant on Civil and Political Rights, Article 18: 1-4. http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

[5] *Commonwealth of Australia Constitution Act 1900*, Sec. 116.

[6] Countries that have established a religion include: the Church of England in UK, the Lutheran Church in Denmark, the Eastern Orthodox Church in Greece and the Roman Catholic Church in Argentina.

[7] Religious observance is enforced in Saudi Arabia, including five daily prayers, fasting during Ramadan and the modesty of women's dress under *sharia* law by the religious police, or *mutawwiin*; see "Saudi Arabia Law Enforcement", *Encyclopedia of the Nations* (Illinois: Advameg, 2007–2013).

[8] Religious observance is enforced in the West Bank: Eric Westervelt, "Police Enforce Ramadan Fasting Rules in West Bank", *NPR* (Washington, DC, 11 October 2007).

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[10] Prohibition of house churches in the People's Republic of China has been reported. See "China—Son of Christian Leader Beaten Unconscious", *Barnabas Fund Prayer Focus* Update, No 145 (November 2008).

[11] A religious test for public office in Pakistan was imposed on Pakistan-born Daniel Scot, who had to pass an exam on Islam before gaining a lectureship in mathematics at the University of Punjab. See Roslyn Phillips, "Religious Vilification: The Daniel Scot Decision", resource paper in *Light* (Adelaide, May 2005), 8–11.

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[16] J. Stonestreet, "We Aren't Charlie: The Decline of Satire and Culture", *Breakpoint* (16 Jan 2015), http://www.breakpoint.org/bpcommentaries/entry/13/26699.

[17] Sadio Kante, "Mali's human sacrifice - myth or reality?", *BBC News* (20 September 2004).

[18] Amy Fallon and Amy Corderoy, "Tortured by a witch doctor, saved by Australian surgeons", *Sydney Morning Herald* (12 May 2012).

[19] Janet Fife-Yeomans and Matthew Benns, "Peddling pages of barbaric savagery: Islamic shops still selling female mutilation books", *Daily Telegraph* (17 November 2014): http://www.dailytelegraph.com.au/news/national/peddling-pages-of-barbaric-savagery-islamic-shops-still-selling-female-mutilation-books/story-fnpn0zn5-1227125017909

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[23] Milton Friedman, "Capitalism and Freedom", *New Individualist Review*, editor-in-chief Ralph Raico, (Indianapolis: Liberty Fund, 1981): http://oll.libertyfund.org/pages/friedman-on-capitalism-and-freedom

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[39] Catholic Church, *Code of Canon Law*, clause 1031

[40] Catholic Church, *Code of Canon Law*, clause 538

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[61] *Commonwealth of Australia Constitution Act 1900*, Sec. 116.

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