Submission

on the

Equal Opportunity (Religious Bodies) Amendment Bill 2020

to the

Attorney-General's Department

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1. Terms of reference

The Attorney-General's Department is seeking feedback on its draft *Equal Opportunity (Religious Bodies) Amendment Bill 2020* (*EO Bill*).

The consultation claims that:

> *The Equal Opportunity Act 1984 allows some organisations to discriminate in relation to their staffing practices and how they provide services to their clients.*
>
> *We want to amend the Act to clarify that organisations providing certain essential services – e.g. health care and aged care – cannot discriminate against workers and care recipients on the basis of sex or LGBTIQ identity.*
>
> *The changes would also create an exception that lets people or organisations discriminate when selecting people for direct participation in religious practices, which will preserve important religious freedoms. The changes would not affect the current ability of religious schools to hire staff in accordance with their religious values.*
>
> *The sectors that would be affected by the proposed changes are:*
>
> - *children's education*
> - *health care and disability support*
> - *aged care*
> - *emergency accommodation*
> - *public housing*
> - *foster care placement and children's residential services.*
>
> *The consultation summary provides further detail on what we are proposing.*
>
> *Changes will help create a better balance between the right to equality and religious freedom for organisations that provide essential services and will bring South Australia into line with almost every other Australian state and territory.*

FamilyVoice Australia is a national Christian advocacy group – promoting family, freedom, and faith 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 flourish, Australia's Christian heritage is valued, and fundamental freedoms are enjoyed.

The closing date for submissions is **Friday, 27 November 2020 at 5pm**.

2. Introduction

The Marshall Liberal Government gave no indication leading up to and during the 2018 election campaign that it would seek to restrict religious freedoms. The proposed changes are a direct attack on people of faith and religious institutions which do so much good work in our community.

It is extraordinary that the Government has announced a draft bill which infringes so severely on religious freedom without any consultation to date with the religious community that will be impacted by the bill. Further, it is highly offensive for the Marshall Liberal Government to be dictating to faith communities what are and are not "important religious freedoms".

The push for these changes have come out of the blue and have blindsided the faith community. We are left wondering: why is the Marshall Liberal Government targeting faith-based institutions at this time?

The consultation paper, while speaking of a balanced approach, is anything but. It clearly and heavily tilts the scales in favour of LGBT ideology. Concerningly, the consultation paper smears religious organisations as discriminatory.

Highlighting that the Marshall Liberal Government has pinned their rainbow colours to the mast, the consultation paper summary even uses the political rainbow flag symbol. This begs the question of whether this is even a genuine consultation or simply a box checking exercise.

3. 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 or compulsion. The first recorded reference to the freedom of religion term is found in the works of Tertullian, a Christian writer around AD 200:

> *It is a fundamental human right, a privilege of nature, that every man should worship according to his own convictions.*[1]

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. As Augusto Zimmerman stated, when he was a senior law lecturer at Murdoch University:

> *...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.*[2]

Princeton University Professor of Law Robert P. George has described the broad nature of religious freedom in this way:

> *The US Commission on International Religious Freedom has stood for religious freedom in its most robust sense. It has recognized that the right to religious freedom is far more than a mere "right to worship." It is a right that pertains not only to what the believer does in the synagogue, church, or mosque, or in the home at mealtimes or before bed; it is the right to express one's faith in the public as well as private sphere and to act on one's religiously informed convictions about justice and the common good in carrying out the duties of citizenship. Moreover, the right to religious freedom by its very nature includes the right to leave a religious community whose convictions one no longer shares and the right to join a different community of faith, if that is where one's conscience leads. And respect for the right strictly excludes the use of civil authority to punish or impose civic disabilities on those who leave a faith or change faiths.*[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 ICCPR 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.*

This however has very important ramifications for the protection of religious freedom. Limitations clauses under the International Covenant on Civil and Political Rights (ICCPR), including religious freedom in Article 18(3) are required to be interpreted in accordance with The United Nations Economic and Social Council's ***Siracusa Principles*** on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights:

- These Principles provide that 'all limitation clauses shall be interpreted strictly and in favor of the rights at issue';
- 'Whenever a limitation is required in the terms of the Covenant to be "***necessary***," this term implies that the limitation:
  - Is based on one of the grounds justifying limitations recognised by the relevant article of the Covenant;
  - Responds to a pressing public or social need;
  - Pursues a legitimate aim;
  - Is proportionate to that aim.

The Siracusa Principles also require that 'in applying a limitation, a state shall use no more restrictive means than are required'. This means that:

- Where consideration is being given to the implementation of a fundamental right that conflicts with the right to religious and conscientious freedom, consideration of alternative means for progressing that fundamental right must be undertaken;
- A weighing of the relative burden placed upon religious and conscientious freedom amongst the alternatives is then required in order to identify the means that are the least restrictive.

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.[4] 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..."[5] Consequently, freedom of religion in Australia involves both freedom of belief and freedom of conduct giving effect to that belief.

4. Equal Opportunity (Religious Bodies) Amendment Bill 2020

There is an increasing hostility to people of faith and religious freedom protections, which have been promised by the Federal Government but are not yet delivered, and are long overdue.

South Australia is considered to be out of step with most other States and Territories as it does not protect its citizens against religious discrimination. One of the recommendations of the Ruddock Review, which was tasked with examining whether Australian law (Commonwealth, State and Territory) adequately protects the human right to freedom of religion, was that South Australia should include "religious belief and activity" as a protected attribute, and this should be implemented as a matter of priority.

And yet, in the meantime, the Marshall Liberal Government is seeking to restrict rather than promote religious freedom with its *EO Bill*. While FamilyVoice Australia regards antidiscrimination legislation to be fundamentally flawed, we recognise that this approach to solving community problems is the way government has resolved to tackle such problems. Therefore without endorsing such approaches, if they be relied upon for the resolution of social problems, "religious belief and activity" should be included as a protected attribute.

> ***Recommendation 1***
>
> ***"Religious belief and activity" should be added as a protected attribute in the* Equal Opportunity Act 1984.**

The *EO Bill* seeks to crackdown on religious freedom in a number of areas, including:

- *education*
- *health care*
- *aged care*
- *accommodation*
- *public housing*
- *foster care placement and children's residential services.*

The broad language used in the *EO Bill*, for example, removing the exemption for anything in connection with the provision of services associated with— "the promotion of health and wellbeing" or "the prevention of disease, illness or injury"[6] could lead even to unintended restrictions on religious freedom.

- Is a church service associated with "the promotion of health and well-being"?
- Likewise, is a church camp a service associated with "the promotion of health and well-being"?
- What about a pastor providing counselling to a parishioner? Is that a service associated with the prevention of an "illness"?[7]

The removal of important religious freedoms from faith-based organisations threatens the tremendous good work they do in the community.

As one example of the large number of services provided by a religious organisation:

> *The Catholic Church provides Australia's largest non-government grouping of hospitals, aged and community care services, providing approximately 10 per cent of health care services in*

> *Australia. It provides social services and support to more than 450,000 people across Australia each year. There are more than 1,750 Catholic schools with more than 94,000 staff providing education to more than 765,000 Australian students. There are two Catholic universities, teaching more than 46,000 students.*[8]

Human rights lawyer Mark Fowler has highlighted that "twenty-three of the largest 25 charities in Australia (after pure religious charities are removed) are faith-based."[9] The proposed changes place the provision of services by religious organisations to the community at risk.

Cardinal George Pell has rightly pointed out:

> *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.*[10]

Forcing faith-based organisations to operate at odds with their religious beliefs restricts their religious freedom. For a society to be construed as open and democratic, it must allow both individuals and associations to publicly provide their notion of truth to wider society: "Any removal of the ability of faith-based entities to determine and espouse their beliefs would be a restriction on these historically hard-won liberties, which arguably are characteristic of the Western legal tradition."[11]

The further erosion of religious freedom only serves to reinforce it as a second-class right, as noted by US Supreme Court Justice Samuel Alito:

> *Supreme Court Justice Samuel Alito stated that "in certain quarters, religious liberty is fast becoming a disfavored right." And is viewed by some as "not a cherished freedom, it's often just an excuse for bigotry and it can't be tolerated, even when there is no evidence that anybody has been harmed."*[12]

While the consultation paper smears faith organisations as discriminatory institutions, it should be pointed out that Comment 18 of the United Nations Human Rights Committee recognises that under the International Convention on Civil and Political Rights **"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".**

The removal of exemptions is a real problem because exemptions are the major way that State and Federal governments are currently dealing with their obligations to protect religious freedom in Australia.

Another problem is that when religious organisations are merely permitted an exemption they are perceived negatively as discriminatory organisations, when in reality they are not doing anything wrong but simply living out their faith.

To help overcome this perception issue, a section should be added to the *Equal Opportunity Act 1984* (*EO Act*) that religious organisations are taken not to be discriminatory when they engage in conduct which is consistent with the religion.

Recommendation 2

To balance the flawed exemption model which creates a perception of wrong doing, a section should be added to the* Equal Opportunity Act 1984, stating: *that religious organisations are taken not to discriminate when they engage in conduct which is consistent with the religion.

"Precepts" and "religious susceptibilities"

The draft bill seeks to weaken the existing exemption in section 50. The reality is that the existing "precepts" and "susceptibilities" model has provided inadequate protection to religious organisations in Australia.

Section 50(1)(c) of the *EO Act* provides a religious exemption for "any other practice of a body established for religious purposes that conforms with the precepts of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion."[13]

Again, the exemption is problematic. The consequence of this provision is that anti-discrimination tribunals and courts are required to determine "religious purposes", "precepts" of a religion and the "religious susceptibilities" of adherents – matters which are 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."[14]

Anti-discrimination tribunals have an appalling record when determining such things as "religion", "precepts" and the "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.[15] In the *OV & OW v Wesley Mission* case, the NSW Supreme Court found that the NSW Anti-discrimination 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).[16] 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 "precepts" or "injury to the religious susceptibilities of adherents" of a religion or creed.

The exemption does not apply to natural persons who adhere to religious beliefs and practices. This is a failure to take religious belief seriously. Religious exemptions should be recognised for any person who holds a genuine and conscientious belief that some of the protected attributes are morally unacceptable.

A Commonwealth example again highlights the inadequacy of such exemptions. In 1998 the Catholic Education Office (CEO) of the Archdiocese of Sydney refused an applicant's 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".[17]

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.*[18]

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;*[19]

Relevant sections of the *EO Act* 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 3

Relevant sections of the EO Act 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.

Education

Religious schools exist not only to educate students in their ABCs but to also transmit faith to students. Their very existence is tied to religious instruction. These schools are not simply educational institutions with a religious flavour; rather, they are about providing religious education to the young.

However, this issue is not just about religious freedom; it is also about the fundamental right of parents to determine their children's education. As detailed earlier in this submission, article 18(4) of the ICCPR states:

> *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.*[20]

The Association of Independent Schools of SA (AISSA) has rightly pointed out that:

> *For adherents to a faith, matters of religious belief are of the highest personal significance. For many people, they rest at the very core of their existence, informing all of their conduct and decision-making.*[21]

The Marshall Liberal Government's proposal to restrict the right of parents to educate their children in accordance with their religious beliefs marginalises people of faith. As 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) – have said:

> *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.*[22]

Recommendation 4

To balance the flawed exemption model which creates a perception of wrong doing by educational institutions, a section should be added to the* Equal Opportunity Act 1984 highlighting the right of *parents to educate their children in accordance with their religious beliefs and that religious educational organisations are taken not to discriminate when they engage in conduct which is consistent with their religious foundation.

5. Conclusion

The Marshall Liberal Government gave no indication leading up to and during the 2018 election campaign that it would seek to restrict religious freedoms.

The *EO Bill* is a direct attack on people of faith and religious institutions which do so much good work in our community. The proposed changes go to the very heart of the ability of faith-based organisations to operate in accordance with their mission. They are a severe encroachment upon religious freedom and should be abandoned immediately.

Instead of seeking to amend the *EO Act* to restrict religious freedom further, the Marshall Liberal Government should make changes to promote this fundamental human right, highlighted in the Federal Government's Ruddock Review recommendation that "religious belief and activity" be added to the *EO Act* as a protected attribute as a matter of priority.

As has been pointed out, the removal of exemptions is a real problem because exemptions are the major way that State and Federal governments are currently dealing with their obligations to protect religious freedom in Australia.

Another problem is that when religious organisations are merely permitted an exemption they are perceived negatively as discriminatory organisations, when in reality they are not doing anything wrong but simply living out their faith.

To help overcome this perception issue, a section should be added to the *EO Act* that religious organisations are taken not to discriminate when they engage in conduct which is consistent with the religion.

The *EO Act* should also be amended to strengthen protections for freedom of conscience both for natural persons and corporations.

The Marshall Liberal Government has damaged its standing with people of faith by its attack on religious freedom and it must now urgently seek to restore its tarnished reputation by promoting, not undermining, this fundamental human right.

6. Endnotes

[1] "The Edict of Milan" https://www.holyspirit-al.com/ourpages/auto/2011/7/28/60780317/edict%20of%20milan.pdf

[2] Augusto Zimmermann, "The Secular Challenge to Freedom of Belief", *News Weekly*, 28 February 2015

[3] Robert P. George, 'What is religious Freedom?', *Public Discourse*, Witherspoon institute, July 24, 2013.

[4] Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) [1983] HCA 40; (1983) 154 CLR 120

[5] *Ibid*., para 17; their judgement was qualified by also holding that "though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion."

[6] Section 50(iv)(A) & (B), *Equal Opportunity (Religious Bodies) Amendment Bill 2020*

[7] *Illness: the state of being physically or mentally ill*, https://www.oxfordlearnersdictionaries.com/definition/english/illness?q=illness

[8] Australian Catholic Bishops Conference submission on the exposure drafts of the religious discrimination bills, 2 October 2019, https://www.catholic.org.au/acbc-media/downloads/ad-limina/bishops-1/public-policy-1/papers/2219-2-october-2019-exposure-drafts-of-religious-discrimination-bills/file

[99] Mark Fowler, "State and territory legislation risks breach of international treaty", *The Australian,* 30 June 2017, https://www.theaustralian.com.au/business/legal-affairs/state-and-territory-legislation-risks-breach-of-international-treaty/news-story/92843ff3bb490efd690fd575d749c4d5

[10] George Pell, "The meaning of religious freedom and the future of human rights", *ABC Religion and Ethics*, 23 Aug 2013, http://www.abc.net.au/religion/articles/2013/08/23/3832073.htm.

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[13] *Equal Opportunity Act 1984*, section 50(1)(c), Austlii, http://www.austlii.edu.au/au/legis/sa/consol_act/eoa1984250/s50.html

[14] *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006), para 36: http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html

[15] *Catch the Fire Ministries*, paras 38-61: http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html

[16] *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010): http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2010/155.html?stem=0&synonyms=0&query=title(Wesley%20)

[17] *"Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the ground of sexual preference", Human Rights and Equal Opportunity Commission, HRC Report No. 6*, 1998, http://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/discrimination_sexual_pref.pdf

[18] *"Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the ground of sexual preference", Human Rights and Equal Opportunity Commission, HRC Report No. 6*, 1998, http://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/discrimination_sexual_pref.pdf

[19] *Defence Act 1903 (Cth)*, section 61A

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

[21] Carolyn Grantskalns, CEO, Association of Independent Schools of SA, Letter to Hon. John Rau re SALRI – LGBTIQ Discrimination Audit, 30 June 2015.

[22] Archbishop Chares Chaput, Archbishop Lori, Albert Mohler, Jr., Russell Moore and Professor Russell P. George, "Now is the time to talk about religious liberty", Public Discourse, The Witherspoon Institute, 3 April 2015, http://www.thepublicdiscourse.com/2015/04/14748/