

DRAFT SUBMISSION TO THE RELIGIOUS FREEDOM REVIEW

Background

1. Religious freedom “encompasses freedom of conscience and belief, the right to observe or exercise religious beliefs, and freedom from coercion or discrimination on the grounds of religious (or non-religious) belief”.¹ Fundamentally, it is the right to freedom from interference in matters of belief and worship.
2. There are no laws restricting freedom of religion in Australia. Australians are free to embrace and express any faith, and 60% of them do.² There are no laws establishing or prohibiting any religion, or imposing any religious test for public office.³ Senior federal politicians speak openly of their faith,⁴ and religious believers are over-represented in federal parliament.⁵ Former NSW Premier Mike Baird declared that his Christian faith was “the most important” thing to him, and that he no longer separated it from politics.⁶ Religious lobbyists receive more media time than their secular counterparts.⁷ Religious freedom is clearly alive and well in Australia.
3. It is true that, with the rise of online media, religious beliefs are now more widely debated, criticised and ridiculed than in previous times. However, it is a mistake to confuse this robust debate with religious persecution, or to suppose religious freedom is violated just because some believers disagree with certain laws.
4. In Australia, religious lobbyists use “religious freedom” to demand wide-ranging exemptions to anti-discrimination legislation. These are the focus of this submission.

Anti-discrimination laws

5. Anti-discrimination laws protect religious freedom by prohibiting religious discrimination. In the ACT, NT, Queensland, Tasmania, Victoria and WA, it is illegal, in areas such as employment, education and the provision of goods, services and facilities, to discriminate against others – to treat them unfavourably – based on their

¹ ["Traditional Rights and Freedoms - Encroachments by Commonwealth Laws"](#) [2015] ALRC 4, [5.1].

² In the 2016 census, 60.3% of respondents identified as having a religion, while 30.1% identified as having no religion (with the remaining 9.6% not answering the question): Australian Bureau of Statistics, ["Religion in Australia: 2016 Census Data Summary"](#), 28 June 2017.

³ Such laws are prohibited at the Commonwealth level by s 116 of the Australian Constitution, although there is no such constitutional limitation at the State level.

⁴ See, for example, Mike Secombe, ["Prime Minister Tony Abbott and the Christian right"](#), *The Saturday Paper*, 29 August 2015; Radio National, ["The religious Lives of Malcolm Turnbull and Bill Shorten"](#), 16 June 2016; Scott Morrison MP, [Maiden Speech to the House of Representatives](#), 14 February 2008; Geoff Kitney, ["Mathias Cormann: A tale of two lives"](#), *Sydney Morning Herald*, 2 May 2014.

⁵ Jonathan D James, ["As Australia becomes less religious, our parliament becomes more so"](#), *The Conversation*, 21 August 2017.

⁶ Hope 103.2 Radio, ["Mike Baird: How God & Faith Led the Premier Into Politics \[Interview\]"](#) (14 December 2015); see from 2 minutes 46 seconds. In his [maiden speech](#), Mr Baird similarly declared: “My faith will ground me, shape me and provide my motivation to serve until my time here is done”; see Philippa McDonald, ["Mike Baird: New NSW Premier had rapid rise through political ranks"](#), ABC News, 17 April 2014.

⁷ Christopher Knaus, ["Lyle Shelton gets more media mentions than all three leading yes campaigners"](#), *Guardian Australia*, 22 September 2017.

religious or political beliefs.⁸ Other jurisdictions prohibit discrimination on the narrower grounds of “religious appearance or dress” (SA⁹) or “ethno-religious or national origin” (NSW¹⁰). Commonwealth anti-discrimination laws contain no such protections,¹¹ although the *Fair Work Act* prohibits adverse action against employees on grounds including religion and political opinion.¹²

6. Those protections aside, Commonwealth,¹³ State and Territory¹⁴ anti-discrimination laws contain exemptions that *allow* religious bodies to discriminate in certain areas: in relation to the training, education, ordination and appointment of clergy and members of religious orders, and in relation to participation in religious observance and practice. For example, while sex discrimination is generally unlawful, religious bodies can lawfully engage in sex discrimination by deciding to appoint only males as priests or as persons conducting the liturgy. These exemptions recognise that anti-discrimination laws should not interfere in matters of belief and worship. They are largely uncontroversial.
7. More controversial – and, I will argue, unjustified – are further exemptions across Australia that permit religious bodies (other than purely commercial enterprises¹⁵) to engage in any discriminatory conduct that conforms to their doctrines, tenets or beliefs, or is necessary to avoid injury to their religious sensitivities.¹⁶ In Victoria, these exemptions also extend to – and thus permit – discriminatory conduct by *individuals* (not just bodies), provided “the discrimination is reasonably necessary...to comply with the doctrines, beliefs or principles of their religion.”¹⁷
8. These further exemptions mean that religious bodies – unlike the general public – can discriminate on grounds such as sex, sexual orientation and marital status in

⁸ *Discrimination Act 1991* (ACT) ss 7(1)(o), (u); *Anti-Discrimination Act 1996* (NT) ss 19(1)(m), (n); *Anti-Discrimination Act 1991* (Qld) ss 7(i), (j); *Anti-Discrimination Act 1998* (Tas) ss 16(m), (n), (o), (p); *Equal Opportunity Act 2010* (Vic), ss 6(k), (n); *Equal Opportunity Act 1984* (WA) ss 54-65.

⁹ *Equal Opportunity Act 1984* (SA) ss 85T(1)(f), 85T(7), 85U-85ZH.

¹⁰ *Anti-Discrimination Act 1977* (NSW) s 4 (definition of “race”), ss 8-13.

¹¹ *Sex Discrimination Act 1984* (Cth); *Age Discrimination Act 2004* (Cth); *Racial Discrimination Act 1975* (Cth); *Disability Discrimination Act 1992* (Cth).

¹² *Fair Work Act 2009* (Cth) s 351(1). This is subject to any exemptions at State/Territory level: s 351(2)(a).

¹³ *Sex Discrimination Act 1984* (Cth) s 37; *Age Discrimination Act 2004* (Cth) s 35. There are no specifically religious exemptions under the *Racial Discrimination Act 1975* (Cth) or *Disability Discrimination Act 1992* (Cth).

¹⁴ *Discrimination Act 1991* (ACT) ss 32-33; *Anti-Discrimination Act 1996* (NT) ss 37A and 51; *Anti-Discrimination Act 1991* (Qld) ss 41, 109; *Anti-Discrimination Act 1998* (Tas) s 52; *Equal Opportunity Act 2010* (Vic), ss 82-84; *Equal Opportunity Act 1984* (WA) s 73; *Equal Opportunity Act 1984* (SA) ss 50, 85ZM; *Anti-Discrimination Act 1977* (NSW) s 56.

¹⁵ See *Christian Youth Camps Limited v Cobaw Community Health Services Limited* [2014] VSCA 75.

¹⁶ *Sex Discrimination Act 1984* (Cth) s 37(d); *Age Discrimination Act 2004* (Cth) s 35; *Fair Work Act 2009* (Cth) s 351(2)(c); *Discrimination Act 1991* (ACT) ss 32(d), 33; *Anti-Discrimination Act 1996* (NT) s 37A; *Anti-Discrimination Act 1991* (Qld) ss 41, 109(d); *Anti-Discrimination Act 1998* (Tas) s 52(d); *Equal Opportunity Act 2010* (Vic), ss 82(2), 83(2), 84; *Equal Opportunity Act 1984* (WA) s 73; *Equal Opportunity Act 1984* (SA) ss 50(c) (s 50(ba) further exempts “the administration of a body established for religious purposes in accordance with the precepts of that religion”); *Anti-Discrimination Act 1977* (NSW) s 56(d) (s 56(c) further exempts “the appointment of any other person in any capacity by a body established to propagate religion”).

¹⁷ *Equal Opportunity Act 2010* (Vic) s 84.

almost all areas of public life.¹⁸ Those areas include “schools, hospitals, charities, homeless shelters, employment agencies, [partly] commercial enterprises, aged care facilities, and joint projects with local councils to provide community outreach.”¹⁹ So for example, a Christian evangelical school can expel a gay student or fire a teacher who becomes pregnant outside of marriage, and a Catholic charity can refuse food or shelter to gay and unmarried heterosexual couples (among others).

9. The ability to engage in such discrimination can be fairly described not as religious *freedom*, but religious *privilege*: the right to act in accordance with religious beliefs in all aspects of public life, even where such conduct is illegal for the general public, and where *non*-religious beliefs are not given similar exemptions.
10. In their submissions to this Panel, religious lobbyists²⁰ will no doubt support this existing privilege or seek even broader exemptions. They will argue, without a hint of irony, that it should be illegal to discriminate against them because of their religious beliefs, but legal for them to discriminate against people who do not share those beliefs. They will also seek exemptions around same-sex marriage. Senator Paterson’s draft marriage bill, supported by church leaders,²¹ would allow marriage traditionalists to refuse to provide goods and services for same-sex weddings.²²
11. I accept that in the interests of religious and political freedom and national consistency, NSW, SA and the Commonwealth should amend their anti-discrimination laws to prohibit discrimination based on religious and political belief. Other than this, the religious lobbyists’ demands should be rejected. As I contend:
 - a. There should be no right for religious bodies to discriminate on religious grounds in public life – that is, in employment, education and the provision of goods, services and facilities. Exemptions permitting such discrimination should be repealed.
 - b. The only proper religious exemptions are those that genuinely protect religious freedom. Existing exemptions around appointment of clergy and participation in religious practice are justified on that basis. An exemption should also be made for the appointment or selection of persons to positions

¹⁸ See: "[Traditional Rights and Freedoms - Encroachments by Commonwealth Laws](#)" [2015] ALRC 4, [5.4]; Joint Standing Committee on Foreign Affairs, Defence and Trade, "[Interim Report – Legal Foundations of Religious Freedom in Australia](#)" (November 2017), [7.34]-[7.40].

¹⁹ Elizabeth Sutherland, "[Bigotry in the Name of God: the Case Against Religious Exemptions](#)", *New Matilda*, 3 June 2016. For aged care, discrimination is [permitted against employees but not recipients](#).

²⁰ For example, Freedom for Faith (which released a [draft submission](#)) and the Australian Christian Lobby (which released [talking points](#) for its supporters).

²¹ Michael Collett, "[Same-sex marriage: Why has Senator James Paterson written an alternative bill?](#)", ABC News, 13 November 2017; Joe Kelly, "[Church Heads Pen Open Letter over Same-Sex Marriage Bill Fears](#)", *The Australian*, 1 December 2017.

²² Draft "[Marriage Amendment \(Definition and Protection of Freedoms\) Bill 2017](#)", Sch 1 cl 88M. The bill expressly extends to “artisans, bakers, caterers, jewellers, printers, publishers, dress makers, tailors and florists”, “relationship counsellors, producers of media, photographers, musicians, transport providers, event planners and advisory services and operators of accommodation suites”, and the “hire of reception halls”. Unusually, it would also allow non-religious conscientious objections to same-sex marriage: Sch 1 cl 5AB, 5AC.

substantially involving religious observance, practice, teaching, leadership, counselling or lobbying. This further exemption is justified because religious belief and practice are genuine occupational requirements (that is, necessary parts or attributes) of such roles.

- c. Demands for further religious privileges, either generally or around same-sex marriage, should be rejected.

12. In the following sections, I set out some problems with belief-based exemptions in general. I then consider what exemptions are justified by genuine religious freedom.

Belief-based exemptions

13. With limited exceptions such as military conscription²³ and union membership,²⁴ Australian law does not recognise belief-based exemptions (or conscientious objections) to general laws. For example, inhabitants of the “Principality of Hutt River” in Western Australia, who believe they seceded from Australia in 1970, are not on that basis exempt from Australia’s income tax laws.²⁵ A libertarian who opposes gun control cannot thereby ignore firearms regulations. A motoring enthusiast who opposes speed limits is not thereby entitled to speed. And so on. Sincere though their disagreement may be, they must still obey the law.
14. *Religious* conscientious objection is no different. “Religious conviction is not a solvent of legal obligation.”²⁶ Thus, a religious polygamist is not entitled to multiple spouses.²⁷ Religious pacifists were not entitled to disrupt the war effort.²⁸ In the US, members of the Native American Church were not immune from State laws prohibiting sacramental peyote use.²⁹ Religious supporters of child marriage and paedophilia are not permitted child brides or underage sex. And religious advocates of female genital mutilation and jihad are not exempt from corresponding laws.
15. What underpins this reluctance towards belief-based exemptions? Such exemptions, I submit, contravene three fundamental principles of a secular liberal democracy:
- a. First, the **rule of law**:³⁰ the law applies equally to all, and nobody is above the law, even if they disagree with it.

²³ Department of the Parliamentary Library, “[Conscientious Objection to Military Service in Australia](#)” (research note), 11 April 2003.

²⁴ *Industrial Relations Act 1996* (NSW) s 212.

²⁵ *Casley v Deputy Commissioner of Taxation* [2017] WASCA 196.

²⁶ *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 136 (Mason ACJ and Brennan J).

²⁷ *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 136 (Mason ACJ and Brennan J); *Marriage Act 1961* (Cth) s 94 (establishing the crime of bigamy). Multiple spouses may, however, be [recognised as de facto partners](#) under social security laws.

²⁸ *Adelaide Company of Jehovah’s Witnesses Incorporated v The Commonwealth* (1943) 67 CLR 116.

²⁹ *Employment Div. v. Smith* (1990) 494 U.S. 872.

³⁰ For a discussion of this principle, see “[Traditional Rights and Freedoms - Encroachments by Commonwealth Laws](#)” [2015] ALRC 4, [16.11]-[16.12]. See also *A v Hayden* (“*ASIS case*”) (1984) 156 CLR 532, 562 (Murphy J), 588 & 591 (Brennan J, referring to “the rule of law upon which our system of government depends”).

- b. Second, the **harm principle**:³¹ freedom does not include the right to cause harm to others.
- c. Third, the **neutrality principle**:³² all citizens should be equally free with respect to conscience, religion and belief. The law should not favour religious belief over non-belief (for example by establishing an official religion) or favour one religion over others.
16. These principles are not absolute, but they are forceful: proposals that contravene them would need to be justified by other fundamental rights, such as freedom from servitude (which goes against forced conscription), freedom of association (which goes against forced union membership), and freedom of speech (which raises the question of what *harmful* speech may be properly restricted).³³
17. Turning then to the rule of law, the problem with exemptions to general laws is that they undermine the rule of law by creating classes of people to whom the laws do not apply – that is, people who are above the law. The law should not create a special class of citizens – religious believers – to whom general norms and laws, such as anti-discrimination laws, do not apply. Laws can still of course have limited scope: anti-discrimination laws, for example, do not apply in private homes, or to matters of belief and worship (hence the exemptions paragraph 6 above); but to grant religious exemptions in areas such as employment, education and the provision of goods, services and facilities, is to place believers above the law in those areas.
18. As to the harm principle, religious exemptions to anti-discrimination laws do not protect religious believers from discrimination, but rather protect the “right” of religious believers to discriminate against vulnerable populations based on arbitrary characteristics – for example by refusing employment, goods, services or facilities to gays, lesbians, and single mothers (in the same way that others may seek to deny service to blacks or the disabled³⁴). In a liberal democracy there is no right, and certainly no fundamental right, to harm others in this way.³⁵ As international law recognises, freedom to manifest one's religion or belief may be properly curtailed to protect public morals³⁶ – which is what anti-discrimination laws do.

³¹ The classic statement is John Stuart Mill, *On Liberty* (1859): “[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”

³² This principle is expressed, in part, by s 116 of the Australian Constitution: “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.”

³³ I record here my view that s 18C of the *Racial Discrimination Act 1975* (Cth) is misguided in making it unlawful (subject to the defences in s 18D) to “offend” others based on their “race, colour or national or ethnic origin”. Uncomfortable truths are likely to offend. It should not be unlawful to express them.

³⁴ Disability discrimination could be seen as a matter of “religious freedom”, as many religions justify it; see Michael Moore, “[Religious Attitudes towards the Disabled](#)”, *The Secular Web*, 2015.

³⁵ I would add that the right to religious freedom does not include the right to cause (or allow) harm to children by failing to report known cases of sexual abuse.

³⁶ Article 18(3) of the International Covenant on Civil and Political Rights provides: “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.”

19. As to the neutrality principle, the law should not privilege believers over non-believers by exempting only believers from anti-discrimination laws (as is now the case). Freedom of conscience and belief includes *non-religious* conscience and belief. Thus, if belief-based exemptions are to apply at all, they should apply to anybody who wishes to discriminate on genuine religious *or non-religious* grounds.³⁷ That is, anyone should be able to discriminate against anyone else for any conscientious reason, in any area of public life – be that males against females, whites against blacks, Muslims against Jews and apostates, straights against gays, able against disabled, and so on. Only extreme libertarians would welcome that outcome. The problem, in short, is that religious exemptions unfairly privilege believers over non-believers (in breach of the neutrality principle), while a more general right of conscientious objection would rob anti-discrimination laws of any practical effect.
20. Finally, while the current debate focuses on anti-discrimination laws, there is no reason for belief-based exemptions to stop there. If religious and conscientious objections are granted for anti-discrimination legislation (and/or same-sex marriage), why not for *all* legislation? The logical consequence, if religious and conscientious objections are taken seriously, is that every citizen should be able “opt out” of any laws they genuinely disagree with. This is unworkable: it would “be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”³⁸

Voluntary public activities

21. Another problem with religious exemptions is that religious bodies *choose* to enter public life in the first place. Religions do not *require* believers to provide employment, education, goods, services or facilities; rather, religious bodies freely choose to enter these spheres and to engage with the public, most of whom do not share their beliefs. Entry into the public sphere “marks the point at which the religious beliefs of one person or group impact upon other people and society generally”.³⁹
22. Where religious persons or bodies choose to enter the public sphere, it is reasonable to expect them to abide by the same rules as the general public, including anti-discrimination laws.⁴⁰ If they cannot accept those laws, they are free to cease the public activity while continuing to practise their faith. In this way, their religious freedom is fully preserved.

³⁷ As noted earlier (footnote 22), Senator Paterson’s draft “[Marriage Amendment \(Definition and Protection of Freedoms\) Bill 2017](#)” would allow religious *and* non-religious conscientious objections to same-sex marriage. However, there is no proposal for existing religious exemptions to anti-discrimination laws to be extended to non-religious conscientious objections.

³⁸ As the US Supreme Court recognised in *Reynolds v United States* (1879) 98 U.S. 145 (rejecting a religious right to polygamy) and *Employment Div. v. Smith* (1990) 494 U.S. 872 (rejecting a religious right to peyote use).

³⁹ “[Traditional Rights and Freedoms - Encroachments by Commonwealth Laws](#)” [2015] ALRC 4, [5.78] (submission of Human Rights Law Centre).

⁴⁰ Compare *Christian Youth Camps Limited v Cobaw Community Health Services Limited* [2014] VSCA 75 at [269] (Maxwell P; Neave JA agreeing): “[M]oving from the field of religious activity to the field of secular activity...has the consequence...that in relation to decisions made in the course of the secular undertaking, questions of doctrinal conformity and offence to religious sensitivities simply do not arise.”

23. Peter Singer gives these examples:⁴¹
- a. In Israel, ultra-orthodox Jews, “who interpret Jewish law as prohibiting men from touching women to whom they are not related or married, want separate seating for men and women on buses”. However, as Singer points out, this demand is misplaced. Since “Jewish law does not command that one use public transport”, a lack of segregated seating does not violate their religious freedom, because they can simply use other transport. Similarly (I would add), if the ultra-orthodox were themselves running a transport business, a law against segregated seating would not infringe their religious freedom, because it would be their choice to run the business in the first place.
 - b. In the Netherlands, there was a legislative proposal to require animals to be stunned before slaughter. Islamic and Jewish leaders opposed the laws because halal and kosher practices prohibit stunning prior to slaughter. Singer observes that since “[n]either Islam nor Judaism upholds a requirement to eat meat”, a requirement to stun animals before slaughter does not violate religious freedom. If the choice is between inhumane slaughter and no slaughter at all, believers can become vegetarian.⁴²
 - c. In the US, “Catholic bishops...claimed that [former] President Barack Obama [wa]s violating their religious freedom by requiring all big employers, including Catholic hospitals and universities, to offer their employees health insurance that covers contraception.” However, this requirement did not violate their religious freedom, because “Catholicism does not oblige its adherents to run hospitals and universities.” If the Church handed over its hospitals and universities to others who were willing to provide the insurance coverage, “Catholics would still be free to worship and follow their religion's teachings.”
24. The same applies in Australia. Christian schools have defended their right (under current exemptions) to refuse enrolment to gay students or students with gay parents,⁴³ and they have terminated the employment of teachers who are unmarried mothers⁴⁴ or gay.⁴⁵ Yet, adopting Singer’s point, Christianity does not *require* Christians to run schools. Thus, if exemptions permitting this discrimination were removed, this would not violate religious freedom, because it is the choice of these religious bodies to run the schools in the first place. If the schools cannot accept a gay student or teacher or an unmarried mother on staff, then they are at liberty to shut down, or to hand over to bodies who do not share their beliefs.

⁴¹ Peter Singer, “[The use and abuse of religious freedom](#)”, 12 June 2012.

⁴² My view is that religious exemptions to human slaughter laws (see RSPCA, “[Is religious slaughter legal in Australia?](#)”) should therefore be repealed.

⁴³ “[Gay parents accuse school of enrolment snub](#)”, ABC News, 13 December 2011; “[Gay dad not welcome at Mandurah Christian school](#)”, *Mandurah Mail*, 28 October 2015; “[Schools defend right to expel gays](#)”, *Sydney Morning Herald*, 7 July 2013.

⁴⁴ “[Union in plea for sacked teacher](#)”, *Sunshine Coast Daily*, 2 May 2012.

⁴⁵ Brian Greig, “[You're gay? You're out! Gay teacher sacked due to WA law loophole](#)”, *WA Today*, 22 November 2017.

25. As for commercial enterprises, including those in the wedding industry, religions do not *require* their proponents to go into business. If bakers, florists or civil marriage celebrants insist on a right to discriminate based on a protected attribute – race, sex, sexual orientation, or so on – then, like other members of the public, they are at liberty not to be in business at all. Civil celebrants are also performing a government function (solemnisation of marriages) and should therefore follow the same anti-discrimination laws as governments generally.⁴⁶
26. A further point is that many religious organisations receive public funds. Governments are by far the biggest source of charitable revenue.⁴⁷ Thus, “LGBTI taxpayers are being [unfairly] asked to fund religious organisations that can discriminate against them as employers.”⁴⁸ Recipients of public funds should obey public rules (as UK law recognises⁴⁹); and it can hardly be suggested that government-funded discrimination is justified in the name of “diversity” (as if all viewpoints, including discriminatory ones, deserve public support).
27. Finally, as to the draft Paterson bill, or other proposals to create exemptions around same-sex weddings (but not for other goods and services), this is unjustified for the reasons already given, and leads to absurdities: goods and services could be legally refused to gay couples on their wedding night, but not on holidays, birthdays, anniversaries, or ordinary weekends away. It is also unfair to target gays when others who are immoral by traditional religious standards – unmarried parents, divorcees, and adulterers – would remain protected by anti-discrimination laws.
28. In summary, there should be no belief-based exemptions for the provision of employment, education, goods, services or facilities, because these are voluntary public activities and often publicly funded. If religious adherents cannot abide by the same rules as other members of the public (particularly when using public funds), they should exit from these spheres while freely continuing their belief and worship.

Religious belief, worship and promotion

29. I have argued so far that belief-based exemptions to anti-discrimination laws are unjustified because they are inconsistent with fundamental democratic principles, and because those who voluntarily engage in public activities (especially with public funds) should follow the same rules as the general public. Belief-based exemptions should go no further than strictly necessary to protect religious freedom – that is, to prevent interference in matters of belief and worship.

⁴⁶ The religious freedom of civil celebrants is also protected by grandfathering provisions that allow existing civil celebrants not to officiate same-sex weddings: *Marriage Act 1961* (Cth) ss 39DD, 47A.

⁴⁷ “In 2016, approximately 43.0% of charity revenue came from government grants (\$61.3 billion), with 7.2% of revenue [the next biggest source] being raised through donations and bequests (\$10.5 billion)... Around half of charities received income from government (49.7%)”: Australian Charities and Not-for-profits Commission, [Australian Charities Report 2016](#), pp 53-54.

⁴⁸ Elizabeth Sutherland, “[Bigotry in the Name of God: the Case Against Religious Exemptions](#)”, *New Matilda*, 3 June 2016.

⁴⁹ See *Equality Act 2010* (UK) s 149. There remain limited exemptions for religious schools under the *School Standards and Framework Act 1998* (UK) ss 58 and 60(4), but the UK Equality and Human Rights Commission has recommended these be wound back: [Religion or belief: is the law working?](#), December 2016.

30. I accept that existing exemptions around the appointment of clergy and members of religious orders, and around participation in religious observance or practice, are justified on that basis. However, the broad exemptions currently permitting discrimination in public life by religious bodies in accordance with their doctrines, tenets or beliefs, or as necessary to protect their religious sensitivities, should be repealed – *unless* there are compelling reasons to retain them.
31. Two arguments are commonly made for retaining those broad exemptions. I will argue the first of these, relating to “mission fit” or shared ethos, succeeds to a limited extent, but does not justify the current exemptions. The second argument, concerning the preservation of religious identity, should be rejected entirely.
32. Turning then to the first argument in favour of the current broad exemptions, religious bodies often seek to employ those with a “mission fit” or shared ethos – people who share their tenets, beliefs, teachings, principles and practices. Just as a political party would not be required to employ a member of an opposing party (and indeed some anti-discrimination laws contain specific exemptions permitting discrimination based on political beliefs in the case of political staffers⁵⁰), so (it is argued) religious organisations should have the right to positively select for their own beliefs and practices, even where this would otherwise be unlawful discrimination.⁵¹
33. This argument succeeds to an extent. Religion includes religious “teaching and propagation”,⁵² and so freedom of religion (combined with freedom of speech) includes the right to express and promote a religion. A person will hardly be motivated to promote a cause – religious, political or social – if he or she does not support its beliefs and values. The same applies to practices: a meat-eater, for example, cannot credibly promote vegetarian causes. Shared beliefs and practices are thus genuine occupational requirements for those tasked with promoting religious, political or social causes; and this should be reflected in anti-discrimination legislation.
34. This does not, however, justify the current broad exemptions. What it justifies, I submit, is a narrow exemption for the selection or appointment of people, by bodies established to propagate religion (or religious views), to positions substantially involving religious observance, practice, teaching, leadership, counselling or lobbying. Shared beliefs and practices are genuine occupational requirements for such positions; and the exemption is justified to protect the rights to religious belief, worship, expression and promotion.
35. To illustrate this proposed exemption: many teachers in religious schools are employed not only to teach secular subjects, but also as tutors providing pastoral care (counselling and spiritual support). The role of tutor may be purely secular, or it may, depending on the school, require counselling and advice from a specifically

⁵⁰ *Discrimination Act 1991* (ACT) s 45; *Anti-Discrimination Act 1998* (Tas) s 53; *Equal Opportunity Act 2010* (Vic) s 27; *Equal Opportunity Act 1984* (WA) s 66(2).

⁵¹ See: Joint Standing Committee on Foreign Affairs, Defence and Trade, “[Interim Report – Legal Foundations of Religious Freedom in Australia](#)” (November 2017), [7.30]-[7.33].

⁵² *Adelaide Company of Jehovah’s Witnesses Incorporated v The Commonwealth* (1943) 67 CLR 116, 156 (McTiernan J). ICCPR Article 18(1) similarly refers to “worship, observance, practice and teaching.”

religious viewpoint. In the latter case, the religious counselling exemption would apply, and the school could positively discriminate in favour of tutors who conform to their religious beliefs and practices – again on the basis that this is a genuine occupational requirement. The same would apply to headmasters of religious schools, provided their role involves religious leadership.

Protecting religious identity

36. The second argument for retaining broad religious exemptions to anti-discrimination laws is that religious bodies commonly see *all* their staff as part of a community of believers, bound by common beliefs and practices. Religious bodies therefore insist on (and existing exemptions appear to give them) a general right of positive religious discrimination: the right to ensure that *all* their employees share their beliefs and practices, regardless of whether those beliefs and practices are genuine occupational requirements (that is, essential to the role). This right of positive discrimination, they argue, is necessary to protect the identity and character of the religious body and to prevent it from being overtaken by non-believers. If, for example, a Catholic school cannot ensure all its teachers and administrators are Catholic, then how can it remain a Catholic school?⁵³
37. Curiously, these concerns are not consistently applied. During the same-sex marriage debate, religious lobbyists were rightly incensed at calls for people to lose their corporate jobs merely because they opposed same-sex marriage.⁵⁴ Yet many corporations see the values of diversity and non-discrimination as essential to their business life.⁵⁵ If religious bodies can decline to hire those who do not share their beliefs and practices, why can corporations not do the same – for example by declining to hire those who oppose marriage equality? Yet religious leaders, including supporters of the Paterson bill, are now calling for discrimination against marriage traditionalists to be made illegal⁵⁶ (as in fact it already is in most jurisdictions: paragraph 5 above). Clearly they cannot have it both ways.
38. The better view, I submit – and one reflected in the exemption I proposed (paragraph 34 above) – is that discrimination based on beliefs and practices should be unlawful (in public life) unless those beliefs and practices are genuine occupational requirements. For example, “a person employed as a ‘cleaner or gardener’ should not be required to share [the beliefs and practices of the employing body], as that person’s role does not require these attributes as part of the occupation.”⁵⁷ Similarly, teachers of purely secular subjects at religious schools should not be required to

⁵³ This argument is sometimes bolstered by a general appeal to “freedom of association”, but this is a blunt instrument, as it would equally support a right to race and disability discrimination.

⁵⁴ Rebecca Urban, “[Gay rights activists target IBM executive](#)”, *The Weekend Australian*, 21 March 2017.

⁵⁵ See, for example, Australian Marriage Equality’s [list of corporations that support marriage equality](#).

⁵⁶ Draft “[Marriage Amendment \(Definition and Protection of Freedoms\) Bill 2017](#)” Sch 1 cl 88K, 88KA; Michael Collett, “[Same-sex marriage: Why has Senator James Paterson written an alternative bill?](#)”, ABC News, 13 November 2017; Joe Kelly, “[Church Heads Pen Open Letter over Same-Sex Marriage Bill Fears](#)”, *The Australian*, 1 December 2017.

⁵⁷ Joint Standing Committee on Foreign Affairs, Defence and Trade, “[Interim Report – Legal Foundations of Religious Freedom in Australia](#)” (November 2017), [7.30] (submission of Equal Opportunity Tasmania).

abide by those schools' *religious* beliefs and practices (as opposed to, say, a secular code of conduct), as these are not essential to a secular teaching role.

39. As Elizabeth Sutherland observes:

“I do wonder whether the person who cleans the toilets at the church, or answers the phone at the synagogue office, or cuts the grass at the mosque down the street, or teaches at the parish kindergarten, or does the accounts for the local charity office, or lia[is]es with the local council to provide support for homeless people, has to be heterosexual, cisgender, and have children only within the bounds of marriage.”⁵⁸

40. There are further reasons to reject a general right of positive religious discrimination.

41. First, the primary purpose of schools and hospitals, and of the public funds advanced to them, is to educate children and heal the sick, not to promote a sense of religious community or a particular religious viewpoint. Similarly, while religious charities may wish to assist only the faithful, it is not unreasonable to expect that their services (especially when publicly funded) will be available to all who are genuinely in need. A requirement to help those in need, without discrimination, is unlikely to cause any perceptible decrease in charitable activities.

42. Second, over 1.3 million students attend non-government schools⁵⁹ (almost all of which are religiously affiliated), making them a significant employer. It is unjust that those who deviate in any way from these schools' religious beliefs and practices (when strict conformity is not a genuine occupational requirement) are denied basic workplace protections enjoyed by their colleagues. “People working in these organisations are vulnerable to these exceptional powers [to discriminate based on beliefs and practices] and never know when they might be sacked, denied a promotion or downgraded in their role.”⁶⁰

43. Third, while the possibility of discrimination in religious schools is ever-present, reports of *actual* discrimination are less common. Religious schools are clearly flourishing, and retaining their identity, without enforcing strict conformity to their doctrines. And they hardly need to do so: a religious school's history and traditions, its stated aims and ethos, its religious education classes, its church or chapel services, and the composition of its student and staff body, are more than adequate to define a religious identity and to attract adherents of that religion. Catholic schools, for example, will always attract a majority of Catholic students and staff, even if those schools do not insist that every student and staff member be Catholic. The same applies to other religious schools and organisations. Their sense of identity does not require a right of positive religious discrimination.

⁵⁸ Elizabeth Sutherland, “[Bigotry in the Name of God: the Case Against Religious Exemptions](#)”, *New Matilda* (3 June 2016).

⁵⁹ Australian Bureau of Statistics, “[4221.0 - Schools, Australia, 2016](#)”, 2 February 2017. This is around 35% of a total of 3,780,672 full-time students in 2016.

⁶⁰ Brian Greig, “[Exemptions for religious groups keep fears alive](#)”, *Sydney Morning Herald*, 22 January 2013.

44. Fourth, understanding an organisation's character and culture will always be a relevant job attribute. If, for example, a school has a large Indigenous or Chinese population, then an understanding of Indigenous or Chinese language and culture (for example by having lived in those communities) would be an advantage for any teacher, even a maths teacher. Similarly, knowledge of Catholic or Muslim beliefs and practices (whether or not one strictly conforms to them) will be advantageous in a Catholic or Muslim school; and such knowledge is more likely to be possessed by those who *are* Catholics and Muslims. The same goes for other religious organisations. Their continued existence (as religious organisations) does not depend on a right to positive religious discrimination, because they will tend to attract adherents of the relevant faith in the first place, and because practising adherents will tend to be hired on the basis they best understand the organisation's culture.
45. In short, a "right" to positive religious discrimination is unnecessary and should be rejected. If that right were to be granted, then as a matter of fairness, corporations must similarly be granted the right to positively discriminate in favour of those who share their corporate ethos, including (for example) their views on same-sex marriage. Proponents of religious exemptions are unlikely to accept that outcome.

Conclusion and recommendations

46. Supporters of "religious freedom" are in fact seeking religious privilege. They seek exemptions from anti-discrimination laws, but not from other laws. They seek the right to discriminate based on sexuality and marital status, but not based on race or disability. They want the right to discriminate against gays on wedding days, but not on other days. They want the right to discriminate, but to be protected from discrimination themselves. And in seeking those rights for themselves, they would deny them to non-believers and secular corporations.
47. These arbitrary and inconsistent demands should be replaced with a unifying principle: religious discrimination should be unlawful in public life except in matters of religious belief, worship, and promotion. To that end:
- a. NSW, SA and the Commonwealth should amend their anti-discrimination laws to prohibit discrimination on the grounds of religious (and political⁶¹) belief.
 - b. Religious exemptions to anti-discrimination laws should be amended so that they are limited to the following areas:
 - i. the ordination or appointment of priests, ministers of religion or members of any religious order;
 - ii. the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order;

⁶¹ This may require exemptions for political staffers: *Discrimination Act 1991 (ACT)* s 45; *Anti-Discrimination Act 1998 (Tas)* s 53; *Equal Opportunity Act 2010 (Vic)* s 27; *Equal Opportunity Act 1984 (WA)* s 66(2).

- iii. the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice; and
 - iv. the selection or appointment of people, by a body established to propagate religion (or religious views), to positions substantially involving religious observance, practice, teaching, leadership, counselling or lobbying.
- c. Demands for broader religious exemptions or privileges should be rejected.
48. Current laws that permit civil tribunals to grant exemptions (and allow discrimination) in exceptional cases⁶² should remain. It is appropriate to preserve some flexibility and to allow religious and secular bodies to demonstrate that, in their individual circumstances, there is a compelling need to discriminate. Respect for the rule of law does however require that any exemptions be sparingly granted.
49. I otherwise support the recommendations in the [submission of the National Secular Lobby Limited](#) dated 15 January 2018.

Dean Stretton

Barrister, NSW Bar⁶³

3 February 2018

Comments on this draft are welcome: stretton@tenthfloor.org.

The closing date for [submissions to the Religious Freedom Review](#) is 14 February 2018.

⁶² *Sex Discrimination Act 1984* (Cth) s 44; *Age Discrimination Act 2004* (Cth) s 44; *Discrimination Act 1991* (ACT) s 109; *Anti-Discrimination Act 1996* (NT) s 59; *Anti-Discrimination Act 1991* (Qld) s 174A; *Anti-Discrimination Act 1998* (Tas) ss 56-57; *Equal Opportunity Act 2010* (Vic), s 89; *Equal Opportunity Act 1984* (WA) s 135; *Equal Opportunity Act 1984* (SA) s 92; *Anti-Discrimination Act 1977* (NSW) s 126.

⁶³ This submission is made in my private capacity and is not legal advice.