

SUBMISSION TO THE RELIGIOUS FREEDOM REVIEW

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SUMMARY:

Australia already has religious freedom – and too much religious privilege. Religious bodies operating schools, hospitals, social services and commercial enterprises – often with public funds – are exempt from anti-discrimination laws, and can lawfully discriminate on grounds such as sexuality, marital status and religious belief – even in secular roles where those attributes are irrelevant.

*These exemptions should be repealed. They undermine the rule of law, deny equal opportunity to vulnerable populations, and unfairly privilege religious belief over non-belief. Where religious people or bodies choose to enter the public sphere, they should follow the same rules as the general public (and governments), including anti-discrimination laws. The only reasonable religious exemptions are for matters of belief and worship (religious rites and rituals) and jobs where religious belief is an inherent requirement. Religious freedom is **not** the right to be above the secular law.*

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. On a leading 2017 index of religious freedom, Australia ranks above other leading democracies such as the US, UK, Canada, France, Germany, Sweden and Japan.² Australians are free to embrace and express any faith, and 60% of them do.³ There are no Australian laws establishing or prohibiting any religion, or imposing any religious test for public office.⁴ Religious believers are well represented in federal parliament.⁵ A NSW Premier declared that his Christian faith was “the most important”

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

² Cato Institute, [The Human Freedom Index 2017](#). Religious freedom ratings (out of 10) include: New Zealand 9.8, Hong Kong 9.3, Australia 9.1, Canada 8.9, Sweden 8.9, Japan 8.8, US 8.6, France 8.1, Germany 8.1, UK 7.9.

³ 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.

⁴ Such laws are prohibited at the Commonwealth (and possibly Territory) level by s 116 of the Australian Constitution, although there is no such constitutional limitation at State level.

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

thing to him, and that he no longer separated it from politics.⁶ Religious lobbyists receive more media time than their secular counterparts.⁷

3. Australia clearly has no pressing need for increased religious freedom.
4. It is true that, with the rise of online media, religious beliefs are now more widely debated, criticised and ridiculed than they once were. 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.
5. The terms of reference for this Religious Freedom Review include considering “the intersections between the enjoyment of the freedom of religion and other human rights.” This submission focuses on one key intersection: the use and abuse of “religious freedom” to support religious exemptions to anti-discrimination laws.

Anti-discrimination laws

6. Anti-discrimination laws around Australia 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 religious or political beliefs.⁸ Other jurisdictions prohibit discrimination on the narrower grounds of “religious appearance or dress” (SA)⁹ or “ethno-religious or national origin” (NSW).¹⁰ 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
7. 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

⁶ Hope 103.2 Radio, “[Mike Baird: How God & Faith Led the Premier Into Politics \[Interview\]](#)”, 14 December 2015, 2 mins 46 s. See also his [maiden speech](#) and P McDonald, “[Mike Baird: New NSW Premier had rapid rise through political ranks](#)”, ABC News, 17 April 2014.

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

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.

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 (religious rites and rituals). They are largely uncontroversial.

8. More controversial – and, this submission 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 – discrimination by *individuals* (not just bodies), if “the discrimination is reasonably necessary...to comply with the doctrines, beliefs or principles of their religion.”¹⁷
9. These further exemptions mean that religious bodies – unlike the general public – can discriminate on grounds such as sex, sexual orientation and marital status in almost all areas of public life.¹⁸ Those areas include “schools, [public and private] 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; a Catholic charity can refuse food or shelter to transgender people and de facto couples (among others); and a Muslim school can refuse to hire non-Muslims or can expel a student who declines to participate in daily prayers.
10. The ability to engage in such discrimination can be fairly described not as religious *freedom*, but as 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.
11. In their submissions to this Religious Freedom Review, religious lobbyists²⁰ will no doubt support this existing religious privilege, or will seek even broader exemptions.

¹⁵ See *Christian Youth Camps Limited v Cobaw Community Health Services Limited* [2014] VSCA 75. While the High Court refused special leave to appeal ([2014] HCATrans 289), it remains to be seen whether this decision will be followed outside Victoria.

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.

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 E 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).

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 have different beliefs. They will also seek exemptions around same-sex marriage. Senator Paterson's draft marriage bill,²¹ proposed during the same-sex marriage debate and supported by church leaders (but not yet introduced to parliament),²² would allow marriage traditionalists to refuse goods and services connected with same-sex weddings.

12. It is reasonable to consider that NSW, SA and the Commonwealth, to be consistent with other States and the Territories, should amend their anti-discrimination laws to prohibit discrimination based on religious and political belief. Other than this, the demands of religious lobbyists should be rejected. This submission will argue:
 - a. There should be no general 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. The broad exemptions currently giving them that right should be repealed, and certainly not extended.
 - b. The only reasonable 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 substantially involving religious observance and practice, religious instruction, or religious leadership, counselling or lobbying. This further exemption is justified because religious belief and practice are genuine occupational requirements – that is, inherent requirements, or necessary parts or attributes – of such roles.
 - c. There is no basis to grant further religious privileges, either generally or around same-sex marriage.

13. The following sections of this submission explain the difficulties with belief-based exemptions in general. Later sections consider what exemptions are needed to preserve genuine religious freedom.

²¹ Draft "[Marriage Amendment \(Definition and Protection of Freedoms\) Bill 2017](#)", Sch 1 cl 88M. The bill 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". Notably, it would also allow *non-religious* conscientious objections to same-sex marriage: Sch 1 cl 5AB, 5AC.

²² M Collett, "[Same-sex marriage: Why has Senator James Paterson written an alternative bill?](#)", ABC News, 13 November 2017; J Kelly, "[Church Heads Pen Open Letter over Same-Sex Marriage Bill Fears](#)", *The Australian*, 1 December 2017; J Elton-Pym, "[James Paterson drops plans to introduce alternative same-sex marriage bill](#)", *SBS News*, 15 November 2017.

Belief-based exemptions

14. With limited exceptions such as military conscription and membership of organisations,²³ 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.²⁴ 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 belief and disagreement may be, they must obey the law.
15. *Religious* conscientious objection is no different. “Religious conviction is not a solvent of legal obligation.”²⁵ Thus, a religious polygamist is not entitled to multiple spouses.²⁶ Religious pacifists were not on that basis entitled to disrupt the war effort.²⁷ In the US, members of the Native American Church were not immune from State laws prohibiting the use of peyote (a hallucinogenic substance) as a religious sacrament.²⁸ Religious supporters of child marriage and paedophilia have no right to child brides or underage sex. And religious advocates of female genital mutilation and jihad are not exempt from corresponding laws.
16. What then is wrong with belief-based exemptions? The answer, it seems, is that they contravene three fundamental principles of a secular liberal democracy:
 - a. The **rule of law**:²⁹ the law applies equally to all, and nobody is above the law, even if they disagree with it.
 - b. The **harm principle**:³⁰ freedom does not include the right to cause harm to others. “Harm” here means more than hurt feelings or taking offence; it includes damage to or interference with the physical bodies or the property, reputation or liberty of others.

²³ Department of the Parliamentary Library, “[Conscientious Objection to Military Service in Australia](#)” (research note), 11 April 2003; *Fair Work (Registered Organisations) Act 2009* (Cth) s 180; *Industrial Relations Act 1996* (NSW) s 212.

²⁴ *Casley v Deputy Commissioner of Taxation* [2017] WASCA 196.

²⁵ *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 136 (Mason ACJ and Brennan J).

²⁶ *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.

²⁷ *Adelaide Company of Jehovah’s Witnesses Incorporated v The Commonwealth* (1943) 67 CLR 116.

Regulations declaring the Jehovah’s Witnesses to be a “subversive association” were held invalid, but not for reasons of religious freedom.

²⁸ *Employment Div. v. Smith* (1990) 494 U.S. 872.

²⁹ 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”).

³⁰ The classic statement is J S 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.”

- c. The **neutrality principle**:³¹ 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.
17. These principles are not absolute, but they are forceful: laws that contravene them should not be enacted unless those laws are necessary to protect other fundamental rights, such as freedom from servitude (which goes against forced conscription), freedom of association (which goes against forced membership of organisations), and freedom of speech (which raises the question of what *harmful* speech may be properly restricted).³²
18. Turning 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 in paragraph 7 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.
19. 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 parents (just as others may seek to deny service to black or disabled people³³). This interferes with the liberty of those populations (and so harms them) by denying them equal opportunities to participate in economic and community life. In a liberal democracy there is no right, and certainly no fundamental right, to harm others in this way, because equality of opportunity is itself a fundamental right. As international law recognises, freedom to manifest one's religion or belief may be properly curtailed to protect public morals or the fundamental rights and freedoms of others³⁴ – which is exactly what anti-discrimination laws do.

³¹ 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.”

³² Section 18C of the *Racial Discrimination Act 1975* (Cth) makes it unlawful (subject to the defences in s 18D) to “offend” others based on their “race, colour or national or ethnic origin”. This is misguided because: (1) it is not justified by the harm principle; (2) offence is subjective and too easily taken; and (3) uncomfortable truths are likely to offend – it should not be unlawful to express them.

³³ Disability discrimination could be seen as a matter of “religious freedom”, as many religions justify it; see M Moore, “[Religious Attitudes towards the Disabled](#)”, *The Secular Web*, 2015.

³⁴ Article 18(3) of the International Covenant on Civil and Political Rights (**ICCPR**) 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.”

20. As to the **neutrality principle**, the law should not privilege religious 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 logically should apply to anybody who wishes to discriminate on genuine *religious or non-religious* grounds.³⁵ This would mean anyone should be able to discriminate against anyone else for any conscientious reason (any genuine religious or non-religious belief), 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 this. The problem, in short, is that religious exemptions unfairly privilege religious believers over non-believers (in breach of the neutrality principle), while a more general right of conscientious objection would rob anti-discrimination laws of their practical effect.
21. These problems based on the rule of law, the harm principle and the neutrality principle are in no way solved by proposals to re-label religious exemptions as “general limitations”.³⁶ What matters is the substance, not the words.
22. Finally, while the current debate focuses on anti-discrimination laws, there is no reason for religious 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 consistently applied, is that *every* citizen should be able “opt out” of any (or at least many) laws they genuinely disagree with. This is unworkable and unacceptable: it would “make the professed doctrines of religious belief superior to the law of the land, and in effect...permit every citizen to become a law unto himself.”³⁷

Voluntary public activities

23. Another problem with religious exemptions (or “general limitations”) to anti-discrimination laws is that religious bodies *choose* to be in 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, in so doing, to engage with the public (most of whom do not share their beliefs) or to provide public services that would otherwise be provided by governments (such as

³⁵ As noted earlier (footnote 21), 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.

³⁶ See: “[Traditional Rights and Freedoms - Encroachments by Commonwealth Laws](#)” [2015] ALRC 4, [5.111]; Joint Standing Committee on Foreign Affairs, Defence and Trade, “[Interim Report – Legal Foundations of Religious Freedom in Australia](#)” (November 2017), [7.35]; Freedom for Faith, [draft submission](#), pp 63-4.

³⁷ 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).

health and education). The public sphere “marks the point at which the religious beliefs of one person or group impact upon other people and society generally”.³⁸

24. 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 (and governments), including anti-discrimination laws.³⁹ 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.
25. Peter Singer gives these examples:⁴⁰
 - 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 (one could 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, a law was proposed requiring animals to be stunned before slaughter. Islamic and Jewish leaders opposed the law because halal and kosher practices prohibit stunning before 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.⁴¹
 - 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.”

³⁸ ["Traditional Rights and Freedoms - Encroachments by Commonwealth Laws"](#) [2015] ALRC 4, [5.78] (submission of Human Rights Law Centre).

³⁹ 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.”

⁴⁰ P Singer, [“The use and abuse of religious freedom”](#), ABC Religion & Ethics, 12 June 2012.

⁴¹ Religious exemptions to human slaughter laws (see RSPCA, [“Is religious slaughter legal in Australia?”](#)) should therefore be repealed.

26. In Australia, Christian schools have defended their right (under current exemptions) to refuse enrolment to gay students and students with same-sex parents,⁴² and have terminated the employment of teachers who are unmarried mothers⁴³ or gay.⁴⁴ Yet, adopting Singer's point, Christianity does not *require* its adherents 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.
27. 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, disability, sexual orientation, or so on – then, like other members of the public, they are at liberty not to be in business at all. Civil marriage celebrants are also performing a government function (solemnisation of marriages) and should therefore follow the same anti-discrimination laws as governments generally.⁴⁵
28. A further point is that many religious organisations rely on public funds. Governments are by far the biggest source of charitable revenue,⁴⁶ and make large contributions to religious schools, universities and hospitals.⁴⁷ Thus, “LGBTI taxpayers are being [unfairly] asked to fund religious organisations that can discriminate against them as employers.”⁴⁸ Those who exercise public functions (such as health and education), or receive public funds, should obey public rules;⁴⁹ and government-funded discrimination can hardly be justified by “diversity” (as if all viewpoints, including racist, sexist or other discriminatory ones, deserve public support).

⁴² [“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; J Tovey, [“Schools defend right to expel gays”](#), *Sydney Morning Herald*, 7 July 2013.

⁴³ [“Union in plea for sacked teacher”](#), *Sunshine Coast Daily*, 2 May 2012.

⁴⁴ B Greig, [“You're gay? You're out! Gay teacher sacked due to WA law loophole”](#), *WA Today*, 22 November 2017.

⁴⁵ 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.

⁴⁶ “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.

⁴⁷ See: Department of Parliamentary Services, [“Budget Review 2017-18”](#) (research paper), 19 May 2017, pp 16 (universities), 21-23 (schools), 76-77 (hospitals); C Hanrahan, [“Here's how Australia's schools are funded”](#), ABC News, 30 May 2017; Australian Institute of Health and Welfare, [“Australia's hospitals at a glance 2015-2016”](#), p 6 (“About 91% of care in public hospitals and 33% of care in private hospitals is funded by governments”).

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

⁴⁹ In the UK, bodies exercising “public functions” (including schools) generally cannot discriminate: *Equality Act 2010* (UK) s 149 (see also s 85 and Sch 11). There are 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.

29. Finally, as for the draft Paterson bill,⁵⁰ or other proposals to create exemptions around same-sex weddings (but not for other goods and services), these proposals are unjustified for the reasons already given, and they lead to absurdities: goods and services could be legally refused to gay couples on their wedding day, but not on holidays, birthdays, anniversaries, or ordinary weekends away. It is also unfair to target married (or engaged) same-sex couples when others who contravene traditional religious morals – gay individuals, de facto couples, unmarried parents, divorcees, and adulterers – would still be protected by anti-discrimination laws.
30. In summary, there should be no religious 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.

Repeal of existing exemptions

31. This submission has argued so far that religious belief-based exemptions to anti-discrimination laws are undesirable 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.
32. A qualification to this is that governments should not interfere in matters of belief and worship. This justifies the current exemptions around the appointment of clergy and members of religious orders, and participation in religious observance and practice. However, the broad exemptions currently permitting discrimination by religious bodies in public life 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.
33. Two main arguments are commonly given for retaining those broad exemptions. These are examined in what follows. The first argument, relating to “mission fit” or **shared ethos**, succeeds in part, but only justifies narrower exemptions than are now in place. The second argument, concerning the **preservation of religious identity**, should be rejected entirely.

Shared ethos

34. The first argument commonly made in favour of the current broad exemptions rests on the desire of religious bodies to employ those with a “mission fit” or shared ethos – people who share those religious bodies’ beliefs, tenets, 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 around political staffers⁵¹ – so, it is argued, a religious organisation

⁵⁰ Draft “[Marriage Amendment \(Definition and Protection of Freedoms\) Bill 2017](#)”.

⁵¹ *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).

should have the right to positively select people with that organisation's beliefs and practices, even where this would otherwise be unlawful discrimination.⁵²

35. This argument succeeds to a point. Those whose job it is to promote a cause – religious, political or social – do need to believe in that cause, lest they appear disingenuous or try to undermine it. The same applies to practices: a meat-eater, for example, cannot credibly promote vegetarianism. Shared beliefs and practices are therefore genuine occupational requirements for those tasked with actively promoting religious, political or social causes. If one accepts that freedom of religion (combined with freedom of speech) includes the right to *promote* a religion, it follows that anti-discrimination laws should include an exemption around religious promotion. The exemption could also fairly recognise that some roles involve religious observance and practice (belief and worship) as well as promotion.
36. None of this justifies the current broad exemptions, which go well beyond the protection of religious belief, worship and promotion. What it *does* justify is a narrower exemption for the selection or appointment of people, by bodies established to propagate religion (or religious views), to positions substantially involving religious observance or practice, religious instruction (a form of promotion), or religious leadership, counselling or lobbying (also forms of promotion). Religious beliefs and practices are genuine occupational requirements for such roles; and the exemption is justified to protect the rights to religious belief, worship, and promotion.
37. Three examples help illustrate this proposed exemption:
 - a. 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 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.
 - b. The exemption would similarly apply to principals of religious schools, if their role substantially involves religious leadership.
 - c. The exemption refers to religious *instruction*, not *education*. A teaching role involving religious instruction – teaching students to follow the doctrines of a religion – would be within the exemption (and selection of teachers based on beliefs and practices would therefore be allowed), but a role merely involving general religious education – teaching *about* religions – would not.

⁵² 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].

Preservation of religious identity

38. The second argument commonly given for retaining broad religious exemptions to anti-discrimination laws rests on the fact that religious bodies often 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, even if those beliefs and practices are not genuine occupational requirements. This right of positive discrimination, they say, 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, is it really a Catholic school?⁵³
39. Curiously, these concerns are not consistently applied:
- a. On the one hand, religious bodies operating in the public sphere want the right to discriminate against people who do not share those bodies' beliefs and practices. On the other hand, they want it to be, or remain, illegal for *businesses* operating in the public sphere to discriminate against people who do not share those businesses' beliefs and practices, such as a belief in marriage equality.⁵⁴ Clearly they cannot have it both ways. Why should religious bodies in the public sphere be able to discriminate against those with different beliefs and practices, when businesses cannot do the same?
 - b. It seems unlikely that a Christian school would expel a student merely because he or she is not quite convinced of the literal truth of original sin, the virgin birth, or the resurrection – all of which are core Christian doctrines. One suspects not many students would be left if such beliefs were strictly required. On the other hand, it seems more likely that a Christian school would reject or expel a student for being gay, or for having same-sex parents – as some already have.⁵⁵ A right of positive religious discrimination looks more like a device to persecute minorities than to preserve religious identity.
40. To avoid such hypocrisy, the better view – reflected in the proposed exemption in paragraph 36 above – is that discrimination based on religious beliefs and practices should be unlawful (in public life) unless those religious beliefs and practices are genuine occupational requirements. For example, “a person employed as a ‘cleaner or gardener’ should not be required to share [the religious beliefs and practices of the employing body], as that person’s role does not require these attributes as part of the

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 M Collett, “[Same-sex marriage: Why has Senator James Paterson written an alternative bill?](#)”, ABC News, 13 November 2017; J Kelly, “[Church Heads Pen Open Letter over Same-Sex Marriage Bill Fears](#)”, *The Australian*, 1 December 2017; R Urban, “[Gay rights activists target IBM executive](#)”, *The Weekend Australian*, 21 March 2017. Discrimination against those who oppose marriage equality is already illegal in most jurisdictions: paragraph 6 above. See also Australian Marriage Equality’s [list of over 800 corporations that support marriage equality](#).

⁵⁵ Footnotes 42 to 44 above.

occupation.”⁵⁶ Similarly, teachers of purely secular subjects at religious schools should not be required to 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.

41. 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[ies] with the local council to provide support for homeless people, has to be heterosexual, cisgender [ie, not transgender], and have children only within the bounds of marriage.”⁵⁷

42. There are further reasons to reject the argument that preservation of religious identity justifies a right of positive religious discrimination:

- a. The primary purposes of schools, universities and hospitals, and of the public funds advanced to them, are to educate people and heal the sick, not to preserve religious identity or promote religious practices. Those primary purposes are best served by hiring the best people on their merits, not by compromising the standard of education or healthcare by hiring potentially inferior candidates based on their religious beliefs and practices.
- b. While religious charities may prefer to assist people of their own faith, it is not unreasonable to expect – and generally it seems to be the case – that their services are made available to all who are genuinely in need. A requirement not to discriminate is unlikely to cause charities to shut down (since most already comply with that requirement); but if a small number do shut down, they can be taken over by non-discriminatory bodies or by governments.
- c. Religious bodies are significant employers. Over 1.3 million students attend non-government schools,⁵⁸ almost all of which are religiously affiliated – not to mention religious universities, hospitals, charity groups, nursing homes, employment services, and (partly) commercial enterprises. It is unjust that employees who deviate in any way from these bodies’ 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

⁵⁶ 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).

⁵⁷ E Sutherland, “[Bigotry in the Name of God: the Case Against Religious Exemptions](#)”, *New Matilda*, 3 June 2016.

⁵⁸ 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.

discriminate based on religious beliefs and practices] and never know when they might be sacked, denied a promotion or downgraded in their role.”⁵⁹

- d. 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 mostly attract Catholic students and staff, even if those schools do not insist that every student and staff member be Catholic. The same applies to other organisations. Their sense of identity does not require a right of positive religious discrimination.
 - e. 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* Catholic or Muslim. The same goes for other religious organisations. Their continued existence (as religious organisations) does not depend on a right of 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 that they best understand the organisation’s culture.
43. In short, the “right” of positive religious discrimination – as exists under current exemptions to anti-discrimination laws – is unnecessary and should be repealed. If that right is to be retained, then as a matter of logic (and fairness), businesses 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

44. 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 businesses.

⁵⁹ B Greig, “[Exemptions for religious groups keep fears alive](#)”, *Sydney Morning Herald*, 22 January 2013.

45. These arbitrary and inconsistent demands should be replaced with a unifying principle: discrimination based on religious beliefs and practices should be unlawful in public life except in matters of religious belief, worship, and promotion. To that end:
- a. NSW, SA and the Commonwealth, to be consistent with other States and the Territories, should amend their anti-discrimination laws to prohibit discrimination on the grounds of religious (and political⁶⁰) belief.
 - b. Religious exemptions to anti-discrimination laws should be partially repealed, and amended to be limited to the following areas:
 - i. the ordination or appointment of priests, ministers of religion or members of a religious order;
 - ii. the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order;
 - iii. the selection or appointment of people to perform functions in relation to, or 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 or practice, religious instruction, or religious leadership, counselling or lobbying.
 - c. Demands for broader religious exemptions should be rejected.
46. Current laws that permit civil tribunals to grant exemptions (and allow discrimination) in exceptional cases⁶¹ 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.
47. This Religious Freedom Review should otherwise adopt the recommendations of the National Secular Lobby.⁶²

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12 February 2018

⁶⁰ 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).

⁶¹ *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.

⁶² National Secular Lobby, "[Religious Freedom Review Panel Submission](#)", 15 January 2018.

⁶³ For helpful discussion and comments, I am grateful to Virginia Stretton, Katie Weir, Trevor Bell, Scott Clark, Jonathan Meddings, and Igor Bray. They may or may not share my views.