

The background of the entire page is a warm, orange-toned photograph of several lit candles. The flames are soft and glowing, creating a bokeh effect. In the center, there is a dark, rectangular box with a black background. Inside this box, the title 'Religious Freedom Review' is written in a large, white, serif font. Below the title, the subtitle 'REPORT OF THE EXPERT PANEL' is written in a smaller, orange, sans-serif font.

Religious Freedom Review

REPORT OF THE EXPERT PANEL

18 May 2018

The Hon Malcolm Turnbull MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister

On behalf of the Expert Panel, I submit to you our Report on religious freedom in Australia.

This Report is the culmination of a nationwide consultation process, including a public submission process and face-to-face meetings in every State and Territory.

It reflects the input that the Panel received throughout the life of the Review, as well as comprehensive research and the individual expertise of the Panel members. The Panel would like to thank the many thousands of Australians who took the opportunity to have their say on this important issue.

I would like to take this opportunity to thank my fellow Panel members for their work. I would also like to thank the Secretariat to the Review for its highly professional support.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Philip Ruddock', written in a cursive style.

The Hon Philip Ruddock
Chair
Expert Panel

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Terms of Reference

Religious Freedom Review

Objective

The Panel shall examine and report on whether Australian law (Commonwealth, State and Territory) adequately protects the human right to freedom of religion.

Scope

In undertaking this Review, the Panel should:

- consider the intersections between the enjoyment of the freedom of religion and other human rights
- have regard to any previous or ongoing reviews or inquiries that it considers relevant
- consult as widely as it considers necessary.

Membership of the Panel

The review will be conducted by an Expert Panel, chaired by the Hon Philip Ruddock, which will consist of:

- Emeritus Professor Rosalind Croucher AM
- The Hon Dr Annabelle Bennett AO SC
- Fr Frank Brennan SJ AO
- Professor Nicholas Aroney.

The Panel will be supported by a secretariat led by the Department of the Prime Minister and Cabinet.

Timing

The Panel will report its findings to the Prime Minister by 18 May 2018.

Recommendations

Chapter 3 – Domestic legal framework

Recommendation 1

Those jurisdictions that retain exceptions or exemptions in their anti-discrimination laws for religious bodies with respect to race, disability, pregnancy or intersex status should review them, having regard to community expectations.

Recommendation 2

Commonwealth, State and Territory governments should have regard to the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* when drafting laws that would limit the right to freedom of religion.

Recommendation 3

Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.

Chapter 4 – Manifestation and religious belief

Recommendation 4

The Commonwealth should amend section 11 of the *Charities Act 2013* to clarify that advocacy of a 'traditional' view of marriage would not, of itself, amount to a 'disqualifying purpose'.

Charities and faith-based organisations

Employment in religious schools

Recommendation 5

The Commonwealth should amend the *Sex Discrimination Act 1984* to provide that religious schools can discriminate in relation to the employment of staff, and the engagement of contractors, on the basis of sexual orientation, gender identity or relationship status provided that:

- (a) the discrimination is founded in the precepts of the religion
- (b) the school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced, and
- (c) the school provides a copy of the policy in writing to employees and contractors and prospective employees and contractors.

Recommendation 6

Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools in employment on the basis of race, disability, pregnancy or intersex status. Further, jurisdictions should ensure that any exceptions for religious schools do not permit discrimination against an existing employee solely on the basis that the employee has entered into a marriage.

Enrolment of students in religious schools

Recommendation 7

The Commonwealth should amend the *Sex Discrimination Act* to provide that religious schools may discriminate in relation to students on the basis of sexual orientation, gender identity or relationship status provided that:

- (a) the discrimination is founded in the precepts of the religion
- (b) the school has a publicly available policy outlining its position in relation to the matter
- (c) the school provides a copy of the policy in writing to prospective students and their parents at the time of enrolment and to existing students and their parents at any time the policy is updated, and
- (d) the school has regard to the best interests of the child as the primary consideration in its conduct.

Recommendation 8

Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools with respect to students on the basis of race, disability, pregnancy or intersex status.

Religious and moral education

Recommendation 9

State and Territory education departments should maintain clear policies as to when and how a parent or guardian may request that a child be removed from a class that contains instruction on religious or moral matters and ensure that these policies are applied consistently. These policies should:

- (a) include a requirement to provide sufficient, relevant information about such classes to enable parents or guardians to consider whether their content may be inconsistent with the parents' or guardians' religious beliefs, and
- (b) give due consideration to the rights of the child, including to receive information about sexual health, and their progressive capacity to make decisions for themselves.

Recommendation 10

The Commonwealth Attorney-General should consider the guidance material on the Attorney-General's Department's website relating to authorised celebrants to ensure that it uses plain English to explain clearly and precisely the operation of the *Marriage Act 1961*. The updated guidance should include:

- (a) a clear description of the religious protections available to different classes of authorised celebrants, and
- (b) advice that the term 'minister of religion' is used to cover authorised celebrants from religious bodies which would not ordinarily use the term 'minister', including non-Christian religions.

Solemnisation of marriages and use of places of worship

Recommendation 11

The Commonwealth Attorney-General should consider whether the Code of Practice set out in Schedule 2 of the *Marriage Regulations 2017* is appropriately adapted to the needs of smaller and emerging religious bodies.

Recommendation 12

The Commonwealth should progress legislative amendments to make it clear that religious schools are not required to make available their facilities, or to provide goods or services, for any marriage, provided that the refusal:

- (a) conforms to the doctrines, tenets or beliefs of the religion of the body, or
- (b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Chapter 5 – Vilification, blasphemy and social hostility

Recommendation 13

Those jurisdictions that have not abolished statutory or common law offences of blasphemy should do so.

Blasphemy

Recommendation 14

References to blasphemy in the *Shipping Registration Regulations 1981*, and in State and Territory primary and secondary legislation, should be repealed or replaced with terms applicable not only to religion.

Chapter 6 – Discrimination

Recommendation 15

The Commonwealth should amend the *Racial Discrimination Act 1975*, or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.

Recommendation 16

New South Wales and South Australia should amend their anti-discrimination laws to render it unlawful to discriminate on the basis of a person's 'religious belief or activity' including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for the appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.

Chapter 7 – Data, dialogue and education

Recommendation 17

The Commonwealth should commission the collection and analysis of quantitative and qualitative information on:

- (a) the experience of freedom of religion in Australia at the community level, including:
 - (i) incidents of physical violence, including threats of violence, linked to a person's faith
 - (ii) harassment, intimidation or verbal abuse directed at those of faith
 - (iii) forms of discrimination based on religion and suffered by those of faith
 - (iv) unreasonable restrictions on the ability of people to express, manifest or change their faith
 - (v) restrictions on the ability of people to educate their children in a manner consistent with their faith
- (b) the experience of freedom of religion impacting on other human rights, and
- (c) the extent to which religious diversity (as distinct from cultural diversity) is accepted and promoted in Australian society.

The experience of religious freedom

Poor literacy concerning human rights and religion

Recommendation 18

The Commonwealth should support the development of a religious engagement and public education program about human rights and religion in Australia, the importance of the right to freedom of religion and belief, and the current protections for religious freedom in Australian and international law. As a first step, the Panel recommends that the Attorney-General should ask the Parliamentary Joint Committee on Human Rights to inquire into and report on how best to enhance engagement, education and awareness about these issues.

Recommendation 19

The Australian Human Rights Commission should take a leading role in the protection of freedom of religion, including through enhancing engagement, understanding and dialogue. This should occur within the existing commissioner model and not necessarily through the creation of a new position.

Chapter 8 – Conclusion

Recommendation 20

The Prime Minister and the Commonwealth Attorney-General should take leadership of the issues identified in this report with respect to the Commonwealth, and work with the States and Territories to ensure its implementation. While the Panel hopes it would not be necessary, consideration should be given to further Commonwealth legislative solutions if required.

Chapter 1 – Introduction

- 1.1 Freedom of thought, conscience and religion is a right enjoyed by all, not just those of faith. It protects those who live a life of faith and those who live by other beliefs or, indeed, no beliefs. It protects those who face coercion that impairs their freedom to choose their religion or beliefs. It protects those whose views on faith or belief change over their lifetime. It is not a protection for religions. It is a protection, a human right, for the religious, the non-religious and those who subscribe to other systems of belief.
- 1.2 On 22 November 2017, the Prime Minister, the Hon Malcolm Turnbull MP, announced the appointment of an Expert Panel (the Panel) to examine whether Australian law adequately protects the human right to freedom of religion.
- 1.3 The appointment of the Panel occurred in the context of Parliamentary debate of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (the Marriage Amendment Act). Among other things, that Act amended the definition of marriage in section 5 of the *Marriage Act 1961* (the Marriage Act) to provide that marriage means ‘the union of 2 people to the exclusion of all others’. Previously marriage had been defined as the ‘union of a man and a woman’. Ensuring adequate protections for religious bodies that maintain that marriage can only be between a man and a woman was a key feature of Parliamentary discussion of the legislation.
- 1.4 While the passage of the Marriage Amendment Act provided the immediate context for the appointment and work of the Panel, religious freedom has been the subject of a number of significant reviews and inquiries both in Australia and overseas in recent years.
- 1.5 It was not surprising to the Panel that freedom of religion should be the subject of such interest in Australia. As it went about its work, the Panel heard repeatedly that religious adherence in Australia is at a critical juncture. Changing patterns of religious adherence, a loss of trust in mainstream institutions, and changing social mores are challenging the traditional role that religion has played in Australian society.
- 1.6 In the view of the Panel, human rights have the most work to do during times of change and uncertainty. While the Panel did not accept the argument, put by some, that religious freedom is in imminent peril, it did accept that the protection of difference with respect to belief or faith in a democratic, pluralist country such as Australia requires constant vigilance. Accordingly, it acknowledged the timeliness of the obligations under its Terms of Reference to look again at the protection of religious freedom and its relationship with other rights, which are of equal weight and significance.

- 1.7 In *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*, Mason ACJ and Brennan J observed:

Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint.¹

- 1.8 While freedom of religion attaches to the individual, its exercise contributes to the character of society as a whole. As Ronan McCrea has written, ‘religious freedom is seen as important for its contribution to individual autonomy and to the overall pluralism which ought to characterise democratic societies’.² Respecting diversity, including with respect to belief, not only honours the inherent dignity of the individual, but also contributes to the vibrant democratic life of society.

- 1.9 Diversity in religious belief is just one example of the many differences that exist within pluralistic societies such as Australia. Australia embraces diversity in a host of areas including race, religion, culture, sex, sexuality, national origin, and political and other opinions. It welcomes expression of this diversity, subject only to the importance of respecting the rights of others.

- 1.10 The Panel was conscious of the complexity and delicacy of the task it was given. As McCrea has written:

religion raises different problems and is the basis of very different claims in different contexts. Sometimes it should be seen as a belief akin to political beliefs, other times it is a right to treat it as something closer to ethnic or racial identity. Designing legal rules for such a shape-shifting phenomenon that is viewed in so different ways by different people in so many different contexts is immensely difficult.³

- 1.11 Given this immense difficulty and the significance of the matters before it for all Australians, whether of faith or not, the Panel was circumspect in recommending changes to Australia’s existing laws. It was reluctant to upset these laws unless there was clear evidence that they are inadequate in protecting the right to freedom of thought, conscience and religion or that they unjustifiably burden other rights.

A many-sided discussion

- 1.12 The Panel heard from thousands of Australians and met with over 180 experts and organisations, visiting each State and Territory. Many stakeholders emphasised that Australia is a diverse and inclusive nation, and that freedom of thought, conscience and religion are fundamental to our democracy and our vibrant cultural life. No one during the review challenged the right to hold, or not to hold, a religious belief. Few took issue with the right of religious institutions to operate freely within certain

¹ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 130.

² Ronan McCrea, ‘Singing from the Same Hymn Sheet? What the Differences between the Strasbourg and Luxembourg Courts Tell Us about Religious Freedom, Non-Discrimination, and the Secular State’ (2016) 5 *Oxford Journal of Law and Religion* 183, 186.

³ *Ibid* 209.

parameters—for example, to discriminate in appointing clergy, to control the use of their places of worship, and for religious ministers to be able to choose not to solemnise same-sex marriages.

- 1.13 The Panel also heard that, as a whole, Australians generally enjoy religious freedom. Most stakeholders of faith acknowledged that, by and large, they have been free to observe their religious beliefs. Those from faiths that face persecution overseas were particularly vocal in acknowledging the relative safety that Australia affords people of different faiths. These perspectives highlighted that religious freedom is precious and that it needs to be actively preserved. The question for Australia is how best to continue doing this in changing times. On that question, there were divergent views.
- 1.14 It was clear from the submissions and consultations that this is a discussion with many viewpoints. Within all stakeholder groups, a variety of perspectives were observed and acknowledged. Many stakeholders emphasised the need to protect freedom of religion for people of all faiths, as well as the freedom of conscience and belief of all Australians. Stakeholders also expressed respect for other viewpoints.
- 1.15 Most groups acknowledged the difficult conversations that need to occur when rights intersect and highlighted the need to adopt a position of minimal harm. However, there were divergent views expressed on how the balance should be struck between competing rights. For example, although some groups felt that the current exceptions⁴ for religion in anti-discrimination law strike an appropriate balance, others argued for increased protections, such as through a Religious Freedom Act, while others argued that existing protections should be limited. Others argued that a Human Rights Act or mechanisms such as a general limitations clause would provide a more sophisticated and appropriate protection for everyone's rights.
- 1.16 The Panel also heard widespread concerns that the law in this area is not clear, or that its application created uncertainty. Many religious groups stated that they do not know 'where they stand' following changes to the Marriage Act and in the context of the broader societal changes referred to earlier. Other groups called for religious organisations to be more transparent about their policies in relation to lesbian, gay, bisexual, trans and intersex (LGBTI) communities in particular.
- 1.17 A common characteristic of many of the representations made to the Panel was apprehension, even 'fear'. People of faith were apprehensive that religious freedom may come under threat in Australia. The Panel heard many examples of changes to legislation or judicial decisions from overseas that underpinned this apprehension. While the Panel considered these matters carefully, it was cautious in drawing conclusions from the experience in jurisdictions with quite different legal arrangements from Australia.

⁴ Although there is a technical difference between 'exemptions' and 'exceptions' in some jurisdictions, the terms are often used interchangeably. For consistency, the term 'exception' is used in this Report.

- 1.18 The Panel also heard representations from those who feared that protections for religion would be expanded at their expense, for example through a strengthening of exceptions to anti-discrimination laws.
- 1.19 Many stakeholder groups suggested that more education and respectful dialogue was needed, to increase mutual understanding and dispel fear.
- 1.20 While debate of the Marriage Amendment Act provided the immediate context for the work of the Panel, the Panel received limited evidence that the fears of religious groups expressed during that debate had come to pass in Australia, although it was also noted that the change had only recently been introduced. There was, among many groups, a desire to ‘move on’ from the more divisive aspects of the debate on marriage and to ‘live and let live’. Positive examples were cited of different groups coming together to enhance mutual understanding and work through issues.
- 1.21 Finally, the failure of some religious and other institutions to protect children from sexual abuse, as detailed through the Royal Commission into Institutional Responses to Child Sexual Abuse, cast a long shadow over the Panel’s deliberations. For some in the community, the fundamental breach of trust that occurred in these institutions prompted questions about the protections and privileges that religious bodies hold under Australian law.

Patterns of religious adherence in Australia⁵

- 1.22 For much of Australia’s history, adhering to a religious faith—typically some form of Christianity—was what the philosopher Charles Taylor calls ‘the default option’ for most Australians.⁶ This is no longer the case.
- 1.23 In Australia, the proportion of the population reporting as having ‘no religion’ is increasing. While this is consistent with trends in western European countries, it runs against trends and projections in Australia’s region and globally.
- 1.24 The 2016 Census showed that religion remains an important part of Australia’s strong—and diverse—social fabric. The Census results showed that Christianity—reported by 52.1% of the population—remained the largest faith group, of which the two largest denominations were Catholic at 22.6%, and Anglican at 13.3%. The second and third largest faith groups were Islam at 2.6%, and Buddhism at 2.4%.
- 1.25 The Census, however, also showed that nearly a third (30.1%) of Australians identified as having ‘no religion’. This has increased from the 18.7% reported in

⁵ Statistical data in this section are drawn from Australian Bureau of Statistics, *2016 Census Data Summary: Religion in Australia* (27 March 2018) Australian Bureau of Statistics < <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Religion%20Data%20Summary~70>>; Australian Bureau of Statistics, *Religion in Australia, 2016* (27 March 2018) Australian Bureau of Statistics < <http://www.abs.gov.au/ausstats/abs%40.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Religion%20Article~80>>.

⁶ Charles Taylor, *A Secular Age* (Harvard University Press, 2007) 12.

2006, and the 22.3% reported in 2011. The Census indicated that younger people (34.2% of people under 18, and 38.7% between 18 and 34) were far more likely to report having 'no religion' than older people (25.2% of people between 50 and 64, and 16.1% of people over the age of 65). People born in Australia (33.8%) were more likely to report having no religion than Australians born overseas (27.1%).

- 1.26 The largest decline in religious affiliation has occurred within the Christian denominations. The 52% of people reporting as Christian in 2016 had decreased from 61.1% in 2011, 74.0% in 1991 and 88.2% in 1966. Further, while Australians born overseas were more likely to adhere to Christianity than any other faith group, Christians were still a minority in that category overall (albeit a very significant one at 47.3%).
- 1.27 By way of contrast, Hinduism, Sikhism and Islam all experienced steady growth, albeit off a low base. For example, those who reported their religion as Hinduism went from 0.7% of the population in 2006 to 1.3% in 2011 and 1.9% in 2016. Over the same period, those who reported their religion as Islam went from 1.7% to 2.2% to 2.6%.
- 1.28 Not only is there a decline of religious adherence in Australia but this decline is also out of step with what is occurring globally. Although religious affiliation is decreasing in the United Kingdom, New Zealand, and in much of Europe and North America, religious adherence is increasing overall among the global population.⁷ According to findings by the Pew Research Center, only 16% of the world's population is religiously unaffiliated. This is expected to decrease to 12.5% by 2060.⁸ The same report stated that adherence to Christianity over this period is expected to increase slightly, from 31.2% to 31.8%.⁹
- 1.29 Of particular interest to Australia is the significant change in religious affiliation in the Asia–Pacific region. While in 2015 75% of the world's religiously unaffiliated lived in the Asia–Pacific region, the Pew Research Center expects this to decrease to 66% by 2060.¹⁰
- 1.30 If the current trend continues in Australia, when the next Census occurs in 2021, a minority of Australians will identify as being Christian for the first time. While a majority of Australians, particularly new Australians, are likely to continue to identify as having a religious affiliation, at some point in the next decade, people who report 'no religion' are likely to outnumber the largest faith grouping of Christianity.

The human right to religious freedom

⁷ Pew Research Center, *The Changing Global Religious Landscape* (5 April 2017) Pew Research Center 10, 18, 37–8 <<http://www.pewforum.org/2017/04/05/the-changing-global-religious-landscape/>>.

⁸ *Ibid.*, 10.

⁹ *Ibid.*

¹⁰ *Ibid.*, 12, 18.

- 1.31 By directing the Panel's attention to the human right to religious freedom, the Terms of Reference provide a standard against which to assess the adequacy of protections under Australian law. The Panel has taken care throughout this Report to reference its conclusions back to the human right to freedom of thought, conscience and religion as provided in international human rights law.
- 1.32 The Panel was struck by how often the right to religious freedom was invoked in submissions and during consultations, but how little common understanding exists as to the substantive content of that right. Accordingly, the Panel has taken very seriously the task of describing the right, how it interacts with other human rights and its application to particular issues. Chapter 2 of this Report provides an overview of the right and its various aspects. The Panel drew upon these different aspects in more detail as it considered the particular matters of concern or controversy before it.
- 1.33 By way of introduction, the Panel confines itself to a number of overarching observations.
- 1.34 First, the human right to freedom of thought, conscience and religion belongs to all—the religious, the non-religious and those moving towards, away from, or between religions. The right protects freedom of thought, conscience and religion, not religion as such. The atheist and the agnostic receive the same protection as the religious adherent. Each is free to hold their beliefs and to live free of coercion to adopt some different set of beliefs. Both are given particular protections to manifest their belief, but their right to do so may be limited, on carefully prescribed grounds, in the interests of the broader community.
- 1.35 It should be noted with respect to religious adherents that there are degrees of adherence within each religion, such that it may be hard to define with precision what constitutes a single doctrine for that religion.
- 1.36 Secondly, freedom of religion sits alongside and interacts with the broad suite of human rights found in the international instruments to which Australia is committed. These include well known civil and political rights, such as freedom of expression, non-discrimination, freedom of association, and protections against torture and slavery. They also include social and cultural rights, including, for example, the right to found a family and the right of every child to an education.
- 1.37 Importantly, there is no hierarchy of rights: one right does not take precedence over another. Rights, in this sense, are indivisible.¹¹ This understanding was absent from some of the submissions and representations the Panel received. Australia does not get to choose, for example, between protecting religious freedom and providing for equality before the law. It must do both under its international obligations.

¹¹ See *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna, UN Doc A/CONF.157/23 (25 June 1993) [5].

Sometimes this will mean one right will ‘give way’ to another, but this must occur within the framework provided by international law.

- 1.38 Some rights, including for example the freedom to have or adopt a religion or belief, are non-derogable, that is, they cannot be departed from even in times of national emergency. Some rights are also absolute. They cannot be limited or confined by the need to protect other interests. Other rights may be limited but only in defined circumstances. For example, the freedom to have or adopt a religion or belief is absolute, while limitations may be placed on the freedom to manifest religion or belief in specified circumstances.
- 1.39 Finally, international law generally provides States with a broad discretion as to how they give effect to their obligations. While legally binding, these instruments do not necessarily require the use of legislation specifically to implement them. Other measures may also be appropriate and effective. However, some aspects of those rights might lend themselves readily to implementation through the law.
- 1.40 Even where legislation is mandated under international law, or where it would be the most effective means of implementation, States have some discretion as to how they give effect to their obligations. Australia is not obliged, for example, to confine itself to the exact words used in an international instrument when it introduces specific laws in the domestic sphere. Rather, it is able to reasonably adapt the obligation to Australia’s unique constitutional and legal framework.
- 1.41 A more detailed discussion of the human right to religious freedom is developed in Chapter 2.

Protections under Australian law

- 1.42 It is not possible to point to a standalone law that gives comprehensive effect to the human right to religious freedom throughout Australia. This was the subject of a large number of representations to the Panel. As with other human rights, it is necessary to consider our constitutional arrangements, Commonwealth, State and Territory legislation, and the common law.
- 1.43 It is important to acknowledge that the absence of specific legislative protection is not, of itself, an indicator that the legal regime is inadequate. Further, as Professor Carolyn Evans has written, ‘sometimes the best protection that a government can give to religious freedom is to simply leave people free to make their own decisions about religious issues’.¹² It is also the case that not every social change or social interaction requires legislation.
- 1.44 The Panel found inconsistent approaches to religious freedom and levels of protection as between the Commonwealth and the States and Territories and as between the various States and Territories. While this is not itself necessarily a

¹² Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 107.

reason to conclude that the legal protection of religious freedom in Australia is inadequate, it did lead the Panel to examine, and carefully consider the reasons for, the differences. While consistency may be its own virtue, inconsistency is not necessarily problematic—unless it creates difficulties for people in real-world situations. Indeed, in some circumstances there may be considerable benefits in jurisdictions applying different approaches.

- 1.45 The Panel considered the question of the adequacy of Australian law in protecting the human right to religious freedom through two lenses.
- 1.46 The first lens is that of the overall legal framework. This is a top-down approach which looks at the right and its protection and considers whether the Australian legal framework, as currently constructed, is adequate to protect the right independently and in its intersection with other rights. The adequacy of the Australian legal framework is considered in Chapter 3.
- 1.47 The second lens is that of individual aspects of the right. This is a bottom-up approach. This considers each of the individual aspects of the right, how they are reflected in Australian law and the extent to which current laws, or their absence, protect or fail to protect the right. Of critical importance in this analysis are the ‘friction’ points with other rights and how they are resolved in real-world situations.
- 1.48 The Panel has particularly sought out actual—as opposed to hypothetical—examples of the right to religious freedom being burdened, or of laws that are said to reflect the right ‘going too far’ and burdening unduly or disproportionately other intersecting rights.
- 1.49 The Panel’s detailed consideration of these matters is set out in Chapters 3 to 6 of this Report.
- 1.50 The Panel also considered matters that go to the importance of improved data collection, encouraging dialogue and the importance of education. These matters are considered in Chapter 7.

The Panel

- 1.51 As noted above, the appointment of the Panel was announced by the Prime Minister on 22 November 2017. Terms of Reference were provided to the Panel and released publicly on 14 December 2017. Among other matters, the Terms of Reference required the Panel to consider the intersections between the enjoyment of freedom of religion and other human rights.
- 1.52 The Panel consisted of:
 - The Hon Philip Ruddock (Chair)
 - Professor Dr Nicholas Aroney
 - The Hon Dr Annabelle Bennett AO SC
 - Father Frank Brennan SJ AO, and

- Emeritus Professor Rosalind Croucher AM.

- 1.53 The Panel was supported by a Secretariat within the Department of the Prime Minister and Cabinet.
- 1.54 The Terms of Reference originally asked that the Panel report by 31 March 2018. On 20 March 2018, the Prime Minister agreed to the Panel's request for an extension until 18 May 2018 to ensure it could give due consideration to the large number of submissions it received from the Australian public.

Consultations

- 1.55 The Terms of Reference provided for the Panel to consult as widely as it considered necessary. The Panel was particularly concerned to ensure that anyone who wished to engage with it had the opportunity to do so. To this end, at the same time that they were released by the Prime Minister, the Chair of the Panel called for public submissions addressing the matters contained in the Terms of Reference. Submissions were initially sought by 31 January 2018. However, at its first meeting on 10 January 2018, the Panel agreed to extend that date until 14 February 2018 to allow extra time for public participation.
- 1.56 The Panel received some 15,620 submissions from the public.¹³ The Panel was grateful to all who took the time to provide it with their views.
- 1.57 Submissions to the Panel served three important functions. First, they reinforced for the Panel just how important the issue of religious freedom is for a large number of Australians. Second, they provided useful guidance to the Panel in identifying those areas where religious freedom was the subject of concern or conflict in the Australian community. Finally, they were an invaluable source of arguments, ideas and lived examples that informed the Panel as it developed its views. More information on submissions and how they were considered by the Panel can be found at Appendix A.
- 1.58 In addition to public submissions, the Panel held around 90 consultation meetings with 180 individuals and groups representing a diversity of views. Consultations provided a valuable opportunity for the Panel to hear directly from those affected by the right to religious freedom as it is exercised in Australia. They also allowed the Panel to test the views and ideas put to it by stakeholders. Once again, the Panel is immensely grateful to those who took the time to meet with it and particularly to those who shared their very personal stories. More information on the consultations is set out at Appendix A, and a list of those consulted is at Appendix B.

Other materials considered

¹³ Excluding blank and duplicate submissions.

- 1.59 The Panel's Terms of Reference required it to have regard to any previous or ongoing reviews or inquiries that it considered relevant. Matters pertaining to religious freedom have been the subject of numerous reviews and inquiries in recent years, both in Australia and overseas. In undertaking its work, the Panel was particularly cognisant of Report 129 of the Australian Law Reform Commission (ALRC), *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (2015) (the ALRC Freedoms Report), and the Interim Report of the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Legal Foundations of Religious Freedom in Australia* (2017) (the Foreign Affairs, Defence and Trade Interim Report). However, the Panel also considered a range of other material from Australia and overseas in forming its views.
- 1.60 Finally, the Panel also directed the Secretariat to undertake a range of research tasks on particular issues.

Chapter 2 – International law

- 1.1 The Panel has been asked to examine and report on whether Australian law adequately protects the human right to freedom of religion.
- 1.2 The human right to freedom of thought, conscience and religion is a right recognised in international human rights law. In order to assess the adequacy of Australian law in protecting the right in question, it is helpful to state at the outset precisely what the right entails. It is also helpful to distinguish rights (which correlate to binding legal obligations) from other principles, concepts or values, which do not necessarily involve legal obligations but can still be relevant in other ways.
- 1.3 To that end, the present chapter addresses sources of the human right to freedom of religion or belief (the applicable international law) and various forms of guidance on its interpretation and application, the substantive content of the right and its limits, and the relationship between the human right to freedom of religion or belief and other relevant human rights.
- 1.4 What follows is necessarily a brief overview of certain key concepts. It is not the Panel's intention to examine comprehensively every aspect of human rights law. International law is discussed in more detail later in the Report as appropriate. This Chapter is intended to provide a framework to explain the applicable international legal obligations.

Sources of the human right to freedom of religion or belief and guidance on its interpretation

Relevant treaty obligations

- 1.5 International human rights law derives mostly from multilateral human rights treaties, which are legally binding on the states that are party to them.¹⁴ To a large extent, determining questions of international human rights law involves the interpretation and application of those treaties.¹⁵ Of most relevance here is the International Covenant on Civil and Political Rights (the ICCPR or Covenant). However, other treaties are also relevant.

¹⁴ James Crawford, *Brownlie's Principles of Public International Law* (8th ed., 2012), 638. Other sources of international legal obligation include customary international law.

¹⁵ *Ibid*, 638, 642–3. Other bodies of international law are also relevant, for example the international law on treaties, which governs (among other things) how treaties are to be interpreted.

Freedom of thought, conscience and religion or belief under the International Covenant on Civil and Political Rights

1.6 Australia is a party to the ICCPR, which recognises the right to freedom of thought, conscience and religion in article 18.¹⁶ Article 18 is the main international legal provision protecting freedom of religion or belief. It states as follows:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

1.7 In addition, article 27 of the ICCPR recognises the right of ethnic, religious or linguistic minorities to freedom of religion, among other things. It states:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

1.8 Article 26 of the ICCPR also plays an important role in the protection of freedom of religion, in recognising the right of all persons to equality and to non-discrimination on certain grounds—including religion. Article 26 provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

1.9 Paragraph 2 of article 20 of the ICCPR is also relevant to freedom of religion:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

1.10 Upon ratifying the ICCPR, the Commonwealth Government entered a reservation to article 20.¹⁷ Australia reserved the right not to introduce further legislative provisions

¹⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 generally, and for Australia, 13 November 1980).

¹⁷ The instrument of ratification of the ICCPR deposited for the Government of Australia with the Secretary-General of the United Nations contained the following reservation relating to article 20: 'Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the

regarding the prohibition of propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. That reservation remains in effect.

- 1.11 Article 2 of the Covenant concerns what parties must do domestically to give effect to the various rights recognised in the Covenant. The first paragraph of article 2 provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

- 1.12 Accordingly, as a party to the ICCPR, Australia has an obligation to ‘respect’ the rights secured by the Covenant (including those in articles 18 and 27) and to ‘ensure’ those rights to individuals within Australia’s territory or its jurisdiction, and to do so in a non-discriminatory manner (‘without distinction of any kind...’). Whereas article 26 contains an obligation to prohibit discrimination based on certain grounds (including religion) in general, the obligation of non-discrimination in article 2 applies specifically in relation to the enjoyment of the rights recognised in the Covenant.
- 1.13 The obligation in article 2(1) ‘to respect’ means that states parties must refrain from restricting the exercise of the rights in the Covenant (where the Covenant does not expressly allow such restriction).¹⁸ The obligation ‘to ensure’ is a positive duty to take steps to give effect to the rights in the Covenant.¹⁹
- 1.14 Generally speaking, the Covenant affords a wide discretion to states parties in determining how they fulfil their human rights obligations, whether through legislative, policy or other measures.

Freedom of thought, conscience and religion in other treaties

- 1.15 Australia is also a party to the Convention on the Rights of the Child (CROC).²⁰ Article 14 of the CROC provides:

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

subject matter of the article in matters of practical concern in the interest of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters’.

¹⁸ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 2nd revised ed, 2005) 37.

¹⁹ *Ibid* 38.

²⁰ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990 generally, and for Australia, 16 January 1991) art 14.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.²¹

- 1.16 The CROC also recognises the right of a child belonging to an ethnic, religious or linguistic minority, or who is indigenous, to profess and practise his or her own religion in community with other members of his or her group.²²
- 1.17 Finally, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) also recognises the right to freedom of thought, conscience and religion and obliges parties (including Australia) to guarantee the right of everyone to equality before the law in the enjoyment of that and other rights.²³

Freedom of religion or belief in other international materials

Declarations

- 1.18 The human right to freedom of religion is recognised in various other international instruments, including multilateral declarations on human rights. While such declarations do not have the status or legal effect of a treaty and do not create binding legal obligations for Australia, they have been influential in shaping broader understandings of the concept of freedom of religion or belief.
- 1.19 The right to freedom of thought, conscience, and religion or belief is recognised in the Universal Declaration of Human Rights, which the United Nations (UN) General Assembly proclaimed in 1948 as 'a common standard of achievement for all peoples and all nations'.²⁴ Article 18 states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

- 1.20 While the declaration is not a treaty, it expresses fundamental values shared by all members of the international community, and many of its provisions reflect general principles of law.²⁵ It has had a profound influence on the development of international human rights law, as it identified the rights that would come to be protected through later instruments (including the ICCPR).²⁶
- 1.21 Also of relevance are the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted by the UN General

²¹ Ibid.

²² *Convention on the Rights of the Child*, art 30.

²³ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969 generally, and for Australia, 30 October 1975) art 5(d-vii).

²⁴ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

²⁵ James Crawford, *Brownlie's Principles of Public International Law* (8th ed, 2012) 636.

²⁶ Ibid.

Assembly in 1981 (1981 Declaration),²⁷ which focuses on the prohibition of religious discrimination, and the United Nations Declaration on the Rights of Indigenous Peoples,²⁸ which declares (among other things) the right of indigenous peoples:

... to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.²⁹

Standard-setting by UN human rights mechanisms

- 1.22 At international law, a range of mechanisms provide guidance on the content of the human right to freedom of religion or belief. These include mechanisms established under the Charter of the United Nations (UN Charter) as well as mechanisms established under particular international human rights treaties.
- 1.23 UN Charter-based mechanisms include the United Nations Human Rights Council, the subsidiary organ of the United Nations General Assembly responsible for ‘promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner’.³⁰ The Human Rights Council is required to undertake the Universal Periodic Review—a unique process that involves a periodic review of the human rights records of all UN member states, and which is conducted through an interactive discussion between the State under review and other UN member states.³¹ The Human Rights Council has also adopted resolutions on ‘freedom of religion or belief’³² and on the ‘elimination of all forms of intolerance and of discrimination based on religion or belief’.³³
- 1.24 Guidance on the right is also provided by the Special Rapporteur on freedom of religion and belief (Special Rapporteur), an independent expert mandated by resolutions of the Human Rights Council to report and advise on the protection of the right to freedom of religion or belief.³⁴ The Special Rapporteur has in recent years investigated and reported on a range of relevant issues, for example on: religious

²⁷ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief*, GA Res 36/55, UN GAOR, 3rd Comm, 36th sess, Agenda Item 75, Supp No 51, UN Doc A/RES/36/55 (25 November 1981).

²⁸ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

²⁹ *Ibid* art 12(1).

³⁰ *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, Agenda Items 46 and 120, Supp No 49, UN Doc A/RES/60/251 (3 April 2006) [2].

³¹ *Ibid* [5(e)].

³² *Freedom of religion or belief*, HRC Res 20/22, 22nd sess, Agenda Item 3 UN Doc A/HRC/RES/22/20 (12 April 2013).

³³ *Elimination of all forms of intolerance and of discrimination based on religion or belief*, HRC Res 6/37, 6th sess, Agenda Item 3, UN Doc A/HRC/RES/6/37 (14 December 2007).

³⁴ *Ibid*.

intolerance worldwide;³⁵ violations of freedom of religion or belief, their root causes and variables;³⁶ and the relationship between freedom of religion or belief and freedom of opinion and expression.³⁷

- 1.25 Separately to these UN Charter–based mechanisms, committees (or ‘treaty bodies’) monitor states parties’ compliance with their UN human rights treaty obligations. The Human Rights Committee monitors the implementation of the ICCPR in a number of ways.
- 1.26 States parties are required to report periodically to the Human Rights Committee in relation to their implementation of the Covenant. The Committee issues concluding observations on those reports.
- 1.27 The Human Rights Committee determines complaints submitted to it by individuals alleging that a State has violated their rights under the treaty, if the State has accepted the complaints mechanism under the First Optional Protocol to the ICCPR. If the Committee finds a complaint admissible, it considers the merits of the complaint and adopts a decision (or ‘views’) on whether a violation has occurred. Australia is a party to this complaints mechanism.
- 1.28 The Human Rights Committee also publishes guidance on the Covenant obligations in the form of ‘general comments’. General Comment 22 provides guidance on the Committee’s understanding of article 18. Various other general comments of the Human Rights Committee are also relevant to freedom of religion or belief, such as General Comment 34 on freedom of opinion and expression.

Jurisprudence of regional human rights courts

- 1.29 Apart from the treaty provisions noted above, a right to freedom of religion or belief appears in various forms in a number of other regional human rights treaties, such as article 9 of the European Convention on Human Rights (European Convention). The drafters of the European Convention modelled article 9 on article 18 of the Universal Declaration, in order to reduce the risk of inconsistencies arising between definitions in the European and the United Nations instruments.³⁸ The jurisprudence of the European Court of Human Rights has been crucial in developing a set of European human rights standards under the European Convention. Although not in any way binding on Australia, that body of jurisprudence has been influential internationally in shaping broader understandings of, and approaches to, freedom of religion or belief.

³⁵ Ahmed Shaheed, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/72/365 (28 August 2017).

³⁶ Heiner Bielefeldt, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/71/269 (2 August 2016).

³⁷ Heiner Bielefeldt, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/31/18 (23 December 2015).

³⁸ Paul M Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005) 7.

The Siracusa Principles

- 1.30 Guidance on the ICCPR, in particular its provisions on limitation and derogation, may be drawn also from the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles).³⁹ The Siracusa Principles resulted from a 1984 conference of non-governmental organisations and was focused on the interpretation of article 4 (concerning derogations in times of emergency) and other limitation clauses in the Covenant.

Conclusion

- 1.31 In forming its views, the Panel has considered a range of international materials, recognising the various ways in which they can be relevant to a discussion about the human right to freedom of religion or belief.

The content of the right to freedom of religion or belief

Overview of aspects of the right

- 1.32 While it is convenient shorthand to refer to a singular ‘right to freedom of religion’, the Panel understands the right to encompass a range of more specific aspects or components. Identifying each aspect of the right allows for a focused evaluation of the adequacy of Australian laws in protecting the right to freedom of religion.
- 1.33 This Report focuses on the adequacy of Australian laws in protecting the following components of the right:
- freedom of thought, conscience or religion, including freedom from coercion
 - the freedom to manifest religion or belief
 - the liberty of parents and legal guardians to ensure the moral and religious education of their children
 - freedom from discrimination in the enjoyment of the right, and
 - the obligation to prohibit religious vilification.
- 1.34 These aspects of the right are outlined below, having regard to the applicable international law, interpretive guidance, and other materials referred to above.

³⁹ *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Commission on Human Rights, UN Doc E/CN.4/1985/4 (28 September 1984).

Freedom of thought, conscience or religion and freedom from coercion

- 1.35 The first paragraph of article 18 of the ICCPR guarantees freedom of thought, conscience and religion, including the freedom to have or adopt a religion or belief of one's choice. This includes a right to think freely, and to entertain ideas and hold views based on conscientious, religious, or other beliefs.
- 1.36 In General Comment 22, the Human Rights Committee observed that the right is 'far-reaching and profound' and that it 'encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others'.⁴⁰
- 1.37 The phrase 'religion or belief' has been broadly construed. The Human Rights Committee has interpreted article 18 as protecting theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.⁴¹
- 1.38 The freedom to 'have or to adopt' a religion or belief entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief or to adopt atheistic views, as well as the right to retain one's religion or belief.⁴²
- 1.39 Article 18(2) bars coercion that would impair the right to have or adopt a religion or belief. According to the Human Rights Committee, this includes the use or threat of physical force or penal sanctions to compel adherence to a religion, recantation of a religion or conversion.⁴³ Further, the Committee has stated:

Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18.2. The same protection is enjoyed by holders of all beliefs of a non-religious nature.⁴⁴

- 1.40 The Special Rapporteur has stated that 'freedom of religion or belief also includes the 'negative' right not to be pressured, especially by the State or in State institutions, to participate in religious practices' and further that:

the purpose of the "negative" side of freedom of religion or belief is to make sure that no one is exposed to any pressure, especially by the State, to confess or practice a religion or belief against one's own convictions. State institutions, such as the police, military and public schools, in which authority is exercised, require special safeguards in this regard.⁴⁵

⁴⁰ Human Rights Committee, *CCPR General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) [1].

⁴¹ *Ibid* [2].

⁴² *Ibid* [5].

⁴³ *Ibid*.

⁴⁴ *Ibid*. Under Article 9 of the European Convention, actions by government officials pressuring an employee to renounce her faith in order to keep her job were held by the European Court of Human Rights to be a 'flagrant violation of her right to freedom of religion': *Ivanova v Bulgaria* (European Court of Human Rights, Fifth Section, Application no. 52435/99, 12 April 2007) [84].

⁴⁵ Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion and belief – Addendum*, UN Doc A/HRC/19/60/Add.1 (26 January 2012) [31].

- 1.41 The Human Rights Committee has expressed the view that the right to freedom of thought, conscience and religion or belief does *not* include a right not to have one's religion disparaged, and that laws used to prevent or punish criticisms of religious leaders, or commentary on religious doctrine and tenets of faith, are incompatible with the right to freedom of opinion and expression recognised in article 19 of the Covenant.⁴⁶
- 1.42 It is also important to note that, while the Covenant protects freedom of conscience, it does not expressly refer to a right of conscientious objection. However, the Human Rights Committee has derived from article 18 a right to refuse to perform military service in certain limited circumstances, such as when it may involve an obligation to use lethal force.⁴⁷ In issuing views on two communications in 2012, a majority of Members of the Human Rights Committee considered this right to arise under the 'internal' aspect of freedom of religion and therefore to be protected absolutely.⁴⁸

The right to manifest one's religion or belief and permissible limitations on that right

- 1.43 Article 18(1) protects individual or collective manifestation of a 'religion or belief' (although it does not refer to a right to manifest one's *conscience*, as distinct from one's *religion or belief*). In the case of persons belonging to ethnic, religious or linguistic minorities, article 27 also protects their right to profess and practise their own religion in community with the other members of their group.
- 1.44 Article 18(1) places particular emphasis on four forms of manifestation: worship, observance, practice and teaching.
- 1.45 Article 18 guarantees the freedom to manifest a religion or belief either individually or in community with others, and in public or private. In this respect, the human right to freedom of religion or belief has a communal or 'associational' dimension. However, the Special Rapporteur has observed that it is a right held by individuals and not by religions or religious organisations. The right is not designed to protect particular convictions, truth claims or belief systems (religious or otherwise).⁴⁹ Rather, the

⁴⁶ See Human Rights Committee, *Views: Communication No. 1746/2008*, 94th sess, UN Doc CCPR/C/94/D/1746/2008 (30 October 2008) ('*Goyet v France*'); Human Rights Committee, *Views: Communication No 1632/2007*, 94th sess, UN Doc CCPR/C/94/D/1632/2007 (30 October 2008) ('*Picq v France*'). See also Human Rights Committee, *General Comment 34 – Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc. CCPR/C/GC/34 (12 September 2011) [48].

⁴⁷ It is stated in General Comment 22 that 'the Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief': Human Rights Committee, *CCPR General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc.

⁴⁸ Human Rights Committee, *Views: Communications Nos. 1853/2008 and 1854/2008*, 104th sess, UN Doc CCPR/C/104/D/1853-1854/2008 (19 June 2012) 11-12, 16 ('*Atasoy and Arda Sarkut v. Turkey*'). Cf. Individual opinion of Committee member Mr. Gerald L. Neuman, jointly with members Mr. Yuji Iwasawa, Mr. Michael O'Flaherty and Mr. Walter Kaelin,

⁴⁹ Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion and belief*, UN Doc A/HRC/34/50 (17 January 2017) [24].

purpose of the right is to protect individual believers and their freedom to possess and express their beliefs, either individually or in community with others.⁵⁰ This is an important distinction when assessing whether a particular measure involves a burden on the human right to freedom of religion or belief.

1.46 The Human Rights Committee's General Comment 22 provides guidance on the types of conduct that may constitute a manifestation of religion or belief.⁵¹ Having pointed out that such manifestation 'encompasses a broad range of acts', it states that the concept of worship extends to:

ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest.

1.47 It states that 'observance and practice' of a religion or belief may include:

not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group.⁵²

1.48 In addition, 'practice and teaching' of a religion or belief includes:

acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.⁵³

1.49 The 1981 Declaration, while not binding, also provides guidance. Article 6 provides that the right to freedom of thought, conscience, religion or belief includes the following freedoms:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;

⁵⁰ Ibid.

⁵¹ Human Rights Committee, *CCPR General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) [4].

⁵² Ibid.

⁵³ Ibid.

- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

- 1.50 The above sources of guidance indicate that the word ‘manifest’ in article 18(1) encompasses a broad range of conduct, the precise limits of which are not expressed in the Covenant.
- 1.51 In the context of the European Convention, the European Court of Human Rights has said that in deciding whether an act is a ‘manifestation’ of a religious belief, there is no requirement to establish that a person is acting in fulfilment of a ‘duty mandated by the religion’.⁵⁴ The Court has also stated:

Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a “manifestation” of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of Article 9 § 1 ... In order to count as a “manifestation” within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case.⁵⁵

- 1.52 The Human Rights Committee has not directly considered whether a similarly close and direct connection between the religious belief and the act in question is required in order for it to constitute manifestation under article 18(1). Nowak has observed that, if interpreted broadly, ‘practice’ of a religion or belief could be taken to mean every action or omission motivated by religion or belief, which would ‘open the floodgates to abuse of this right’.⁵⁶ The author concludes that religious practice may thus be said to be ‘only that conduct obviously related to a religious conviction’.⁵⁷
- 1.53 Article 18(3) permits the ‘limitation’ of the right to manifest one’s religion or belief—in contrast to the freedom to have or adopt a religion of one’s choice, which may not be restricted in any way. Specifically, paragraph 3 recognises that the right to manifest religious or other beliefs may be subject to limitations that are prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
- 1.54 The freedom to manifest religion or beliefs under the CROC is similarly qualified.⁵⁸
- 1.55 The Human Rights Committee has taken the view that article 18(3) is to be strictly interpreted, as follows:

restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations

⁵⁴ *Eweida & Ors v The United Kingdom* (2013) 57 EHRR 8, [82].

⁵⁵ *Ibid* (citations omitted).

⁵⁶ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 2nd revised ed, 2005) 420.

⁵⁷ *Ibid*.

⁵⁸ *Convention on the Rights of the Child*, art 14(3).

may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.⁵⁹

1.56 Reports of the Special Rapporteur on article 18 echo these interpretive principles. For example, in his report at the 34th session of the Human Rights Council, the Special Rapporteur states that restrictions on the right must be:

applied in a non-discriminatory manner and be proportionate to the realization of the legitimate aim and, therefore, be the least restrictive among all the adequate measures that could possibly be applied and, in any case without vitiating the right itself.⁶⁰

1.57 The Siracusa Principles, while non-binding, provide some guidance on the interpretation of specific limitations clauses contained in various articles of the ICCPR (including article 18(3)). These include the principle that for a limitation of a particular right to be ‘necessary’ it must:

- be based on one of the grounds recognised in the relevant article as justifying a limitation
- respond to a pressing public or social need
- pursue a legitimate aim and be proportionate to that aim.⁶¹

1.58 It is also stated in the Siracusa Principles that ‘[i]n applying a limitation, a State shall use no more restrictive means than are required for the achievement of the purpose of the limitation’.⁶² The Human Rights Committee’s approach is broadly consistent with this, as can be seen in its own interpretive guidance referred to above.

1.59 The European Court has taken a broadly consistent approach in assessing the lawfulness of limitations upon the right in article 9 of the European Convention, to the extent that it has frequently assessed whether the limitation is proportionate to the harm the State seeks to address.

1.60 Article 18(3) allows for balance between the right to manifest one’s religion or belief and other fundamental rights and freedoms of others. According to the respected human rights law scholar, Manfred Nowak, article 18(3) performs an important ‘corrective’ function, which is necessary because of the potential for an overly broad freedom of religion to lead to the misuse of that right, and to the suppression of the rights and freedoms of others.⁶³

⁵⁹ Human Rights Committee, *CCPR General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) [8].

⁶⁰ Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion and belief*, UN Doc A/HRC/34/50 (17 January 2017) [11].

⁶¹ *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Commission on Human Rights, UN Doc E/CN.4/1985/4 (28 September 1984) [10].

⁶² *Ibid* [11].

⁶³ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 2nd revised ed, 2005) 408-9.

- 1.61 The Human Rights Committee has stated that, ‘in interpreting the scope of permissible limitations clauses States parties should proceed from the need to protect the other rights guaranteed under the Covenant, including the rights to equality and non-discrimination on all grounds specified in articles 2, 3 and 26’.⁶⁴
- 1.62 The Human Rights Committee, Special Rapporteurs, and regional human rights courts (including the European Court) have each addressed this balance in relation to particular factual, legal and policy contexts. Special Rapporteurs have said that the right to freedom of religion or belief cannot be used to justify violations of the rights of women and girls.⁶⁵ The Special Rapporteur’s most recent report to the Human Rights Council notes:
- [T]he jurisprudence of the Human Rights Committee and the regional human rights courts uphold that it is not permissible for individuals or groups to invoke “religious liberty” to perpetuate discrimination against groups in vulnerable situations, including lesbian, gay, bisexual, transgender and intersex persons, when it comes to the provision of goods or services in the public sphere.⁶⁶
- 1.63 The Panel agrees that the relationship between the right to freedom of religion or belief and the rights to equality and non-discrimination requires careful consideration in light of the particular laws and facts concerned.

The liberty of parents and guardians to ensure the moral and religious education of their children

- 1.64 Under article 18(4) of the ICCPR, states parties undertake to respect the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.
- 1.65 The right of parents to ensure the moral and religious education of their children is also protected in other instruments, for example under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Article 10 of the ICESCR recognises, among other things, the responsibility of the family for the care and education of dependent children. In article 13(3) of the ICESCR, the states parties undertake to respect the liberty of parents and legal guardians to choose for their children schools other than those established by public authorities, which conform to minimum educational standards laid down by the State, to ensure the religious and moral education of their children in conformity with their own convictions.
- 1.66 There is also an obligation in article 14(2) of the CROC to respect the rights and duties of parents and legal guardians to ‘provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child’.

⁶⁴ Human Rights Committee, *CCPR General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) [8].

⁶⁵ Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion and belief*, UN Doc A/HRC/34/50 (17 January 2017) [50].

⁶⁶ Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion and belief*, UN Doc A/HRC/34/50 (28 February 2018) [40].

- 1.67 The 1981 Declaration also refers to certain rights of parents or legal guardians relating to the moral education of their children.⁶⁷
- 1.68 The Human Rights Committee in General Comment 22 has said that article 18(4) permits public school instruction in subjects such as the general history of religions and ethics if it is given ‘in a neutral and objective way’.⁶⁸ It has also said that the liberty of parents and guardians to ensure religious and moral education, like the freedom from coercion, ‘cannot be restricted’.⁶⁹
- 1.69 Although the ICCPR does not impose any obligation on states to fund religious schools, the Human Rights Committee has said that if a state decides to do so, the funding should be offered without discrimination and subject only to such differentiation as is justified by reasonable and objective criteria.⁷⁰

Freedom from discrimination on the basis of one’s religion

- 1.70 The obligation in article 2 of the ICCPR is to respect and ensure the rights in the Covenant ‘without distinction of any kind’ as to certain characteristics, including religion and political or other opinion. Therefore, the rights set out in the ICCPR must be protected without discrimination on the basis of religion, political or other opinion (or other protected attribute).

- 1.71 Article 26 of the Covenant recognises the right of all persons to equality before the law and non-discrimination on certain grounds, including religion. It provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

- 1.72 The 1981 Declaration also proclaims in article 3 that discrimination on the grounds of religion or beliefs constitutes ‘an affront to human dignity and a disavowal of the principles of the Charter of the United Nations’.⁷¹ Article 2(1) of the Declaration states that ‘[n]o one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs’.

The obligation to prohibit religious vilification

- 1.73 Article 20(2) of the ICCPR obliges states parties to prohibit religious vilification, although for Australia this obligation is subject to its reservation concerning article 20

⁶⁷ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief*, art 5.

⁶⁸ Human Rights Committee, *CCPR General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) [6].

⁶⁹ *Ibid* [8].

⁷⁰ Human Rights Committee, *Views: Communication No 694/1996*, 67th sess, UN Doc CCPR/C/67/D/694/1996 (5 November 1999) [10.6] (*‘Waldman v Canada’*).

⁷¹ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief*, art 3.

(as to which, see above). Article 20(2) needs to be considered in the context of article 19, which protects freedom of expression (as to which, see below).

The relationship between the human right to freedom of religion or belief and certain other human rights obligations

- 1.74 The human right to freedom of religion or belief under the ICCPR is intimately connected with the right to equality and non-discrimination in a number of ways. The right not to be discriminated against on the basis of one's religion is a core aspect of the right in article 18, which is supported by the rights to equality and non-discrimination recognised in articles 2 and 26.
- 1.75 The covenant recognises a range of other rights that support, and are supported by, the right to freedom of thought, conscience and religion or belief. These include, for example: article 19, which recognises the right to hold opinions without interference, and the right to freedom of expression; article 21, which recognises the right to peaceful assembly; and article 22, which recognises the right to freedom of association. These rights support both the 'internal' and 'external' aspects of the right to freedom of religion or belief. For example, the right in article 19(1) to hold opinions without interference and the right to freedom of thought, conscience and religion in article 18(1) are mutually supportive. Similarly, the right to freedom of expression in article 19(2) and the right of peaceful assembly in article 21 support the right in article 18(1) to manifest one's religion or belief, either individually or in community with others and in public or private.
- 1.76 The rights recognised in articles 19, 21 and 22, along with the right to freedom of thought, conscience and religion in article 18, can be described as political freedoms or 'fundamental rights of communication'.⁷² Together, they play an important role in protecting freedom of expression and pluralism, which are fundamental to the maintenance of a democratic society. The Human Rights Committee has observed that 'the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably viewed by the government or the majority of the population, is a cornerstone of a democratic society'.⁷³
- 1.77 In summary, the right to freedom of religion or belief is mutually supportive of a range of other rights, which collectively are essential to the proper functioning of a democracy such as Australia's.

⁷² Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 2nd revised ed, 2005) 410.

⁷³ Human Rights Committee, *Views: Communication No 1478/2006*, 102nd sess, UN Doc CCPR/C/102/D/1478/2006 (20 July 2011) [8.4] ('*Nikolai Kungurov v Uzbekistan*'); Human Rights Committee, *Views: Communication No 1039/2001*, 88th sess, UN Doc CCPR/C/88/D/1039/2001 (17 October 2006) [7.2] ('*Boris Zvozkov et al. v. Belarus*'); Human Rights Committee, *Views: Communication No 1274/2004*, 88th sess, UN Doc CCPR/C/88/D/1274/2004 (10 November 2006) [7.3] ('*Korneenko et al. v. Belarus*').

Chapter 3 – Domestic legal framework

- 1.78 The Panel gave careful consideration to the overall legal framework for the protection of freedom of religion in Australia.
- 1.79 To the extent that freedom of religion is expressly protected under Australian law, it is through a combination of constitutional protections and Commonwealth, State and Territory legislation. Where the law is silent, people are free to act in accordance with their faith so long as doing so does not interfere with other laws.
- 1.80 The Panel was conscious that questions of religion and religious freedom impact wide areas of the law, from trusts to employment to criminal law.

Meaning of religion

- 1.81 Australian courts have taken an inclusive approach to defining religion. As Chief Justice Latham famously observed in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*:

It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed in the world.⁷⁴

- 1.82 In *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*, four justices of the High Court adopted approaches to understanding the meaning of 'religion' that have proved highly influential.

- 1.83 In developing their approach, Mason ACJ and Brennan J were particularly concerned to ensure the inclusion of religions that were not well established or were yet to find broad acceptance in the community:

A definition cannot be adopted merely because it would satisfy the majority of the community or because it corresponds with a concept currently accepted by that majority.⁷⁵

- 1.84 Their Honours went on to propose that:

We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.⁷⁶

⁷⁴ (1943) 67 CLR 116, 123.

⁷⁵ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 131.

⁷⁶ *Ibid*, 136.

1.85 Their Honours observed that:

Those criteria may vary in their comparative importance, and there may be a different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion. The tenets of a religion may give primacy to one particular belief or to one particular canon of conduct. Variations in emphasis may distinguish one religion from other religions, but they are irrelevant to the determination of an individual's or a group's freedom to profess and exercise the religion of his, or their, choice.⁷⁷

1.86 As Professor Carolyn Evans has written, the approach adopted by Mason ACJ and Brennan J 'is the one that has most commonly been taken up in other legal contexts in which a definition of religion has been required'.⁷⁸ However, the approach of Wilson and Deane JJ has also had some influence.

1.87 Wilson and Deane JJ thought that religion should be understood by reference to a range of factors. They put it this way:

One of the more important indicia of 'a religion' is that the particular collection of ideas and/or practices involves belief in the supernatural, that is to say, belief that reality extends beyond that which is capable of perception by the senses. If that be absent, it is unlikely that one has 'a religion'. Another is that the ideas relate to man's nature and place in the universe and his relation to things supernatural. A third is that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance. A fourth is that, however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups. A fifth, and perhaps more controversial, indicium ... is that the adherents themselves see the collection of ideas and/or practices as constituting a religion.⁷⁹

1.88 These approaches to defining religion have been applied in several anti-discrimination cases, some of which are discussed later in this Report.

Constitutional protections

1.89 Section 116 of the Constitution limits the ability of the Commonwealth to legislate in respect of religion. It provides:

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.

1.90 Section 116 has a number of important limitations. First, it is a limitation on the legislative power of the Commonwealth only. The States are not limited by its terms. Whether the Territories are restricted by section 116 has been considered by the High Court on a number of occasions but the position remains unclear.⁸⁰ Second, section 116 is a limitation on Commonwealth legislative power; it does not create a

⁷⁷ Ibid.

⁷⁸ Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 51.

⁷⁹ *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 174.

⁸⁰ See *Lamshed v Lake* (1958) 99 CLR 132; *Kruger v Commonwealth* (1997) 190 CLR 1.

‘right’ for individuals to hold or manifest their faith. Nor does it create a positive obligation on the Commonwealth to do anything to ensure freedom of religion.

- 1.91 The High Court has tended to take a narrow approach in interpreting section 116. A law will only fall foul of the ‘free exercise’ limb of section 116, for example, if its purpose is to restrict religious practice, even if its effect is to burden disproportionately the practices of a particular religion.⁸¹
- 1.92 Section 116 does not impose a strict separation of church and state. The High Court has upheld, for example, the funding of faith-based schools as being consistent with section 116.⁸²
- 1.93 There have been two attempts to amend section 116 by way of referendum to extend its application to the States and Territories, in 1944 and 1988, both of which failed. The 1988 proposal also would have amended the wording of the ‘establishment’ limb of the provision. This may have upset the conclusion reached in *Attorney-General (Vic); Ex Rel Black v Commonwealth* (‘DOGS Case’) and is often cited as a reason why that proposal failed.
- 1.94 The only other constitutional provision in Australia that expressly concerns religion is section 46 of the *Constitution Act 1934* (Tas), which provides:
- (1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
- (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.
- 1.95 Section 46 has not been subject to judicial application. However, observations made by Tracey J in *Corneloup v Launceston City Council* suggest it may be of limited scope:
- ...s 46 does not, in terms, confer any personal rights or freedoms on citizens. The qualified “guarantee” has been held to prevent coercion in relation to the practise of religion and to guarantee a freedom to profess and practise a person’s religion of choice: see *McGee v Attorney-General* [1974] IR 284 at 316 – a decision of the Irish Supreme Court on the equivalent provision of the Constitution of Ireland, Article 44(2)(1). There is, however, no authority to which I was referred which determines the practical effect of the “guarantee”. In particular, there remains an open question as to whether it could operate to render invalid provisions of other Tasmanian legislation (or subordinate legislation made thereunder), given that the Constitution Act is also an Act of the Tasmanian Parliament and s 46 is not an entrenched provision.⁸³
- 1.96 No other State or Territory protects freedom of religion in its constitution.

⁸¹ See *Kruger v Commonwealth* (1997) 190 CLR 1.

⁸² See *Attorney-General (Vic); Ex Rel Black v Commonwealth* (‘DOGS Case’) (1981) 146 CLR 559.

⁸³ [2016] FCA 974, [38].

Legislation

- 1.97 All jurisdictions protect aspects of freedom of religion through legislation. These include provisions relating to discrimination, vilification and the education of children. An overview of Commonwealth, State and Territory laws with respect to freedom of religion is at Table C1 of Appendix C.
- 1.98 It is important to acknowledge the pivotal role of anti-discrimination laws with respect to freedom of religion. All States and Territories protect against discrimination on the basis of religion with the exception of New South Wales and South Australia, both of which have more limited protections. Religion is not a protected attribute under Commonwealth anti-discrimination law.
- 1.99 All jurisdictions provide protections from discrimination on the basis of a range of other attributes, including sex, disability, age and race. These laws protect people with these attributes in areas of activity such as work, education and the receipt of goods and services. There is considerable variation between jurisdictions as to the attributes and areas of activity they regulate. An overview of protected attributes by jurisdiction is at Table C2 of Appendix C. An overview of protected attributes by area of activity is at Table C3 of Appendix C.
- 1.100 All jurisdictions provide for limited exceptions for religious bodies with respect to anti-discrimination provisions that protect other attributes, such as sex or sexual orientation. All jurisdictions allow religious bodies to discriminate, for example, in the appointment of religious office holders such as priests. The application and scope of these exceptions vary considerably between jurisdictions. An overview of exceptions for religious bodies in anti-discrimination laws is at Table C4 of Appendix C.
- 1.101 In considering the overall framework for protection of freedom of religion, the Panel noted that Victoria and the Australian Capital Territory differ significantly from the other jurisdictions in that they have statutory human rights ‘charters’.
- 1.102 The *Charter of Rights and Responsibilities Act 2006* (Vic) illustrates the charter model. Part 2 of the Charter sets out the human rights that it seeks to protect and promote. Freedom of thought, conscience, religion and belief is provided for in section 14. Section 19(1) protects the right of persons with particular cultural, religious, racial or linguistic backgrounds to declare and practise their religion and section 19(2) protects the rights of Aboriginal persons to maintain their distinctive spiritual relationship with land, waters and other resources with which they have a traditional connection.
- 1.103 Section 7 sets out the circumstances under which a right may be limited under law. The Charter then imposes a set of requirements or obligations with respect to the human rights set out in Part 2, including:
- a requirement for a ‘statement of compatibility’ to be prepared for any Bill to be presented to Parliament setting out whether the Bill is compatible with the rights listed in the Charter and the nature and extent of any incompatibility. Such statements have no legal effect.

- a requirement that all statutory provisions are to be interpreted in a way that is compatible with the human rights listed in the Charter, so far as it is possible to do so consistently with the purpose of those provisions. Again, an Act or provision that is incompatible with a human right is not invalid as a result.
- an obligation on public authorities not to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. This obligation may be enforceable against the authority by way of legal proceedings, but damages are not available by way of relief merely because of a breach of the Charter.
- a provision enabling an Act that is incompatible with the rights listed in the Charter to include an express override declaration. The Charter has no application to a legislative provision for which an override declaration is in force. Failure to include an override declaration does not affect the validity, operation or enforcement of an Act.

1.104 The Charter also provides a mechanism for the Supreme Court of Victoria to make a declaration that a statutory provision cannot be interpreted consistently with a human right listed under the Charter. While such a declaration does not affect the validity, operation or enforcement of the provision, the minister responsible for the relevant provision is required to prepare a written response to the declaration which is then tabled in Parliament.

1.105 At the time of writing, the Queensland Government had committed to introducing a Human Rights Act modelled on the Victorian Charter.

Common law

1.106 The common law is of some, limited, value in protecting freedom of religion through principles of interpretation. For example, as Mason CJ and Deane J observed in *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273, it is a well-recognised principle of statutory construction that in cases of ambiguity the courts will favour an interpretation that is consistent with Australia's international legal obligations.

1.107 Similarly, the common law principle of legality provides that in the absence of express language, a statute will not be interpreted to override a common law right (see, for example, *Coco v The Queen* (1994) 179 CLR 427). The possibility that this would extend to freedom of religion was suggested by McHugh JA in *Canterbury Municipal Council v Moslem Alawy Society Ltd*, when his Honour observed that if a law:

is capable of a rational construction which permits persons to exercise their religion at the place where they wish to do so, I think that a court should prefer the construction to one which will prevent them from doing so.⁸⁴

1.108 Regardless of whether the principle of legality applies or a court would prefer a construction that limits a burdening of religious practice, these approaches to construction would only be of consequence in the face of an ambiguous statute.⁸⁵

Criticism of the current framework and proposals for reform

1.109 Numerous submissions to the Panel, representing a range of views, argued that the current framework for protecting freedom of religion in Australia is ineffective. These submissions pointed to factors such as:

- the absence of a positive right to freedom of religion in Australian law
- the limited scope of constitutional protections
- the framing and limited role of human rights charters in Victoria and the Australian Capital Territory and their absence in other jurisdictions
- the reliance on the absence of contrary laws to protect freedom of religion
- inconsistent approaches across different jurisdictions, and
- the limitations of preserving religious freedom through exceptions in anti-discrimination law.

1.110 Many submissions, particularly by those representing a faith perspective, argued that freedom of religion was a ‘poor cousin’ to other human rights such as the right to freedom from discrimination. Elsewhere, freedom of religion has been described as a ‘forgotten freedom’.⁸⁶

1.111 The Panel also heard that Australia’s ‘piecemeal’ approach to implementing our human rights obligations generally makes the balancing or reconciling of those rights difficult when ‘friction’ arises between rights.

1.112 While international law is generally silent on the question of the most appropriate legal framework for implementing Australia’s obligations with respect to freedom of religion, Australia has been criticised by international bodies for not legislating for all of the rights in the ICCPR and other instruments.

1.113 In its *Concluding observations on the sixth periodic report of Australia in 2017*, the Human Rights Committee reiterated its previous recommendations that Australia

⁸⁴ *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 544.

⁸⁵ See, for example, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196.

⁸⁶ Tim Wilson, *Opening Minds to Forgotten Freedoms* (19 May 2014) Australian Human Rights Commission <<https://www.humanrights.gov.au/news/opinions/opening-minds-forgotten-freedoms>>.

should ‘adopt comprehensive federal legislation giving full legal effect to all Covenant provisions across all state and territory jurisdictions’.⁸⁷

Submissions put forward a variety of framework-level proposals for improving the protection of freedom of religion, including:

- a Commonwealth Human Rights Act
- a Commonwealth Religious Freedom Act
- consolidation of Commonwealth anti-discrimination laws
- the use of general limitations clauses in anti-discrimination legislation, and
- clarification of exceptions in Commonwealth, State and Territory laws.

1.114 The Panel notes that many of these issues have been considered in great detail in recent years, including by the Joint Standing Committee on Foreign Affairs, Defence and Trade and the ALRC.

1.115 In 1998, the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) concluded a substantial report on implementing article 18 of the ICCPR, *Article 18: Freedom of Religion and Belief*, which also considered a number of these suggestions. The development of a Commonwealth Human Rights Act and the consolidation of anti-discrimination laws were also the subject of detailed consideration in 2009 and 2012 respectively.

A Human Rights Act

1.116 One approach advocated by those concerned with the current legal framework for protecting freedom of religion was the development of a Commonwealth Human Rights Act. Support for this approach came from stakeholders with otherwise diverse views on the question under consideration. Those advocating for a Human Rights Act emphasised the importance of giving equal treatment to all rights. They also noted that such an Act could provide a framework for resolving conflict between rights when such conflict occurs.

1.117 The Panel also heard from those who did not support the development of a Human Rights Act. The Panel noted that this question had been considered in depth in the Report of the National Human Rights Consultation released in 2009.

1.118 Those who supported the development of a Human Rights Act did not necessarily agree on what such an Act should look like. The Victorian Charter, outlined above, was pointed to by some as a potential model, while others would have preferred greater powers for the courts to invalidate legislation and more enforcement options for individuals. The Victorian Charter was also criticised for the way it balances different rights, with some faith-based organisations arguing that the approach to

⁸⁷ Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121st sess, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [6].

limitations in the Charter was inconsistent with the approach taken in article 18(3) of the ICCPR.

- 1.119 In considering this question, the Panel noted that to assess the merits of a Human Rights Act adequately would require consideration of a range of complex issues well outside of its Terms of Reference. Accordingly, and in view also of the time available to it, the Panel was of the opinion that such consideration could not be undertaken.

A Religious Freedom Act

- 1.120 The Panel also heard arguments in favour of a Religious Freedom Act, which could provide for positive rights to hold and manifest religious belief, as well as protections against discrimination on the basis of religion. A variation on this proposal would include protections for associated rights such as freedom of expression and association.
- 1.121 The Panel agreed with those who argued that such an enactment would send a positive message to all Australians as to the importance of the human right to freedom of thought, conscience and religion.
- 1.122 However, the Panel did not support enactment of a standalone Commonwealth enactment of this kind at this time. Specifically protecting freedom of religion would be out of step with the treatment of other rights. Moreover, the statutory expression of positive rights would need to be carefully crafted having regard to the need to reconcile them with the full suite of other human rights. As a matter of practicality, this necessitates a framework which provides equal treatment for a wide range of human rights.
- 1.123 While not supportive of a Religious Freedom Act, the Panel does support some of the measures that advocates would have included in such an Act, such as protection against discrimination on the grounds of religious belief or activity, and ensuring that legislation that limits the right to freedom of religion is no more restrictive than required, in order to address many of the daily issues encountered by religious adherents. These matters are addressed in Chapters 4 and 6 in particular.

Consolidation of Commonwealth anti-discrimination laws

- 1.124 A number of submissions advocated for the consolidation of Commonwealth anti-discrimination laws. Unlike the States and Territories, Commonwealth anti-discrimination protections are spread over a number of Acts addressing specified attributes or particular activities. Of particular note are the four main discrimination Acts: the *Sex Discrimination Act 1984*, the *Age Discrimination Act 2004*, the *Racial Discrimination Act 1975* and the *Disability Discrimination Act 1992*. Complaints with respect to unlawful discrimination under these four Acts are handled under the *Australian Human Rights Commission Act 1986*. Anti-discrimination provisions are also found in the *Fair Work Act 2009* with respect to employment.
- 1.125 The development of Commonwealth anti-discrimination law occurred over a 40-year period and reflects developments in international law and the Commonwealth's limited legislative powers. The four main discrimination Acts differ from one another

in subtle and sometimes significant ways. For example, the tests for discrimination differ as between the different Acts with the result that conduct may amount to discrimination with respect to one protected attribute in circumstances where it would not have amounted to discrimination if the complaint had concerned a different protected attribute.

- 1.126 The four main discrimination Acts and the Fair Work Act contain a range of exceptions that render lawful conduct that may otherwise amount to discrimination. Exceptions for religious bodies are found in the Sex Discrimination Act, the Fair Work Act and, in a more limited form, in the Age Discrimination Act.
- 1.127 In 2012–13, the then Government considered the consolidation of the four main Commonwealth discrimination Acts. A number of submissions to the Panel supported taking up this project again in the interests of consistent treatment and the provision of greater anti-discrimination protections, including for discrimination on the grounds of religion.
- 1.128 The Panel acknowledged the policy arguments for consolidating Commonwealth anti-discrimination legislation. However, the Panel received no clear advice about actual problems caused by a lack of consolidation (as opposed to problems with particular provisions).

General limitations clauses

- 1.129 The 2012–13 process considered the use of a general limitations clause to replace existing exceptions in the various discrimination Acts. The Panel heard support for the replacement of existing exceptions in Commonwealth discrimination laws with a general limitations clause or clauses. However, there was significant divergence as to what form such a clause might take.
- 1.130 General limitations clauses are intended to set out the broad circumstances in which conduct that might be construed as discriminatory does not, in fact, amount to discrimination. Typically, such clauses have the following basic features:
- Conduct undertaken in good faith will not be discriminatory if it is undertaken to achieve a legitimate aim defined, for example, by reference to furtherance of another human right.
 - The conduct has been engaged in with the intention of achieving the legitimate aim.
 - The conduct must be a proportionate means of achieving that aim.
- 1.131 One benefit of such clauses is they allow for the recognition of the importance of other rights when considering the application of discrimination laws. Another benefit is that they allow for the removal of what are sometimes referred to as ‘permanent’ exceptions under anti-discrimination law. They provide a dynamic mechanism that allows an administrative body or a court to resolve novel situations as they arise, rather than requiring a legislative response.

- 1.132 On the other hand, general limitations clauses potentially give rise to uncertainty, particularly in the short term, as individuals and organisations work out what conduct will be legitimate and proportionate. This uncertainty has led to variations of the general limitations clause model that incorporate specific protections for religion, resulting in a hybrid approach.
- 1.133 Almost all the submissions which gave thoughtful consideration to the issue of general limitations clauses and supported their use acknowledged that drafting such provisions is delicate and required the careful consideration of a range of factors. In the context of freedom of religion, consideration would specifically need to be given to the particular requirements of article 18(3) of the ICCPR in relation to limitations on the right.
- 1.134 While the Panel was not convinced as to the need for a general limitations clause or clauses in Commonwealth discrimination legislation at this time, it nonetheless could see the potential benefits of such provisions. Accordingly, it encourages jurisdictions to consider the use of such provisions as they modernise the exceptions in their discrimination laws.

Clarification of exceptions in Commonwealth, State and Territory laws

- 1.135 A number of stakeholders consulted by the Panel pointed to the inconsistency in treatment of religious freedom as between the various jurisdictions in Australia. Particular concern was expressed about inconsistent approaches to exceptions to protect religious freedom in discrimination law.
- 1.136 As already noted in this Chapter, discrimination law has a pivotal role with respect to the protection of freedom of religion, particularly in those jurisdictions that do not have a charter of human rights.
- 1.137 The role of exceptions in discrimination legislation raises difficult challenges for legislators. Such legislation's primary purpose is to protect the individual from discrimination on the basis of their inherent characteristics. This is essential to the 'inherent dignity of the human person' as set out in the preamble of the ICCPR. At the same time, such laws may require the rights of others to 'give way' or be limited, at least to some extent.
- 1.138 Article 18(3) of the ICCPR provides that freedom to manifest one's religion or beliefs may be limited in certain circumstances. Such limitations must be 'prescribed by law' and 'necessary' to protect, among other things, the fundamental rights and freedoms of others—which includes the right to equality before the law and to effective protection against discrimination.
- 1.139 This issue was recently addressed by the Special Rapporteur, who observed:

States that adopt more secular or neutral governance models may ... run afoul of article 18(3) of the Covenant if they intervene extensively, overzealously and aggressively in the manifestation of religion or belief alleging the attempt to protect other rights, for example the right to gender equality or sexual orientation. Such protection efforts need to be reconciled with the obligations to uphold freedom of religion or belief, although its manifestation can be limited if this leads to the violation of the rights and freedoms of others. When these rights

ultimately clash, every effort must be made, through a careful case-by-case analysis, to ensure that all rights are brought in practical concordance or protected through reasonable accommodation.⁸⁸

- 1.140 As can be seen from Table C4 at Appendix C, there is considerable variation from jurisdiction to jurisdiction in the exceptions available for religious belief or practice in discrimination laws. This variation occurs in both the protected attributes (such as sex, disability or age) and the areas of activity (such as work or education) to which those exceptions apply.
- 1.141 While the Panel accepted that some variation in approaches between jurisdictions was appropriate to reflect the values of different communities, it could see no justification for exceptions in existing law relating to race, disability, pregnancy or intersex status. The Panel is of the view that those jurisdictions retaining exceptions should review them having regard to community expectations.
- 1.142 Further variation occurs with respect to the manner in which the particular exceptions are framed. An example of this is the various approaches taken to exceptions in the area of employment for religious schools, which is discussed in further detail in Chapter 4.
- 1.143 The decision of the Victorian Court of Appeal in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 50 VR 256 (*CYC v Cobaw*) was referred to in submissions as an example of the difficulty in crafting laws that ‘prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination’ as required by article 26 of the ICCPR while burdening the right to manifest religious belief both individually and in community to the smallest extent possible.
- 1.144 In that case, Christian Youth Camps Limited (CYC) was found to have discriminated unlawfully in refusing to allow Cobaw Community Health Services (Cobaw) to hire a camping resort operated by CYC. Cobaw, an organisation concerned with youth suicide prevention, had wished to conduct a program for same-sex-attracted young people at the camping resort.
- 1.145 CYC was a corporation that was established by, and leased property from, the trustees of the Christian Brethren Trust and operated the camping resort on that property. Profits from the enterprise were returned to the Trust. CYC considered homosexuality was against God’s teaching as set out in the Bible and argued that, as a religious body, it was entitled to rely on exceptions in the relevant legislation that permitted discrimination on religious grounds.
- 1.146 The matters considered by the Court are complex and turn heavily on the particular facts. Those who are critical of the outcome in the case argue, among other things, that the court was too narrow in its approach to determining whether CYC was a religious body and in considering whether CYC’s actions were ‘necessary to avoid

⁸⁸ Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/37/49 (28 February 2018) [47].

injury to the religious sensitivities of people of the religion' as required by the legislation under consideration. They also questioned the approach of the Court to determining the content of religious doctrine.

- 1.147 The Panel noted that the legislation applicable in *CYC v Cobaw* has subsequently been repealed and that the Victorian Charter of Human Rights and Responsibilities would also apply if a similar case came before the courts in Victoria in the future. However, it nonetheless took the view that the case does highlight the unique challenges of crafting laws that give appropriate effect to the right to live free from discrimination and other rights such as freedom of religion. It also highlights the importance of recognising the equality of human rights within a statutory framework and the evidentiary difficulties in ascertaining religious doctrine and conformity with it.
- 1.148 Although not binding under international law, the Siracusa Principles referred to in Chapter 2 have been influential in clarifying the application of limitation clauses in the ICCPR. Relevantly, the Siracusa Principles provide:
10. Whenever a limitation is required in the terms of the Covenant to be “necessary”, this term implies that the limitation:
- (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant;
- (b) responds to a pressing public or social need;
- (c) pursues a legitimate aim; and
- (d) is proportionate to that aim.
- Any assessment as to the necessity of a limitation shall be made on objective considerations.
11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.
- 1.149 The Panel is of the view that the Siracusa Principles form a sound basis for parliaments to assess whether a law limiting the operation of freedom of religion or other rights is unduly burdensome.
- 1.150 The Panel is also of the view that, in drafting laws that do have an impact on rights such as freedom of religion, parliaments should consider the inclusion of express provisions that require the interpretation of laws consistently with those rights so far as it is possible to do so in a way that gives effect to the purpose of the law.
- 1.151 This could be achieved in a variety of ways. One approach is through the use of objects clauses. Many discrimination laws refer to their purpose or object as being the promotion of the right to equality or equality of opportunity, but make no express reference to other human rights, such as the right to freedom of religion. In a different context, the Panel had regard to the objects clause in the Marriage Act, as amended by the Marriage Amendment Act, which provides:

2A Objects of this Act

It is an object of this Act to create a legal framework:

(a) to allow civil celebrants to solemnise marriage, understood as the union of 2 people to the exclusion of all others, voluntarily entered into for life; and

(b) to allow ministers of religion to solemnise marriage, respecting the doctrines, tenets and beliefs of their religion, the views of their religious community or their own religious beliefs; and

(c) to allow equal access to marriage while protecting religious freedom in relation to marriage.

1.152 Alternatively, or in addition, appropriate interpretation clauses could be inserted in the relevant legislation or in legislation of general application to ensure that such laws are interpreted in a manner consistent with the equal status of all human rights.

The Panel also stressed the importance of clear drafting with respect to exemptions and exceptions, noting, for example, the approach taken in newer legislation such as the *Equal Opportunity Act 2010* (Vic).

Conclusion

1.153 Having considered the various arguments as to why fundamental reform of the current legal framework for protecting freedom of religion is needed, the Panel remained unconvinced of the urgent need for such change. While it could be described as piecemeal, inconsistent and overly static, basic protections are in place and the Panel did not receive sufficient advice that the framework itself was causing significant problems.

1.154 However, the Panel encourages all Australian governments to give careful consideration to the appropriateness, and drafting, of existing exceptions in discrimination laws with respect to religious freedom. The Panel also notes the importance of ensuring that the right to religious freedom is given appropriate weight in situations where it is in tension with other public policy considerations, including other human rights.

Recommendation 1

Those jurisdictions that retain exceptions or exemptions in their anti-discrimination laws for religious bodies with respect to race, disability, pregnancy or intersex status should review them, having regard to community expectations.

Recommendation 2

Commonwealth, State and Territory governments should have regard to the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* when drafting laws that would limit the right to freedom of religion.

Recommendation 3

Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.

Chapter 4 – Manifestation and religious belief

Provision of goods and services

- 1.155 A number of stakeholders suggested to the Panel that people of faith should be able to refuse to provide goods and services if doing so would be contrary to their personal religious beliefs. It was put that such a right is necessary to recognise fully the right to freedom of religion under international law.
- 1.156 Some stakeholders cited high-profile cases in other countries in which service providers have been the subject of legal proceedings as a result, for example, of their refusal to provide services for same-sex marriages. In particular, some drew a distinction between the provision of goods and services and being asked to express support for same-sex marriage through the exercise of artistic or expressive skills.
- 1.157 The Panel received a range of proposals to address this issue, including:
- expanding the exceptions provided to religious bodies in the Sex Discrimination Act to include a general exemption for people to act in accordance with their religious beliefs
 - extending to the general public the rights conferred on religious ministers and religious marriage celebrants by the Marriage Act to refuse their services in same-sex marriage ceremonies
 - enshrining a ‘conscience clause’ or ‘reasonable accommodation’ provision in legislation, and
 - allowing businesses to register as objectors to same-sex marriage.
- 1.158 A range of similar proposals were advanced in the context of the public and parliamentary debates in 2017 about the Marriage Amendment Act.
- 1.159 The Panel also heard from a range of stakeholders who argued that religious freedom is already favoured unfairly over the right to non-discrimination and equality in laws relating to marriage and anti-discrimination. The Panel was provided with examples of the harm and distress that the existence of such exceptions causes. The Panel heard that the targets of such exceptions are simply asking to be treated as any other citizen in the public sphere.
- 1.160 Some argued that, at a minimum, the right to discriminate on religious grounds should not be extended, while others argued that religious exceptions in anti-discrimination law should be repealed.

Evaluation

- 1.161 As discussed in Chapter 2 of this Report, while the ICCPR places particular emphasis on forms of manifestation encompassing a broad range of acts, it does not extend protection to every action or omission motivated by religion or belief.
- 1.162 Indeed, as noted earlier, the Special Rapporteur's 2017 report to the Human Rights Council stated that it is not permissible for individuals or groups to invoke 'religious liberty' to perpetuate discrimination against vulnerable groups, including lesbian, gay, bisexual, transgender and intersex persons, when it comes to the provision of goods or services in the public sphere. The Panel was mindful that Australia's anti-discrimination regime has evolved over a 40-year period. The exceptions for religious bodies in the Sex Discrimination Act, for example, were part of that legislation when it was first enacted. They have been amended only once, in 2013, when the application of the Act was extended to cover sexual orientation, gender identity and intersex status. They have never provided individuals with the right to discriminate in the provision of goods and services on the ground of the protected attributes simply on the basis of their personal religious beliefs.
- 1.163 The Panel also noted the views of the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (the Select Committee), the Foreign Affairs, Defence and Trade Interim Report, and the ALRC Freedoms Report on this issue. The Select Committee, for example, concluded that it was not inclined to change 'decades of anti-discrimination law and practice'⁸⁹ by providing a right to allow conscientious belief to be used to discriminate against any class of persons.
- 1.164 In its consideration of freedom of religion, the ALRC concluded:

It is not clear that freedom to manifest religion or belief should extend to refusing to provide, for example, a wedding cake for a same-sex couple. Protecting individuals from discrimination in ordinary trade and commerce seems a proportionate limitation on freedom of religion.⁹⁰

Conclusion

- 1.165 The Panel does not accept arguments that a right to discriminate in the provision of goods and services is required or proportionate to ensure the free and full enjoyment of Australians' rights to freedom of religion under international law. Rather, the Panel is of the view that allowing businesses and individuals to discriminate in the provision of goods and services would unnecessarily encroach on other human rights, and may cause significant harm to vulnerable groups in the community.

⁸⁹ Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, *Report on the Commonwealth Government's Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (February 2017) 62 [3.120].

⁹⁰ Australian Law Reform Commission, Report 129: *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (2015) 157 [5.147].

Charities and faith-based organisations

- 1.166 The undertaking of ‘good works’ or acts of charity is an important aspect of individual and communal manifestation for many religions.
- 1.167 While not binding under international law, article 6 of the 1981 Declaration identifies the establishment and maintenance of charitable and humanitarian institutions as one of the freedoms encompassed in the right to freedom of thought, conscience, religion or belief.
- 1.168 Charities law has continually sought to protect charities that hold a purpose of advancing religion. The foundations of charities and trusts law dates back to the *Statute of Elizabeth* of 1601. It has been progressively developed through case law, most notably *Pemsel’s Case*,⁹¹ which sought to settle the common law definition of charity for the purposes of trust law. The *Charities Act 2013* (the Charities Act) now sets out the definition of a charity for Australian law purposes.
- 1.169 Faith-based organisations have played, and continue to play, a vital role in civic life in Australia. They assist the needy, provide hospitals and aged-care facilities, provide homecare and company to the elderly, run schools and institutions for higher learning, and provide humanitarian assistance in times of natural disaster. Many of these institutions operate outside Australia as well.
- 1.170 Issues raised with the Panel concerning faith-based charities can be broadly divided into two categories: the receipt of public funding, and the maintenance of charitable status while manifesting their faith.
- 1.171 The Select Committee’s Report and the Foreign Affairs, Defence and Trade Interim Report both refer to some of these issues; and the ALRC Freedoms Report addressed exceptions for religious organisations and public funding.⁹²

Public funding

- 1.172 The Panel heard from a number of faith-based organisations which were concerned that, in the future, public funding to religious organisations providing services, such as education or healthcare, may be tied to undertaking activities, or giving up exceptions from anti-discrimination law, and this might conflict with their religious ethos.
- 1.173 Concern was expressed that subsection 37(2) of the Sex Discrimination Act, which provides that the exemption for religious bodies in section 37 does not apply to the provision of Commonwealth-funded aged care (unless it is connected with employment of staff at the facility), would serve as a precedent for further winding back of exceptions. While no objection was heard in the context of aged care, there

⁹¹ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

⁹² Australian Law Reform Commission, Report 129: *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (2015) 148-149.

was considerable concern that this model could be applied, for example, to education.

- 1.174 The Panel also heard that protection was needed, in the form of ‘anti-detriment’ provisions, to ensure that faith-based organisations were not disqualified from receiving public funds because of their religious beliefs.
- 1.175 The Panel heard from other stakeholders that religious bodies should not receive public funding if they acted in a way that was discriminatory towards some members of the community, particularly LGBTI people. Particular concern was heard with respect to funding provided for the provision of services by a faith-based organisation where no alternative service provider was available in that location. An example given was a school operated by a faith-based organisation in a remote location. It was argued that the school should not be able to rely on exceptions from discrimination law, with respect to teachers or students, when no other alternative employer or service provider was readily available.
- 1.176 The Panel also heard from stakeholders who argued that religious bodies should not receive any public funding and should not be eligible to provide government-funded services—regardless of whether or not they discriminate.
- 1.177 The establishment of charitable or humanitarian institutions is encompassed by the right to freedom of religion. The 1981 Declaration provides that the right includes the freedom to receive voluntary financial and other contributions from individuals and institutions (article 6). However, international law does not impose positive obligations on Australia to fund charitable organisations, or to allow faith-based organisations to deliver public services.
- 1.178 While acknowledging the limits of international law in this area, the Panel was nonetheless of the view that the importance of charity to a life of faith, which was the subject of many submissions from different faith groups and charitable organisations, warranted careful consideration of the concerns raised.
- 1.179 With respect to public funding, the Panel accepted the argument advanced that it is important to distinguish between funding provided to support diversity and funding provided for the delivery of a service. This distinction was particularly important in an area such as education, where government funding serves two purposes: first, ensuring universal access to education; and secondly, supporting the ability of parents to choose an education for their children that conforms to their values and beliefs, noting that this will typically require some financial contribution on the parents’ part.
- 1.180 The Panel was conscious that there is a qualitative difference between funding a faith-based organisation to deliver a service and funding a for-profit organisation. The Panel noted the extraordinary contribution of volunteers in not-for-profit organisations to the public benefit. While this is true of not-for-profit organisations generally—faith-based and non-faith-based—the Panel noted that faith-based organisations have an extraordinary capacity to mobilise unpaid contributions and the Panel noted the commitment of many of the persons participating in those organisations for reasons of faith.

- 1.181 The Panel also noted that in the *DOGS Case*, the High Court held that the non-preferential funding of religious schools did not contravene the non-establishment clause of section 116 of the Constitution.
- 1.182 The Panel could see no reason to preclude faith-based organisations from continuing to be entitled to apply for public funding for their activities, or from competing to provide services on behalf of government, on the same terms as they have had.
- 1.183 In the absence of any concrete indications of a problem in Australia, the Panel was reluctant to recommend the enactment of ‘anti-detriment’ clauses to protect religious bodies from funding decisions based on their beliefs. Faith-based organisations are a significant provider of services in areas such as aged care, education and health. The Panel was satisfied that governments would struggle to find other providers to deliver many such essential services if they chose to discriminate against faith-based organisations.
- 1.184 The Panel did not agree that public funding should be tied to religious bodies ‘waiving’ or renouncing exceptions from anti-discrimination laws. Great care would need to be taken before such exceptions were removed or reduced in relation to the provision of services by bodies that provide those services for reasons of faith.
- 1.185 However, the Panel considered that the situation was different where there was only one service provider or employer in a community, thus precluding choice on the part of the consumer of that service or prospective employees. In such cases, the Panel considered that it should be open to governments to insist that the sole provider not discriminate against any part of the population, and that in circumstances of limited employment opportunities, be open to the employment of suitable and qualified persons—regardless of intrinsic qualities such as their sexual orientation.
- 1.186 This should not require a change to the law, but could be managed by way of contract or through public tender processes.

Charitable status

- 1.187 The Panel heard from faith-based organisations that protections were needed to ensure that organisations do not lose their charitable status because of their religious beliefs.
- 1.188 This issue was of particular concern to faith-based organisations during debate on the Marriage Amendment Act, when a number of charities expressed concern that they may lose their charitable status, should they continue to articulate a ‘traditional’ view of marriage.
- 1.189 Concerned organisations pointed to overseas examples where faith-based organisations had lost their charitable status, allegedly because of their advocacy for

positions said to be based on their religious views, such as the Family First case in New Zealand.⁹³

- 1.190 During debate on the Marriage Amendment Act, a number of amendments were discussed in the Senate and the House of Representatives that would have established a positive protection for charities from having their recognition as a charity, or their eligibility for tax benefits, revoked, as a result of maintaining a view that marriage is between a man and a woman. While these amendments were defeated, there was a broad consensus among those Senators and Members who spoke on this topic that the legalisation of same-sex marriage should not have an impact on religious charities.
- 1.191 Senator Dean Smith, who sponsored the introduction of the *Marriage Amendment (Definition and Religious Freedoms) Bill 2017* in the Senate, sought advice from the Commissioner of Taxation, Chris Jordan AO, and the Acting Commissioner of the Australian Charities and Not-for-profits Commission (the ACNC), Murray Baird, as to whether such protections were necessary. The responses to Senator Smith were tabled by the Hon Warren Entsch MP in the House of Representatives on 7 December 2017.
- 1.192 In summary, Mr Jordan advised Senator Smith on 24 November 2017 that, generally speaking, the advocacy of a ‘traditional’ view of marriage would not, of itself, affect the eligibility of a charity for deductible gift recipient status under the *Income Tax Assessment Act 1997*, or for concessions under the *Fringe Benefits Tax Act 1986*. However, Mr Jordan did note that continued eligibility for these benefits depended on the organisation continuing to be registered as a charity with the ACNC.
- 1.193 Mr Baird advised Senator Smith on 24 November 2017 that ‘it is unlikely that a charity for the advancement of religion could lose charitable status by adopting and advocating for the pre-existing definition of marriage’. However, given the doubts and concerns of charities, he noted that ‘a legislative provision confirming the intention of Parliament that the charity status of such an entity should not change by reason of the new definition, would put the matter beyond doubt’.
- 1.194 In relation to faith-based charitable bodies other than bodies for the ‘advancement of religion’ (for example, a body with the purpose of advancing education), Mr Baird advised that continuing to advocate for a traditional view of marriage, or lawfully refusing to provide goods or services on the basis of a traditional view of marriage, would not be considered a ‘disqualifying purpose’ under the Charities Act, and would thus not affect the body’s classification as a charity.
- 1.195 The Charities Act codified the definition of a charity under Commonwealth law. Section 5 provides that ‘charity’ means an entity:
- that is a not-for-profit entity

⁹³ *Re Family First New Zealand* [2015] NZHC 1493 (30 June 2015).

- all of the purposes of which are charitable purposes for the public benefit (or incidental or ancillary to such purposes)
- none of the purposes of which are ‘disqualifying purposes’, and
- that is not an individual, a political party or a government entity.

1.196 The definition of ‘charitable purpose’ is found in section 12 of the Charities Act. Among other matters, it lists advancing religion, health, education, and social or public welfare as charitable purposes. Promoting or opposing a change to law, policy or practice can also be a charitable purpose, provided that it is done in furtherance of one of the other listed purposes, such as religion or education. Certain activities such as the advancement of religion and education are presumed to be for the public benefit by virtue of section 7 of the Charities Act.

1.197 Section 11 of the Charities Act provides that ‘disqualifying purpose’ means, among other matters, ‘the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy’. The provision then includes an example and a note as follows:

Example: Public Policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security.

Note: Activities are not contrary to public policy merely because they are contrary to government policy.

1.198 The concern of faith-based charities is that continued advocacy, or adherence to, their religious beliefs, where such beliefs are out of step with law or policy, may constitute a ‘disqualifying purpose’. In the event that an organisation cannot meet the definition of a charity, it cannot be registered under the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act) which, among other matters, would also make it ineligible for the tax concessions discussed earlier.

1.199 The example and note appended to section 11 of the Charities Act emphasise that the public policy ground for disqualification is intended to apply only to restricted cases. Mere advocacy of a position contrary to government policy does not meet the threshold of a disqualifying purpose; and, indeed, advocating a change to law or policy in furtherance of another charitable purpose is itself a charitable purpose under the Charities Act as discussed above.

1.200 The Panel does not consider charities, established for a religious purpose, which continue to advocate their religious views, including a ‘traditional’ view of marriage, to be at risk of losing their charitable status under Australian law. The Panel was reluctant to draw too many inferences from overseas experiences which turned on different legislation and specific facts in those cases. However, the Panel can see a benefit to assist certainty, and could see no particular harm, in an amendment similar to that suggested by the Acting Commissioner of the ACNC to put the immediate issue raised by the legalisation of same-sex marriage beyond doubt.

Other matters

- 1.201 Two other concerns were raised by faith-based organisations with respect to charities.
- 1.202 First, concerns were expressed, though only in passing, about the conditions under which a charity can be registered as a ‘basic religious charity’ under the ACNC Act. Basic religious charities have reduced reporting requirements and governance obligations under the ACNC Act. The Panel received only minimal information on this topic and, given it is also being considered by the Statutory Review of the Australian Charities and Not-for-profits Commission Act, the Panel did not consider the issue in further detail.
- 1.203 Second, a number of submissions expressed concern about the lack of clarity concerning the relationship between recognition as a charity for the purpose of the advancement of religion and the definition of a body established for religious purposes in Commonwealth, State and Territory anti-discrimination laws.
- 1.204 Faith-based organisations were concerned that a Commissioner’s Interpretation Statement issued by the ACNC in 2016, with respect to public benevolent institutions (PBIs), may have consequential implications as to whether a body will be recognised as being a body established for ‘religious purposes’.
- 1.205 The Statement indicated that an organisation established solely for the purposes of the advancement of religion is *unlikely* to be a PBI. This did not preclude an organisation motivated by faith from being a PBI.
- 1.206 The concern from faith-based organisations is that a court may rely on the fact that an organisation is not registered as a body for the purpose of advancing religion, as evidence supporting a finding that the body is not a body established ‘for religious purposes’. Consequently, it is argued, the organisation may then be found to be ineligible for the exceptions found in anti-discrimination laws such as section 37 of the Sex Discrimination Act and elsewhere.
- 1.207 This issue was linked to concerns about the approach of the Court of Appeal in

Recommendation 4

The Commonwealth should amend section 11 of the *Charities Act 2013* to clarify that advocacy of a ‘traditional’ view of marriage would not, of itself, amount to a ‘disqualifying purpose’.

CYC v Cobaw. Other aspects of that decision are discussed in Chapter 3.

Employment in religious schools

- 1.208 The establishment and conduct of educational institutions is a critical aspect of the manifestation of religious faith in Australia. Schools conducted in accordance with the principles of most major religions operate throughout Australia.
- 1.209 Religious schools enjoy exceptions to discrimination law with respect to the employment of teachers or other staff in all Australian jurisdictions. However, there is considerable variation in these provisions as between the different jurisdictions.
- 1.210 The Panel heard from a number of religious schools that argued that spiritual education is not just about teaching content in classes, but also the formation of a community or environment that supports the teachings of their faith. A key theme in these discussions was the need for staff to model the religious and moral convictions of the community and to uphold, or at least not to undermine, the religious ethos of the school. The Panel heard repeatedly that faith is ‘caught not taught’.
- 1.211 There was broad acceptance that schools should be free to select staff that adhere to and model their beliefs where the position involves the teaching of religion or responsibility for the overall culture of the school—religious education teachers or principals, for example. Submissions differed in their views on whether religious schools should be able to discriminate, or choose, with respect to teachers who were not directly involved in the teaching or practices of religion, such as a mathematics teacher, or support staff who are not required to be in contact with students, such as a gardener.
- 1.212 Secular and other non-religious groups argued that, with the exception of religious education teachers, there was no basis for discrimination particularly with respect to non-teaching staff. For some religious schools, however, the only way to create a community consistent with the teachings of the faith is to be selective in employment, including with respect to non-teaching staff, who are also important members of the school community.
- 1.213 Few disputed that a religious school should be able to discriminate on the basis of religious belief—although the Panel did not hear of any examples of schools that applied this in an absolute fashion. The Panel also heard that exceptions relating to pregnancy were typically not relied on by religious schools. Many of the faith-based schools explained that they understood this not as a matter of excluding people from employment but of positively choosing people who conscientiously adhere to their religious beliefs and religious moral code. The Panel was made aware of examples of faith-based schools that expect this of their staff, although the Panel also noted the variety in approaches among the many kinds of religious and denominational schools.
- 1.214 Undoubtedly the most difficult issue was the operation of exceptions for sexual orientation, gender identity and marital or relationship status with respect to same-sex couples in light of the passage of the Marriage Amendment Act. With respect to sexual orientation, gender identity and marital or relationship status, the Panel heard of a wide variation in school practice. The Panel heard of schools that would employ

a same-sex-attracted person provided they adhere to the schools' religious beliefs and moral code. The Panel heard that some religious schools employed teachers in same-sex relationships provided they did not openly contest the school's teachings on family relationships.

- 1.215 The Panel heard reports of religious schools terminating the employment of staff on the basis of their sexuality, despite the staff not openly discussing those issues in the school. The Panel also heard examples of religious schools having made a decision to continue the employment of teachers whose sexuality put them at odds with the school's faith-based teachings on relationships and marriage, to celebrate the inclusivity of the school community and to send a positive message to young people.
- 1.216 LGBTI communities spoke of the stress and mental health pressures placed on teachers and other staff who felt compelled to hide important aspects of their identity from colleagues and students, and who felt they were prevented from full participation in the school community. The Panel heard of individuals 'editing' the way they presented themselves to others, depending on the context. These groups also pointed to the indirect impact on students of creating environments that were unaccepting of LGBTI people.
- 1.217 The Panel heard that these issues were exacerbated by the uncertainty and lack of transparency that attaches to the use of exceptions by religious schools. Examples were given of teachers who were 'out' in all other aspects of their life, but not 'out' at work, because they were unsure whether their employer would be accepting, or would choose to dismiss them. A further example was given of an employee at a religious school who was employed despite being open about being same-sex attracted. Later, when the leadership of the school changed, that teacher was dismissed on the basis of his sexuality.
- 1.218 For many religious groups, the key issue is that parents have the choice whether to raise their children in accordance with their own religious beliefs. It was also pointed out that if parents are unhappy with the employment practices of the school, they can simply move to a different school which better espouses the parents' views. If many students moved schools, this might force the school to reconsider its practices.
- 1.219 Some religious schools attributed their success to the ability of the school to create a community that accords with the values and beliefs of their faith. They argued that the ability of the school to foster a community that accords with the values and beliefs of their faith was critical to the achievement of their religious purpose and was the reason for their existence in the first place. However, it was also pointed out that this approach is not feasible in rural and regional areas where there is very little choice of school for both students and teachers, especially given that religious schools make up a significant portion of the education sector.

Suggested reforms

- 1.220 The Panel received numerous recommendations for better ways to balance the right to freedom of religion with that of protection against discrimination, including that:

- faith-based schools should be free to choose staff who adhere to their religious beliefs and practices, provided they do so in good faith and in order to maintain the religious ethos of the school
- the Commonwealth should legislate to permit faith-based schools to select staff who uphold the aims of the organisation and maintain the ethos of the school in a way that prevents the States and Territories from offering any lesser protection (that is, to ‘cover the field’)
- faith-based schools should be required to publish their policies on employment, including at the time of hiring, and should be entitled to discriminate only in accordance with their published policy
- faith-based schools should be allowed to discriminate in employment on the basis of protected attributes only if the possession of that attribute is a genuine occupational requirement of the role
- the current exceptions enabling faith-based schools to discriminate on the basis of protected attributes should be replaced by a ‘general limitations clause’ as discussed in Chapter 3
- faith-based schools should not have any special exceptions to anti-discrimination laws, except in respect of teachers of religious instruction
- if faith-based schools choose to discriminate on the basis of protected attributes, state funding should be withdrawn.

1.221 Some submissions drew attention to provisions enabling political parties to discriminate on the basis of political belief or activity in offering employment as a ministerial adviser and other political positions, arguing that a similar model could be used to enable religious organisations to discriminate on the basis of religious belief and adherence to religious values.⁹⁴ To reduce inconsistency between jurisdictions, and to provide certainty to religious organisations, it was suggested that the Commonwealth could introduce a provision in such a way as to override any conflicting State and Territory provisions.

International law

1.222 Australia has obligations under international law relating to the provision of education, which are contextually relevant to the matter of employment at religious schools.

1.223 For example, article 13 of the ICESCR recognises the right of everyone to education. Paragraph 3 of the article 13 states:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than

⁹⁴ Such as s 27 of the *Equal Opportunity Act 2010* (Vic).

those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

- 1.224 Article 10 of the ICESCR recognises the responsibility of the family in respect of the care and education of their dependent children.
- 1.225 A key aspect of the right to manifest one's belief in article 18(1) of the ICCPR is a right for religious groups to establish their own private schools conducted according to the beliefs of their religion. As the Special Rapporteur put it in 2010, 'private schools constitute a part of the institutionalised diversity within a modern pluralistic society'.⁹⁵ This does not, however, mean the state has an obligation to provide religious instruction in state schools or to fund private schools.
- 1.226 With respect to instruction by teachers, the Panel notes in *Delgado Paez v Colombia* (1990), the Human Rights Committee considered that church authorities could decide who may teach religion and in what manner at a religious school.⁹⁶
- 1.227 Australia additionally has obligations under article 18(4) of the ICCPR to respect the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.
- 1.228 The CROC also places upon Australia an obligation to respect the rights and duties of parents to provide directions to the child. Article 14(2) recognises states parties' obligation to respect the rights and duties of parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child. Parents therefore have a right to educate their children in accordance with the doctrines of their faith.
- 1.229 Protection from discrimination also forms part of Australia's obligations under the ICCPR, under article 26. Discrimination is recognised as having the potential to cause emotional distress to individuals and a loss of personal dignity and self-worth. The principles of equality and non-discrimination underpin the ICCPR. The issue of whether religious schools can discriminate against students or staff on the basis of protected attributes needs to be balanced against these international treaty obligations.

Existing Australian law

- 1.230 As already noted, Australian jurisdictions have different approaches as to how they balance the issue of discrimination in employment and the provision of education by religious schools. Although they differ in scope, each jurisdiction has laws preventing discrimination. These laws also include exceptions setting out specific areas in which

⁹⁵ Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/16/53 (15 December 2010) [54].

⁹⁶ Human Rights Committee, *Views: Communication 195/1985*, 39th sess, UN Doc CCPR/C/OP/3 (1990) [5.7] (*Delgado Páez v Colombia*).

discrimination is lawful. All jurisdictions have exceptions for religious bodies, although they differ in scope.

- 1.231 While Commonwealth legislation protects against discrimination in both employment and education, it contains exceptions for religious institutions. In the Fair Work Act, employers, including religious schools, are prohibited from taking adverse action against, or terminating the employment of, employees on the basis of a variety of protected attributes.⁹⁷ However, religious institutions are exempt from this requirement if the action meets the ‘good faith’ and ‘religious susceptibilities’ tests in section 351 of the Act.⁹⁸ Discrimination is also permitted if it is not unlawful under the anti-discrimination law in force in the place where the action is taken.⁹⁹ Protections also apply with respect to discriminatory terms in modern awards.
- 1.232 Similarly, the Sex Discrimination Act prohibits discrimination in employment on the grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy or potential pregnancy, breastfeeding or family responsibilities, with exceptions for religious educational institutions on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy if the act meets the good faith and religious susceptibilities tests in section 38.¹⁰⁰
- 1.233 The Australian Capital Territory’s approach distinguishes between religious and non-religious schools. The first is that educational institutions established in accordance with the doctrines of a particular religion can discriminate against applicants, employees and contract workers in relation to any protected attribute.¹⁰¹ The second permits any educational authority to discriminate on the basis of religion if the duties of the employment involve participation in the teaching, observance or practice of the relevant religion.¹⁰² Western Australia takes a similar approach.¹⁰³
- 1.234 In New South Wales, any private educational institution can lawfully make employment decisions on the grounds of sex, transgender status, marital or domestic status, disability and homosexuality.¹⁰⁴
- 1.235 In the Northern Territory, educational institutions operating in accordance with the doctrines of a religion may discriminate in the area of employment on the basis of religious belief or activity and sexuality, only if the act meets the good faith and religious susceptibilities tests.¹⁰⁵
- 1.236 Victoria permits adverse employment decisions to be made by religious educational institutions on the grounds of sex, sexual orientation, lawful sexual activity, marital

⁹⁷ *Fair Work Act 2009* (Cth) ss 351(1), 772(1)(f).

⁹⁸ *Ibid* s 772(2).

⁹⁹ *Ibid* s 351(2).

¹⁰⁰ *Sex Discrimination Act 1984* (Cth) s 38.

¹⁰¹ *Discrimination Act 1991* (ACT) s 33(1).

¹⁰² *Ibid* s 44.

¹⁰³ *Equal Opportunity Act 1984* (WA) ss 66, 73.

¹⁰⁴ *Anti-Discrimination Act 1977* (NSW) ss 25, 38C, 40, 49D, 49ZH.

¹⁰⁵ *Anti-Discrimination Act 1996* (NT) s 37A.

status, parental status or gender identity only if it conforms to the doctrines of that religion, or if it is reasonably necessary to avoid injury to the religious susceptibilities of followers of that religion.¹⁰⁶

- 1.237 Queensland differs from other jurisdictions, providing a general exemption for employers to impose a genuine occupational requirement for a position.¹⁰⁷ It also provides a more specific exception for educational institutions under the direction or control of a body established for religious purposes. Under this provision, discrimination in relation to employment is not unlawful provided that the discrimination is not unreasonable, it is a genuine occupational requirement that a person act in accordance with the employer's religious beliefs, and that the person has openly acted in a way that is contrary to those beliefs.¹⁰⁸ The test of reasonableness depends on the circumstances of the case, but can include consideration of whether the adverse action is unjust or disproportionate to the person's actions, and the consequences to both parties, should the discrimination happen or not happen.¹⁰⁹
- 1.238 Tasmania permits religious educational institutions to discriminate on the grounds of religious belief, affiliation or activity in employment, if religious observance or practice is a genuine occupational requirement of the position.¹¹⁰ Educational institutions are also permitted to discriminate on the grounds of religious belief, affiliation and activity, if it is to better enable the educational institution to be conducted in accordance with the religion's tenets, beliefs, teachings, principles or practices.¹¹¹
- 1.239 The Tasmanian provisions do not permit religious educational institutions to discriminate on any other ground, including sex or sexuality.
- 1.240 South Australia allows adverse employment decisions to be made by religious educational institutions on the grounds of sexual orientation, gender identity or intersex status, only if the institution provides a written policy position to the applicants, employees, prospective employees, and any person who requests it.¹¹² The discrimination does not need to meet a 'good faith' test, but the discrimination must be founded in the precepts of that religion. Furthermore, discrimination is permitted on the grounds of marital or domestic partner status if the employee is in a same-sex domestic partnership and the school provides a policy on the matter.¹¹³
- 1.241 The Panel heard concerns about uncertainty in the operation of exceptions for religious schools. Very few formal complaints have been made to the commissions in recent years relating to these provisions. The lack of case law in the area, as well as

¹⁰⁶ *Equal Opportunity Act 2010* (Vic) s 83.

¹⁰⁷ *Anti-Discrimination Act 1991* (Qld) s 25(1).

¹⁰⁸ *Ibid* s 25(3).

¹⁰⁹ *Ibid* s 25(5).

¹¹⁰ *Anti-Discrimination Act 1992* (Tas) s 51(1).

¹¹¹ *Ibid* s 51(2).

¹¹² *Equal Opportunity Act 1984* (SA) s 34(3).

¹¹³ *Ibid* s 85Z(2).

the fact that jurisdictions balance the rights in different ways, makes it unclear how narrowly or extensively these exceptions may apply.

Conclusion

- 1.242 This is an extremely complicated area of law, involving a number of intersecting rights under international law and with some regulation at both the Commonwealth and State and Territory level. The Panel notes the variety of approaches across Australia dealing with the intersection between the rights of faith-based schools and those of current or potential employees.
- 1.243 The Panel received a range of comments from stakeholders about the extent to which individual provisions are, or are not, used in practice, together with conflicting reports about whether the exceptions from anti-discrimination law that apply to faith-based schools were utilised in particular circumstances.
- 1.244 In light of the complexity, and in the context of the other issues raised in the Review, the Panel is particularly concerned to avoid unintended consequences that may flow from proposals in this area.
- 1.245 The Panel noted the wide variety of faith-based schools in Australia and the communities in which they operate. The Panel considered there is value in this variety, as it supports parental rights to select the best education for their individual child. While many faith-based schools choose not to rely on the existing exceptions in legislation to discriminate against staff on the basis of protected attributes, others consider that the freedom to select, and to discipline staff who act in a manner contrary to the religious teachings of the school, is essential to their ability to foster an ethos that is consistent with their religious beliefs.
- 1.246 The Panel agreed that faith-based schools should have some discretion to discriminate in the hiring of teachers and other staff on the basis of religious belief, sexual orientation, gender identity, or marital or relationship status for the reasons outlined above. This enables schools positively to select staff and contractors that adhere to the religion and its practices in order to foster or protect the religious ethos of the school.
- 1.247 Having considered the approach taken in each of the jurisdictions and the proposals put forward by those consulted, the Panel has reached conclusions in two areas.

Grounds for discrimination

- 1.248 The Panel could see no justification for a school to discriminate on the basis of race, disability, pregnancy or intersex status. The Panel did not hear of a single instance of a faith-based school discriminating, or wanting to discriminate, against a person on the basis of these attributes. Accordingly, those jurisdictions that have exceptions for these attributes should repeal or amend them as the case requires. This would not affect other exceptions that apply in relation to those attributes.
- 1.249 In the Panel's view, existing employees who marry someone of the same sex should not have adverse action taken against them for the sole reason that a person has

entered into a same-sex marriage. The Panel can see no reason for any distinction being made between a staff member who is in a same-sex partnership, and one who is married to a same-sex partner under the Marriage Act. Similarly, the Panel can see no reason for a distinction being made between a heterosexual person who is in a *de facto* relationship or partnership, and someone who is married.

Transparency

- 1.250 For the Panel, the key to the maintenance of existing exceptions is clarity and transparency so that prospective employees understand the precepts of the religion on which the school is based and the school's policies with respect to employment and can make choices accordingly.
- 1.251 Noting the variety of approaches taken in different jurisdictions, the Panel confines its recommendations in this regard to the Commonwealth. However, it encourages States and Territories to improve the transparent use of exceptions in discrimination law.

Recommendation 5

The Commonwealth should amend the *Sex Discrimination Act 1984* to provide that religious schools can discriminate in relation to the employment of staff, and the engagement of contractors, on the basis of sexual orientation, gender identity or relationship status provided that:

- (a) the discrimination is founded in the precepts of the religion
- (b) the school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced, and
- (c) the school provides a copy of the policy in writing to employees and contractors.

Recommendation 6

Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools in employment on the basis of race, disability, pregnancy or intersex status. Further, jurisdictions should ensure that any exceptions for religious schools do not permit discrimination against an existing employee solely on the basis that the employee has entered into a marriage.

Enrolment of students in religious schools

- 1.252 The current framework of exceptions to anti-discrimination law which allows schools to select staff and contractors based on whether they conform to the religious ethos of the school, also includes a number of provisions allowing schools to be selective in the admission of students. There are a variety of approaches to this issue in State, Territory and Commonwealth law and the Panel heard a variety of views.
- 1.253 Similarly to the issues discussed in the previous section, the central issues concern whether faith-based schools should be allowed to select, or preference, individuals who will uphold the religious values of the school. However, many of the submissions to the Panel drew a distinction in relation to students, as careful consideration is required to ensure that the rights of the child, including to access religious education, are upheld without compromising the ability of religious schools to create the environment and ethos they wish to create.
- 1.254 Circumstances in which schools may wish to discriminate in enrolment include:
- on the basis of parental attributes, such as in relation to a child with same-sex parents
 - on the basis of religious belief, where the school caters to a specific religious community, and
 - on the basis of other attributes of the child including sex, sexual orientation and gender identity.
- 1.255 As noted in the previous section, there is a wide variety of religious schools in Australia, with a range of approaches to the issue of selecting, or preferencing, students from families that uphold the religious ethos of the school. Some religious schools argued that they should be allowed to select students who would contribute positively to their community. One school mentioned that it has declined enrolments on the basis that it thought that enrolment at the school would not be positive for the child. Other schools informed the Panel that they do not make enrolment decisions on the basis of the parents' attributes. For example, if a child's parents are a same-sex couple, one school said that their process is to explain that the school's traditional view of marriage will be taught in school, but that the parents are welcome to join the school community regardless and that several same-sex couples decided to send their children to that school.
- 1.256 The Panel notes that faith-based schools have varying approaches to students who do not adhere to the faith of the school or whose sexual orientation, gender identity or relationship status places them at variance with the teachings of the faith of that school. When asked during consultations, many faith-based schools reassured the Panel that they would not expel students solely because they came out as same-sex attracted. However, the Panel also heard that some instances of discrimination did occur against students in schools and that students were forced to leave as the school was not supportive of them coming out. Some groups, including at least one State-based human rights institution, argued that discrimination against children is a special category and should not be allowed.

- 1.257 The Panel heard that LGBTI youth are an at-risk group for mental health issues and, due to a fear of outing themselves, are less likely to seek services or assistance from their teachers and school counsellors. The Panel heard accounts of LGBTI youth who felt bullied and unsupported at religious schools, particularly where schools adopted a stance that was less accepting of homosexual relationships generally.¹¹⁴ It was reported that many students are discovering their sexual orientation and gender identity in their mid-teens, during high school, and that this includes students in religious schools. A number of groups argued that these children should not be forced to leave their school communities at the vulnerable stage when their sexual orientation and gender identity first become apparent. On the other hand, the Panel was reassured by religious schools that they were aware of these issues and were committed to work with and support their LGBTI students. The Panel also heard accounts of some LGBTI students who were well supported by religious schools that nevertheless maintained conservative views about sexuality generally.
- 1.258 A related issue raised with the Panel concerned the provisions made by schools to accommodate students of different religious beliefs. In one instance, a child enrolled in a public school was not given adequate opportunity to conduct prayers during lunchtime in accordance with his faith. In the main, these appeared to be issues that could be, and have been, resolved through better awareness among teachers and principals about those of diverse faiths.

Applicable international law

- 1.259 As discussed in the previous section, Australia has a number of obligations under international law with regard to the provision of education at religious schools. These include:
- the right of all people to education and the right of parents to choose schools for their children which provide education in accordance with their own convictions, such as articulated in article 13 of the ICESCR
 - obligations under article 18(4) of the ICCPR to respect the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions
 - the right to manifest one's belief, as articulated in article 18 of the ICCPR, which has been interpreted to include a right for religious groups to establish their own private schools conducted according to the beliefs of their religion. This follows from the right of parents to choose schools for their children
 - article 14 of the CROC, which places upon Australia an obligation to respect the rights and duties of parents to provide directions to the child

¹¹⁴ For example, if the school chooses not to hire teachers on the basis of their sexual orientation or gender identity, or not to enrol new students who are openly gay or transgender, the Panel heard that this can have an indirect impact on existing students who may be same-sex attracted or transgender.

- article 3 of the CROC, which places ‘the best interests of the child’ at the centre of all actions concerning children, whether undertaken by public or private institutions
- article 24 of the CROC, which recognises the right of children to ‘the highest attainable standard of health’
- the obligation under article 26 of the ICCPR to protect individuals from discrimination and, more broadly, to respect the principles of equality and non-discrimination, which underpin the ICCPR.

1.260 Parents therefore have a right to educate their children in accordance with the doctrines of their faith. However, the extent to which religious schools can discriminate against students in order to uphold these religious doctrines must be balanced against other international treaty obligations protecting individuals from discrimination and enshrining the fundamental rights of children.

Existing Australian law

1.261 Under existing Australian law, all jurisdictions prohibit discrimination in the provision of education on the basis of protected attributes. To varying degrees, each jurisdiction also has exceptions allowing religious schools to discriminate on the basis of religion and to allow discrimination on the basis of sex in single-sex schools. The Commonwealth, the Australian Capital Territory, New South Wales and Western Australia also provide exceptions that allow religious schools to discriminate against students on the basis of gender identity and sexual orientation, in certain circumstances.

1.262 As in the area of employment in religious schools, the number of actual complaints of discrimination against students on the basis of these protected attributes appears to be relatively low.

1.263 The Sex Discrimination Act prohibits discrimination in the provision of education on the grounds of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding. Exceptions for religious educational institutions apply to discrimination on the grounds of sexual orientation, gender identity, marital or relationship status or pregnancy if the act is taken in good faith and to avoid injury to the religious susceptibilities of the adherents of a particular religion.¹¹⁵

1.264 As with employment, the Australian Capital Territory’s approach to discrimination in education depends on the purposes of the school. First, educational institutions conducted solely for students having a particular religious conviction are permitted to discriminate against a potential student applying for admission on the grounds of religious conviction.¹¹⁶ Second, educational institutions that are conducted in

¹¹⁵ *Sex Discrimination Act 1984* (Cth) s 38(3).

¹¹⁶ *Discrimination Act 1991* (ACT) s 46.

accordance with the doctrines of a particular religion are permitted to discriminate on any ground provided that the discrimination is in good faith and to avoid injury to the religious susceptibilities of the adherents of a particular religion.¹¹⁷

- 1.265 The Northern Territory, Queensland and Victoria each permit discrimination on the basis of religious conviction in the provision of education. These jurisdictions do not have exceptions for religious schools permitting discrimination against students on the basis of sexual orientation or gender identity in any case.
- 1.266 The Tasmanian legislation allows religious educational institutions to discriminate against potential students applying for admission on the basis of religious belief, but not if the student is already enrolled in that institution.¹¹⁸
- 1.267 South Australian law does not have any exceptions for religious educational authorities regarding the provision of education except that they are able to discriminate against a student or potential student on the basis that the student appears or dresses, or wishes to appear or dress, in a manner required by, or symbolic of, a different religion.¹¹⁹
- 1.268 The New South Wales exceptions are extended to all private educational institutions, not only religious educational institutions. Private educational institutions can lawfully discriminate against students and prospective students applying for admission on the grounds of sex, transgender status, marital and domestic status, disability, homosexuality, and age.¹²⁰ The good faith and religious susceptibilities tests do not apply.
- 1.269 Western Australia's approach prescribes a 'positive discrimination' test. The legislation permits religious educational institutions to discriminate on all grounds except race, impairment or age, in the provision of education, if the act is done in good faith and in favour of adherents of the religion generally, but not in a manner that discriminates against a particular class of people who are not adherents of that religion.¹²¹ This permits a faith-based school to positively discriminate against a student on some protected attributes if the aim of doing so was to advance the interests of adherents of that faith, and if all people who are not adherents of that religion are treated in the same manner.¹²²

Conclusion

- 1.270 As with employment, this is an extremely complicated area of law, involving a number of intersecting rights under international law and with varying degrees of regulation at both the Commonwealth and State and Territory level. The Panel heard that most religious schools place the best interests of the child at the core of their

¹¹⁷ *Discrimination Act 1991* (ACT) s 33(2).

¹¹⁸ *Anti-Discrimination Act 1992* (Tas) s 51A.

¹¹⁹ *Equal Opportunity Act 1984* (SA) s 85ZE.

¹²⁰ *Anti-Discrimination Act 1977* (NSW) ss 31A, 38K, 46A, 49L, 49ZO, 49ZYL.

¹²¹ *Equal Opportunity Act 1984* (WA) s 73.

¹²² *Goldberg v G Korsunski Carmel School* (2000) EOC 93-074.

actions in this area and that, at least in the case of an existing student, all children, including those who are same-sex attracted or identify as transgender, are valued and supported in religious schools.

- 1.271 The Panel recognises, however, that there is a wide variety of religious schools in Australia and that to some school communities, cultivating an environment and ethos which conforms to their religious beliefs is of paramount importance. To the extent that this can be done in the context of appropriate safeguards for the rights and mental health of the child, the Panel accepts their right to select, or preference, students who uphold the religious convictions of that school community.
- 1.272 This is not an easy balance to strike. The Panel considers that a religious school should be able to select, or preference, students only on the basis of a written policy that is grounded in the doctrines of the school's faith. This would ensure that schools have a continued ability to uphold their specific religious ethos while protecting the right of students not to be discriminated against. A written policy would provide transparency and certainty for students and parents. It would also uphold the right of parents to select the best education for their individual child.
- 1.273 To the extent that some jurisdictions do not currently allow religious schools to discriminate against students on the basis of sexual orientation, gender identity and gender characteristics, the Panel sees no need to introduce such provisions. Very few religious schools or organisations submitted that this was necessary. To the extent, however, that certain jurisdictions, including the Commonwealth, do allow this type of discrimination, the Panel believes the exceptions should be limited by the requirement that the discrimination be in accordance with a published policy which is grounded in the religious doctrines of the school.
- 1.274 The Panel can see no justification for a school to discriminate on the basis of race, disability, pregnancy or intersex status. The Panel did not hear of a single instance of a faith-based school discriminating or wanting to discriminate against a student on the basis of these attributes.
- 1.275 Finally, in order to bring the law into line with information presented to the Panel as to the current practices of these schools, and to protect the rights of children, the Panel considers that the ability to discriminate against students on the basis of sexual orientation, gender identity and gender characteristics should be limited to the enrolment of new students only and should not apply to discrimination against existing students unless such a policy was clearly given in writing to the students' parents as the basis of their child's enrolment at the school.

Recommendations on next page

Recommendation 7

The Commonwealth should amend the Sex Discrimination Act to provide that religious schools may discriminate in relation to students on the basis of sexual orientation, gender identity or relationship status provided that:

- (a) the discrimination is founded in the precepts of the religion
- (b) the school has a publicly available policy outlining its position in relation to the matter
- (c) the school provides a copy of the policy in writing to prospective students and their parents at the time of enrolment and to existing students and their parents at any time the policy is updated, and
- (d) the school has regard to the best interests of the child as the primary consideration in its conduct.

Recommendation 8

Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools with respect to students on the basis of race, disability, pregnancy or intersex status.

Religious and moral education

- 1.276 A number of submissions expressed concerns about the ability of parents to ensure the religious and moral education of their children in accordance with their own convictions, including in government and non-faith-based schools.
- 1.277 This concern was expressed in a number of contexts, including in discussion about faith-based schools and their ability to maintain a religious ethos through employment and enrolment practices, as addressed earlier in this Chapter. The concern was also expressed in relation to curriculum in government schools. Some submissions expressed concerns that parts of government schools' curriculums may be in tension with some parents' religious and moral convictions. It was suggested that this undermined those parents' liberty to ensure their children's religious and moral education in conformity with their own convictions.
- 1.278 This issue drew diverse viewpoints, which typically centred on the topic of exceptions from special religious education, exceptions from education about sex or sexuality, or general objections to any class. The common theme among these views related to the ability of parents to raise their children in accordance with a particular set of beliefs or values, religious or otherwise.
- 1.279 Of these three key topics, the issue of sex education was the most frequently raised and the most contentious. The Panel heard concerns that sex education in public schools—including education on contraception, sexual health, and sexual and gender diversity—could be contrary to the teachings and values of certain faiths. The ability for parents to withdraw their children from such classes was therefore raised as an aspect of religious freedom in need of greater protection at a federal level.
- 1.280 The Panel heard various recommendations directed at increasing parents' control over their children's education. These ranged from exceptions to enable parents to withdraw their children from classes that conflict with their values, to rearranging the curriculum of government schools to limit the discussion of such topics, to banning certain school resources entirely.
- 1.281 The inclusion of material on gender and sexual diversity in school curriculums and the 'Safe Schools' program featured prominently in this discussion. While many submissions raised concerns that this material was contrary to their religious beliefs, the Panel also heard that concern about the Safe Schools program on religious grounds is by no means unanimous, and that a number of religious schools are in fact members of the Safe Schools Coalition. The Panel also heard that children often come to terms with their sexual orientation or gender identity at a school age, and that LGBT youth experience much better mental health outcomes in educational environments that are supportive and inclusive. This is also true for intersex children. In this sense, rather than consider parental rights in isolation, the Panel was asked to be mindful of the independent rights of the child.
- 1.282 The Panel heard that changing the curricula or resources of government schools, to limit material that may be antithetical to certain religious beliefs, went beyond what is required adequately to protect the right to religious freedom. There were also

arguments that, while these topics may conflict with certain religious doctrines, there are also public benefits to providing education on subjects such as sexual health. It was suggested that parents who would prefer that their child receive a faith-based education should enrol them in a religious school. However, as others pointed out, the decision between public and private education is sometimes a financial one. This is likely to be a particular issue for newer members of the Australian community.

- 1.283 To the extent that the Safe Schools program was raised, submissions engaged more strongly with a broader political debate about the issue than the particular content of teaching materials. An independent review of the appropriateness of the Safe Schools program was completed in 2016.

Applicable international law

- 1.284 Submissions to the Panel on this issue often referred to article 18(4) of the ICCPR, which states:

The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

- 1.285 While this was the most frequently cited treaty provision in submissions, other international human rights obligations are also relevant to the religious and moral education of children.
- 1.286 As discussed previously, the ICESCR recognises the fundamental role of families in the education of their children and a duty of States to respect the liberty of parents and legal guardians with respect to their children’s religious and moral education.
- 1.287 The CROC also recognises rights and duties of parents in relation to their children’s freedom of religion, although in comparison with earlier human rights instruments, the CROC, as adopted on 20 November 1989, focuses more on children’s rights. Article 14 of the CROC begins with the recognition in paragraph 1 of the right of the child to freedom of thought, conscience and religion. Following this, paragraph 2 recognises states parties’ obligation to:
- respect the rights and duties of parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.¹²³
- 1.288 This is to be read together with article 12 of the CROC, which provides that a child who is capable of forming their own views has ‘the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child’.
- 1.289 In a 2015 report, the Special Rapporteur on freedom of religion and belief observed that the CROC ‘combines parental rights and the rights of the child to freedom of

¹²³ *Convention on the Rights of the Child*, article 14(2).

religion or belief', reflecting 'increased awareness, manifested in the [CROC] of the status of the child as a rights holder'.¹²⁴

- 1.290 The 1981 Declaration refers to certain rights of parents or legal guardians relating to the moral education of their children.¹²⁵ Although the Declaration is not a treaty and does not create legal obligations for Australia, it is relevant to the development of (non-binding) international standards with respect to the elimination of religious intolerance.
- 1.291 Human rights treaty-monitoring bodies have provided guidance on the parental liberty to ensure the religious and moral education of their children, as well as other relevant rights, such as the child's rights to health and education.
- 1.292 The Human Rights Committee's General Comment 22 distinguishes between information about the history of religions or ethics on the one hand, and instruction in a particular religion or belief in public schools on the other hand. It states that article 18(4) of the ICCPR permits public school instruction in subjects, such as the general history of religions and ethics, if given in a neutral and objective way.¹²⁶ General Comment 22 also states that, in public education, instruction in a particular religion or belief will be inconsistent with article 18(4), unless provision is made for non-discriminatory exceptions or alternatives that would accommodate the wishes of parents and guardians.¹²⁷
- 1.293 A range of human rights are relevant in the context of children's religious and moral education, and to their education more broadly. The 2015 report of the Special Rapporteur refers to the complex relationship between the rights of children and parents in this area, and states that 'all relevant international human rights instruments must be taken into account'.¹²⁸ Accordingly, while article 18(4) recognises an important duty to respect parents' liberty, it should not be read in isolation from other obligations.
- 1.294 Article 18(4) cannot be interpreted as requiring absolute deference to parents' wishes in the context of education. As the Special Rapporteur observed, in some

¹²⁴ Heiner Bielefeldt, *Interim Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/70/286 (5 August 2015) [32].

¹²⁵ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief*, art 5.

¹²⁶ Human Rights Committee, *CCPR General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc. CCPR/C/21/Rev.1/Add.4, 30 July 1993, [6]. Also of relevance is the guidance of the Committee on Economic, Social and Cultural Rights on the right to education in its General Comment 13. The Committee has described article 13(3) of the ICESCR as permitting 'public school instruction in subjects such as the general history of religions and ethics if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression': Committee on Economic, Social and Cultural Rights, *General Comment 13: The right to education (article 13 of the Covenant)*, 21st sess, E/C.12/1999/10 (8 December 1999) [28].

¹²⁷ Human Rights Committee, *CCPR General Comment. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) [6].

¹²⁸ Heiner Bielefeldt, *Interim Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/70/286 (5 August 2015) [15].

situations State interventions in the sphere of parental rights are necessary, including to protect the child’s right to health.¹²⁹ In this regard, the Special Rapporteur has referred to a 2003 General Comment of the Committee on the Rights of the Child on adolescent health and development:

the right to education has the component of compulsory primary education, which by implication can also be enforced against the will of the parents or guardians (article 28, paragraph 1 (a), of the Convention). With regard to adolescents, the Committee on the Rights of the Child emphasizes that States parties should provide them ‘with access to sexual and reproductive information, including on family planning and contraception, the dangers of early pregnancy, the prevention of HIV/AIDS and the prevention and treatment of sexually transmitted diseases (STDs).’ In that context the Committee insists that adolescents should ‘have access to appropriate information, regardless of ... whether their parents or guardians consent’.¹³⁰

Existing Australian law

- 1.295 The Panel recognises that legislation relating to education is primarily the responsibility of States and Territories, not the Commonwealth Government. Accordingly, different jurisdictions have different approaches to the issue of religious, moral, health and sexual education in government schools.
- 1.296 Consistent with the obligation in article 18(4), each State and Territory has provided in its legislation for students to access exceptions from special religious instruction.¹³¹ While the requirements and processes for students to opt out of such classes differ from one jurisdiction to another and differ between schools whose principals are given a degree of autonomy, the Panel is not aware of any practical problems relating to such differences, or issues with any particular jurisdiction’s laws.
- 1.297 As noted above, more contentious was the issue of whether parents may require that their children be exempt from classes involving sex or sexuality education. Again, jurisdictions differ in their approach to this matter.¹³² On the basis of the information and views conveyed to the Panel, it did not appear that such differences were relevant to the fulfilment of Australia’s obligations concerning the human right to freedom of religion.

¹²⁹ Heiner Bielefeldt, *Interim Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/70/286 (5 August 2015) [58].

¹³⁰ *Ibid* [59], referring to Committee on the Rights of the Child, *General Comment 4 on the adolescent health and development in the context of the Convention on the Rights of the Child*, UN Doc CRC/GC/2003/4 (1 July 2003).

¹³¹ *Education Act 2004* (ACT) s 29; *Education Act 1990* (NSW) ss 26, 32, 33, 34; *Education Act 2015* (NT) s 87; *Education (General Provisions) Act 2006* (QLD) s 76(4); *Education Act 1972* (SA) s 102(2) and *Education Regulations 2012* (SA) s 92; *Education Act 2016* (Tas) s 126; *Educational Training and Reform Act 2006* (Vic) s 2.2.11; *School Education Act 1999* (WA) ss 71, 72.

¹³² For example, New South Wales, Western Australia and the Northern Territory have legislation allowing for student exceptions from various classes on various grounds. See Table C1 at Appendix C for more information.

Conclusion

- 1.298 Questions surrounding education about sex, sexuality and morality are complex, and a range of factors come into play. These include sexual health, the right to an education, and the fact that children become more capable of making decisions about their own education as they age. Addressing these issues would require an in-depth analysis of the specific curricula across a range of subjects, as well as the relevant State and Territory laws and how they differ. Submissions have not addressed these laws and policies to this level of detail, nor explained the practical implications for the right to freedom of religion or belief. In this sense, the Panel did not receive any information about what is specifically being taught now, or how it burdens the right to freedom of religion.
- 1.299 It is noted that exceptions to special religious instruction are in place in all jurisdictions. Such exceptions are important to protect the rights of parents to ensure that their child is educated in a particular faith, or no faith, according to their religious or moral beliefs. In relation to other classes, while some submissions have commented on policies or programs that may be of relevance to religious matters, the Panel did not receive sufficient information that would allow it to draw firm conclusions.
- 1.300 As a general principle, there should be respect for the liberty of parents to ensure the moral and religious education of their children, regardless of whether the child is in a government or non-government school. However, there must also be respect for the rights of the child. This would extend to avoiding any unintended consequences of withdrawing children from certain classes, thereby compromising the child's health or scientific education.
- 1.301 The Panel therefore encourages State and Territory governments to be mindful of these factors, and to consider ways of increasing consistency on these matters between jurisdictions. State and Territory education authorities should ensure that there are policies in place to allow a parent to request that their child be withdrawn from classes, where they can establish that the subject or teaching is directly inconsistent with a religious or moral teaching or belief, subject to due consideration of the rights of the child (for example, to information about sexual health). Steps should also be taken to ensure that greater clarity regarding these policies is provided to parents and school principals.
- 1.302 However, the Panel is of the opinion that the topic of education about sex or sexuality is too broadly characterised, and would necessarily include such matters as sexual health, safety, consent and bodily autonomy.

Recommendation on next page

Recommendation 9

State and Territory education departments should maintain clear policies as to when and how a parent or guardian may request that a child be removed from a class that contains instruction on religious or moral matters and ensure that these policies are applied consistently. These policies should:

- (a) include a requirement to provide sufficient, relevant information about such classes to enable parents or guardians to consider whether their content may be inconsistent with the parents' or guardians' religious beliefs, and
- (b) give due consideration to the rights of the child, including to receive information about sexual health, and their progressive capacity to make decisions for themselves.

Solemnisation of marriages and use of places of worship

- 1.303 For people of faith, the rites and ceremonies associated with marriage are one of the most significant ways in which they manifest that faith. The freedom to observe marriage rites and ceremonies is an essential aspect of the broader freedom of manifestation in the ICCPR.
- 1.304 Of course, marriage is often of equal importance to people who do not adhere to any faith.
- 1.305 As discussed in Chapter 1, the legalisation of same-sex marriage provided the immediate context for the appointment of the Panel.
- 1.306 The Marriage Amendment Act, which came into force on 9 December 2017, contained a range of measures to protect religious freedoms. These measures were the result of extensive public and parliamentary debate, including a Parliamentary committee inquiry (the Select Committee, which reported on 15 February 2017). The provisions also reflect consideration by the Senate and the House of Representatives of a range of proposed amendments during debate of the Bill.
- 1.307 While some stakeholders expressed ongoing opposition to the legalisation of same-sex marriage on the basis of their religious beliefs, the Panel also heard from other faith groups that they were reconciled to the outcome.
- 1.308 The Panel heard from some individuals and groups who were concerned about the level of protections afforded to authorised celebrants under the Marriage Act.
- 1.309 The Panel received a range of different views on these issues, including that:
- Civil celebrants registered after the changes to the Marriage Act are taking on the responsibility to administer marriages under the law as it now stands, and therefore should not be able to refuse to solemnise a same-sex marriage.
 - The Marriage Amendment Act struck a good balance between freedom of religion and the rights of couples seeking to marry, although some stakeholders would have preferred that civil celebrants on the register when same-sex marriage was legalised not be given the ability to refuse to solemnise same-sex marriages.
 - No person, including civil celebrants, should have to solemnise a same-sex marriage if they do not want to, for either religious or personal reasons. A person who has a ‘traditional’ view of marriage, whether based in religion or not, should be free to refuse to marry a same-sex couple.
 - Some ministers of religion decided to relinquish their ability to solemnise marriages following the passage of the Marriage Amendment Act (notwithstanding they would have been able to exercise their religious beliefs when deciding to solemnise a marriage) because they felt that the changes to the definition of marriage were fundamentally contrary to their religious convictions.

- Some stakeholders stressed that religious freedoms were not infringed or limited by the Marriage Amendment Act, as religious bodies are still free to conduct separate religious ceremonies for members of their congregation, regardless of the operation of the Marriage Act.
- Some ministers of religion are conducting same-sex marriages even though they hold a traditional view of marriage because they believe that to refuse to do so is now unlawful.
- Although the provisions of the Marriage Act enable celebrants registered as religious marriage celebrants to decline to solemnise a marriage, the fact that they are required to advertise as such is inappropriate and will lead to a loss of business for those celebrants.

1.310 There was considerable confusion, particularly among smaller faith groups, as to the existence of protections available to them under the Marriage Act to decline to solemnise a same-sex marriage. In particular, these groups were confused about how a person could be recognised under the Marriage Act as a ‘minister of religion’, the protections available to ministers of religion under the Act and the difference between being recognised as a minister of religion and registering as a ‘religious marriage celebrant’.

1.311 The Panel also heard concerns from some organisations that they may be required to allow a same-sex couple to be married in places of worship in religious schools, hospitals and other similar locations, because it is unclear whether those locations are covered by section 47B of the Marriage Act, which allows a body established for religious purposes to refuse to make a facility available for the purposes of the solemnisation of a same-sex marriage in certain circumstances. For example, the Panel heard that it is common for past students to return to a religious school to be married.

Evaluation

1.312 Under the Marriage Act, only an authorised celebrant can legally solemnise marriages within Australia. The types of ‘authorised celebrants’ able to solemnise marriages in Australia are:

- ministers of religion from recognised denominations. These ministers are registered under Subdivision A of Division 1 of Part IV of the Marriage Act, and are called ‘category A’ celebrants. They are registered by the States and Territories. A recognised denomination is a religious body or organisation that has been proclaimed by the Governor-General under section 26 of the Marriage Act.
- State and Territory officers. These officers are authorised by virtue of Subdivision B of Division 1 of Part IV of the Marriage Act (‘category B’ celebrants).
- Commonwealth-registered marriage celebrants, including ministers of religion from smaller or emerging religious bodies or organisations, and the new

category of religious marriage celebrants which was created by the Marriage Amendment Act. These celebrants and ministers are registered under Subdivision C and Subdivision D of Part IV of the Marriage Act respectively ('category C' and 'category D' celebrants respectively).

1.313 The *Marriage (Recognised Denominations) Proclamation 2007* (the Proclamation) lists all religious organisations recognised for the purpose of the Marriage Act. Proclamation of a religious body or organisation as a 'recognised denomination' is for the purposes of solemnising marriages in accordance with the Marriage Act only and does not confer any other status. Bodies may apply to the Attorney-General's Department to be included in the Proclamation, which assesses the application against the guidelines and makes a recommendation to the Attorney-General. There are approximately 23,000 registered ministers of religion of a recognised denomination.

Ministers of religion

1.314 A minister of religion of a recognised denomination (category A celebrant) and a minister of religion of a smaller or emerging religious body or organisation (a non-recognised denomination) who is registered as a Commonwealth-marriage celebrant (category C celebrant) can act in accordance with their religious beliefs when solemnising a marriage, or determining whether to solemnise a marriage. They can refuse to solemnise a marriage, including same-sex marriages, on religious grounds. Religious protections are also provided under section 40 of the Sex Discrimination Act.

1.315 Section 5 of the Marriage Act defines 'minister of religion' as follows:

minister of religion means:

- (a) a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation; or
- (b) in relation to a religious body or a religious organisation in respect of which paragraph (a) is not applicable, a person nominated by:
 - (i) the head, or the governing authority, in a State or Territory, of that body or organisation; or
 - (ii) such other person or authority acting on behalf of that body or organisation as is prescribed;

to be an authorised celebrant for the purposes of this Act.

1.316 All ministers of religion must be nominated by their religious body.¹³³

1.317 Section 47 of the Marriage Act applies to any 'minister of religion' as defined in section 5 of the Marriage Act. It provides authority for all ministers, including those from smaller or emerging religious bodies or organisations, to choose not to

¹³³ *Marriage Act 1961* (Cth), ss 5(b) (definition of 'minister of religion'), 29(b).

solemnise any marriage for a range of reasons, including if: refusal conforms to the doctrines, tenets or beliefs of the religion of the minister's religious body or religious organisation; the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion; or the minister's religious beliefs do not allow the minister to solemnise the marriage (subsection 47(3)).

Religious marriage celebrants

- 1.318 A religious marriage celebrant (category D celebrant) can also refuse to solemnise a marriage on religious grounds (section 47A of the Marriage Act). All Commonwealth-registered marriage celebrants who are ministers of religion and perform ceremonies on behalf of an independent religious organisation (that is, not a recognised denomination), whose registration was current immediately before 9 December 2017, were automatically listed on the Register of Marriage Celebrants as 'religious marriage celebrants'. There were 502 individuals who were automatically recognised as religious marriage celebrants. Some have since requested to have this automatic recognition reversed.
- 1.319 Section 39DA of the Marriage Act provides that a person who is a minister of religion from a smaller or emerging religious body or organisation is entitled to be registered as a religious marriage celebrant. This entitlement is not a 'transitional provision' of the Marriage Act, and is not otherwise time limited. This means that any minister of religion who is registered in the future will be able to register as a religious marriage celebrant. However, choosing not to register as a religious marriage celebrant does not affect the ability of a minister of a smaller or emerging religious body or organisation to access the protections set out in section 47 of the Marriage Act. Among other things, this provision allows a minister of religion to choose not to solemnise a same-sex marriage.

Example

Maria is the religious leader of a small, community-based religious body in regional Queensland which was established in 2017. The guidelines under the Marriage Act currently require that the religious body be established for at least three years before it can become a recognised denomination for the purposes of the Marriage Act. However, Maria meets the requirements for becoming a category C celebrant under the Marriage Act, and her religious group provides her with a letter nominating Maria as an authorised celebrant for the religious body. In May 2018, Maria applies to be registered as a minister of religion for her religious body under the Marriage Act. She is registered as a category C celebrant, and entitled to rely on section 47 of the Marriage Act when deciding to solemnise a marriage. If she chooses to do so, Maria can also apply to become a religious marriage celebrant under section 39DB of the Marriage Act.

Civil celebrants

- 1.320 Civil celebrants (who are not ministers of religion), whose registration was current immediately before 9 December 2017, were given a three-month window under the transitional provisions of the Marriage Amendment Act to register as a religious marriage celebrant (subsection 39DD(2) of the Marriage Act). This period expired on

9 March 2018. This transitional provision reflects the fact that those celebrants agreed to solemnise marriages before same-sex marriage was legalised, and may have personal religious beliefs which prevent them from solemnising such marriages. There were 406 Commonwealth-registered marriage celebrants who nominated to be identified as a religious marriage celebrant during the three-month period.

- 1.321 From 9 March 2018, individuals who apply to be an authorised celebrant who are not a minister of religion will not be able to nominate to be identified as a religious marriage celebrant, and, accordingly, will not be able to access the protections in section 47A of the Marriage Act.

Code of Practice for celebrants

- 1.322 Section 39G(1)(a) of the Marriage Act provides that category C and category D celebrants must adhere to the Code of Practice prescribed by the regulations. The current Code of Practice is set out in Schedule 2 of the *Marriage Regulations 2017*. Among other things, the Code of Practice provides that celebrants must give the parties to the marriage ‘information and guidance to enable them to choose or compose a marriage ceremony, including information to assist the parties to decide whether a marriage ceremony rehearsal is needed or appropriate’.

- 1.323 This requirement may not be appropriately adapted to the circumstances of a category C or D celebrant who is a minister of religion from a smaller or emerging religious body. In particular, the Panel notes the Code of Practice might be taken to require that a minister of religion from a smaller or emerging religious body must agree to a form of ceremony proposed by the couple to be married that does not align with the particular rites of the religious body.

Solemnisation of marriage in places of worship

- 1.324 Section 47B of the Marriage Act provides that ‘a body established for religious purposes’ may refuse to make facilities available or provide goods or services for the purposes of the solemnisation of a marriage or for purposes reasonably incidental to the solemnisation of a marriage, on religious grounds. The Marriage Act provides that the term ‘body established for religious purposes’ has the same meaning as in section 37 of the Sex Discrimination Act. That provision is as follows:

37 Religious bodies

(1) Nothing in Division 1 or 2 affects:

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
- (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or

(d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

(2) Paragraph (1)(d) does not apply to an act or practice of a body established for religious purposes if:

(a) the act or practice is connected with the provision, by the body, of Commonwealth-funded aged care; and

(b) the act or practice is not connected with the employment of persons to provide that aged care.

1.325 The term ‘body established for religious purposes’ is not defined in the Sex Discrimination Act. It is arguable that a faith-based school, other than a school established for the purposes of training or educating persons seeking ordination or appointment as religious officers, may not fall within the meaning of a ‘body established for a religious purpose’ for the purposes of section 37. This is because the Sex Discrimination Act treats educational institutions established for a religious purpose, such as an Anglican or Islamic primary school, as a separate category of institutions with its own exemption clause in section 38. Whether a given institution is capable of falling under both section 37 and section 38 is likely to turn on the structure and governance of the institution in question. An educational institution established for religious purposes may therefore not be able to avail itself of the exemption in section 47B of the Marriage Act.

Conclusion

1.326 No person who solemnises a marriage as an authorised representative of a religious body or organisation (however described) is required to solemnise any marriage if it does not conform to the doctrines, tenets or beliefs of the religious body or organisation. This includes authorised representatives from smaller or emerging religious bodies or organisations, which do not meet the requirements to be listed in the Proclamation.

1.327 The Panel recognises that the transitional provision allowing civil celebrants to register as religious marriage celebrants was the result of an extensive parliamentary and public debate over the issue of same-sex marriage. However, as civil celebrants are performing a civil, rather than religious, function, the Panel does not consider there to be a sufficient nexus between the solemnisation of marriages by civil celebrants and the right to religious freedom under international law. As a result, the Panel does not consider it appropriate that civil celebrants who are not ministers of religion should be entitled to refuse to solemnise same-sex marriages unless their registration as a celebrant pre-dated the Marriage Amendment Act and they chose to register as a religious marriage celebrant.

1.328 The Panel was concerned that there is a lack of understanding within the community about how the law currently operates. The Panel notes that there is some confusion as to the religious protections that apply to each category of celebrant, and particularly to ministers of religion. The Panel also notes that the Marriage Act uses

the term ‘minister of religion’ to refer to authorised representatives from any religious body or organisation, including those not associated with Christianity or from bodies that otherwise do not use the term. This has resulted in a lack of clarity within the community as to whether some religious bodies are able to avail themselves of the religious protections under the Marriage Act.

- 1.329 The Panel is of the view that religious educational institutions should not be required, on religious grounds, to make facilities available or to provide goods and services for a marriage, thus treating them in the same way as any other body established for a

Recommendation 10

The Commonwealth Attorney-General should consider the guidance material on the Attorney-General’s Department’s website relating to authorised celebrants to ensure that it uses plain English to explain clearly and precisely the operation of the *Marriage Act 1961*. The updated guidance should include:

- (a) a clear description of the religious protections available to different classes of authorised celebrants, and
- (b) advice that the term ‘minister of religion’ is used to cover authorised celebrants from religious bodies which would not ordinarily use the term ‘minister’, including non-Christian religions.

religious purpose.

Recommendation 11

The Commonwealth Attorney-General should consider whether the Code of Practice set out in Schedule 2 of the *Marriage Regulations 2017* is appropriately adapted to the needs of smaller and emerging religious bodies.

Recommendation 12

The Commonwealth should progress legislative amendments to make it clear that religious schools are not required to make available their facilities, or to provide goods or services, for any marriage, provided that the refusal:

- (a) conforms to the doctrines, tenets or beliefs of the religion of the body, or
- (b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Indigenous belief and spirituality

1.330 The Panel is conscious that Indigenous belief and spirituality represent an important aspect of religious practice in Australia and would have liked to receive more information about the Indigenous experience of religious freedom. However, only a very small number of submissions addressed these issues. The Panel sought to consult with Indigenous stakeholders but this could not occur during the timeframe for the Review.

1.331 To the extent the issue was raised, the Panel heard that:

- special protections are needed for Indigenous Australians' spirituality and culture
- many Indigenous Australians successfully combine Indigenous spirituality and cultural practices with adherence to faiths such as Christianity
- it is vital to protect Indigenous Australians' right to manifest traditional practices while still protecting those Indigenous people of faith who choose to follow other religious convictions
- Indigenous religion is fundamentally different from other religions in Australia and the law fails to adequately accommodate these differences, particularly in requiring public evidence of religious belief that is traditionally held in secret or by requiring non-Indigenous authentication of Indigenous beliefs.

1.332 In a paper prepared for the Australian Institute of Aboriginal and Torres Strait Islander Studies in 2016, titled *Freedom of Religion, Belief, and Indigenous Spirituality, Practice and Cultural Rights*, Katja Mikhailovich and Alexandra Pavli argued that, while much is known about traditional beliefs of Aboriginal and Torres Strait Islander peoples, 'more information is required to gain a broader picture of contemporary religious and spiritual beliefs'. The authors also recommend that further consultations should take place with Indigenous people across Australia to determine more fully their concerns relating to freedom of religious belief.

1.333 The Panel did not consider that it had either the appropriate membership or expertise to explore this issue further, nor the time to give the issue due consideration, but thinks there would be considerable value in gaining a better picture of Indigenous spirituality and religious life. Such information could then inform consideration of whether greater protection for religious freedom is required for Indigenous Australians.

Chapter 5 – Vilification, blasphemy and social hostility

Vilification

- 1.335 Article 20(2) of the ICCPR provides that ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’. As noted in Chapter 2 of this report, upon ratifying the ICCPR, the Commonwealth Government entered a reservation to article 20 which reserved the right not to introduce any further legislative provisions regarding the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.
- 1.336 To the extent that this issue was raised, stakeholders brought examples of targeted hate speech to the Panel’s attention, rather than raising concerns with broadscale advocacy of nationalistic religious hatred.
- 1.337 The Panel heard examples about hate speech directed at people of faith, generally directed towards people of minority religions in Australia. The Panel was also presented with examples of hate speech against other groups, particularly LGBTI people and communities.
- 1.338 Stakeholders noted that speech can travel across physical boundaries, such as State and Territory borders. For example, the Panel heard of instances of vilification that occurred online, in written publications, and in public spaces and fora.

Evaluation

- 1.339 Article 20 of the ICCPR does not prohibit hate speech as such. Article 20 has a ‘responsive character’, being intended to ‘combat the horrors of fascism, racism and National Socialism at their roots’,¹³⁴ by preventing the type of incitement and hatred that would lead to the systematic violation of the rights to life (article 6) and equality (article 7).¹³⁵ It is directed at the shaping of public opinion rather than targeted acts of hatred.
- 1.340 There is an inconsistent approach to vilification laws across Australia. With the exception of the Northern Territory, each State and Territory has civil or criminal provisions prohibiting vilification in respect of race. The Australian Capital Territory has the most extensive vilification provisions, covering disability, gender identity, HIV/AIDS status, intersex status, religious conviction, and sexuality in addition to race.

¹³⁴ Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, 2nd revised ed, 2005) 475.

¹³⁵ *Ibid*, 468.

- 1.341 Only the Australian Capital Territory, Queensland, Tasmania and Victoria have civil vilification protections on the grounds of religion, religious belief or activity, or religious conviction.¹³⁶ These provisions are broadly similar in their terms. New South Wales prohibits vilification on the grounds of race, including ethnic, national or ethno-religious origin.¹³⁷ The term ‘ethno-religious origin’ is intended to cover groups such as Sikhs. It does not cover religious groups without a common ethnic identity—such as Christians.
- 1.342 The Australian Capital Territory, New South Wales and Queensland have criminal offences that apply to serious vilification, noting that the New South Wales offence is limited as described above.
- 1.343 The Northern Territory, South Australia and Western Australia do not prohibit vilification on the basis of religion.
- 1.344 Article 20 of the ICCPR is concerned only with vilification. It is important to distinguish between vilification and other restrictions on speech. Vilification is concerned with advocacy of hatred that incites discrimination, hostility or violence. It is intended to capture speech addressed to an individual or group in society inciting them to discrimination, hostility or violence towards another individual or group.
- 1.345 By way of contrast, many jurisdictions also regulate offensive, insulting, humiliating or intimidating speech that is directed at an individual with particular characteristics. Unlike vilification, incitement does not form part of these provisions.
- 1.346 There was considerable confusion in the community between vilification provisions and provisions directed at other restrictions on speech. For example, a large number of groups raised concerns about high-profile complaints, arguing that religious groups now feel threatened by uncertainty around what they can and cannot say in relation to their beliefs about marriage. These matters usually did not relate to vilification provisions in the sense of article 20 of the ICCPR but rather laws regulating offensive, insulting, humiliating or intimidating speech directed at particular individuals or groups.
- 1.347 While all Australian vilification laws include protections for ‘legitimate’ speech, the Panel heard from some groups who argued that anti-vilification provisions have a ‘chilling effect’ on freedom of speech and that any amendments to the existing anti-vilification regime should ensure that an appropriate balance be set to minimise the disruption of legitimate expression of beliefs.
- 1.348 Vilification laws (and laws that prohibit aspects of speech) raise complex questions with regard to freedom of expression. Article 19 of the ICCPR recognises the human right to freedom of expression, which comes with special duties and can be subject to certain restrictions, particularly respect for the rights or reputations of others and

¹³⁶ *Discrimination Act 1991* (ACT) s 67A; *Criminal Code 2002* (ACT) s 750; *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Anti-Discrimination Act 1998* (Tas) s 19; *Racial and Religious Tolerance Act 2001* (Vic) s 8.

¹³⁷ *Anti-Discrimination Act 1977* (NSW) ss 4 (definition of ‘race’), 20C.

the protection of national security or public order, public health or morals. The Human Rights Committee has concluded that the obligations in articles 19 and 20 are ‘compatible with and complement one another’.¹³⁸ The Panel did not consider the application of article 19 to other legislative restrictions on speech as this was beyond its Terms of Reference.

- 1.349 The Panel also heard that anti-vilification legislation in Australia was inadequate due to a lack of universal coverage for vilification with respect to religion. The Panel heard concerns that, even where protections did exist, they had been interpreted narrowly by courts and tribunals, rendering them of little practical effect.
- 1.350 With respect to vilification laws, while noting Australia’s limited international obligations in relation to article 20(2), the Panel nonetheless considered this is an area where further consideration is warranted. The inconsistent coverage of vilification laws creates a situation where speech that would be lawful in one part of the country would be unlawful in another. Further, the Panel notes the ease with which information is communicated across State and Territory borders. The making of a statement in one jurisdiction may give rise to liability in another. In an area with such serious social ramifications, either from failing to prevent the worst kinds of incitement to hatred or from stepping too far and shutting down legitimate speech, it is important to have a consistent approach.
- 1.351 Accordingly, while not making a recommendation on the matter, the Panel encourages the Commonwealth, State and Territory Attorneys-General to cooperate to ensure greater consistency and national coverage with respect to anti-vilification provisions.

Blasphemy

- 1.352 Blasphemy is an antiquated offence under the common law that addresses ridicule or insult to religious groups, customs and beliefs. There is some doubt as to its reception into the common law of Australia. However, assuming that it was received with the other aspects of the English common law, its legal application in Australia may well be limited to Christianity and potentially more narrowly to the doctrines of the Anglican Church, as the offence only applied to the Church of England at the time of Federation.
- 1.353 While blasphemy and blasphemous libel are distinct—the former refers to speech and action, while the latter refers to published statements—the term ‘blasphemy’ will be used to cover both in this Report.
- 1.354 Blasphemy was not a major theme in submissions or consultations; however, a small number of submissions called for the repeal of blasphemy laws. In considering blasphemy laws, the Panel has had regard to Australia’s obligations under

¹³⁸ Human Rights Committee, *General Comment 34 – Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc. CCPR/C/GC/34 (12 September 2011) [52].

articles 18(2) and 19(2) of the ICCPR concerning the right to be free from coercion that would impair an individual's freedom to have or adopt a religion, and the right to freedom of expression. It is the Panel's view that laws prohibiting blasphemy have the potential to infringe the enjoyment of these rights. The Panel has also drawn on research and publications on the issue of blasphemy laws in Australia, including the ALRC's 1992 report, *Multiculturalism and the Law*, and the New South Wales Law Reform Commission's 1994 report on blasphemy.¹³⁹

- 1.355 Blasphemy is not an offence under Commonwealth law. The only federal law that refers to blasphemy is a provision that appears in the *Shipping Registration Regulations 1981* (Cth), which prohibit the registration of vessels with names that are 'blasphemous or likely to be offensive to members of the public'.¹⁴⁰
- 1.356 Queensland and Western Australia have abolished the criminal offence of blasphemy by omitting it from the codification of their respective criminal laws. In the Australian Capital Territory, the *Law Reform (Abolitions and Repeals) Act 1996* (ACT) purported to repeal blasphemy in the context of defamation law reform. However, that Act only referred to the offence of blasphemous libel (i.e. published statements), and there is some argument that the offence of blasphemy through speech and action may continue.
- 1.357 In Tasmania, blasphemy is a statutory offence under section 119 of the *Criminal Code Act 1924* (Tas). In Queensland and Western Australia, codification of the criminal law has the effect of abolishing any common law offence of blasphemy.
- 1.358 In New South Wales, Victoria, South Australia and the Northern Territory, the common law offence of blasphemy most likely continues to exist. Section 574 of the *Crimes Act 1900* (NSW) modifies the operation of the common law offence to clarify that mere argument or statement is not sufficient for a prosecution if it does not amount to scoffing or reviling, violating public decency or tending to a breach of the peace.
- 1.359 There have been no prosecutions under these laws in Australia since Federation. The single Australian prosecution for blasphemous libel took place in New South Wales in 1871 in the case of *R v Jones*.¹⁴¹ A more recent and well-known blasphemy case occurred in 1997 when then Archbishop George Pell tried unsuccessfully to secure a court injunction to prevent the National Gallery of Victoria from displaying an artwork titled *Piss Christ* on the basis that the artwork was blasphemous.¹⁴² To the extent that there have been no prosecutions since 1871, claims that the offence has lapsed under the common law doctrine of desuetude are not unreasonable.

¹³⁹ Australian Law Reform Commission, Report 57, *Multiculturalism and the Law* (1994); New South Wales Law Reform Commission, Report 74 *Blasphemy* (1994).

¹⁴⁰ *Shipping Registration Regulations 1981* (Cth) reg 21(2)(d).

¹⁴¹ *R v Jones* (Unreported, Parramatta Quarter Sessions (NSW), Simpson J, 18 February 1871).

¹⁴² *Pell v Council of Trustees of the National Gallery of Victoria* [1998] 2 VR 391.

- 1.360 Blasphemy continues to be referred to in a range of other primary and secondary legislation—for example, section 19 of the *Classification of Theatrical Performance Act 1978* (SA), section 84 of the *Classification (Publication, Films and Computer Games) Act 1995* (SA), and section 12 of the *Police Offences Act 1935* (Tas).
- 1.361 Internationally, blasphemy laws have been routinely criticised by human rights groups as draconian and vulnerable to abuse. In the most recent annual report by the United Nations Special Rapporteur on freedom of religion and belief, the Special Rapporteur noted that blasphemy laws were being used to ‘target political dissidents, humanists, non-believers or any religious thinker who expressed different theological views than the state-sponsored religion’.¹⁴³ The report concluded that blasphemy laws stifle the enjoyment of freedom of religion and called for such laws to be repealed as a matter of priority.
- 1.362 Domestically, blasphemy laws have rarely been raised as an issue requiring urgent reform. This has been reflected in the submissions to the Panel which typically have only covered blasphemy laws as a matter ancillary to more substantive issues concerning freedom of religion in Australia. Where the issue of blasphemy laws has been raised, the message has been fairly consistent in arguing for their repeal.
- 1.363 Concern over blasphemy laws has been expressed principally in relation to their effect on other rights. More specifically, it has been noted that Australia’s commitment to international law and the human rights expressed therein is undermined by the existence of blasphemy as an offence under statute and common law.
- 1.364 A number of submissions raised blasphemy laws in Australia in the context of religious privilege, arguing that these laws are only invoked against critics of Christianity. This interpretation is supported by the Federal Court, which has described in obiter elements of the offence of blasphemy as follows:

The essence of the crime of blasphemy is to publish words concerning the Christian religion, which are so scurrilous and offensive as to pass the limits of decent controversy and to be calculated to outrage the feelings of any sympathiser with or believer in Christianity.¹⁴⁴

- 1.365 Religious groups have also expressed concern over blasphemy laws, arguing that such laws are inappropriate and are incompatible with freedom of religion, freedom of speech and freedom of expression, which in their view includes the freedom to dissent from, and to be critical of, a religion.

Conclusion

- 1.366 The Panel’s view is that the concerns raised during the consultations are valid. Indeed, the prohibition of certain speech on the grounds of religious belief presents

¹⁴³ Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/37/49 (28 February 2018) [83].

¹⁴⁴ *Ogle v Strickland* (1987) 13 FCR 306, 317–8.

difficult problems for reconciling competing rights in a free society where beliefs and ideas of any kind should be able to be debated and criticised.

- 1.367 Blasphemy laws are out of step with a modern, tolerant, multicultural society. Religion should be subject to the same questioning and criticism as other areas of public life.
- 1.368 While many submissions advocate for the abolition of blasphemy as an offence under Australian law, very few have given consideration to how this should be achieved in practice. While the Panel considers that abolition of blasphemy laws is desirable, the fact that blasphemy remains an offence at the State and Territory level, rather than under Commonwealth law, means that the abolition of these laws

Recommendation 13

Those jurisdictions that have not abolished statutory or common law offences of blasphemy should do so.

should commence and take place entirely within those jurisdictions.

Recommendation 14

References to blasphemy in the *Shipping Registration Regulations 1981*, and in State and Territory primary and secondary legislation, should be repealed or replaced with terms applicable not only to religion.

Social hostility

- 1.369 The Panel also heard troubling examples of social hostility, including criminal acts, directed towards people of faith, particularly people from minority religions. More serious incidents involved the forcible removal of items of clothing, mainly religious head coverings; death threats; vandalism; and more extreme forms of verbal abuse. Identifiably religious persons are often singled out.
- 1.370 The Panel was told that some women have been subjected to verbal and physical abuse on the basis of their religion, due to the fact they were easily identified by their religious dress. These incidents have often occurred in public areas, such as on public transport or in shopping centres. Similar incidents targeting adherents were reported with respect to a number of minority religions.
- 1.371 The Panel heard examples of the impact that such hostility has on people in the community. For example, some women from minority faiths reported that they do not feel comfortable being in public places for fear of being subject to abuse. Some individuals are reluctant to deal with government, non-government and commercial services, and avoid accessing particular public places and transport, and curtail their social activities and those of their children.
- 1.372 While these matters go beyond questions of vilification, they were of concern to the Panel. In the time available, however, the Panel was not able to obtain advice from police and other community services on how widespread the issue was and the types of mechanisms that are in place to address it. Accordingly, the Panel considers this is an important area for further research, as discussed in Chapter 7.

Chapter 6 – Discrimination

- 1.373 A broad range of stakeholders expressed concern that not all Australian jurisdictions prohibit discrimination on the basis of a person's religious belief or activity. Stakeholders expressed a broad range of concerns about their ability to manifest their faith publicly without suffering discrimination. This includes, for example, their ability to hold and communicate views based on religious understandings, the ability to wear religious symbols and dress in educational or employment settings, and to access goods and services and generally engage in public life without fear of discrimination because of their religion.
- 1.374 This concern directly relates to the question of how well Australian laws protect the human right to freedom of religion. As outlined in Chapter 2, the right to freedom of religion includes the right not to be discriminated against on the basis of one's religion, as well as a right to effective protection against such discrimination.
- 1.375 Equality and non-discrimination are basic and general principles relating to the protection of all human rights, which appear in various articles of the ICCPR. These include article 2(1), which provides that states parties must respect and ensure the rights in the Covenant 'without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The rights to equality and non-discrimination also appear in article 3, which recognises the equal right of men and women to the enjoyment of the civil and political rights in the Covenant, as well as in articles 24 and 25 in relation to the particular subject matter addressed by those provisions.
- 1.376 Also, as noted in Chapter 2, article 26 of the ICCPR sets out a separate right to equality and non-discrimination. It provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law, and that the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on certain grounds, including religion. Whereas article 2(1) relates specifically to the civil and political rights enumerated in the ICCPR itself (i.e. in articles 6 to 27), article 26 is a standalone right. It prohibits discrimination in any field regulated and protected by public authorities.¹⁴⁵
- 1.377 Therefore, in accordance with article 26, people of faith are entitled not to be discriminated against on the basis of their faith, and are entitled to equal and effective protection against discrimination on the ground of their religion. Similarly, those who adhere to atheistic, agnostic or other belief systems are also entitled not to be discriminated against on that basis, and to an equal and effective protection against such discrimination.

¹⁴⁵ Human Rights Committee, *CCPR General Comment 18: Non-discrimination*, 37th sess (10 November 1989) as contained in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.8 (2006) [12].

Relevant Australian laws

- 1.378 A wide range of Commonwealth, State and Territory laws protect the right to equality and the right not to be discriminated against on the grounds of specified protected attributes. At the federal level, the main protections against discrimination are found in the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992*, the *Age Discrimination Act 2004* and the *Fair Work Act 2009*.
- 1.379 This framework includes some protections against discrimination on the ground of religion. For example, the *Fair Work Act 2009* (Cth) provides protections against discrimination on the basis of religion or political opinion in the area of employment.¹⁴⁶ In addition, the Australian Human Rights Commission (AHRC) has powers to inquire into, conciliate, and report on complaints of discrimination in employment on the basis of religion.¹⁴⁷
- 1.380 It should also be noted that the *Racial Discrimination Act 1975* (Cth) protects some faith groups against discrimination in some circumstances. That Act makes direct and indirect discrimination on the ground of race, colour, descent, national origin or ethnic origin unlawful.¹⁴⁸ While the Racial Discrimination Act does not specifically prohibit discrimination on the grounds of religious identity or belief, it can be regarded as covering religious groups that can establish a common 'ethnic origin'. This has been interpreted to include Jewish and Sikh people.
- 1.381 While these mechanisms each play an important function in the resolution of disputes, their application is limited in terms of the areas of activity to which they apply, or the groups they protect. These Acts do not provide comprehensive protection at the federal level against religious discrimination. By way of contrast, protections in federal law against discrimination based on other attributes, such as sex, race, age and disability, are more comprehensive. For example, complaints to the AHRC of discrimination on the grounds of sex, disability, race and age are considered complaints of *unlawful* discrimination. A person affected by the complaint can lodge an application with the Federal Court or Federal Circuit Court in limited circumstances.¹⁴⁹
- 1.382 While the AHRC can also investigate and resolve complaints of discrimination, harassment and bullying (in employment only) based on a person's religion, these are regarded as complaints of 'unfair conduct'. Unlike the complaints procedures

¹⁴⁶ These include, for example: s 153, which provides that a modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's religion or political opinion (among other attributes); s 351(1), which provides that an employer must not take adverse action against an employee on the basis of a protected attribute or characteristic (including religion and political opinion); and s 772(1)(f), which provides that an employer must not terminate an employee's employment on the basis of a listed reason (including religion or political opinion) subject to exceptions in s 772(2)(b).

¹⁴⁷ *Australian Human Rights Commission Act 1986* (Cth) pt II, div 4.

¹⁴⁸ *Racial Discrimination Act 1975* (Cth) s 9.

¹⁴⁹ *Australian Human Rights Commission Act 1986* (Cth) s 46PO.

under other specific anti-discrimination laws for which the AHRC has statutory responsibilities, complaints brought under the *Australian Human Rights Commission Act 1986* (Cth) cannot be heard in court if conciliation is unsuccessful. States and Territories have each enacted anti-discrimination laws that operate alongside federal laws. They too differ in the level of protection they provide and in the areas of activity to which they apply. For example, in South Australia, people are protected against discrimination on the basis of their ‘religious appearance or dress’, but not against discrimination on the basis of their religious beliefs.¹⁵⁰

1.383 In New South Wales, religious belief and activity are not protected attributes under the *Anti-Discrimination Act 1977*, although that Act does protect against discrimination on the ground of race, which is defined to include ‘ethno-religious’ origin.¹⁵¹ This has meant that some people of faith are protected, while others are not. For example, ethno-religious origin has generally been interpreted to include Jewish people but not Muslim people, and accordingly the New South Wales legislation does not protect Muslim people against religious discrimination.

Previous recommendations on freedom of religion as a protected attribute

1.384 A number of previous reviews and inquiries have recommended the inclusion of religion as a protected attribute in federal anti-discrimination law. In July 1998, the then Human Rights and Equal Opportunity Commission released its report, *Article 18: Freedom of Religion or Belief*, which reported that many Australians suffered discrimination on the basis of religious belief or non-belief despite the legal protections then applicable in different jurisdictions.¹⁵² The Commission proposed a Religious Freedom Act that would make it unlawful to discriminate directly or indirectly on the ground of religion or belief in all areas of public life, subject to certain exceptions.¹⁵³

1.385 In its 1999 *Review of the Anti-Discrimination Act 1977*, the New South Wales Law Reform Commission also recommended the inclusion of religion as a ground of discrimination, while recognising the need to delimit carefully the scope of the ground and to apply appropriate exceptions.¹⁵⁴

1.386 In 2017, the Select Committee also considered the issue in its inquiry into the Commonwealth Government’s exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill. Chapter 3 of its report addresses, among other things, the adequacy of Australian legal protections against discrimination on the basis of

¹⁵⁰ *Equal Opportunity Act 1984* (SA) s 85T(1) (definition of ‘discriminate’).

¹⁵¹ *Anti-Discrimination Act 1977* (NSW) s 4 (definition of ‘race’).

¹⁵² Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998) 92.

¹⁵³ *Ibid* Recommendation 4.1.

¹⁵⁴ New South Wales Law Reform Commission, Report 92, *Review of the Anti-Discrimination Act 1977* (NSW) (1999) [5.141]-[5.171] and Recommendation 38.

religious belief, in the particular context of same-sex marriage.¹⁵⁵ The Select Committee formed the view that '[o]verall the evidence supports the need for current protections for religious freedom to be enhanced', and that this 'would most appropriately be achieved through the inclusion of "religious belief" in federal anti-discrimination law'.¹⁵⁶

1.387 At the international level, the Human Rights Committee (which monitors Australia's implementation of its ICCPR obligations) has also expressed a concern about 'the lack of direct protection against discrimination on the basis of religion at the federal level' in its Concluding Observations on the sixth periodic report of Australia (December 2017). It recommended that Australia:

take measures, including considering consolidating existing non-discrimination provisions in a comprehensive federal law, in order to ensure adequate and effective substantive and procedural protection against all forms of discrimination on all the prohibited grounds, including religion, and intersectional discrimination, as well as access to effective and appropriate remedies for all victims of discrimination.¹⁵⁷

Stakeholder views

1.388 The Panel heard wide-ranging support for making religion a protected attribute under Commonwealth anti-discrimination law. In calling for a reform of this nature, stakeholders pointed to the fundamental character of non-discrimination in human rights law, and to the important role that non-discrimination plays in supporting a fair, tolerant and inclusive society. Stakeholders referred to Australia's international legal obligations to protect the right to non-discrimination on the basis of religion, including under article 26 of the ICCPR.

1.389 Many stakeholders expressed concerns about the anomalies between Commonwealth, State and Territory laws, which have resulted in greater protection for people in some parts of Australia than others.

Discussion

1.390 The Panel has concluded that Australian laws should do more to protect the right to non-discrimination on the basis of religious or other beliefs. In particular, the Panel considers that 'religious belief or activity' (including not having a religious belief) should be a protected attribute under federal anti-discrimination law.

1.391 This could be achieved in a number of ways, including the adoption of a federal Religious Freedom Act or a Human Rights Act. For the reasons discussed in

¹⁵⁵ Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, *Report on the Commonwealth Government's Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (February 2017) 65–8.

¹⁵⁶ *Ibid* [3.142].

¹⁵⁷ Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCOR/C/AUS/CO/6 (1 December 2017) 4 [18].

Chapter 3 of this Report, the Panel has not recommended either of those courses at the present time.

- 1.392 The Panel recommends that steps be taken to amend the Racial Discrimination Act, or preferably to develop a Commonwealth Religious Discrimination Act directed at the provision of comprehensive protection against discrimination based on religious belief or activity. This should include protecting people who do not hold any religious belief. The development of such legislative protection would require careful consideration of appropriate exceptions, for example, such exceptions for religious bodies as may be required in order safeguard other aspects of the human right to freedom of religion or belief.
- 1.393 Some concern was expressed that making religion a protected attribute might be used by religious groups to insist that employers and others accommodate practices that are out of step with broader community standards. The limitations found in other discrimination provisions and the small number of complaints made in those jurisdictions that already protect religious belief and activity suggest these concerns are unfounded. However, the Panel is of the view that it is important that the Government consult widely on draft legislation to avoid any unintended consequences.
- 1.394 The Panel also takes the view that anti-discrimination laws in South Australia and New South Wales should be amended so as to include religion as a protected attribute. Again, consideration would need to be given to exceptions to new anti-discrimination laws, which may be necessary to safeguard other aspects of the human right to freedom of religion or belief.

Recommendation 15

The Commonwealth should amend the *Racial Discrimination Act 1975*, or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.

Recommendation 16

New South Wales and South Australia should amend their anti-discrimination laws to render it unlawful to discriminate on the basis of a person's 'religious belief or activity' including on the basis that a person does not hold any religious

belief. In doing so, consideration should be given to providing for the appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.

Chapter 7 – Data, dialogue and education

The experience of religious freedom

- 1.395 The Panel has been greatly impressed by the amount of interest in the topic of religious freedom, reflected in the large number of individuals and organisations that took the time to make a submission to the Review, and took the opportunity to meet with the Panel to discuss their views.
- 1.396 State and Territory human rights institutions reported high levels of interest and contestability in discussions about the religious exceptions in their respective Anti-Discrimination Acts. This stands in contrast to the relatively small number of formal complaints in the last two years in relation to either discrimination on the basis of religion (in the jurisdictions which have such provisions) or discrimination by religious bodies against others (see Table 1).

Table 1: Complaints of religious discrimination or vilification, by State and Territory, 2015–16 and 2016–17

Jurisdiction	Protected attribute/discrimination ground	Complaints (2015–16 and 2016–17)
Victoria	Religious vilification	2016–17 – 5 complaints 2015–16 – 4 complaints
	Religious belief or activity	2016–17 – 37 complaints 2015–16 – 54 complaints
Tasmania	Religious belief or affiliation	2016–17 – 10 complaints 2015–16 – 8 complaints
	Religious activity	2016–17 – 5 complaints 2015–16 – 13 complaints
	Incitement of hatred, serious contempt or severe ridicule on the basis of religion	2016–17 – 6 complaints
Northern Territory	Religious belief or activity	2016–17 – 31 complaints 2015–16 – 25 complaints

Queensland	Religious belief or activity	2016–17 – 10 complaints 2015–16 – 5 complaints
	Religious vilification	2016–17 – 2 complaints 2015–16 – No complaints
New South Wales	Non-statutory (religion)	2016–17 – 4 complaints 2015–16 – 8 complaints
	Race discrimination (ethno-religious)	2016–17 – 5 complaints 2015–16 – 15 complaints
Western Australia	Religious conviction	2016–17 – 13 complaints 2015–16 – 13 complaints
South Australia	Religious dress	No complaints
Australian Capital Territory	Religious conviction	2016–17 – 2 complaints 2015–16 – 7 complaints

- 1.397 The Panel heard that only a minority of these formal complaints concerned issues of relevance to the same-sex marriage debate, and that there has been no identifiable increase in complaints or inquiries relating to these matters since the passage of the Marriage Amendment Act.
- 1.398 The Panel was cautious about drawing conclusions from overseas examples, or from the few high-profile examples in Australian law, although many submissions encouraged it to do so. To the extent that those cases do raise issues of concern to this Review, they are considered elsewhere in this Report.
- 1.399 The Panel has taken an evidence-based approach in executing its brief and has sought to identify real-world examples of infringement of people’s right to freedom of religion. However, it should be noted that the Panel is unable, within the scope of this Review, to verify and comprehensively fact-check the examples given in submissions and during consultations.
- 1.400 While many submissions contained examples, most repeated several well-known, high-profile cases of perceived infringement of religious freedom. Only a small minority of submissions provided personal examples. With a few notable exceptions, this was also the experience in the consultations. To the extent that examples were identified, common themes included:
- complaints of intolerance, bullying and coercion as a result of expressing religious beliefs in the workplace, at school or in public
 - instances of persecution for apostasy and mistreatment in ‘cults’

- instances of discrimination against individuals on the basis of religious dress or observance, particularly in relation to Muslim women
- instances of intolerance against religious minorities, including through attacks or threats of attacks on their institutions and places of worship
- instances of discrimination against LGBTI people—as students in religious schools, patients in faith-based hospitals, employees in religious institutions and members of religious congregations
- instances where people of faith experienced adverse consequences as a result of expressing views in favour of same-sex marriage or as a result of their sexual orientation or gender identity
- concerns from people of faith that they need to suppress their religious identities or views for fear of ostracism or reprisal
- instances of church facilities being booked for purposes that are contrary to their religious values (such as a church hall being used for a seminar promoting the legalisation of euthanasia in Victoria)
- instances of venues cancelling, or refusing to provide bookings for, religious institutions that wish to promote a traditional view of marriage.

1.401 There was insufficient information to determine how frequently these issues arise. The Panel received limited advice that would enable it to determine conclusively how well current mechanisms are equipped to deal with them—particularly as few appear to result in formal complaints. Meaningful interfaith dialogue, as well as a greater level of genuine engagement between politicians and faith communities, is needed to come to a deeper understanding of the nature and frequency of these issues and identify appropriate solutions.

1.402 Federal inquiries that have sought to engage with the issue of religious freedoms have done so primarily by exploring legal frameworks in a way that highlights potential statutory encroachments on the enjoyment of this right. This approach was reflected in the ALRC Freedoms Report, the Select Committee’s Report, and, more recently, the Foreign Affairs, Defence and Trade Interim Report. The Panel was concerned that neither it, nor these inquiries, received a complete picture in relation to the day-to-day experience of people of faith manifesting their religious beliefs.

1.403 Looking more broadly, evidence of infringement of religious freedom becomes more readily available. For instance, the Executive Council of Australian Jewry publishes an annual report on antisemitism in Australia. This report analyses data collected by state Jewish organisations and by the Council itself. The data are limited to incidents involving violence or the threat of violence in which there is evidence that

antisemitism was a factor. According to the 2017 report, there were 230 reported anti-Semitic incidents between 1 October 2016 and 30 September 2017.¹⁵⁸

- 1.404 In July 2017, Dr Derya Iner released a report analysing data from a recently launched Islamophobia Register.¹⁵⁹ The report, which is based on quantitative and qualitative analysis of incidents submitted to the register between September 2014 and December 2015, identified 243 incidents including verbal assaults, threats, hate mail, property damage and offensive media content.
- 1.405 In a similar vein, the Scanlon Foundation has been measuring ‘social cohesion’ in Australia for over a decade. The Foundation’s 2017 national survey sought to illuminate Australians’ attitudes toward people belonging to three different religions; Buddhism, Christianity and Islam. The survey found that only around 5% of respondents held negative attitudes toward those belonging to Buddhist and Christian traditions. On the other hand, almost one in four respondents indicated negative attitudes toward Muslims.¹⁶⁰
- 1.406 Although the data gathered by these and similar organisations provide a useful snapshot, the reality is that relatively few religious groups collect information on the serious harms and discrimination experienced by their members. Further, those that do collect data of this nature are unlikely to do so in accordance with the same methodological standards that govern the quantitative and qualitative research of polling companies or academic and government institutions.
- 1.407 There is a significant data gap on the prevalence of harm suffered by people of faith. It is difficult to get a comprehensive picture of the nature and extent of infringements on religious freedoms as experienced by individuals and faith communities generally. It is the Panel’s view that further research needs to be undertaken into the enjoyment (or lack thereof) of religious freedom in Australia.
- 1.408 There is also a lack of reliable information regarding the experience of religious freedom intersecting with other human rights. Although the Panel is aware of a number of reviews of State and Territory anti-discrimination frameworks, which touch on the exceptions for religious bodies, it is unaware of any systematic national inquiry into these exceptions and how they are applied.¹⁶¹ In light of the small

¹⁵⁸ Executive Council of Australian Jewry, *Report on Antisemitism in Australia 2017* (26 November 2017).

¹⁵⁹ Derya Iner (ed.), *Islamophobia in Australia 2014–2016* (July 2017).

¹⁶⁰ Andrew Markus, *Mapping Social Cohesion: the Scanlon Foundation surveys 2017* (2017) 69.

¹⁶¹ Northern Territory Government, *Discussion Paper: Modernisation of the Anti-Discrimination Act*, September 2017; Western Australia Equal Opportunity Commission, *Report on the Review of the Equal Opportunity Act 1984, 2007*; Victorian Parliament Scrutiny of Acts and Regulations Committee, *Exceptions and Exemptions to the Equal Opportunity Act 1995 Final Report*, 2009; New South Wales Law Reform Commission, Report 92 (1999), *Review of the Anti-Discrimination Act 1977 (NSW)*; South Australian Law Reform Institute, *Lawful Discrimination: Exceptions under the Equal Opportunity Act 1984 (SA) to unlawful discrimination on the grounds of gender identity, sexual orientation and intersex status*, (June 2016); Senate Legal and Constitutional Affairs Legislation Committee, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, February 2013.

numbers of formal complaints, there is insufficient evidence as to the frequency and

Recommendation 17

The Commonwealth should commission the collection and analysis of quantitative and qualitative information on:

- (a) the experience of freedom of religion in Australia at the community level, including:
 - (i) incidents of physical violence, including threats of violence, linked to a person's faith
 - (ii) harassment, intimidation or verbal abuse directed at those of faith
 - (iii) forms of discrimination based on religion and suffered by those of faith
 - (iv) unreasonable restrictions on the ability of people to express, manifest or change their faith
 - (v) restrictions on the ability of people to educate their children in a manner consistent with their faith
- (b) the experience of freedom of religion impacting on other human rights, and
- (c) the extent to which religious diversity (as distinct from cultural diversity) is accepted and promoted in Australian society.

impact of this type of discrimination within the community.

Poor literacy concerning human rights and religion

1.409 Despite the large volume of information presented to it, the Panel has found that the high levels of community concern about religious freedom were not matched in their degree by clear and concrete examples demonstrating how current Australian laws have failed to protect it. However, it is also possible that complaints do not arise because people are unaware of, or unwilling to exercise, their rights or because they adapt their behaviour so that issues stay beneath the surface but continue to cause a high degree of personal anxiety and stress.

1.410 These issues are exacerbated by limited understanding in the general community about the human right to religious freedom, its application, and how it interacts with other human rights. To the extent that understanding and acceptance of religious diversity are promoted, it appears to be often as an afterthought to conversations about cultural diversity. The failure to promote religious diversity as an important aim in its own right is out of step with the fundamental nature of the human right to freedom of religion, and contributes to the type of religious intolerance catalogued in the examples listed above.

- 1.411 Many of the current concerns about religious freedom may be alleviated by better engagement with religious groups and better public education about the extent and operation of religious freedom protections as they already exist in law. Greater literacy about the law in this area would also assist in ensuring that any issues which do arise are raised and dealt with in the appropriate channels.
- 1.412 Greater public awareness and understanding of religion and human rights could help to address the kind of misinformation that may lead to serious harms and invidious discrimination against people of faith and other sections of the community, including LGBTI people. Stakeholders on all sides of this discussion drew the Panel’s attention to the need for education to enhance understanding and mutual respect. Ideally, this would lead to religious and other differences being met with acceptance and compassion so that unsavory incidents such as those presented to the Panel do not arise in the first place, and so that people do not feel pressured to suppress unreasonably their beliefs and identities in public settings.

Recommendation 18

The Commonwealth should support the development of a religious engagement and public education program about human rights and religion in Australia, the importance of the right to freedom of religion and belief, and the current protections for religious freedom in Australian and international law. As a first step, the Panel recommends that the Attorney-General should ask the Parliamentary Joint Committee on Human Rights to inquire into and report on how best to enhance engagement, education and awareness about these issues.

Religious Freedom Commissioner

- 1.413 A number of submissions from faith groups argued for the appointment of a Religious Freedom Commissioner as part of the Australian Human Rights Commission. The new commissioner would have similar functions to that of existing commissioner positions within the AHRC, such as the Disability Discrimination Commissioner, including: commenting on legislation, advocating for religious freedom with Commonwealth, State and Territory governments, liaising with religious leaders, and raising awareness of religious freedom in the community. Advocates placed a particular emphasis on the role that such a commissioner could play with respect to the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.
- 1.414 Some submissions also supported the appointment of an LGBTI Commissioner as well as a Religious Freedom Commissioner.
- 1.415 While the AHRC should play a greater role in bringing together people of diverse faiths and in educating and engaging with the public about issues related to religious freedom, the Panel is of the view that the appointment of an additional commissioner is not necessary. The Panel noted that the Human Rights Commissioner already has

the capacity to perform many of the functions suggested for a Religious Freedom Commissioner. The Panel observed that one of the themes emerging from its work was the importance of building a common understanding of *all* human rights and their equal status.

- 1.416 However, to the extent that there is need for greater mutual engagement and understanding of harms experienced by those of faith, the Panel considers that there is value in extending the remit of an existing commissioner to include responsibility for issues relating to religious freedom.

Recommendation 19

The Australian Human Rights Commission should take a leading role in the protection of freedom of religion, including through enhancing engagement, understanding and dialogue. This should occur within the existing commissioner model and not necessarily through the creation of a new position.

Chapter 8 – Findings and conclusions

- 1.417 Within the time available to it, the Panel has conducted a thorough and exhaustive review of issues relating to religious freedom in Australia. It has considered over 15,000 submissions, consulted with over 180 stakeholders, and reviewed and evaluated a range of Australian laws and international treaty obligations.
- 1.418 The Panel has adopted an evidence-based approach to its brief. In reviewing the current state of Australian law, it has searched for clear examples of where the law either has infringed religious freedom or has failed to safeguard it adequately. Consistent with its Terms of Reference, the Panel considered the issue broadly. Additionally, given that the Religious Freedom Review originated with the public and parliamentary debate on the Marriage Amendment Act, the Panel has given particular consideration to any new or emerging challenges to religious freedom resulting from its passage.

Legal framework

- 1.419 The Panel found that, by and large, Australians enjoy a high degree of religious freedom, and that basic protections are in place in Australian law. These protections are found in the Australian Constitution and in Commonwealth, State and Territory laws. In the absence of any specific and comprehensive law dealing with freedom of religion, the Panel noted the pivotal role of exceptions to discrimination laws in the protection of freedom of religion.
- 1.420 In relation to the overall legal framework, the Panel has considered opportunities to improve protection of religious freedom through fundamental reforms, such as legislating a Commonwealth Human Rights Act; developing a Religious Freedom Act; and replacing the current framework of exceptions to anti-discrimination law with a general limitations clause. To the extent that these reforms raise complex issues beyond the scope of this Review, and in the absence of clear information that the current framework is causing real problems, the Panel makes no recommendation in this area. However, the issue should be looked at again in the future.
- 1.421 The Panel encourages the Commonwealth, State and Territory governments to consider the appropriateness of existing exceptions in discrimination laws that seek to protect religious freedom.
- 1.422 Those jurisdictions that retain exceptions in anti-discrimination laws for religious bodies with respect to race, disability, pregnancy or intersex status should review them, having regard to community expectations. This includes in the area of education.
- 1.423 The Panel noted the importance of ensuring that the right to religious freedom is given appropriate weight in situations where it is in tension with other public policy considerations, including other human rights. Although not binding at international

law, the Siracusa Principles form a sound basis for considering any law that limits the operation of freedom of religion. The Panel recommends that legislators have regard to the Siracusa Principles when drafting laws that would limit the right to freedom of religion and other rights. In addition, the Panel recommends that governments consider the use of interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.

Manifestation of belief

- 1.424 Many of the submissions presented to the Panel focused their attention on specific instances of where the right to manifest religious belief was perceived to be under threat. These included the ability of goods and services providers to decline services for reasons of conscience; the ability of religious schools to select staff and students that conform to their religious ethos; the right of parents to ensure that their children are educated in accordance with their religious and moral values; the provision of public funding to charities and faith-based organisations; the extent to which religious ministers can choose not to solemnise marriages that go against their religious beliefs; and the ability of religious bodies to prevent their facilities from being used for the solemnisation of such marriages.
- 1.425 The Panel received limited information to suggest that the right to freedom of religion is currently being infringed in any of these areas. The Panel notes that the Marriage Amendment Act included a number of measures to protect religious freedom, and that these and other protections appear to be operating effectively.
- 1.426 The Panel further notes that the human right to freedom of religion, as articulated in the ICCPR and other international instruments, provides a broad freedom to people to manifest their faith either individually or in community. However, this aspect of the right may be limited in the interests of giving effect to the fundamental rights and freedoms of others.
- 1.427 The Panel is of the view that a right to discriminate in the provision of goods and services is not required to ensure the free and full enjoyment of Australians' right to freedom of religion under international law. In a similar vein, the Panel does not consider it appropriate that civil celebrants who are not ministers of religion should be entitled to decline to solemnise same-sex marriages if they became celebrants after same-sex marriage was legalised or chose not to avail themselves of the transitional provision in the Marriage Amendment Act. There was also an absence of any concrete indications that funding to faith-based charities is under immediate threat.
- 1.428 That said, the Panel considers that there are a number of opportunities to clarify the law in order to avoid issues arising in the future. Recommendations in this area include:

- that the Commonwealth Government amend section 11 of the Charities Act to clarify that advocacy of a ‘traditional’ view of marriage would not, of itself, amount to a disqualifying purpose
- that the Commonwealth Government amend the Sex Discrimination Act to ensure that religious schools can continue to select staff and students who conform to their religious ethos, provided that it is on the basis of a published policy
- that the Commonwealth progress legislative amendments to make it clear that religious educational institutions are not required to make facilities available or provide goods and services for a marriage on religious grounds, and
- that the Attorney-General consider the advice on the Attorney-General’s Department website relating to marriage celebrants to better explain the religious protections available to different classes of authorised celebrants, including ministers of religion.

1.429 The Panel further considers that there are opportunities to bring administrative practice into line with public expectations in the area of education. The Panel encourages State and Territory education authorities to ensure that they have clear, consistently applied policies in place as to when a parent or guardian may request a child be removed from a class that contains instruction on religious or moral education matters. Such policies should reflect due consideration of the rights of the child.

Vilification, blasphemy and social hostility

1.430 Many submissions encouraged the Panel to consider the relationship between religious freedom and other rights and freedoms, including freedom of speech and freedom of association.

1.431 Concerns raised in this area included the wide variance of anti-vilification and hate speech laws across jurisdictions, including in relation to which types of speech are prohibited and in relation to which protected attributes; uncertainty about whether and how religious beliefs about marriage and sexuality can be legitimately voiced; the ongoing presence of blasphemy laws in some jurisdictions; and instances of social hostility against members of some religions.

1.432 With respect to vilification laws, while not making a recommendation on the matter, the Panel encourages the Commonwealth, State and Territory Attorneys-General to cooperate to ensure greater consistency and national coverage with respect to anti-vilification provisions in accordance with our international obligations.

1.433 With respect to blasphemy, the Panel’s view is that the prohibition of certain speech on the grounds of religious belief presents difficult problems for reconciling competing rights in a free society where beliefs and ideas of any kind should be able to be debated and criticised. Accordingly, blasphemy laws are out of step with a modern, tolerant, multicultural society and should be abolished.

Discrimination

- 1.434 Discrimination on the basis of religion and religious belief is prohibited in most jurisdictions in one way or another. However, legislative protection from discrimination on the grounds of religion is limited at the Commonwealth level to the area of employment; in New South Wales to ‘ethno-religious origin’ and in South Australia to ‘religious appearance or dress’.
- 1.435 The Panel recommends that steps be taken to amend the Racial Discrimination Act to include religion as a protected attribute, or, preferably, to develop a Commonwealth Religious Discrimination Act directed at the provision of comprehensive protection against discrimination based on religious belief or activity, including the absence of religious belief. In doing so, careful consideration should be given to appropriate exceptions and practical considerations, including the need to review and adjust responsibilities for the Australian Human Rights Commission, to the extent that new Commonwealth legislation in this area would create additional responsibilities for it.
- 1.436 The Panel also took the view that New South Wales and South Australia should consider legislative reform so as to include religion as a protected attribute. Again, consideration would need to be given to exceptions to new anti-discrimination laws, which may be necessary to safeguard other aspects of the human right to freedom of religion or belief.

Data, dialogue and education

- 1.437 The Panel has taken an evidence-based approach in executing its brief and has sought to identify real-world examples of infringement on people’s right to freedom of religion. In this respect, the Panel found that there were limited data relating to the experience of religious freedom at a community level, including experience of where religious freedom has come into contact with other rights. The vast amount of public interest and contestability around these issues stands in clear contrast to the number of formal complaints, which shows that discrimination on the basis of religion is a little-used ground of complaint, as is discrimination on the basis of sex, sexual orientation, gender identity and related attributes by religious bodies.
- 1.438 A recurring theme in the consultations was the low level of awareness and understanding in the community about these issues, and the limited focus given to religious freedom in more general discussions about diversity, understanding and tolerance. The Panel is of the view that greater public literacy in these areas would go a long way to ensuring that issues do not arise, and that they are dealt with appropriately when they do.
- 1.439 Accordingly, the Panel recommends that the Government commission further research into the community experience of religious freedom. The Panel also recommends that steps be taken to develop a religious engagement and public education program about human rights and religion in Australia, and that the

Parliamentary Joint Committee on Human Rights be asked to report on how best to enhance engagement, education and awareness about these issues.

- 1.440 The Panel recognises that its recommendations will require ongoing work across all levels of government, reflecting the need for constant vigilance to ensure that human rights are appropriately valued and protected. Throughout the process of consultation, the Panel heard of examples where mutual respect and dialogue were resulting in greater understanding, and conversely of areas where intolerance and lack of understanding were leading to individuals and groups feeling threatened in their ability to practice and express their beliefs freely. To this end, the Panel recommends that the AHRC should take a leading role in the protection of freedom of religion.
- 1.441 Issues relating to freedom of religion are the responsibility of all jurisdictions. However, the Commonwealth Government has a special responsibility due, in part, to the importance of Australia's international commitments.

Recommendation 20

The Prime Minister and the Commonwealth Attorney-General should take leadership of the issues identified in this report with respect to the Commonwealth, and work with the States and Territories to ensure its implementation. While the Panel hopes it would not be necessary, consideration should be given to further Commonwealth legislative solutions if required.

Appendix A – Submissions and consultations

The Terms of Reference provided for the Expert Panel to consult as widely as it considered necessary. The Panel was particularly concerned to ensure that anyone who wished to engage with it had the opportunity to do so.

To this end, the Chair of the Panel called for public submissions addressing the matters contained in its Terms of Reference at the same time they were released by the Prime Minister, on 14 December 2017. Submissions were initially sought by 31 January 2018. However, the Panel subsequently agreed to extend that date until 14 February 2018 to allow extra time for public participation. Submissions were accepted through an online form, in email and in hardcopy.

In addition to public submissions, the Panel held around 90 consultation meetings with individuals and groups representing a diversity of views. Consultations provided a valuable opportunity for the Panel to hear directly from those impacted by the right to religious freedom. They also allowed the Panel to test the views and ideas put to it by stakeholders and to gain a location-specific understanding of the issues, particularly given that the scope of the Review included Commonwealth and State and Territory laws.

The Panel is immensely grateful to those who took the time to meet with it or to present a submission, and particularly to those who shared their very personal stories.

Overview of responses

Submissions

The Religious Freedom Review received a total of 15,620 submissions.¹⁶² One of these submissions was signed by 5,428 individuals.

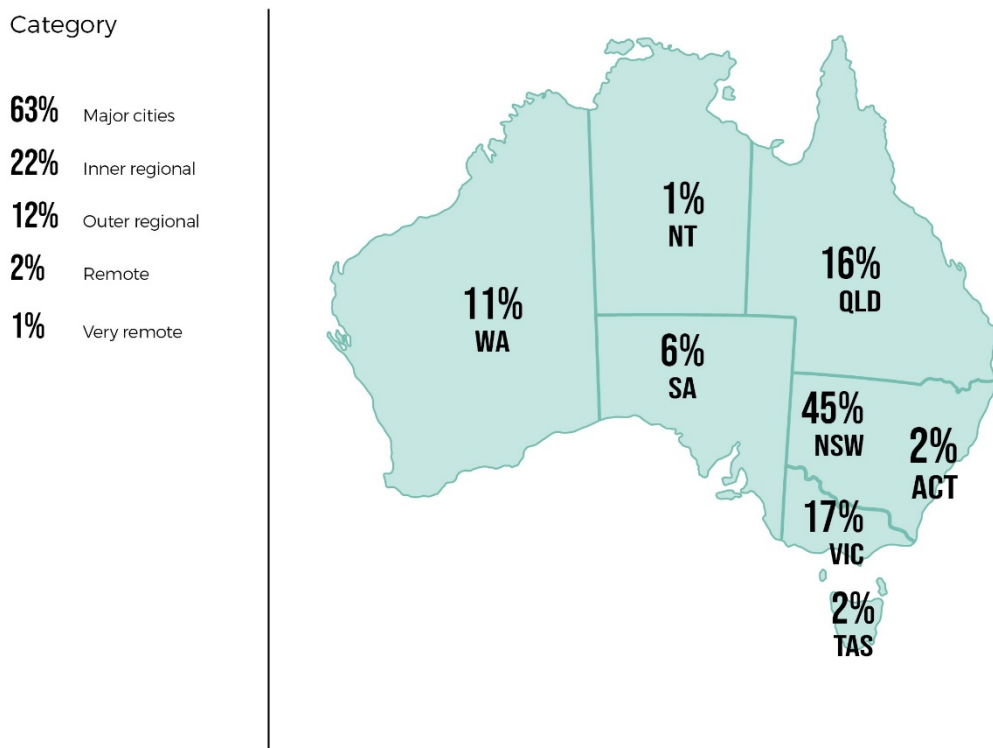
Approximately 60% of submissions were received through the website, with the remainder received via email or hard copy. Over 40% of submissions were received in the final week before the closing deadline. Among the 15,620 submissions were a number of substantially similar submissions. These were usually provided by individuals, drawing on text provided by an advocacy group, and ranged from being completely identical to being variations on a template submission. In all, the Panel received around 2,500 of these substantially similar submissions. Each submission

¹⁶² Excluding blank submissions and duplicate submissions received from the same person.

group has been published on the website along with a list of contributors who agreed to their name being published.

Where available, postcodes were used to assign each submission to a remoteness area¹⁶³ and State or Territory. Postcode data were unavailable for the majority of submissions (approximately 56%). Figure A1 shows the origin of submissions, where the information was available.

Figure A1: Location of origin of submissions, where information was provided



Note: n=13,804. Submissions without enough information to determine postcode (n=7,243) excluded.

Among submissions with available information, over two in five were from respondents living in New South Wales. A further 17% were from Victoria, and 16% were from Queensland. Just over one in 10 submissions (11%) were from Western Australia, and 6% were from South Australia. Fewer than 5% of submissions were from respondents living in Tasmania, the Australian Capital Territory and the Northern Territory.

Among submissions with available information, most were received from respondents living in major cities, and just over one in five were from respondents in

¹⁶³ Based on the Australian Bureau of Statistics' Australian Statistical Geography Standard.

inner regional areas of Australia. Very few submissions were received from respondents living in remote or very remote Australia.

The vast majority of submissions were from individuals, were less than a page in length, and responded in broad terms to the issues, often from a personal perspective. Most submissions contained general expressions of opinion and preference rather than specific suggestions for reform.

The Panel received 198 submissions from organisations and a further 57 submissions from academics and individuals with a public professional profile. These submissions varied greatly in length. Many of these submissions were complex and included extensive detail supporting their arguments. They came from a broad mix of stakeholders, including religious organisations, legal and academic institutions, secular and humanist groups and a wide range of advocacy and interest groups, including a number of LGBTI groups.

Submission authors were asked whether they agreed to their submission being published, or if they preferred it to remain confidential. All submissions where consent was provided to publication, and where there was no other reason not to publish it (for example, if publication could raise legal issues), are available on the Review’s website at <https://www.pmc.gov.au/domestic-policy/religious-freedom-review/review-submissions>.

Consultations

The Panel visited every State and Territory as follows:

Date	Location
5 and 6 February	Canberra
12 and 13 February	Perth
14 and 15 February	Sydney
19 February	Hobart
20 and 21 February	Melbourne
23 February	Western Sydney
26 February	Brisbane
27 February	Adelaide
2 March	Western Sydney
5 and 6 March	Darwin
8 and 9 March	Sydney
23 March	Sydney
26 March	Canberra

In total, the Panel held 90 meetings, with 152 organisations and 32 individuals appearing in a personal capacity. Stakeholders were invited to attend consultations based on:

- expertise
- interest, including whether they had submitted to this or previous reviews
- ability to represent a perspective specific to that State or Territory.

To maximise the time available, stakeholders representing similar viewpoints were sometimes invited to meet with the Panel in groups. Consultation meetings varied from 30 minutes to two hours depending on the number of participants and the complexity of issues discussed. Participants spoke briefly to their submissions, if they had made one, and responded to questions from the Panel.

The Panel was concerned to ensure that it heard from a variety of groups representing a broad array of perspectives on the topic of religious freedom. The Panel met with a range of groups, including:

- human rights institutions in all jurisdictions, with the exception of South Australia¹⁶⁴
- 74 religious groups
- 7 secular and humanist groups
- 24 LGBTI groups
- 13 education providers
- 21 academics.

Within each of these groups, there was a wide variety of perspectives. For example, the Panel met with several organisations representing LGBTI people of faith and also made an effort to consult with a wide range of religious denominations, as well as hearing from different perspectives within a religious denomination.

A full list of organisations and individuals who met with the Panel is at Appendix B.

Analysis of submissions

Given the large number of submissions, a computer-assisted submissions analysis methodology was used to identify the main theme of each submission. For the purposes of the analysis, all of the substantially similar submissions were counted as

¹⁶⁴ The Equal Opportunity Commission of South Australia was not available to meet with the Panel during the timeframe for the Review. However, members of the Secretariat spoke to the Commission before the Panel finalised this Report.

individual contributions. Consistent with this, the petition from just.equal was counted 5,428 times. This brought the total submissions analysed to 21,047.

The Secretariat read and analysed approximately 11,000 of these submissions and coded each one according to one of 12 overview themes:

1. No changes should be made
2. Stronger protections for religious freedom are required
3. Religious freedom protections go too far
4. Religious freedom protections are adequate
5. Protections should be clearer/more consistent
6. Laws/practices should reflect Australia's secular nature
7. Australia should have a bill of rights / Human Rights Act
8. Religious protections should not override anti-discrimination law
9. Religious tax exceptions should be limited
10. Freedom of religion is important
11. No clear position
12. Other

The themes were identified and refined iteratively, to ensure that they comprehensively covered the issues that submissions raised while being sensitive enough to distinguish differences between them. An analyst specialising in computerised, qualitative data analysis used these submissions to develop the rules for applying an overview theme to the remaining submissions.

Members of the Panel each read a large number of the submissions. They considered it important to read enough submissions to gain a clear sense of the views emerging, and to understand the results of the submissions analysis in light of their own reading of the views provided. Panel members read all submissions from key stakeholders and a large number of submissions from private individuals.

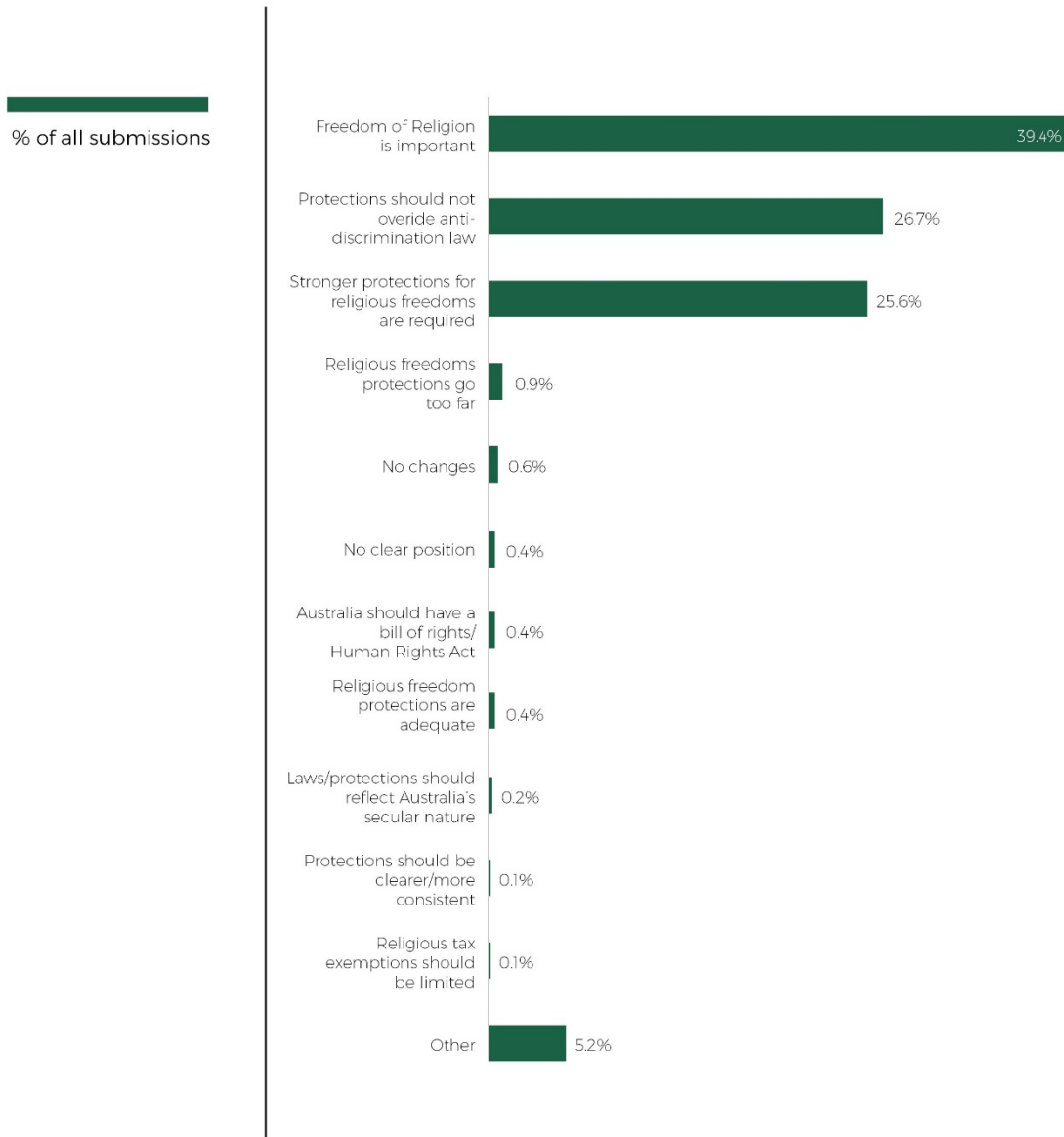
In addition, Panel members and the Secretariat closely read the more detailed submissions in order to draw out arguments and views in relation to the core questions for the Review. In particular, the Panel was interested in their views on how well Australian law protects the human right to religious freedom, the intersection between religious freedom and other human rights, examples of infringements of the right, and proposals for change. In addition, the Panel used these submissions to inform discussions at later consultation meetings.

Overview of themes expressed in the public submissions

Analysis of the 21,047 submissions revealed three dominant overview themes, as shown in Figure A2. Almost two in five submissions, or 8,303, argued that freedom of religion was important. A further 5,386 submissions (25.6%) expressed a view that stronger protections for religious freedom were required. Taken together, these submissions represented over 65% of the total received.

The second most common overview theme was that religious freedom should not override anti-discrimination law. In total, around 5,865 submissions (27.9%) argued that religious freedom should be limited, either to protect others from discrimination (5,612 submissions) or for other reasons.

Figure A2: Overview theme for submissions received by the Religious Freedom Review



Note: n=21,047 submissions.

Within these dominant overview themes, a large number of submissions also included common, more detailed sentiments. Of the submissions that broadly argued for stronger protections for religious freedom, one of the most commonly raised issues was the importance of people being able to express their opinions or beliefs (either religious or otherwise) publicly through speech or action. Also of particular concern was the continued ability of religious schools to administer a faith-based curriculum and the rights of parents regarding the education and upbringing of their children, including through the removal of their children from classes that may conflict with their religious beliefs. Others expressed a general discomfort with the

legalisation of same-sex marriage or the increase in visibility of LGBTI issues (such as in educational settings).

Of the submissions stating that religious freedom should not override anti-discrimination law, one of the most prominent concerns was discrimination by organisations that receive public funding to administer a service. Many of these submissions also argued that religious exceptions to anti-discrimination law in employment should be restricted only to what is necessary for the inherent requirements of the position. Others felt that existing exceptions to anti-discrimination law had the effect of ‘privileging’ religious organisations over organisations that were not established for religious purposes.

The remaining submissions, comprising less than 5% of the total, argued for a range of views in support of, and against, furthering protections to religious freedom. For example, these suggestions included the creation of ‘conscientious’ exceptions to anti-discrimination law, or ensuring that freedom *from* religion was also considered in the Review.

Excluding substantially similar submissions from the analysis of overview themes revealed that the large majority of ‘unique’ submissions argued that freedom of religion was important or that stronger protections for religious freedom were required. Over 85% of ‘unique’ submissions argued one of those viewpoints.

Geographic analyses revealed no meaningful differences in the distribution of overview themes in relation to State/Territory or remoteness area.

The Panel was struck by the large number of submissions presented to the Review, and the large proportion of submissions expressing the view that religious freedom is important and/or in need of protection. It would be inappropriate to consider the submissions received by the Review as determinative of the views of the broader Australian public. However, the Panel considers that the large numbers of people expressing these views demonstrates the high value that many Australians continue to place on their ability to practise their religious beliefs freely.

Stakeholder views

This section provides a summary of views expressed in the more detailed submissions to the Panel from key stakeholders, as well as in consultation meetings.

While different viewpoints were expressed, some themes were common to nearly all of the more detailed representations to the Panel:

- Australia is, and should aspire to be, a diverse and inclusive nation.
- Freedom of religion, thought and belief are fundamental to our democracy and our vibrant cultural life.

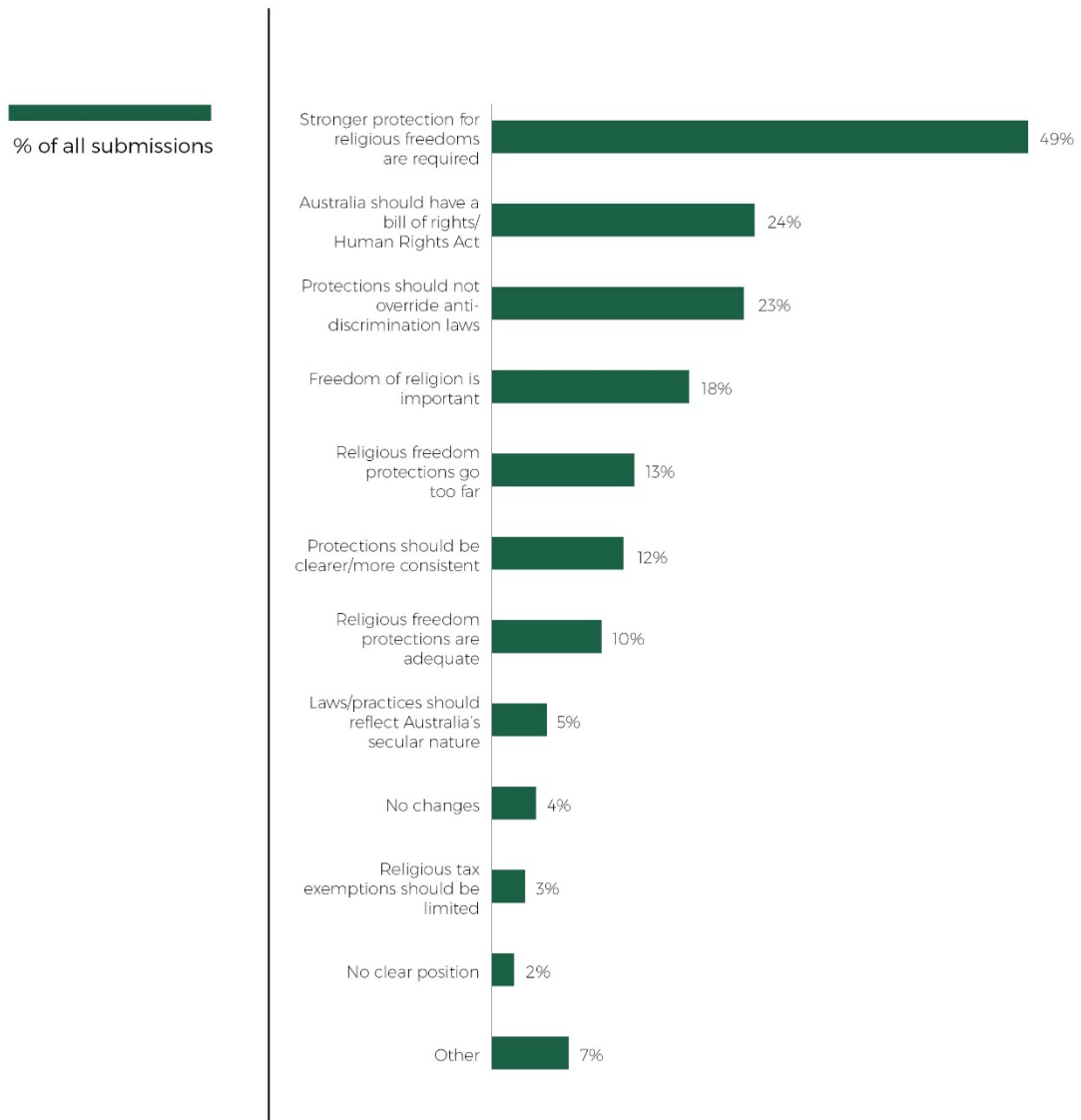
- Religious institutions should have the right to operate freely where it doesn't cause harm to others, and within certain parameters such as the appointment of clergy, use of church facilities and religious solemnisation of marriage.
- In general, Australians enjoy religious freedom and there have been few instances of unresolved religious persecution in Australia.
- There are a variety of perspectives in this debate, within and across different religions and stakeholder groups, and those perspectives should be respected and accommodated wherever possible.
- A balancing act needs to occur when rights intersect and the approach should be to adopt a position of minimal harm.
- There is a need for greater clarity and transparency where possible.
- Greater education and mutual understanding is needed to help the nation move on from the more divisive aspects of this debate.

Adequacy of existing protections for religious freedom

Submissions from key stakeholders reflected a variety of perspectives as to how well Australian law protects religious freedom. Given the detail and depth of most of the submissions from key stakeholders, each one was attributed up to three overview themes rather than one.

Figure A3 shows that almost half of the submissions from key stakeholders (49%) expressed the view that stronger protections for religious freedom were required. Almost one-quarter (24%) suggested that Australia should have a Human Rights Act or bill of rights, and a similar number (23%) argued that protections to religious freedom should not override anti-discrimination law. Eighteen per cent stated that freedom of religion was important. Fourteen per cent argued that current protections were adequate or suggested that no changes be made, and 13% proposed that current protections to religious freedom went too far. Twelve per cent suggested that religious freedom protections should be clearer or more consistent.

Figure A3: Overview themes for submissions from key stakeholders



Note: n=120 submissions.

While these broad categories give a sense of the types of views presented to the Panel, it is important to note that this is not a conversation with only two sides. Most stakeholder groups acknowledged the value of religious freedom. Many who felt that the current protections for religious freedom were adequate, or should be wound back in certain areas, also supported improvements in overall protection for human rights, for example through a Human Rights Act.

The points of difference arose where stakeholders felt the current law was inadequate, unclear or inconsistent, or improperly balanced the right to freedom of religion with other human rights such as the right to non-discrimination, or the right not to hold a religion. These areas form the areas of focus for this Report, and stakeholder views in relation to those specific areas are considered in detail in other chapters.

In summary:

- There was a mix of views about whether **goods and services providers** should be able to decline involvement with same-sex marriages. The Panel heard from very few actual goods and services providers, and a relative minority of stakeholders were of the view that this kind of ‘conscientious objection’ should be permitted.
- There were concerns that **church-owned properties** should not have to be made available for purposes that are contrary to the religious beliefs of their owners, and that the current legislation which protects the right of churches to decline bookings in connection with the solemnisation of marriage should be expanded to cover receptions and other celebrations of marriage and circumstances where bookings are handled through third parties.
- The Panel heard that **blasphemy laws** are out of date, inappropriate in a pluralistic society, and should be repealed.
- There was a wide variety of views in relation to the right of religious organisations, particularly schools, to be **selective in employing staff and in the admission of students**. The Panel heard that these organisations place a high value on creating an ‘ethos’ that is consistent with a religiously informed world view. The Panel also heard accounts of where the presence of exceptions in relation to sex discrimination by religious organisations causes harm to LGBTI communities. A prevailing theme in many of these conversations was the need for greater clarity and consistency about how the exceptions apply, and for religious organisations to be more transparent about how they intend to make use of them.
- The Panel heard concerns that religious organisations and individuals could be disadvantaged as a result of stating a view contrary to the legal definition of marriage as it now stands. More specifically, people were concerned that religious charities would **lose their charitable status or funding** if they adhered to a more traditional view of marriage.
- A number of groups raised concerns about high-profile **vilification** or hate speech complaints, arguing that some legislation impeded free speech and that religious groups now feel threatened by uncertainty around what they can and cannot say in relation to their beliefs about marriage. Other groups argued that, as the complaints were unresolved, they did not demonstrate that there were any unreasonable constraints on free speech. The Panel also heard that there is a large degree of inconsistency in vilification legislation around the country—including in relation to whether anti-vilification laws exists, which attributes are protected from vilification and which types of speech constitute vilification.
- There was a mix of views on whether the Marriage Act provided adequate protection for religious freedom for **authorised marriage celebrants**.

Concern was expressed that ministers of some smaller religions did not have the ability to register as religious ministers authorised to conduct marriages, and instead had to register as civil celebrants and therefore were unable to decline to solemnise same-sex marriages. Some submitters felt that civil celebrants should be able to conscientiously object to solemnising same-sex marriages on the basis of their religious or moral beliefs. Other stakeholders argued that civil celebrants are essentially civil servants and should be required to conduct marriages in accordance with the law. A strong theme in these submissions was that any expansion to the areas in which discrimination is permitted would be at odds with the result in the same-sex marriage postal survey and would unreasonably restrict the rights of LGBTI people.

- The Panel heard a range of concerns about the **right of parents to educate their children in their religious and moral beliefs**. Concerns were expressed about whether parents could withdraw their children from religious instruction, from sex education, and from other classes that may conflict with their beliefs. A number of LGBTI groups drew the Panel's attention to evidence supporting the need for education and sensitivity training about the lived experience of LGBTI people, including the risks inherent in failing to provide sex education that is relevant to children who are same-sex attracted.
- The Panel heard that the extent of **protections against discrimination on the basis of religion** varies widely across Australia. It was suggested that the New South Wales and South Australian legislation is particularly deficient in this regard. As a result, individuals in those jurisdictions are also unable to access protections under the Fair Work Act against discrimination on the basis of religion or religious belief.

Outside of these common themes, a number of other issues were raised, such as the need to consider specific protections for Indigenous religion and spirituality, objections to the requirement that doctors in Victoria who conscientiously object to performing abortions or assisted dying refer patients to another doctor who will provide those services, concerns that discrimination should not be allowed in religious hospitals and aged-care homes, and the need for specific changes to better reflect Australian secularism, such as removing religious symbolism from State institutions.

Examples of where the right has been infringed

The Panel took an evidence-based approach to its brief and formed the view that recommendations for legislative change should be firmly grounded in evidence of real-world problems that have arisen. As a result, the Panel undertook a thorough review of instances that had been brought to its attention of where the right to religious freedom has been infringed, or had unreasonably impacted upon the rights of others. A small minority of submissions contained such examples. Further detail about these examples is contained in Chapter 7.

How the right should be protected into the future

Submissions and consultations revealed a general concern for how well existing protections could withstand future challenges, including societal changes. There was not, however, consistency of opinion as to how best to ensure an appropriate balance. For example:

- There should be a positive assertion of, or recognition of, the right to religious freedom in Australian law.
- Religion should be a protected attribute in discrimination law.
- A Religious Freedom Commissioner should be appointed.
- A Human Rights Act is necessary to provide an appropriate balance of human rights.
- It is too soon and too complex to introduce a Human Rights Act at this time.
- Inconsistencies between Commonwealth and State legislation should be remedied.
- There should be no interference with existing State legislation.
- Exceptions are an appropriate way to provide protection for religious freedom, recognising the importance of discrimination laws.
- Exceptions are an inappropriate way to protect religious freedom as they relegate the human right to religious freedom as a lesser right to freedom from discrimination.
- The Marriage Amendment Act struck the correct balance between religious freedom and the rights of LGBTI people.
- The Parliament should revisit the defeated amendments to the same-sex marriage bill providing for additional religious freedom protections.
- There should be a general limitation clause.
- There should be no change to existing laws.
- It is time to address the adequacy of protection.
- It is too soon to reopen the divisive debates surrounding amendments to the Marriage Act.
- It is too soon to address the adequacy of protection as the public needs further education as to the human right to religious freedom and as to the right of parents to provide religious and moral education to their children.

A large number of submissions expressed support for a Human Rights Act as an appropriate and more sophisticated way to balance competing rights, although many

stakeholders acknowledged this was a longer-term aspiration. Interestingly, a national Human Rights Act was supported by those who felt that stronger protections for religious freedom were needed, as well as those who believed that religious freedom should not override anti-discrimination law. The use of general limitations clauses and the introduction of a Religious Freedom Act were also common recommendations.

Appendix B – List of stakeholders involved in consultations

Organisations

1. A Progressive Christian Voice in Australia
2. ACON
3. ADRA (Adventist Development and Relief Agency) Australia
4. Affinity Intercultural Foundation
5. Amnesty International
6. Anglican Diocese of Perth
7. Anglican Diocese of Tasmania
8. The Anglican Schools Corporation
9. Anglicare
10. Anti-Discrimination Board of New South Wales
11. Atheist Foundation of Australia
12. Attorney-General of Australia
13. Attorney-General's Department (Commonwealth)
14. Australian Baha'i Community
15. Australian Capital Territory Humanist Society
16. Australian Capital Territory Human Rights Commission
17. Australian Capital Territory Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) Ministerial Advisory Council
18. Australian Catholic Bishops Conference
19. Australian Catholics for Equality & Rainbow Catholics InterAgency for Ministry
20. Australian Centre for Christianity and Culture
21. Australian Charities and Not-for-profit Commission Legislation Review
22. Australian Christian Lobby
23. Australian Council of Hindu Clergy
24. Australian Federation of Islamic Councils
25. Australian Greens
26. Australian Human Rights Commission
27. Australian Jewish Association
28. Australian Labor Party (Shadow Attorney-General and federal parliamentarians)
29. Australian Marriage Equality
30. Australian Marriage Forum
31. Australian National Imams Council
32. Baha'i Community of Victoria
33. Baptist Churches WA
34. Baptist Union Northern Territory
35. Bishops from Eastern Christian Denominations

36. Board of Imams Victoria
37. Buddhist Council of Queensland
38. Buddhist Council of Victoria
39. Buddhist Council of Western Australia
40. Castan Centre for Human Rights Law
41. CatholicCare NSW
42. CatholicCare NT
43. Catholic Diocese of Perth
44. Catholic Education Office, Diocese of Darwin
45. Catholics for Renewal
46. Centre for Independent Studies
47. Church of the Flying Spaghetti Monster Australia
48. Church of Jesus Christ of Latter-day Saints in Western Australia
49. Christian Reformed Churches of Australia
50. Christian Schools Australia
51. Civil Liberties Australia
52. Coalition for Marriage (Catholic Diocese of Sydney, Anglican Diocese of Sydney, Australian Christian Lobby, Marriage Alliance)
53. Coalition of Celebrant Associations
54. Condell Park Bible Church
55. Condell Park Christian School
56. Coptic Orthodox Church
57. Council of Australian Humanist Societies
58. Council of Churches WA
59. Department of Education (Commonwealth)
60. Department of Foreign Affairs and Trade (Commonwealth)
61. Department of Jobs and Small Business (Commonwealth)
62. Discrimination Law Group
63. Diversity Council Australia
64. Drummond Street Services
65. Ebenezer Christian College
66. Equal Voices
67. Equality Campaign
68. Executive Council of Australian Jewry
69. Fadeck Cultural Centre
70. Family Council of Victoria
71. Family Voice Australia
72. Federation of Australian Buddhist Councils
73. Federation of Ethnic Communities Councils Australia (FECCA)
74. First Church of Christ Scientist
75. Freedom for Faith
76. Geneva Christian School
77. GLHV
78. Greek Orthodox Archdiocese of Melbourne
79. Hindu Society of Queensland
80. Hindu Society of Victoria
81. Humanist Society of South Australia
82. Human Rights and Equal Opportunity Commission Victoria

83. Human Rights Law Centre
84. Human Rights Sub-Committee of the Federal Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade (the Hon Kevin Andrews MP and Ms Anne Aly MP)
85. Institute of Public Affairs
86. Interfaith Centre of Melbourne
87. International City Church, Brisbane
88. Islamic Council of Queensland
89. Islamic Council of Victoria
90. Islamic Schools Association of Australia
91. Jewish Community Council of WA
92. Jubilee Christian College
93. Law Council of Australia
94. LGBTI Legal Service
95. Liberty Victoria
96. Local Anglican Ministers, Revesby
97. Local Baptist Ministers, Revesby
98. Local Catholic Priests, Revesby
99. Lutheran Church of Australia
100. Metropolitan Community Churches in Australia
101. National Association of Community Legal Centres (Kingsford Legal Centre)
102. National Council of Churches Australia
103. National School Chaplaincy Association
104. National Secular Lobby
105. Northern Territory AIDS and Hepatitis Council
106. Northern Territory Anti-Discrimination Commission
107. Northern Territory Department of the Attorney-General and Justice
108. New South Wales Council of Churches
109. New South Wales Cross-Party Marriage Equality Working Group (Mr Trevor Kahn MP)
110. New South Wales Gay and Lesbian Rights Lobby
111. NT Christian Schools
112. Nungalinga College
113. Open Doors Youth Service
114. Perth Hebrew Congregation
115. PFLAG Brisbane
116. PFLAG Perth
117. Plunkett Centre for Ethics
118. Presbyterian Church of Queensland
119. Presbyterian Church of Victoria
120. Public Interest Advocacy Centre
121. Queensland Action Group for LGBTIQ Students
122. Queensland Anti-Discrimination Commission
123. Rabbinical Council of Victoria
124. Rainbow Families Victoria
125. Rainbow Territory
126. Rationalist Society of Australia
127. Seventh-day Adventist Church – Australian Union Conference

128. Shore School
129. Sikh Association of WA
130. South Australian Council of Churches
131. South Australian Equal Opportunity Commission
132. Southern Cross Baptist Church and Christian School
133. Tasmanian Equal Opportunity Commission
134. Tasmanians United for Marriage Equality
135. The Salvation Army
136. Transgender Victoria
137. Trinity Grammar School
138. Uniting Care
139. Uniting Church LGBTI Network (Dr Margaret Mayran)
140. Uniting Church in WA
141. Victorian AIDS Council
142. Victorian Gay and Lesbian Rights Lobby
143. Victory Life Centre
144. WA Baha'i Community
145. WA Office of Multicultural Interests
146. WA Religious Society of Friends (Quakers)
147. Watchtower Bible and Tract Society
148. Wesley Mission
149. Western Australian Equal Opportunity Commission
150. William Wilberforce Foundation
151. YouthCARE

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23. Dr Sharon Rodrick
24. The Hon Susan Ryan AO
25. Professor Brett Scharffs
26. Senator Dean Smith
27. Professor Mark Sneddon
28. Dr Paul Taylor

29. Associate Professor Keith Thompson
30. Victorian Multicultural Commissioner
31. Professor George Williams AO
32. Nathan Zamprogno
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Appendix C – Overview of applicable laws in Australian jurisdictions

Table C1 outlines key protections for religious belief in Australian legislation, including anti-discrimination, anti-vilification, constitutional, and human rights protections.

Table C1: The human right to religious freedom

Jurisdiction	Constitutional protection	Human rights charter	Discrimination	Vilification	Provision for exemption from special religious education in schools	Provision for exemption from sex education in schools	General provision for exemption from classes in schools
Commonwealth	Limitation on Commonwealth legislative power. Constitution of Australia s 116.	N/A	Religion in employment. <i>Fair Work Act 2009</i> (Cth). Ethnic origin, including ethno-religious origin. <i>Racial Discrimination Act 1975</i> (Cth).	Urging violence against a groups, or members of groups, distinguished by religion. <i>Criminal Code Act 1995</i> (Cth).	N/A	N/A	N/A
Australian Capital Territory	None.	Freedom of thought, conscience, religion and belief. <i>Human Rights Act 2004</i> (ACT).	Religious conviction. <i>Discrimination Act 1991</i> (ACT).	Religious conviction. <i>Discrimination Act 1991</i> (ACT). Religious conviction. <i>Criminal Code 2002</i> (ACT).	Yes – parents may request for their children to receive religious education. <i>Education Act 2004</i> (ACT).	No.	No.
New South Wales	None.	N/A	Race, including ethno-religious origin. <i>Anti-Discrimination Act 1977</i> (NSW).	Race, including ethno-religious origin. <i>Anti-Discrimination Act 1977</i> (NSW).	Yes. <i>Education Act 1990</i> (NSW).	Covered by general exemption provision. <i>Education Act 1990</i> (NSW).	Only on religious grounds. <i>Education Act 1990</i> (NSW).
Northern Territory	None.	N/A	Religious belief or activity. <i>Anti-Discrimination Act 1996</i> (NT).	None.	Yes. <i>Education Act 2015</i> (NT).	Covered by general exemption provision. <i>Education Act 2015</i> (NT).	Yes. <i>Education Act 2015</i> (NT).
Queensland	None.	N/A	Religious belief or religious activity. <i>Anti-Discrimination Act 1991</i> (Qld).	Religion. <i>Anti-Discrimination Act 1991</i> (Qld).	Yes. <i>Education (General Provisions) Act 2006</i> (Qld).	No.	No.
South Australia	None.	N/A	Religious appearance or dress. <i>Equal Opportunity Act 1984</i> (SA).	None.	Yes. <i>Education Act 1972</i> (SA). Educational Regulations 2012 (SA).	No.	No.
Tasmania	Freedom of conscience and the free profession and practice of religion. <i>Constitution Act 1934</i>	N/A	Religious activity or affiliation, or religious belief. <i>Anti-Discrimination Act 1998</i> (Tas).	Religious activity or affiliation, or religious belief. <i>Anti-Discrimination Act 1998</i> (Tas).	Yes. <i>Education Act 2016</i> (Tas).	No.	Yes (for activities). <i>Education Act 2016</i> (Tas).

Jurisdiction	Constitutional protection	Human rights charter	Discrimination	Vilification	Provision for exemption from special religious education in schools	Provision for exemption from sex education in schools	General provision for exemption from classes in schools
	(Tas).						
Victoria	None.	Freedom of thought, conscience, religion and belief. <i>Charter of Human Rights and Responsibilities Act 2006 (Vic).</i>	Religious belief or activity. <i>Equal Opportunity Act 2010 (Vic).</i>	Religious belief or activity. <i>Racial and Religious Tolerance Act 2001 (Vic).</i>	Yes. <i>Educational Training and Reform Act 2006 (Vic).</i>	No.	No.
Western Australia	None	N/A	Religious conviction. <i>Equal Opportunity Act 1984 (WA).</i>	None.	Yes. <i>School Education Act 1999 (WA).</i>	Covered by general exemption provision. <i>School Education Act 1999 (WA).</i>	Yes. <i>School Education Act 1999 (WA).</i>

Table C2 sets out on what grounds is discrimination unlawful by jurisdiction, noting that jurisdictions may differ on which areas of activity for which each attribute is prohibited.

Table C2: Protected attributes by jurisdiction

Commonwealth	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
<ul style="list-style-type: none"> Sex Sexual orientation Gender identity Intersex status Marital or relationship status Pregnancy or potential pregnancy Breastfeeding Family responsibilities Disability Age Race Religion [in the <i>Fair Work Act 2009</i>] 	<ul style="list-style-type: none"> Accommodation Age Association with a person identified by reference to another attribute Breastfeeding Disability Employment status Gender identity Genetic information Immigration status Industrial activity Intersex status Irrelevant criminal record Parent, family, carer or kinship responsibilities Physical features Political conviction Pregnancy Profession, trade, occupation or calling Race Record of person's sex being altered Relationship status Religious conviction Sex Sexuality Subjection to domestic or family violence 	<ul style="list-style-type: none"> Race [including ethno-religious groups] Sex Transgender Marital or domestic status Disability Carer responsibilities Homosexuality Age 	<ul style="list-style-type: none"> Race Sex Sexuality Age Marital status Pregnancy Parenthood Breastfeeding Impairment Trade union or employer association activity Religious belief or activity Political opinion, affiliation or activity Irrelevant medical record Irrelevant criminal record Publication of details according to <i>Fines and Penalties (Recovery) Act</i> Association with a person who has an, or is believed to have an, attribute 	<ul style="list-style-type: none"> Sex Relationship status Pregnancy Parental status Breastfeeding Age Race Impairment Religious belief or activity Political belief or activity Trade union activity Lawful sexual activity Gender identity Sexuality Family responsibilities Association with a person identified on the basis of the above attributes 	<ul style="list-style-type: none"> Sex, sexual orientation or gender identity Race Disability Age Marital or domestic partnership status Identity of spouse or domestic partner Pregnancy Association with child Caring responsibilities Religious appearance or dress 	<ul style="list-style-type: none"> Race Age Sexual orientation Lawful sexual activity Gender Gender identity Intersex Marital status Relationship status Pregnancy Breastfeeding Parental status Family responsibilities Disability Industrial activity Political belief or affiliation Political activity Religious belief or affiliation Religious activity Irrelevant criminal record Irrelevant medical record Association with a person who has or is believed to have any of these attributes 	<ul style="list-style-type: none"> Age Breastfeeding Employment activity Gender identity Disability Industrial activity Lawful sexual activity Marital status Parental status or status as carer Physical features Political belief or activity Pregnancy Race Religious belief or activity Sex Sexual orientation An expunged homosexual conviction Personal association with a person identified by reference to any of the above attributes 	<ul style="list-style-type: none"> Sex Marital status Pregnancy Breastfeeding Gender history Family responsibility or family status Sexual orientation Race Religious or political conviction Impairment Age Publication of relevant details of persons on Fines Enforcement website

Table C3 sets out which jurisdictions protect certain attributes by area of activity.

Table C3: Protected attributes by area of activity

Area of activity	Religion, religious conviction, belief or activity	Political opinion, belief or conviction	Age	Race	Disability or impairment	Sex	Sexuality or sexual orientation	Gender identity and history	Intersex status	Relationship, marital, family or carer status or responsibility
Work	Commonwealth ACT NT QLD SA# TAS VIC WA	Commonwealth ACT NT QLD TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW^ NT QLD SA TAS VIC WA	Commonwealth ACT NSW* QLD SA TAS VIC WA	Commonwealth ACT TAS	Commonwealth ACT NSW NT QLD SA TAS VIC WA
Education	ACT NT QLD SA# TAS VIC WA	ACT NT QLD TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW^ NT QLD SA TAS VIC WA	Commonwealth ACT NSW* QLD SA TAS VIC WA	Commonwealth ACT TAS	Commonwealth ACT NSW NT QLD SA TAS VIC WA
Goods, services and facilities	ACT NT QLD TAS VIC WA	ACT NT QLD TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW^ NT QLD SA TAS VIC WA	Commonwealth ACT NSW* QLD SA TAS VIC WA	Commonwealth ACT TAS	Commonwealth ACT NSW NT QLD SA TAS VIC WA
Accommodation	ACT NT QLD TAS VIC WA	ACT NT QLD TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW^ NT QLD SA TAS VIC WA	Commonwealth ACT NSW* QLD SA TAS VIC WA	Commonwealth ACT TAS	Commonwealth ACT NSW NT QLD SA TAS VIC WA
Clubs and associations	ACT NT QLD TAS VIC WA	ACT NT QLD TAS VIC WA	ACT NSW NT QLD SA TAS VIC WA	ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW^ NT QLD SA TAS VIC WA	Commonwealth ACT NSW* QLD SA TAS VIC WA	Commonwealth ACT TAS	Commonwealth ACT NSW NT QLD SA TAS VIC WA

Area of activity	Religion, religious conviction, belief or activity	Political opinion, belief or conviction	Age	Race	Disability or impairment	Sex	Sexuality or sexual orientation	Gender identity and history	Intersex status	Relationship, marital, family or carer status or responsibility
Requests for information	ACT WA	ACT WA	Commonwealth ACT WA	ACT WA	Commonwealth ACT WA	Commonwealth ACT WA	Commonwealth ACT WA	Commonwealth ACT WA	Commonwealth ACT	Commonwealth ACT WA
Superannuation and insurance	NT QLD	NT QLD	NT QLD WA	NT QLD	NT QLD SA WA	NT QLD	NT QLD	QLD WA		NT QLD
Access to premises	ACT	ACT	Commonwealth ACT WA	Commonwealth ACT WA	Commonwealth ACT WA	ACT WA	ACT WA	ACT WA	ACT	ACT WA
Disposal and sale of land	QLD VIC	QLD VIC	Commonwealth QLD SA VIC WA	Commonwealth QLD SA VIC WA	Commonwealth QLD SA VIC	Commonwealth QLD SA VIC WA	Commonwealth QLD SA VIC WA	Commonwealth QLD SA VIC WA	Commonwealth	Commonwealth QLD SA VIC WA
Administration of laws and programs	QLD TAS	QLD TAS	Commonwealth QLD TAS	Commonwealth QLD TAS	Commonwealth QLD TAS	Commonwealth QLD TAS	Commonwealth QLD TAS	Commonwealth QLD TAS	Commonwealth TAS	Commonwealth QLD TAS
Sport	VIC	VIC	VIC WA	VIC	Commonwealth VIC WA	VIC	VIC	VIC WA		VIC

* Only on the ground of transgender status.

^ Only on the ground of homosexuality.

Only on the ground of religious appearance or dress.

Table C4 sets out which jurisdictions provide for religious exemptions to anti-discrimination legislation by area of activity and protected attribute. An area of activity may be divided into sub-categories to account for specific types of religious exemptions, which may vary across jurisdictions. There are also two general exemptions which are a general exemption for religious bodies or institutions conducted according to the doctrines or practices of a particular religion, and a general exemption for personal religious belief, both of which are exemptions for all areas of activity and attributes to which the legislation applies.

Table C4: Religious exemptions by jurisdiction and area of activity

Exemptions by area of activity	Religion, religious conviction, belief or activity	Political opinion, belief or conviction	Age	Race	Disability or impairment	Sex	Sexuality or sexual orientation	Gender identity and history	Intersex status	Relationship, marital, family or carer status or responsibility
Work General exemptions, incl. genuine occupational requirements	Commonwealth NT QLD TAS	Commonwealth NT QLD	Commonwealth NT SA	Commonwealth ACT NSW NT	Commonwealth NT	Commonwealth ACT NT QLD SA TAS VIC WA	Commonwealth NT QLD SA	QLD SA TAS	SA	Commonwealth NT QLD
Work Appointment and training of priests, ministers, etc. and in the participation of religious observances	ACT NT QLD TAS VIC WA	ACT NT QLD VIC WA	ACT NSW NT QLD VIC WA	ACT NSW NT QLD VIC WA	ACT NSW NT QLD VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW NT QLD SA VIC WA	Commonwealth ACT NSW QLD SA VIC WA	Commonwealth ACT	Commonwealth ACT NSW NT QLD VIC WA
Work Employment etc. at educational institutions	ACT NT QLD TAS VIC WA	ACT QLD WA	ACT WA	ACT WA	ACT NSW WA	Commonwealth ACT NSW QLD SA VIC WA	Commonwealth ACT NSW NT QLD SA VIC WA	Commonwealth ACT NSW QLD SA WA	ACT SA	Commonwealth ACT NSW QLD SA VIC WA
Education Exemptions regarding admission as students, etc.	ACT NT QLD SA [#] TAS [†] VIC WA	ACT WA	ACT NSW VIC	ACT VIC	ACT NSW QLD VIC	Commonwealth ACT NSW NT QLD VIC WA	Commonwealth ACT NSW WA	Commonwealth ACT NSW WA	ACT	Commonwealth ACT NSW WA
Accommodation Exemptions related to aged care, health, students, or single-sex dormitories	ACT NT QLD VIC WA	ACT NT QLD WA	ACT NT QLD VIC WA	ACT NT QLD VIC WA	ACT NT QLD VIC	ACT Commonwealth* NT QLD VIC WA	ACT Commonwealth* NT QLD	ACT Commonwealth*	ACT	ACT Commonwealth* NT QLD
Access to premises Use of religious sites	NT QLD		NT QLD	NT QLD TAS		NT QLD				

Exemptions by area of activity	Religion, religious conviction, belief or activity	Political opinion, belief or conviction	Age	Race	Disability or impairment	Sex	Sexuality or sexual orientation	Gender identity and history	Intersex status	Relationship, marital, family or carer status or responsibility
General exemptions for religious bodies where the act or practice is necessary to avoid injury to religious sensibilities of adherents, etc.	ACT NT QLD [^] TAS VIC WA	ACT NT QLD [^]	Commonwealth ACT NSW NT QLD [^] WA	ACT NSW NT QLD [^] WA	ACT NSW NT QLD [^] WA	Commonwealth* ACT NSW NT QLD [^] SA VIC WA	Commonwealth* ACT NSW NT QLD [^] SA VIC WA	Commonwealth* ACT NSW QLD [^] SA VIC WA	ACT	Commonwealth* ACT NSW NT QLD [^] SA VIC WA
Exemptions for personal religious beliefs	VIC					VIC	VIC	VIC		VIC

* These exemptions do not apply to accommodation, acts or practices in connection with the provision of Commonwealth-funded aged care by the body.

[^] These general exemptions do not apply in the work or education related areas.

[#] This exemption entails it is not unlawful for an educational authority administered according to the precepts of a religion to discriminate against a student because the student wishes to dress according to a manner required by a different religion.

[†] This exemption does not apply to students already enrolled in the educational institution.

Abbreviations and acronyms

ACNC	Australian Charities and Not-for-profits Commission
ACNC Act	<i>Australian Charities and Not-for-profits Commission Act 2012 (Cth)</i>
Age Discrimination Act	<i>Age Discrimination Act 2004 (Cth)</i>
AHRC	Australian Human Rights Commission
ALRC	Australian Law Reform Commission
ALRC Freedoms Report	Australian Law Reform Commission Report 129, <i>Traditional Rights and Freedoms—Encroachments by Commonwealth Laws</i> (2015)
Charities Act	<i>Charities Act 2013 (Cth)</i>
Cobaw	Cobaw Community Health Services
<i>CYC v Cobaw</i>	<i>Christian Youth Camps Ltd v Cobaw Community Health Services Ltd</i> (2014) 50 VR 256
CROC	<i>Convention on the Rights of the Child</i>
CYC	Christian Youth Camps Ltd
<i>DOGS Case</i>	<i>Attorney-General (Vic); Ex Rel Black v Commonwealth</i> (1981) 146 CLR 559
European Convention	European Convention on Human Rights
Fair Work Act	<i>Fair Work Act 2009 (Cth)</i>
Foreign Affairs, Defence and Trade Interim Report	Joint Standing Committee on Foreign Affairs, Defence and Trade Interim Report: <i>Legal Foundations of Religious Freedom in Australia</i> (2017)
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICERD	<i>International Convention on the Elimination of All Forms of Racial Discrimination</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>

LGBTI	lesbian, gay, bisexual, trans and intersex
Marriage Act	<i>Marriage Act 1961 (Cth)</i>
Marriage Amendment Act	<i>Marriage Amendment (Definition and Religious Freedoms) Act 2017 (Cth)</i>
PBI	public benevolent institution
Proclamation	<i>Marriage (Recognised Denominations) Proclamation 2007 (Cth)</i>
Racial Discrimination Act	<i>Racial Discrimination Act 1975 (Cth)</i>
Select Committee	Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill
Select Committee's Report	Report on the Commonwealth Government's Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (February 2017)
Sex Discrimination Act	<i>Sex Discrimination Act 1984 (Cth)</i>
Siracusa Principles	<i>Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights</i>
Special Rapporteur	Special Rapporteur on freedom of religion or belief
UN	United Nations
UN Charter	Charter of the United Nations
1981 Declaration	<i>1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief</i>