Submission

to the

ReligiousFreedomBillsConsultation

by the

Attorney-General’sDepartment

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1. Introduction

On 13 December 2018, the Prime Minister and the Attorney-General released the Report of the Religious Freedom Review. The Review made several recommendations and concluded there is an opportunity to further protect and better promote freedom of religion under Australian law and in the community.

In its response, the Australian Government committed to a range of measures to implement the Review’s recommendations. These form the basis of the legislative package the government plans to introduce into Parliament:

- The Religious Discrimination Bill 2019
- The Religious Discrimination (Consequential Amendments) Bill 2019
- The Human Rights Legislation Amendment (Freedom of Religion) Bill 2019

Submissions are due by 2 October 2019.

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

We work with people from all mainstream Christian denominations. We are independent of all political parties and engage with parliamentarians of all political persuasions.

2. Freedom of Religion

The concept of freedom of religion arises from the capacity of humans to order their lives by thought, belief and reason, rather than by instinct or compulsion. The first recorded reference to the terms is found in the writings of Tertullian, a Christian writer around AD 200:

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

Governments acknowledging the humanity of their citizens will recognise their inalienable right to freedom of thought, belief and opinion, including the right to change religion or belief. As Augusto Zimmerman a senior law lecturer at Murdoch University has stated:

...religion is not an isolated component of life, because religion has broad, holistic implications for the lives of its adherents as a worldview that shapes the way individuals think and act.²

Princeton University Professor of Law Robert P. George has described the broad nature of religious freedom in this way:
The US Commission on International Religious Freedom has stood for religious freedom in its most robust sense. It has recognized that the right to religious freedom is far more than a mere “right to worship.” It is a right that pertains not only to what the believer does in the synagogue, church, or mosque, or in the home at mealtimes or before bed; it is the right to express one’s faith in the public as well as private sphere and to act on one’s religiously informed convictions about justice and the common good in carrying out the duties of citizenship. Moreover, the right to religious freedom by its very nature includes the right to leave a religious community whose convictions one no longer shares and the right to join a different community of faith, if that is where one’s conscience leads. And respect for the right strictly excludes the use of civil authority to punish or impose civic disabilities on those who leave a faith or change faiths.3

Freedom of religion includes three distinct elements:

• the freedom to form, hold and change opinions and beliefs without government interference;

• the freedom to manifest those beliefs and opinions in public or private through speech and actions;

• the freedom of parents to raise their children in accordance with their opinions, beliefs and practices.

The ICCPR recognises these rights in Article 18:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

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

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

The High Court of Australia has confirmed in its judgement on the “Scientology case” that the legal definition of religion involves both belief and conduct.4 Justices Mason and Brennan held that “for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief...”5 Consequently, freedom of religion in Australia involves both freedom of belief and freedom of conduct giving effect to that belief.

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

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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.\textsuperscript{6}

Consequently, the Commonwealth Parliament:

- cannot establish a State church;\textsuperscript{7}
- cannot enforce religious observance;\textsuperscript{8, 9, 10}
- cannot prohibit religious observance;\textsuperscript{11} and
- cannot impose a religious test for public office.\textsuperscript{12}

With such strong international and national legal support for religious freedom it is a matter of importance to consider what has changed and where the challenge to religious freedom is coming from.

Where the challenge to freedom of religion is coming from

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

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

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

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

Religiously motivated violence, such as the siege of the Lindt Café in Sydney by Man Haron Monis\textsuperscript{13} or in Paris concerning the murder of Charlie Hebdo staff, that threatens public safety and order, is clearly unacceptable and may be justifiably prohibited. Even in the face of harsh mockery, such violence is never justified, as political commentator John Stonestreet aptly noted:

\textit{What happened in Paris [with Charlie Hebdo] was despicable. No matter how offensive the magazine’s cartoons might have been, nothing justifies murder.}\textsuperscript{14}

Limitations are also justified to protect individuals from serious harm. For example, in some parts of the world, abhorrent religious practices occur. Ritual child sacrifice, perpetrated by animistic witchdoctors on behalf of some people seeking fame and fortune, is still known in parts of sub-Saharan Africa.\textsuperscript{15, 16} Female genital mutilation is practised in some Islamic countries and promoted by some Islamic authorities.\textsuperscript{17, 18} With increasing migration from countries where these practices are known to occur, Australia must be vigilant prohibiting these harms to individuals.
3. Religious Discrimination Bill 2019

Definitions – section 5

The definition of “religious belief or activity” in section 5 includes “engaging in lawful religious activity”. Concerns have been raised at the broad nature of this definition and that it appears that state, territory and local governments could pass laws over time which erode religious freedom.¹⁹

Recommendation 1

The definition of “religious belief or activity” be amended to make clear that state, territory and local governments cannot erode religious freedom.

Discrimination on the ground of religious belief – section 8

The legislation provides religious freedom protections for employees however, those protections are very narrow. The protection for an employee is a limited protection proposed for persons making a statement of belief in their own time and not on behalf of their employer in Part 2, Section 8.3. However, there is an exception for an employer if it would cause “unjustifiable financial hardship”. This means that a sponsor could control the religious freedom rights of employees of another organisation. On the face of it, it appears that an Israel Folau-type situation, where an employee quotes the Bible, would not be protected by the legislation.

Further, the ruling only applies to companies with an annual turnover of $50 million or more, which suggests that a person of faith in smaller to medium companies will be without protection. This is not a small or insignificant number of people given the large numbers of people who are employed by small business alone. ABS data for the end of 30 June 2014, for example, showed that small businesses accounted for 97.4 per cent of all businesses operating in Australia.²⁰ The universality of the right to religious freedom is undermined when it does not apply to small to medium businesses and when large ones have an “unjustifiable financial hardship” get-out clause.

The law as it applies to all other (smaller) businesses is silent. Should a case arise it would require a ruling being made on the basis of that silence.

It is also concerning that Commonwealth, state or territory governments are explicitly excluded from the definition of “relevant employer”. A further exemption is provided for an employer if a statement of belief is “malicious”, or likely to “harass, vilify or incite hatred”. Is a Biblical statement of opposition to homosexuality “vilification” against homosexuals? Such a broad and subjective term could effectively ban a Christian view of human sexuality being espoused.

Recommendation 2

Religious freedom is a universal human right deserving of universal protection. Employees of small to medium enterprises, or those with hostile sponsors or employed by government, should not have their religious freedom rights sacrificed.
Section 8 also provides limited protections for healthcare practitioners who conscientiously object to procedures like abortion and euthanasia.

These sections do not make it clear what constitutes “unjustifiable adverse impact” upon the employer or the patient that would over-rule the conscientious objection. The idea of “unjustifiable adverse impact” fails to comprehend conscientious objection – as an objection to perform a disputed service under any conditions. It may also open the door to contracts which make medical services such as those that might create a problem of conscience part of the inherent requirement of work, thus precluding people of faith as applicants for a position.

The legislation doesn’t prevent religious doctors from being compelled to refer on patients to receive abortions (see, for example, the Victorian Abortion Law Reform Act 2008). Further, in NSW and South Australia, a qualifying body can lawfully refuse to admit someone to practice (medicine, etc.). It is not clear that the draft legislation will provide protection in this instance. Does the law (and therefore the state) intend for society to be devoid of the operation of conscience or only as it applies to religion?

**Recommendation 3**

*The draft legislation be amended to provide stronger protections for freedom of conscience.*

**Religious Bodies – section 10**

Section 10 provides that religious bodies may act in accordance with their faith, however, for the protection to apply, the conduct must be in “good faith”, “reasonable”, and in accordance with the “doctrines, tenets beliefs or teachings of the religion”.

Further, the protection only applies to so-called “discrimination” under the Religious Discrimination Bill 2019. That is to say, it does not provide religious organisations protection against complaints made under other legislation, eg. the Sex Discrimination Act 1984.

It is concerning that anti-discrimination tribunals and courts would be required to determine the “religion” in question and its “doctrines, tenets or beliefs”, which may be understood by adherents but not carefully defined in writing.

The “doctrines, tenets or beliefs” of a religion are matters more theological and traditional than judicial. Courts, tribunals and judges are ill-equipped to determine such matters, as Justice Nettle observed in his *Catch the Fire* judgement: “In my view it was calculated to lead to error for a secular tribunal to attempt to assess the theological propriety of what was asserted at the Seminar.”

Anti-discrimination tribunals have an unflattering record when determining such things. In the *Catch the Fire* case in the Victorian Court of Appeal, Justice Nettle determined that the Victorian Civil and Administrative Tribunal had erred in nineteen findings. In the *OV & OW v Wesley Mission* case, the NSW Supreme Court found that the NSW Anti-discrimination Tribunal had wrongly identified the “religion”, wrongly determined the question of “doctrinal conformity” and was wrong about “religious susceptibilities”.23
A Commonwealth example again highlights the problem with inviting tribunals and courts to make determinations about religious matters. In 1998 the Catholic Education Office (CEO) of the Archdiocese of Sydney refused an applicant’s classification as a teacher because of her “high profile as a co-convenor of the Gay and Lesbian Teachers and Students Association and her public statements on lesbian lifestyles.”

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

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

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

These cases demonstrate the dangers of tribunals and courts being arbiters of religious matters.

**Parental rights**

A commitment to a free and just society also commands respect for parental choice in the style and type of education for their children.

This principle of choice in education is reflected in both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Article 26 (3) of the UDHR states:

> Parents have a prior right to choose the kind of education that shall be given to their children.

Similarly, ICCPR Article 18 (4) 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.

These internationally agreed statements acknowledge the importance of parental choice in education and the right of parents to pass on their religious beliefs and moral values.

The right of parents to choose their children’s education has also been affirmed in the South Australian Supreme Court.

A small South Australian Christian school was deregistered in the 1980s because its low numbers were deemed to provide insufficient social interaction and hence an unsatisfactory education. Yet the school’s academic standards were very high and this was not contested in the court case appealing the deregistration. The full bench of the SA Supreme Court upheld the appeal. In his judgment, Chief Justice King said (emphasis added):

> ""
The family is generally recognised in our society as the basic unit of the society and that general recognition is reinforced in the International Covenant on Civil and Political Rights to which this nation is a party. The primary role of parents in choosing the education which their children are to receive is a feature of free societies which distinguishes them from those which are founded on totalitarian notions of the role of the state.  

Thus a South Australian court has upheld the right of parents to choose the kind of education their children are to receive.

More recently, a legal case against Ballarat Christian College is challenging the ability of faith-based schools to provide an education in accordance with the wishes of parents. As reported by The Australian:

Catholic Archbishop of Sydney Anthony Fisher has warned activist-backed legal cases launched against religious schools “threaten the very future of faith-based education in this country”.

...  
Archbishop Fisher said the Victorian case challenged the right of religious schools to “teach that marriage is between a man and a woman and to require staff not undermine that teaching”.

“It contests the right of parents to choose schools for their children that accord with their own religious beliefs,” he said.

“It undermines the expectation students will be taught by teachers with conviction.”

The requirement in the draft legislation that an action must be in “good faith” and “reasonable” is extremely subjective. Such wording invites complaints. Often the process is the punishment. The huge costs incurred by respondents in seeking to defend their religious freedom are grossly unjust.

Parental concerns should not be dismissed because they are easily dismissible. Their concerns have been identified and protected in ICCPR Article 18 (4) precisely because governments would otherwise ride roughshod over them. See ICCPR Article 18 (4) as a roadblock to ideologically disposed governments, not a pebble in the road.

Further, a religious body is defined narrowly in subsection 2, denying religious freedom to many faith-based organisations. Religious freedom protections should apply broadly to all religious organisations and not relate to whether they are a “registered charity” or whether or not they are “solely” or “primarily” undertaking “commercial” activities.

There are a number of faith-based organisations which may not meet the criteria, for example, aged care homes, hospitals, religious printing houses and publishers. They will be denied the ability to operate according to their ethos. The inadequacy of the draft legislation has been highlighted by the lack of protection for a Christian rehabilitation centre:
A Christian rehabilitation centre for women would not be shielded from a discrimination claim for turning away a biological male who identified as female under the government’s draft laws upholding religious freedom.

...

The chief executive of the centre, who spoke on the condition of anonymity, said: “It’s not just about us being a Christian facility, but it’s about me being able to have a level of protection for those already in our facility.

“Women have come to us because they don’t want co-ed (living-arrangements) because they have had so much abuse in their life, usually from a male.

“This is their safe place ... If you were to bring someone who is transgender into the facility, they are sharing bedrooms and bathrooms with these women. That for me was the huge factor.

“We were going to engage with this person to ask more questions, but before we could get to that point the person became extremely aggressive and immediately said they were going to bring in their lawyer and accused us of being -discriminatory.”

The Weekend Australian has been told the applicant was offered a placement in a day treatment program for both men and women but rejected the assistance.

[Commonwealth Attorney-General] Mr Porter confirmed that, “on the women’s rehabilitation example, the new commonwealth bill deals with religious discrimination, not sex discrimination”.

“It does not deal with a situation where a person has been denied access to services because of their gender identity. In those cases, the person ... would have a claim under the Sex Discrimination Act, which would be dealt with under the existing law.”30

Protections for religious organisations should apply more broadly so that religious freedom is not infringed by other antidiscrimination legislation.

This problem highlights the fact that the legislation fails to comprehend the faith-based motivation to works of service to the community. It treats all work as a purely commercial arrangement.

Recommendation 4

The draft legislation should express clearly and unambiguously that all religious organisations should have the right to operate in accordance with their ethos, including the hiring of staff whose beliefs and conduct are consistent with the organisation’s values.

Recommendation 5
The draft legislation should be expanded so that religious freedom is protected from being infringed by other antidiscrimination legislation.

**Recommendation 6**

*The draft legislation should make clear that parents have the right to educate their children in accordance with their wishes.*

**Inherent Requirements – Section 31**

Section 31 contains an exemption against religious discrimination in employment (section 13) or relating to partnerships (section 14) if a person is unable to carry out the “inherent requirements” of the employment or partnership. But what are and what are not “inherent requirements”? As one commentator has noted, “one danger is that this becomes a back-door way of authorising religious discrimination, by a secular company specifying an ‘inherent requirement’ that, for example, staff never talk about religious topics.”31

**Recommendation 7**

*The “inherent requirements” exemption should be tightened to ensure it does not empower religious discrimination.*

**Statements of Belief – section 41**

There are concerns that section 41 does not adequately protect free speech. In particular, that the legislation will not prevent an Archbishop Porteous-like situation from occurring again. As News Weekly highlighted:

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At the time of the marriage debate, Archbishop of Hobart Julian Porteous was taken to the Tasmanian Anti-Discrimination under section 17 of the Tasmanian Anti-Discrimination Act for circulating a statement of the Catholic Church’s beliefs on marriage. Would that statement of the Catholic Church on marriage be protected by the Bill?

Clause 41(1) of the Bill provides statements of religious belief will not contravene section 17 of the Tasmanian Anti-Discrimination Act. This is welcome and would have avoided Archbishop Porteous being dragged through mediation. However, clause 41(2) provides that any statement of belief that is likely to “vilify” another person or group of persons will not be protected by clause 41(1).

What does “vilify” mean? Is it a statement which someone feels insults or criticises (synonyms of “vilify”) them enough to render that statement of belief discriminatory? This is a term that has caused widespread criticism of section 17 and of section 18C of the federal Racial Discrimination Act as being too low a threshold for a claim of discrimination.32

While it is proper for demonstrable harm, based upon untrue statements or publications, to be compensated through court ruling, vilification is subjective and should not be actionable.
Being able to speak about matters of faith is integral to religious freedom. It is inevitable that matters of faith will cause offence, not because that is the intention but because that is the nature of faith – that is affirms certain behaviour and disavows other behaviour. Legislation that sets about limiting religious communication because some will be offended misunderstands freedom of speech.

**Recommendation 8**

*The draft legislation should not approve or endorse anti-vilification measures.*

4. **Religious Discrimination (Consequential Amendments) Bill 2019**

The *Religious Discrimination (Consequential Amendments) Bill 2019* introduces a Freedom of Religion Commissioner to the Australian Human Rights Commission, however, no true consultation or persuasive case for the formation of such an office has been made. Further public consultation is required before the Commonwealth moves to form such an office.

**Recommendation 9**

*Further public consultation is required to consider whether a Freedom of Religion Commissioner is warranted.*

5. **Human Rights Legislation Amendment (Freedom of Religion) Bill 2019**

**Section 11 – Charities Act**

Section 11 provides protection for charities which have a man-woman view of marriage. This is welcome but there is increasing hostility against traditional human sexuality views beyond marriage, particularly centred around gender ideology. Protection for charities should not be restricted merely to marriage but should also cover broader human sexuality and gender identification.

**Recommendation 10**

*Section 11 should be amended to take into account religious beliefs pertaining to human sexuality and gender identification.*

**Section 47C – Marriage Act**

Section 47C, a proposed amendment to the *Marriage Act 1961*, provides protection for religious educational institutions to refuse to make facilities available or provide goods or services in relation to weddings. While the exemption protects religious educational institutions, it does not assist other organisations and individuals who may have objections to participating in weddings contrary to their religious beliefs, such as wedding photographers, florists or wedding cake bakers. Why is their freedom to exercise their conscience not protected?

The religious institution derives its ethos from the community of faith that has established it and maintains it. Why should that very ethos not be respected in the individual person who conducts a business or service that is not overtly religious but is conducted by the religious ethos of the owner/operator?
Freedom of conscience

Overseas examples highlight the need for broader protections for freedom of conscience. In the US, Barronelle Stutzman suffered legal sanctions for refusing to provide floral arrangements for a same-sex “wedding”. She was fined $1,000 and directed that she must make the arrangements for same-sex “weddings” if she provided them for opposite-sex weddings.33

In the UK, Ashers bakery was taken to court after it refused to make a cake with a slogan supporting same-sex “marriage”.34 Australian law should uphold freedom of conscience and make clear that no one can be coerced to act against their deeply held beliefs.

Recommendation 11

The exemption in section 47C should be broadened to protect individuals and organisations whose conscientious beliefs do not allow them to participate, whether directly or indirectly.

6. Conclusion

The Government’s move to provide better protection for religious freedom is welcome, however, the draft legislation is inadequate. The Government should go back to the drawing board and rewrite the legislation so that this important freedom is comprehensively understood, defined and protected.

Broader consultation with the communities of faith is necessary to ensure the success of such legislation. The people to do this task are not solely government lawyers, but must include people of faith whose motivations, beliefs and actions are being misunderstood, misrepresented and diminished.
Endnotes

1 “The Edict of Milan”


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

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

6 Commonwealth of Australia Constitution Act 1900, s116

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

8 Religious observance is enforced in Saudi Arabia, including five daily prayers, fasting during Ramadan and the modesty of women’s dress under sharia law by the religious police, or mutawwiiin; see “Saudi Arabia Law Enforcement”, Encyclopedia of the Nations, Illinois, Advameg, 2007–2013.


11 Prohibition of house churches in the People’s Republic of China has been reported. See “China—Son of Christian Leader Beaten Unconscious”, Barnabas Fund Prayer Focus Update, No 145, November 2008.

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


15 Sadio Kante, “Mali’s human sacrifice - myth or reality?”, BBC News (20 September 2004).

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


28 Fountain Centre Christian School Incorporated v Harrington, South Australia Supreme Court, 1990


