



**Australian
Human Rights
Commission**

Religious Freedom Review

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUBMISSION TO THE EXPERT PANEL**

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1 Introduction

1. The Australian Human Rights Commission makes this submission to a review commissioned by the Australian Government on religious freedom, chaired by the Hon. Philip Ruddock (the Review).¹
2. The Terms of Reference for the Review require consideration of the ‘intersections between the enjoyment of freedom of religion and other human rights.’
3. It is axiomatic that human rights are universal, inalienable, indivisible, interdependent and interrelated. It should be no surprise, then, that human rights commonly interact with one another. Sometimes they are mutually reinforcing. Sometimes they intersect in ways that create tensions or conflicts. This is all the more likely in a pluralistic society with a diversity of beliefs and values. This diversity adds further weight to the international law requirement to accommodate human rights that are in tension.
4. Article 18 of the International Covenant on Civil and Political Rights (ICCPR) refers to ‘freedom of thought, conscience and religion’. Hence, this right under international law extends beyond religious belief to include atheistic and non-theistic beliefs. Noting that the Terms of Reference for this Review specifically advert to ‘freedom of religion’, this term is frequently used in this submission. Generally, however, the term should be understood to extend also to other belief systems beyond religion.
5. International human rights law distinguishes between absolute rights and non-absolute rights. No limitation is permitted in respect of absolute rights. Under Article 18 of the ICCPR, the freedom to *hold* a religious or other belief is absolute. It cannot be limited or restricted in any circumstances.
6. By contrast, the freedom to *manifest* a religion or belief can be limited, but only in certain prescribed circumstances. Questions of public policy generally arise in respect of the freedom to manifest a religion or belief, because this is the more public dimension of the right. It is, therefore, where the right is most likely to intersect with other human rights and interests.
7. Recognising that human rights sometimes come into tension does not undermine the universality or inalienable nature of the rights in question; nor is resolution of these conflicts a matter of arbitrary choice. International human rights law has developed principles to help states manage conflicts between rights, and Australia is obliged under international law to apply these principles when considering any reform in this area.
8. Part 4 of this submission contains a more detailed analysis of these principles, and their application to the issues that are the subject of this Review. However, in summary, the core principles in respect of limitations on the right to manifest one’s religion or belief are:
 - A limitation on a human right can be justified only if the limitation occurs in pursuit of a legitimate aim. There is a finite list of legitimate aims set out in article 18(3) of the ICCPR – namely, protecting ‘public safety,

order, health, or morals or the fundamental rights and freedoms of others’.

- Any limitation must be clearly set out in law, and the people who may be affected by it must understand how and under what circumstances the limitation operates. The limitation must not be exercised in an arbitrary way.
 - It is not enough to show that limiting a human right will achieve a legitimate aim; it must also be shown that the aim cannot be achieved in a less restrictive way. That is, limiting the right must be *necessary*.
 - The extent and severity of the limitation must be *proportionate* to the legitimate aim.
9. These principles do not always provide simple solutions to the tensions that arise in practice when human rights intersect. Governments retain significant autonomy in where and how limitations on human rights are made, and sometimes governments are called on to make difficult choices that leave some parts of a community feeling aggrieved. Nevertheless, these principles provide a means of reconciling competing human rights claims; one that focuses on *accommodation* of the differing needs of the various parts of our Australian community.
10. Any reform designed to further protect religious freedom should be done in such a way as promotes human rights in their universality and indivisibility, and in accordance with the above principles. A crucial test will be whether a proposed reform is likely to permit forms of discrimination that are currently unlawful. It is highly unlikely the Commission could support such proposed reforms.

2 Recommendations

Recommendation 1: The Commission recommends the Government commission an independent body to collect and analyse, in accordance with conventional scientific standards, quantitative information on the nature and prevalence of matters such as:

- **threats and actual physical violence linked to a person’s religion**
- **verbal abuse, harassment or intimidation because of a person’s religion**
- **discrimination based on religion and the contexts in which this arises**
- **restrictions in the ability of a person to educate their children in a manner consistent with their religious belief.**

Recommendation 2: The Commission recommends the Government consider the development of public education about religion and its place 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.

Recommendation 3: The Commission recommends the Government enable the operation of a multi-faith advisory group, consisting of leaders and representatives of Australia's diverse religious communities, to advise the Government on the practical experience of freedom of religion and belief, as well as policy and law reform in this area.

Recommendation 4: The Commission recommends that the Australian Government undertake research and community consultation, with a view to developing new legislation that prohibits discrimination on the basis of religion or belief.

Recommendation 5: The Commission recommends that the Australian Government follow the recommendation of the United Nations Human Rights Committee to 'adopt comprehensive federal legislation giving full effect' to the International Covenant on Civil and Political Rights.

Recommendation 6: The Commission recommends that the Government examine alternatives to the current system of religious exemptions to anti-discrimination laws, including a general limitations clause, and that proposed changes should adhere to Australia's obligations under international law.

3 Commission work on religious freedom

11. Since 2000, the Commission has undertaken a considerable body of work on the protection of freedom of religion and belief. This includes:

- [Freedom of religion and belief in 21st century Australia](#): the Commission engaged the Australian Multicultural Foundation, in association with Monash University and RMIT University, to prepare this report. Published in 2011, the report captures views expressed in consultations and submissions on freedom of religion or belief in Australia.²
- [Submission to the Attorney-General's Department review of Consolidation of Commonwealth Discrimination Law](#): in 2011, the Commission provided an extensive submission to the Attorney-General's Department on consolidating Commonwealth anti-discrimination law into a single Act, which included recommendations relevant to the right to freedom of religion or belief.³
- [Submission to Senate Inquiry into 2012 Human Rights and Anti-Discrimination Bill](#): the Commission made a submission to the Senate Legal and Constitutional Affairs Committee's inquiry into this Bill, which included consideration of exemptions to anti-discrimination law for religious bodies.⁴

- [Swamy v Percival \[2013\] AusHRC 66](#): the Commission published this report on its inquiry into a complaint of discrimination in employment on the basis of religion.⁵
 - [Rights & Responsibilities Consultation Report](#): this report sets out the process and outcomes of the *Rights & Responsibilities* consultation, undertaken in 2014 by the then Human Rights Commissioner, Tim Wilson.⁶
 - [Religious Freedom Roundtable](#): in 2015, Mr Wilson established a Religious Freedom Roundtable process, publishing an [Issues Paper](#), [Statement of Purpose and Guiding Principles](#) and a [Summary Paper](#) of discussions of faith and non-faith organisations at the inaugural Roundtable on 5 November 2015.⁷
 - [Submission to the Inquiry into the status of the human right to freedom of religion and belief](#): in February 2017, the Commission made a submission to the Inquiry held by the Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade.⁸
12. In 1998, the Commission conducted an inquiry into freedom of religion and belief in Australia, and first proposed that Australia incorporate religious freedom into Australian law.⁹
13. The Commission's advocacy work includes engagement with members of religious communities as it pertains to other aspects of their human rights, for instance racial discrimination or sex discrimination. Discrimination based on religion was consistently raised at the consultations that took place to mark the 40th anniversary of the *Racial Discrimination Act 1975* (Cth).¹⁰
14. The Commission in recent years has also advocated for aspects of religious freedom, including in respect of the right to wear religious attire in public,¹¹ to observe religious practices,¹² and more generally.¹³ The Commission has also spoken publicly against racially-motivated attacks on members of religious communities.¹⁴

4 Religious freedom in international human rights law

4.1 The right to freedom of thought, conscience and religion

15. The right to freedom of thought, conscience and religion is protected in article 18 of the ICCPR,¹⁵ which provides:
- 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.
 - No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

- 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.
 - 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.
16. Article 9 of the *European Convention on Human Rights* (ECHR) protects an equivalent right:
- 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 worship, teaching, practice and observance.
 - Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
17. Although the terms of the right to freedom of religion are different between these instruments, the overlap is substantial. One significant difference is the express requirement in article 9 of the ECHR for limitations to be 'necessary *in a democratic society*'. The rationale for this qualification is that in a democratic society, in which several religions coexist within a single population, it may be necessary to place limitations on freedom to manifest one's religion or beliefs in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.¹⁶ This requirement has influenced the European Court of Human Rights to place great weight on democratic values, such as tolerance and pluralism.
18. The right to freedom of religion is also protected in other international instruments.
19. The *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (the Religion Declaration) elaborates on the guarantees provided under article 18 of the ICCPR.¹⁷
20. Article 6 of the Religion Declaration lists some of the elements of the freedom to manifest a religion or belief, including the freedom to assemble for worship, freedom to use the articles and materials related to the rites or customs, freedom to write and disseminate publications and freedom to teach the religion.
21. The Religion Declaration further provides that States shall take 'effective measures to prevent and eliminate discrimination on the grounds of religion or belief,' including the enactment or repeal of legislation, and take 'all appropriate measures' to prevent intolerance on the basis of religion or belief.¹⁸
22. Article 14 of the *Convention on the Rights of the Child* provides for the right of the child to freedom of thought, conscience and religion.¹⁹ It also recognises 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'.²⁰

23. Article 20 of the ICCPR requires States Parties to prohibit by law any 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.
24. Upon ratifying the ICCPR Australia made a reservation, or statement of interpretation and intention, in relation to article 20. It states:

Australia interprets the rights provided for by articles 19 [freedom of expression], 21 [freedom of assembly] and 22 [freedom of association] as consistent with article 20; accordingly, the Commonwealth and the constituent States, having legislated with respect to the 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.²¹
25. The UN Human Rights Committee considers the prohibition in article 20 to be 'fully compatible' with the right to freedom of expression under article 19 of the ICCPR.²² However, the Committee has also stated that prohibitions of 'displays of lack of respect for a religion or other belief system, including blasphemy laws' are incompatible with the right to freedom of expression, except in the specific circumstances contemplated in article 20.²³
26. Article 26 of the ICCPR provides that all people 'are equal before the law and are entitled without any discrimination to the equal protection of the law'. It requires State Parties to prohibit and guarantee protection against discrimination on the basis of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.
27. The phrase 'other status' in article 26 of the ICCPR has been interpreted by human rights treaty bodies to include attributes such as age,²⁴ disability,²⁵ and sexual orientation.²⁶
28. Article 27 of the ICCPR provides particular protection for ethnic, religious, or linguistic minorities to 'enjoy their own culture, to profess and practise their own religion or to use their own language'.
29. Religious groups and individuals also enjoy the protection of the right to freedom of expression and the right to freedom of association (articles 19 and 22 of the ICCPR).
30. The Commission has analysed how five jurisdictions comparable to Australia – the United States, United Kingdom, France, Canada and New Zealand - protect the human right to freedom of religion. The results are summarised in the Appendix.
31. It is worth noting that in each of these jurisdictions, unlike in Australia, discrimination on the ground of religion is unlawful. Exemptions apply in each case. Further, apart from the US, these jurisdictions also prohibit religious vilification or hate speech (although there is some disagreement in New Zealand over whether racial hate speech laws apply to religion). The

jurisdictions differ in the extent to which religious organisations are exempted from other anti-discrimination laws (see Appendix).

32. As a signatory to the ICCPR, Australia is obliged to *respect* the human rights protected by that convention of all people within its jurisdiction. That means that Australia must ensure that its laws, and its administration of its laws, do not impermissibly limit those rights. Australia is also required to *protect* and *fulfil* those rights.²⁷ That means, among other things, that Australia is required to ensure that individuals' human rights are not impermissibly limited by the actions of others.

4.2 Content of the right to freedom of religion

33. The UN Human Rights Committee has provided interpretive guidance on article 18 in *General Comment 22*.²⁸ According to the Committee, the scope of the right is 'far-reaching and profound'.²⁹ 'Belief' and 'religion' are to be broadly construed, encompassing newly established religions and religious minorities.³⁰

34. The Committee has said that the article 18 right includes:

- the freedom to choose and change religion or belief;³¹
- the freedom to manifest religion or belief publicly or privately, alone or with others, in worship, teaching, practice and observance,³² where, for example:

Worship includes ritual and ceremonial acts giving direct expression to belief, building places of worship, using ritual formulae and objects, displaying symbols, and observing holidays and days of rest,

Observance and practice includes ceremonial acts, customs such as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language, and

Practice and teaching includes choosing religious leaders, priests and teachers, establishing seminaries or religious schools and preparing and distributing religious texts or publications;³³

- the right to have no religion or to have non-religious beliefs protected;³⁴
- the right not to be coerced in any way that might impair a person's ability to have or adopt a religion or belief of his or her own choice (see art 18(2)),³⁵ including through:

Use of threat or physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert, and

Other policies having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or other ICCPR rights;³⁶

- the liberty of parents or legal guardians to ensure that children receive a religious and moral education in conformity with their own convictions (see art 18(4)). (However, public education that includes instruction in a particular religion or belief is inconsistent with article 18(4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians’);³⁷ and
- the freedom of thought and freedom of conscience, which are both *equally* protected with freedom of religion and belief under article 18.³⁸

35. The Human Rights Committee has stated that the freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted.³⁹

4.3 Limitations on the right to ‘manifest’ religion

36. Importantly, article 18 of the ICCPR distinguishes between the freedom to ‘have or adopt’ a particular religion or belief, and freedom to ‘manifest’ that religion or belief in worship, observance, practice or teaching.

37. The freedom to ‘have or adopt’ a religion or belief is *absolute* and cannot be limited for any reason or under any circumstances.⁴⁰ However, the freedom to ‘manifest’ a religion or belief in worship, observance, practice or teaching *may* be subject to legitimate limitations.⁴¹ The same distinction applies in article 9 of the European Convention.

38. In the context of the ICCPR, limitations on the freedom to ‘manifest’ a religion or belief are permitted where they:

- are ‘prescribed by law’,
- pursue one of the legitimate aims listed in article 18(3), namely, public safety, order, health or morals or the fundamental rights of others, and
- are ‘necessary’ to pursue that legitimate aim. In international human rights law, an assessment of the necessity of a measure will require an assessment of proportionality.⁴²

39. The UN Human Rights Committee has stated that article 18(3) should be strictly interpreted, such that limitations should be restricted to the legitimate aims there listed.⁴³ In interpreting the scope of permissible limitations in article 18(3), State Parties should proceed from the need to protect the rights guaranteed under the ICCPR.⁴⁴ Furthermore, restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.⁴⁵

40. Similar requirements apply for limitations in the context of the European Convention. However, in this context limitations for the protection of the rights

of others need not be for ‘fundamental’ rights, and all limitations must be ‘necessary *in a democratic society*’.

(a) *Limitations must interfere with the right*

41. Before proceeding to determine whether a limitation on article 18 is legitimate, it must be shown that the limitation or restriction in question actually interferes with the right to freedom of religion. There may be no such interference where a person can circumvent a limitation placed on his or her freedom to manifest religion or belief.
42. For example, in *Cha'are Shalom Ve Tsedek v France*, the relevant religious practice was the consumption by ultra-orthodox Jews of meat from animals that had been ritually slaughtered and certified to comply with religious dietary laws.⁴⁶ The European Court of Human Rights held that ‘there would be interference with the freedom to manifest one’s religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with the religious prescriptions they considered applicable’.⁴⁷
43. There have been cases where restrictions placed by an employer on an employee’s ability to observe religious practice were held not to interfere with the employee’s right to religious freedom on the basis that the employee could resign and reasonably change employment.⁴⁸ However, the European Court of Human Rights may no longer adopt this approach. In the 2013 decision of *Eweida and Others v UK*, it was considered that, given the importance of freedom of religion in a democratic society:

where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.⁴⁹
44. There are at least two inferences that one might draw from this aspect of the international jurisprudence, which are relevant to the current debate on religious freedom in Australia.
45. First, careful scrutiny must be given to any negative consequences that flow to an individual where a law impels them to seek to avoid an interference with the exercise of their right to freedom of religion. It would be a significant restriction that impels individuals to resign and seek new employment in order to continue to exercise their freedom of religion. That said, the jurisprudence also makes clear that each such instance must be considered in its own specific context, including with reference to the other human rights engaged.
46. Secondly, it is implicit from this jurisprudence that a *fear or prediction* that the law may be amended in the future in a way that fails to protect an aspect of religious freedom does not amount to an interference with religious freedom now.

47. While a concern about a possible future law change cannot constitute a breach of religious freedom under international law, it may be appropriate for government to respond to a well-founded concern in an appropriate way. The question then becomes: what is the most appropriate response? Generally speaking, caution should be exercised before amending the law itself, lest it have unintended negative consequences. A better approach might be to consider responses that address the underlying anxiety – such as through education and awareness raising.

(b) *Limitations must be 'prescribed by law'*

48. The requirement that a limitation be 'prescribed by law' means that a limitation must have a clear legal basis, either set out in legislation or under an established rule of the common law, in a manner adequately specified so that people know the legal consequences of their actions or the circumstances under which authorities may restrict the exercise of their rights.⁵⁰ Limitations must be applied in a manner that is not arbitrary. If the limitation grants discretion to public authorities, it must be framed with sufficient clarity and specify the manner in which it is to be exercised.⁵¹

49. In *Güler and Uğur v Turkey*, an application directed against Turkey involved the conviction of two persons for propaganda in support of a terrorist organisation. The applicants had organised a memorial ceremony on behalf of members of a terrorist organisation who had been killed in action. The European Court of Human Rights found the charge of 'propaganda' was not sufficiently precise. As a result, the requirement that the restriction be 'prescribed by law' was not met.⁵²

(c) *Limitations must pursue a legitimate aim*

50. To be legitimate, limitations on article 18 of the ICCPR must be designed to achieve one of the prescribed purposes enumerated in article 18(3). The broadest of those prescribed purposes is a law that aims to protect the 'rights and freedoms of others.' The *Siracusa Principles on the limitations and derogation provisions in the International Covenant on Civil and Political Rights* state:

35. The scope of the rights and freedoms of others that may act as a limitation upon rights in the Covenant extends beyond the rights and freedoms recognised in the Covenant.

36. When a conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context especial weight should be afforded to rights not subject to limitations in the Covenant.⁵³

51. Uniquely, article 18(3) does not permit restrictions for the protection of the rights and freedoms of others generally but rather only of their 'fundamental rights and freedoms'. Nowak says this means that States parties are entitled to limit article 18 to protect:

- those rights of others that have the character of fundamental rights and freedoms in their legal system; and
 - the rights guaranteed in the ICCPR and ICESCR – regardless of whether the Covenants enjoy the rank of constitutional law.⁵⁴
52. As Nowak notes, it is under this ground that States parties may prohibit certain religious rites such as female genital mutilation, to protect the equality, privacy and physical integrity of the females concerned.⁵⁵ As a number of international human rights bodies have observed, female genital mutilation is inconsistent with a number of human rights, including absolute and non-derogable rights. Those include the right not to be subject to torture or cruel, inhuman or degrading treatment, protected by article 7 of the ICCPR⁵⁶ and articles 2 and 16 of the Convention Against Torture,⁵⁷ and a number of rights protected by the Convention of the Elimination of All Forms of Discrimination against Women⁵⁸ and the Convention on the Rights of the Child.⁵⁹ The need to protect those rights requires the prohibition of female genital mutilation, even if that limits religious freedom.
53. The UN Human Rights Committee has said that no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.⁶⁰ The Committee has also said that a State or ‘official’ religion of a nation shall not result in any impairment of the enjoyment of other rights under the ICCPR, nor in discrimination against adherents to other religions or non-believers.⁶¹
54. In the ECHR context, the ground of ‘rights and freedoms of others’ accommodates democratic values such as secularism and the need to promote tolerance in society.⁶² In *SAS v France*, the European Court of Human Rights relevantly said:
- Pluralism, tolerance and broadmindedness are hallmarks of a ‘democratic society’. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair treatment of people from minorities and avoids any abuse of a dominant position. Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society. Where these ‘rights and freedoms of others’ are themselves among those guaranteed by the Convention or the Protocols thereto, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a ‘democratic society’. [citations removed]⁶³
- (d) *Limitations must be ‘necessary to achieve legitimate object’*
55. Once a restriction falls within a prescribed legitimate aim, it must be shown that it is ‘necessary’ to achieve that purpose. Otherwise, it will not be a justified restriction to the right to manifest religion or belief.

56. By 'necessary', limitations must respond to a pressing public or social need, be directly related, and proportionate, to the specific need on which they are predicated.⁶⁴
57. In considering whether a limitation is 'directly related', the relevant inquiry is whether the limitation is rationally connected to the legitimate aim (that is, whether, as a matter of rationality, the measure will actually achieve the desired end).
58. In considering whether a limitation is proportionate to its legitimate aim, key factors include:
- whether there are other less restrictive ways to achieve the same aim,
 - whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review,
 - the extent of the interference with the right – the greater the interference the less likely it is to be considered proportionate,
 - whether affected groups are particularly vulnerable, and
 - whether the measure provides sufficient flexibility to treat different cases differently or imposes a blanket policy without regard to the merits of an individual case.
59. Importantly, proportionality must be considered in the particular circumstances of the case, and on a case-by-case basis. The above list of considerations is not exhaustive.
60. In the ECHR context, the same considerations are relevant. However, there is also an important relationship between 'necessity' and 'democratic society', of which the hallmarks are pluralism, tolerance and broadmindedness. Furthermore, Schabas notes that, in applying the 'necessary in a democratic society test', the Court will

allow the State a margin of appreciation, recognising that [the Court's] role is not to sit as a tribunal of fourth instance and that it is in one sense not as well positioned as the national legal institutions to assess many of the relevant factors. Often, especially in sensitive matters that concern morality, ethics, and social policy, the Court refers to the practice in European jurisdictions in determining whether or not any consensus exists. Where there is none, the margin of appreciation will almost invariably be much greater. But although the national authorities make the initial assessment of necessity, 'the final evaluations as to whether the reasons cited for the interference are relevant and sufficient remains subject to review by the Court for conformity with the requirements of the Convention'.⁶⁵

5 Current challenges to freedom of religion in Australia

61. Part 6 of this submission considers Australia's current legal protections in respect of freedom of religion, and their operation. Part 5 of the submission

considers the sorts of harm in Australia that the freedom is designed to protect against.

62. Current challenges to freedom of religion in Australia may be divided into two categories:
- direct harms currently occurring to people on the basis of their religion
 - concerns held by some people that religious freedom is not currently protected in Australian law in a way that will prevent its diminution in the future.
63. The latter category often relates to the intersections between religious freedom and other rights, and often involve the concern that tensions in this area will increasingly be resolved in favour of the other rights, and against religious freedom. These intersections, and a human rights-based response to them, are considered in the next Part.

5.1 Direct harms

64. One way to assess the adequacy of Australia's protection of religious freedom is to examine whether religious individuals and communities are able to hold and manifest their religion without fear of violence, abuse, intimidation or discrimination. Some religious communities collect data on these issues.
65. For example, each year the Executive Council of Australian Jewry (ECAJ) publishes a *Report on Antisemitism in Australia*. This report analyses data collected by state Jewish organisations and by the ECAJ itself. The data is limited to incidents involving violence or the threat of violence in which there is evidence that antisemitism was a factor.
66. The 2017 report found 230 reported antisemitic incidents between 1 October 2016 and 30 September 2017—an increase of 9.5% on the previous year—including physical attacks, verbal abuse and intimidation, vandalism and threats by email, mail or telephone.⁶⁶
67. To take two examples:
- On 21 March 2017, a Jewish school student on a public bus in Sydney was asked by another student 'Where are your striped pyjamas?' before being spat on, kicked and punched.⁶⁷
 - On 1 November 2016, swastikas were found graffitied in a public park in an area of Perth where many Jewish people live. This was one of 55 reported incidents of antisemitic graffiti, often in areas frequented by Jewish people.⁶⁸
68. July 2017 also saw the first analysis of data from a new Islamophobia Register, launched in 2014, in a report entitled *Islamophobia in Australia 2014-2016*.⁶⁹

69. This report is based on quantitative and qualitative analyses of incidents reported to the Register between 17 September 2014 and 31 December 2015. 243 incidents were logged in this time. Register staff made contact and verified the identity of reporters in 97% of cases.⁷⁰
70. Reported incidents occurred both online and in public. Incidents included verbal assault, threats, damage and graffiti, offensive media content, hate mail and discrimination.⁷¹
71. To take two examples:
- A Muslim person reported being verbally assaulted and pelted with eggs in the street. She told the Islamophobia Register: 'I'm shocked, saddened, angry and just heartbroken right now.'⁷²
 - Another Muslim reporter to the Register found a note outside his house threatening to 'kill your women and children' in the name of 'white power'. The note identified the victim as Muslim. The victim stated 'I am terrified. I stay awake waiting for something to happen. My kids aren't allowed outside as I'm worried something might happen or someone could throw objects over our fence'.⁷³
72. Such reports are important because they help us to understand how particular members of individual religious groups experience can experience very serious harm in connection with their religious affiliation. Some of the most powerful information from these reports is the individual stories collected from individuals who have suffered discrimination, intimidation or violence.
73. For ten years, the Scanlon Foundation has been measuring 'social cohesion' in Australia. The 2017 Scanlon Foundation national survey tests Australians' attitudes to people of three religious traditions: Buddhism, Christianity and Islam. They found:
- Very few respondents indicate negative attitude to Christians (average 5%) or to Buddhists (5%) ... in contrast, negative attitudes to Muslims is indicated in close to one in four respondents (24%).⁷⁴
74. The Scanlon Foundation's anonymous, online survey, which attempts to correct for respondents' reluctance to admit certain attitudes to interviewers, found that '41% of respondents are negative towards Muslims'.⁷⁵
75. Despite the work of ECAJ, the Islamophobia Register, and the Scanlon Foundation, there are significant gaps in the available data. Relatively few religious groups systematically collect information on the violence, abuse, intimidation, discrimination or other serious harm experienced by their members. The religious groups that do collect and publish such information provide a very useful snapshot. Generally, they do not claim to collect this information in accordance with the scientific standards that government, academic and reputable polling companies use when engaging in quantitative research. This is not a criticism of those religious organisations; it simply reflects their legitimate and understandable focus on other activities.

76. The gaps in the available data are filled only partially by government and other bodies, such as the Scanlon Foundation. The national census breaks down the population by reference to their religious belief, or absence of religious belief.
77. However, the Commission is not aware of any population-level data that presents a reliable and nuanced picture of the extent and prevalence of serious harm suffered by people of faith in connection with their religious affiliation.
78. The existence of this data gap is significant because, without this information, we cannot know the prevalence of harm experienced by people of faith generally, and of specific faith groups. There is also limited information about the prevalence of specific *types* of harm, with the greatest available information collected regarding religious discrimination based on complaints to federal, state and territory complaints bodies.
79. The Commission has a long history of working with faith-based organisations. In our experience, it is difficult to extrapolate from the available qualitative data that outlines the experience of members of particular religious groups, to gain an accurate understanding of the precise nature of the problem. For example, on the available data, the reported experience of harm by members of some Christian groups differs from other faith traditions such as Muslim and Jewish groups. Moreover, broad faith groupings – such as Christianity, Islam and Judaism – are themselves neither homogenous in their modes of organisation nor in the extent to which individual members or denominations feel able to enjoy the right to freedom of religion in Australia.
80. It follows that, in the absence of such data, it is very difficult to be clear on the nature and scope of the threat to freedom of religion generally, or the threat to particular faith communities. Without more detailed information about this threat, it is almost impossible for Government to determine the most appropriate and effective solutions to that problem.
81. If this data gap is filled, the Government will be able to determine with confidence whether a particular faith group is facing a distinct and unique threat to its freedom of religion. In principle, that might merit a more targeted response focusing on the needs of that particular faith group. Similarly, it would also clarify whether particular threats to religious freedom cross faith and denominational lines, thereby suggesting a more generalised policy response.
82. Filling this data gap would also complement the work of this Review. It is anticipated that this Review will receive a large number of responses from the public through submissions and consultations. Those responses will provide valuable qualitative data. Augmenting this evidence base with quantitative data will provide a robust basis for a once-in-a-generation reform to the protection of religious freedom in Australia.

Recommendation 1: The Commission recommends the Government commission an independent body to collect and analyse, in accordance

with conventional scientific standards, quantitative information on the nature and prevalence of matters such as:

- **threats and actual physical violence linked to a person's religion**
- **verbal abuse, harassment or intimidation because of a person's religion**
- **discrimination based on religion and the contexts in which this arises**
- **restrictions in the ability of a person to educate their children in a manner consistent with their religious belief.**

5.2 Intersections between religious freedom and other rights

83. Beyond such direct harms, the recent debate on changing the Marriage Act to make civil marriage available, without discrimination, to all couples regardless of sex, sexual orientation, gender identity or intersex status revealed that some individuals and religious organisations are concerned that their religious freedom may be compromised in the future. This concern goes beyond questions about Australian marriage law, which is why this broader Religious Freedom Review is welcome.
84. Unfortunately, there is limited hard data available on Australians' perceptions of their religious freedom. Between August and December 2014, the Commission conducted an online survey as part of its *Rights & Responsibilities 2014 Consultation*. Noting that this survey was not conducted using scientific methods, it found:
- 37% of respondents considered the right to freedom of religion as extremely well or well protected;
 - 44% considered religious freedom either moderately or slightly protected;
 - 10% considered religious freedom is not at all protected in Australia.⁷⁶
85. This research provides some limited insight into perceptions of religious freedom in 2014. Nevertheless, more rigorous and up-to-date data is needed regarding these issues, so that these more difficult-to-gauge concerns about freedom of religion can be accurately assessed and solutions tailored accordingly. As with the preceding analysis of direct harms, such information would need to be broken down by reference to particular religious affiliation, geographical location and other relevant demographic variables.
86. It is worth noting that some current concerns about religious freedom may be allayed by public education about the current extent and operation of religious freedom protections in law. Further, better understanding of religion may help address some of the attitudes that may lead to the kind of direct, serious harms to people of faith described in the section above. For example, negative

attitudes towards people of the Muslim religion may be addressed through education about religion in general and Islam in particular.

87. There may also be merit in considering a specialist body to advise the Government on the experience of faith communities, as well as those that are oriented around a shared belief system, in respect of freedom of religion and belief.⁷⁷
88. The Government may wish to consider working directly with the Commission, through its nascent religious freedom roundtable, on such issues. Similarly, some state and territory governments have established multi-faith advisory bodies that advise government on threats to religious freedom.

Recommendation 2: The Commission recommends the Government consider the development of public education about religion and its place 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.

Recommendation 3: The Commission recommends the Government enable the operation of a multi-faith advisory group, consisting of leaders and representatives of Australia's diverse religious communities, to advise the Government on the practical experience of freedom of religion and belief, as well as policy and law reform in this area.

6 Religious freedom in Australian law

89. Although Australia has an international legal obligation to protect the right to freedom of thought, conscience and religion, there is only limited protection of that right in our domestic law.
90. Australia has no constitutional or other form of entrenched bill of rights at federal level to constrain the making of laws which interfere with the freedom of religion.
91. Section 116 of the *Australian Constitution* provides some protection by restraining the legislative power of the Commonwealth.
92. There is also some protection against discrimination or vilification on the basis of religion in federal and state anti-discrimination laws. These protections, however, are inconsistent across jurisdictions and are quite narrow at the federal level. These laws, to a limited extent, protect people in Australia from interference with their religious freedom by the executive government and by others. They do so by protecting people from being subject to negative treatment as a result of manifesting their religious belief. These laws also are consistent with the right enshrined in article 26 of the ICCPR.
93. Even where protection against discrimination or vilification on the basis of religion is prohibited in law, complaints made to state and territory human rights bodies on these grounds represent a very small proportion of the total number of complaints made to these bodies.

94. Certain exemptions from federal anti-discrimination legislation for religious bodies and educational institutions established for religious purposes also seek to protect freedom of religion by balancing that right with the right to non-discrimination.

6.1 The Australian Constitution

95. The *Australian Constitution* prohibits the Commonwealth from enacting legislation that would establish any religion, or which would prohibit the free exercise of religion. Section 116 states:

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.

96. Section 116 has been framed largely as a restraint on Commonwealth legislative power and prevents one religion being given pre-eminence over other forms of observance. The High Court of Australia has made clear that it does not operate as a freestanding individual right to freedom of religion.⁷⁸

6.2 Religion as a protected attribute under state and territory law

97. The anti-discrimination laws of each state and territory, with the exception of New South Wales and South Australia, contain a prohibition against discrimination on the ground of religious belief.⁷⁹ For individuals who believe their right to freedom of religion has been violated, the core legal protections at the state and territory levels exist in the anti-discrimination provisions of their respective anti-discrimination statutes and, in Victoria and the ACT, their human rights charters. Where those laws prohibit discrimination or vilification on the basis of a person's religion, an individual complainant may make a complaint to a specialist anti-discrimination or human rights body. That body will have a function to investigate and seek to resolve those complaints without the more adversarial process of court proceedings. In consultation with state and territory anti-discrimination or human rights bodies, the Commission has compiled recent data on complaints of discrimination or vilification on the basis of religion under state and territory law.
98. Victoria prohibits discrimination on the grounds of religion under the *Equal Opportunity Act 2010* (Vic) and religious vilification under the *Racial and Religious Tolerance Act 2006* (Vic).
99. In the last three years, the Victorian Equal Opportunity and Human Rights Commission received 173 complaints about discrimination on the grounds of religion (approximately 2.4% of total discrimination complaints) and 46 complaints about vilification (approximately 72% of total vilification complaints).
100. Examples of such complaints include:

- a Muslim woman who complained that she was forbidden by her employer to wear a headscarf
 - an atheist who complained that he was told he must attend church services if he were to continue working at a Christian school.
101. The *Anti-Discrimination Act 1977* (NSW) does not specifically protect religion, but does prohibit discrimination on the ground of 'ethno-religious origin'.⁸⁰
102. Religious belief is not a protected attribute under the *Equal Opportunity Act 1984* (SA), but in 2009 the Act was changed to include protections from discrimination on the grounds of religious dress in employment and education. In the last five years, there have been 12 enquiries and one accepted complaint on these grounds.
103. The *Anti-Discrimination Act 1991* (Qld) prohibits religious discrimination and religious vilification. In the last three years there have been 28 complaints of discrimination and five of vilification. Discrimination complaints included areas such as accommodation, state laws and programs, goods and services, employment and education.
104. In Western Australia, religious discrimination is prohibited under the *Equal Opportunity Act 1984* (WA). In the past three years, 34 complaints were received—about 2.5% of the total discrimination complaints. For example, a Seventh Day Adventist man complained that he was unable to access a local government waste disposal facility because it was only accessible on his Sabbath day. Another complaint was from a Muslim woman who alleged she was dismissed after requesting to pray on her shift.
105. In the Northern Territory, religion is a protected attribute under the *Anti-Discrimination Act*. In the past three years, 64 claims were received—about 3% of total claims—but only five were accepted.
106. In the Australian Capital Territory religious discrimination and vilification are prohibited in the *Anti-Discrimination Act 1991* (ACT). In the last three years, 10 complaints were received under this legislation, which came from people of the Jewish, Sikh, Muslim and Buddhist traditions.
107. Victoria and the Australian Capital Territory have also enacted statutory charters of human rights, which each include freedom of religion.⁸¹ Each of these laws requires that for every proposed draft law (such as a bill), the executive branch of government must produce a statement that assesses the compatibility of the draft law with human rights. The Victorian and ACT charters each allows the Supreme Court of the relevant jurisdiction to make a declaration that an existing law cannot be interpreted consistently with a human right. In those circumstances, the declaration is provided to the responsible Minister for them to consider whether to amend the draft law.⁸²

6.3 Protection of freedom of religion under federal law

108. At the federal level, a person who suffers discrimination in employment on the basis of religion can make a complaint to the Commission, pursuant to the

Australian Human Rights Commission Act 1986 (Cth). This implements Australia's human rights obligations under the *International Labour Organization Convention (No 111) concerning Discrimination in respect of Employment and Occupation*. The Commission has the function of inquiring into and attempting to reach a settlement of such complaints through conciliation.⁸³

109. In the last three years, the Commission has received 35 complaints under the ILO that relate to discrimination on the basis of religion. These represent fewer than 0.6% of the 6350 total complaints made to the Commission in this period. They include complaints about workplace harassment on the basis of religion, discrimination because of religious dress, and discrimination because of the lack of a religious identity.
110. The Commission also has the function of inquiring into complaints about acts or practices by or on behalf of the Commonwealth or under a Commonwealth enactment which may be inconsistent with articles 18 (freedom of religion) or 26 (right to non-discrimination, including on the basis of religion) of the ICCPR or the Religion Declaration.⁸⁴ In the last three years the Commission has received eight complaints of this kind - 0.1% of the total number of complaints received by the Commission.
111. The narrow parameters within which the Commission is able to accept complaints about discrimination on the basis of religion, or other interference with the freedom of religion, may help to explain the relatively small number of complaints under these provisions of the *Australian Human Rights Commission Act 1986 (Cth)*.
112. If these types of complaints cannot be conciliated, the Commission may inquire into the acts or practices and prepare a report to the Attorney-General if it finds that there has been a breach. This report may contain recommendations to prevent a repetition of the act or practice or to remedy a breach of rights. However, these recommendations are not binding.⁸⁵ These reports are published on the Commission's website.⁸⁶
113. Under the *Fair Work Act 2009 (Cth)*, employers are prohibited from:
 - taking adverse action against an employee or prospective employee on the basis of a number of specified protected attributes, including religion⁸⁷
 - including terms in a modern award that discriminate against an employee for a number of reasons, including religion⁸⁸
 - terminating an employee's employment for reasons including their religion.⁸⁹
114. Any Member of Parliament who proposes a draft law must also prepare a statement of compatibility in respect of the proposed law, which sets out whether the law is compatible with human rights, including freedom of religion or belief.⁹⁰ Where proposed legislation engages and limits the right to freedom of religion or belief, the statement of compatibility should provide an

assessment of the measures against the criteria for legitimate limitations provided in the ICCPR.⁹¹

115. The Parliamentary Joint Committee on Human Rights (PJCHR) analyses bills and legislative instruments introduced into the federal Parliament for compliance with human rights. Since August 2012, the PJCHR has produced over 65 reports to Parliament assessing over 960 bills.⁹²
116. Since November 2013, the PJCHR has only found six bills to engage the right to freedom of religion.⁹³ Of those bills to engage this right:
- Four bills engaged the right to freedom of religion in the context of marriage equality;⁹⁴
 - One bill engaged the right to freedom of religion in the context of a prohibition on the wearing of 'full face coverings' in public places;⁹⁵
 - One bill engaged the right to freedom of religion by removing exemptions for religious or conscientious objection in the context of family assistance payments payable only when a child meets immunisation requirements.⁹⁶
117. The *Racial Discrimination Act 1975* (Cth) (RDA) does not specifically prohibit discrimination on the ground of religious identity or belief. However, religious groups may be regarded as being covered by the RDA where they can establish a common 'ethnic origin'.⁹⁷
118. In *Macabenta v Minister for Immigration & Multicultural Affairs*,⁹⁸ the Full Court of the Federal Court stated that the following questions are relevant when considering 'ethnic origin':

For example, is there a long shared history?, is there either a common geographical origin or descent?, is there a common language?, is there a common literature?, is there a common religion or a depressed minority? One can easily appreciate that the question of ethnic origin is a matter to be resolved by those types of factual assessments.⁹⁹

119. The term 'ethnic origin' has been interpreted as including Jewish and Sikh people.¹⁰⁰ However, there is no jurisprudence concerning whether Muslim people are a group of common 'ethnic origin' for the purposes of the RDA. Currently, complaints made to the Commission about racial discrimination by Muslim people will not be accepted unless there is some racial or ethnic element to the complaint.¹⁰¹
120. Evans has summarised the argument for making religion a protected attribute under Commonwealth anti-discrimination law:

Currently, 'individuals can face outright discrimination on the basis of their religion without effective recourse other than in the employment area. While some people who are discriminated against on the basis of their religion or belief will be able to obtain a remedy through State or Territory law, others will not. Protection against religious discrimination is therefore a patchwork and people are given greater protection in some parts of Australia than others. In the

jurisdictions where there is no protection against discrimination on the basis of religion, the judiciary can be forced into complicated distinctions between religion (which is not protected) and race, ethnicity and even ethno-religiosity (which are protected).¹⁰²

121. As noted above and in the Appendix, religion is a protected attribute in the anti-discrimination laws of five jurisdictions comparable to Australia: the United States, the United Kingdom, Canada, France and New Zealand.
122. Given the ambiguity in Australia's current law, the anomaly between federal and state laws, and the fact that religion is already a protected attribute in federal law in certain narrow circumstances, the Commission has advocated for many years for freedom of religion or belief to be a protected attribute under federal anti-discrimination law. The Commission has suggested a number of approaches that could be taken to advance such a reform.
123. For example, in 1998, the Commission proposed wider-reaching reform in relation to freedom of religion, via the proposed enactment of a Religious Freedom Act, which would recognise and give effect to the freedom of religion or belief in Australian law.¹⁰³ The Commission also recommended that this Act should proscribe the advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence as required by article 20 of the ICCPR and that Australia should withdraw its statement of interpretation in relation to article 20.¹⁰⁴
124. The Commission's 1998 report was considered in 2000 by the Joint Standing Committee on Foreign Affairs, Defence and Trade and the then Australian Government. At that time, its view was that a Religious Freedom Act was not necessary to better protect freedom of religion in Australia.¹⁰⁵
125. In 2011, the Commission recommended that the attributes of freedom of religion covered by the Commission's existing ILO jurisdiction under the *Australian Human Rights Commission Act 1986* (Cth) and by the *Fair Work Act 2009* (Cth) should be the basis of a new general legal protection.¹⁰⁶
126. In the almost two decades since the Commission first considered this issue in depth, much has changed in Australia. The Commission therefore urges the Australian Government to consider expanding the circumstances in which federal anti-discrimination law protects against discrimination and vilification on the basis of religion.
127. Such a reform would further incorporate the right to non-discrimination into Australian law. It would provide enforceable remedies for people who experience discrimination or vilification on the basis of their religion in an area of public life – for example, a person whose rental application is refused because the home owner doesn't want people of a particular religion living in the property.
128. If the Government supports in principle a prohibition on religious discrimination, it would be necessary to ensure that the reform process adheres to three key principles.

129. First, this reform would need to be carefully tailored to address the precise problem in relation to freedom of religion. As set out in greater detail in Part 5 above, more data is needed on the nature and extent of harm experienced as a result of threats to freedom of religion and belief in Australia. The Commission recommends that rigorous research with affected communities should be undertaken to assess such harms, and that this research should inform any reform to federal anti-discrimination law.
130. Secondly, Australia has not fully incorporated its international human rights obligations into domestic law, which heightens the risk that reform to protect freedom of religion alone might have a distorting effect on the protection afforded to other human rights.
131. It has been observed many times that Australia is largely alone among liberal democracies in taking a piecemeal, rather than a comprehensive, approach in the incorporation of its international human rights obligations into domestic law. For example, in its most recent review of Australia's compliance with the ICCPR, in November 2017, the UN Human Rights Committee recommended that Australia 'adopt comprehensive federal legislation giving full legal effect to all [ICCPR] provisions across all state and territory jurisdictions.'¹⁰⁷
132. The Commission is on record over a long period in urging reform, such as through a comprehensive federal human rights statute, to bring Australia into compliance with its international law obligations.¹⁰⁸ A detailed consideration of this issue would be beyond the scope of this submission.
133. Thirdly, the absence of a more comprehensive approach to human rights law protection heightens the need for any Australian law reform designed to protect one specific human right – in this case, freedom of religion – to be undertaken in a way that does not detract from the protection of other human rights. Any reform would need to be considered along with other protections for religious communities, such as exemptions from some existing anti-discrimination legislation.
134. Relatedly, special attention needs to be paid to avoiding unintended consequences. There is particular risk, for instance, in simply adding this new protected attribute to an existing anti-discrimination statute.
135. For these reasons, the Commission urges caution and close consultation with all parts of the Australian community who are likely to be especially affected in determining exactly how religion may be made a protected attribute under federal anti-discrimination law.

Recommendation 4: The Commission recommends that the Australian Government undertake research and community consultation, with a view to developing new legislation that prohibits discrimination on the basis of religion or belief.

Recommendation 5: The Commission recommends that the Australian Government follow the recommendation of the United Nations Human Rights Committee to 'adopt comprehensive federal legislation giving full effect' to the International Covenant on Civil and Political Rights.

6.4 Managing the ‘intersections’: exemptions

136. One way Australia currently deals with the intersections between religious freedom and other rights is by offering exemptions for religious organisations to certain anti-discrimination laws.
137. The *Sex Discrimination Act 1984* (Cth) (SDA) makes it unlawful to discriminate against a person on the basis of their sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding and family responsibilities,¹⁰⁹ in areas of public life including employment, education and the provision of goods, services and facilities.¹¹⁰
138. However, it is not unlawful for a religious body to discriminate on one of the grounds set out in the SDA in relation to:
- the ordination or appointment of priests, ministers of religion or members of any religious order
 - the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order
 - 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,¹¹¹ and
 - the provision of accommodation.¹¹²
139. Under the SDA, discrimination on the ground of attributes protected by the SDA is also permitted in relation to any other act or practice ‘of a body established for religious purposes’ where that act or practice:
- conforms to the ‘doctrines tenets or beliefs’ of that religion, or
 - is necessary to avoid ‘injury to the religious susceptibilities of adherents to that religion’.¹¹³
140. However, exemptions for religious bodies under the SDA do not apply where:
- an act or practice is connected to the provision of Commonwealth-funded aged care or the employment of persons to provide that aged care¹¹⁴
 - accommodation provided by a religious body is connected to the provision of Commonwealth-funded aged care.¹¹⁵
141. Section 38 of the SDA permits educational institutions established for religious purposes to discriminate on the grounds set out in the SDA in connection with the employment of staff or the provision of education or training where:
- it is ‘conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed’, and

- the educational institution ‘discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed’.¹¹⁶
142. These exemptions have operated largely unchanged since the inception of the SDA in 1984, and in relation to sexual orientation, gender identity and intersex status since these attributes were introduced to the SDA in 2013.
143. Concerns have been expressed about the scope of the exemptions in the SDA as they relate to religious organisations for some time. For example, the Senate Standing Committee on Legal and Constitutional Affairs conducted a review of the effectiveness of the SDA which reported in 2008.¹¹⁷
144. Successive governments have not fully considered the views and recommendations of that committee. For example, the Rudd Government announced that it would respond to the report’s recommendations through the consolidation of discrimination laws process that commenced in 2011. That process resulted in a Draft Exposure Bill that proposed some reforms to the existing exemption provisions so that they are more targeted in their approach. However, the Exposure Draft Bill did not proceed to legislation, leaving the SDA review recommendations unimplemented.
145. Section 35 of the *Age Discrimination Act 2004* (Cth) contains an exemption for unlawful age discrimination in relation to the acts and practices of bodies established for a religious purpose that is virtually identical to section 37(1)(d) of the SDA (see paragraph [55]).
146. Each of the prohibitions of discrimination contained in the *Fair Work Act 2009* (Cth) discussed at paragraph [48] are subject to exemptions where the adverse action, term or termination:
- relates to the staff of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed
 - is in good faith, and
 - is to avoid ‘injury to the religious susceptibilities of adherents of that religion’.¹¹⁸
147. Whether these exemptions provide an appropriate balance is a source of ongoing concern. Some believe they provide too much scope for discrimination, particularly against LGBTI people. Others say the exemptions provide too little scope for religious freedom.
148. In consultations for the Australian Human Rights Commission’s 2008-2010 report on *Freedom of Religion and Belief in 21st Century Australia*, some religious organisations expressed concern about attitudes towards exemptions, saying that ‘the religious exemptions that are a reflection of freedom of religion or belief according to Article 18 are merely tolerated, not viewed as a right to be protected.’¹¹⁹
149. The Commission’s Religious Freedom Roundtable of November 2015 found:

religious institutions expressed a need to act in a way that is consistent with their purpose, particularly in relation to the selection of employees, clients and the services they provide. There was concern about the current terminology of religious exemptions in anti-discrimination legislation. There were divergent views about the depth and breadth that exemptions should apply for different positions within institutions, and how those exemptions should be justified and determined¹²⁰

150. In its submission to the Attorney-General's 2011 Inquiry into the Consolidation of Commonwealth Discrimination Law, the Commission examined alternatives to the current system of exemptions, which the Commission agreed was 'inconsistent and potentially confusing.'¹²¹
151. Some have proposed, as an alternative, to replace current exemptions with a general limitations clause. This would require careful wording in order to avoid allowing discriminatory acts that are currently unlawful. Detailed consultation would be required in considering any such change.
152. In 2011 the Commission recommended that 'favourable consideration be given to adoption of a general limitations clause to replace other exceptions as far as possible, subject to further discussion of the impacts of this approach on clarity and certainty for affected parties and of any areas of possible diminution of existing protection.'¹²²

Recommendation 6: The Commission recommends that the Government examine alternatives to the current system of religious exemptions to anti-discrimination laws, including a general limitations clause, and that proposed changes should adhere to Australia's obligations under international law.

6.5 *Managing the 'intersections': conciliation*

153. Another way Australia deals with conflicts arising between the right to be free from discrimination and other rights, including the right to religious freedom, is by providing for conciliation in the event of claims of discrimination. The Commission, as well as corresponding State and Territory bodies, have responsibility for attempting conciliation in respect of various anti-discrimination laws.
154. In April 2017, the *Australian Human Rights Commission Act 1986* was amended to improve the way in which complaints of unlawful discrimination are defined and handled by the Commission. This included the introduction of a higher threshold for complaints and expanded grounds for termination of complaints.
155. Even before these changes, the available evidence suggests that such conciliation processes generally play a positive role in resolving complaints involving discrimination and other breaches of human rights.
156. In 2016–17, the Commission received 1,939 complaints of alleged discrimination and breaches of human rights and finalised 1,987 complaints. The Commission conducted approximately 1,128 conciliations, of which 843

complaints (75%) were successfully resolved. This is the second highest conciliation success rate on record.¹²³

157. Commission survey data also highlights the educative effect of the Commission's complaint process. For example, in 2016–17, 74% of surveyed participants in conciliated complaints indicated that involvement in the complaint process had helped them understand human rights and responsibilities.¹²⁴
158. The Commission seeks feedback on aspects of the service from both complainants and respondents. The survey can be completed online or in other formats. Feedback is sought regardless of the outcome of the complaint, including from parties where the complaint was terminated, withdrawn or discontinued.
159. In 2016-17, 88% reported that they were satisfied with the service provided and 71% rated the service as 'very good' or 'excellent'. Where complaints were conciliated, 96% of surveyed participants reported they were satisfied and 84% rated the service as 'very good' or 'excellent'.¹²⁵
160. While sometimes the prospect of conciliation has been presented as a threat to religious freedom, it is worth noting these high rates of success and satisfaction with conciliation processes.

6.6 *Managing the 'intersections': religion and marriage equality*

161. In Australia, some people perceive a tension between the right to freedom of religion or belief and the right not to be discriminated against on the basis of sex, sexual orientation, gender identity or intersex status.
162. This point arose repeatedly during some of the public debate that preceded the 2017 amendment of the *Marriage Act 1961* (Cth). While there was clearly a wide variety of views among people of faith on whether to support this reform, it is also clear that a large number of religious leaders publicly opposed this reform on grounds related to religious belief or religious freedom or both.
163. Protections for religious freedom were built into the amendment to the Marriage Act in the form of exemptions for religious ministers, and allowance for civil celebrants to register as religious celebrants and thereby be entitled to refuse to administer a particular legally valid marriage for religious reasons.
164. Some believe these protections do not go far enough. For example, in the aftermath of the marriage vote, Archbishop Anthony Fisher, Roman Catholic Archbishop of Sydney, said: 'Lame proposals to protect ministers of religion and places of worship offer no protection to the 99.9% of religious believers who are not clergy.'¹²⁶
165. At the same time, some believe the protections go too far. For example, in the week leading up to November 15, 2017, Just Equal and Parents and Friends of Lesbians and Gays (PFLAG) surveyed 3300 LGBTI people and found that 63.1% of respondents opposed allowing civil celebrants to nominate

themselves as religious celebrants and refuse to marry same sex couples. Only 18.2% were in support, with the rest neutral.¹²⁷

166. The Marriage Amendment (Definition and Religious Freedoms) Bill 2017 passed the Australian Parliament in December 2017. The reform process involved extensive community consultation over several years, a national postal survey, and was the subject of numerous parliamentary inquiries. The Bill that was passed sought to take account of the many differing views and interests that arose during this consultation process. The drafters of the Bill sought a practical compromise to protect and accommodate a number of human rights, including freedom of religion.
167. Concerns that the Marriage Act, as amended, will likely give too little or too much protection to freedom of religion are largely prognostications of the possible operation of the law. It is far too early to determine whether the accommodation that was struck in December 2017 gives appropriate protection, in practice, to freedom of religion, the right to be free from discrimination and other human rights engaged by this law.
168. Noting the extraordinary process that preceded the passage of the Bill, the Commission considers that it would be inappropriate *at this time* to undertake further reform in relation to this aspect of Australian marriage law. Instead, the Commission urges that the Government collect data on the operation of the Marriage Act. When such data has been collected, it may be appropriate to review the impact of the amended Marriage Act on the human rights that are most directly engaged.

7 Appendix - comparative law analysis

In this appendix, the Commission has summarised the legal position in respect of discrimination on the basis of religion in five jurisdictions that are comparable to Australia: the United Kingdom, United States of America, France, New Zealand and Canada.

The Commission gratefully acknowledges the pro bono legal research provided by the law firm Quinn Emmanuel Urquhart & Sullivan, in preparing this analysis. Any errors or omissions are the Commission's alone.

Table 1: Does the jurisdiction prohibit discrimination on the basis of religion?

	UK	US	France	New Zealand	Canada
Legislation	Yes - <i>Equality Act 2010</i>	Yes - <i>Civil Rights Act 1964</i>	Yes - <i>European Convention on Human Rights, French Constitution</i> (subsection 1.1(A))	Yes - <i>Bill of Rights Act 1990, Human Rights Act 1993</i>	Yes - <i>Canadian Charter of Rights and Freedoms; Canadian Human Rights Act</i>
Civil or criminal?	Civil	Civil	Both	Civil	Civil
Application?	Goods and services, workplace, education, clubs and associations	Employment, public accommodation, public education, public facilities	General under European law; additional limited protections under domestic law including employment, health, education	Government, employment, education, goods and services, accommodation, professional associations	Government, employment, goods and services, accommodation
Exemptions?	Religious employers demonstrating an occupational requirement; religious schools; religious organisations providing goods and services who need to 'avoid causing offence to persons of that religion or belief.'	Yes—for businesses demonstrating a 'bona fide occupational qualification' requirement, religious educational institutions, private clubs	Yes—on a balancing of rights test	Yes—national security, private household employment, clergy and religious teachers, social workers in religious organisations	Yes—occupational requirement, or 'bona fide justification' such as hardship or health and safety

Table 2: Is vilification/hate speech on the basis of religion unlawful?

	UK	US	France	New Zealand	Canada
Legislation	Yes - <i>Racial and Religious Hatred Act 2006</i> - it is forbidden to stir up 'religious hatred'.	No	Yes - <i>Law of July 29 1881</i>	Racial hate speech is unlawful (<i>Crimes Act 1961</i>) - opinions vary as to whether this applies to religion; 'Harmful digital communication' is unlawful (<i>Harmful Digital Communications Act 2015</i>), and religion is a protected attribute	Yes - <i>Criminal Code R.S.C. 1985</i>
Civil or criminal?	Criminal	N/A	Both	Both	Criminal

Table 3: Do exemptions to anti-discrimination laws apply to religious organisations?

	UK	US	France	New Zealand	Canada
	Yes	Yes	Not specifically—some general exemptions in labour laws	Yes	No, although the Civil Marriage Act provides for ministers to perform marriages only in accordance with their religious beliefs
Which activities?	Employment, goods and services	Hiring of ‘ministers’	N/A	Employment, marriage	N/A
Which grounds?	Religion, sex, marriage, sexual orientation	Grounds covered in <i>Civil Rights Act</i>	All grounds	Sex, sexual orientation (in limited circumstances)	N/A
Limited/unlimited?	Limited to religious ministers and organisations	Limited to ministers	Limited to labour laws	Limited to buildings, etc, not available for public hire	N/A
Applicable to individuals?	No	There is provision for individuals to challenge any federal law (and laws of some states) on grounds of religious freedom - <i>Religious Freedoms Restoration Act 1993</i>	Available to any employer	No	No

¹ The President of the Commission, Professor Rosalind Croucher, accepted the Prime Minister's invitation to serve on the Expert Panel for the Review. As such, the President has not been involved in the preparation of this submission. The Commission consists of the President, the Human Rights Commissioner, the Race Discrimination Commissioner, the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Sex Discrimination Commissioner, the Age Discrimination Commissioner, the Disability Discrimination Commissioner, and the National Children's Commissioner.

² Australian Human Rights Commission, *Freedom of Religion and Belief in 21st Century Australia* (2011). At https://www.humanrights.gov.au/sites/default/files/content/frb/Report_2011.pdf

³ Australian Human Rights Commission, *Consolidation of Commonwealth Discrimination Law: Submission to the Attorney General's Department* (2011). At http://www.humanrights.gov.au/sites/default/files/content/legal/submissions/2011/20111206_consolidation.pdf

⁴ Australian Human Rights Commission, *Exposure Draft Human Rights and Anti-Discrimination Bill: Submission to the Senate Legal and Constitutional Affairs Committee* (2012). At http://www.humanrights.gov.au/sites/default/files/20121206_hrad_bill.pdf

⁵ Australian Human Rights Commission, *Swamy v Percival* [2013] AusHRC 66. At https://www.humanrights.gov.au/sites/default/files/document/publication/2013%20AusHRC%2066%20Swamy%20v%20Percival_Web.pdf

⁶ Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015). At <http://www.humanrights.gov.au/sites/default/files/document/publication/rights-and-responsibilities-report-2015.pdf>

⁷ All available at <https://www.humanrights.gov.au/our-work/rights-and-freedoms/projects/religious-freedom-roundtable>

⁸ Australian Human Rights Commission, *Inquiry into the Status of the Human Right to Freedom or Belief: Submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade* (2017). At https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Freedomofreligion/Submissions

⁹ Australian Human Rights Commission, *Article 18: Freedom of Religion and Belief* (1998). At http://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/religion/article_18_religious_freedom.pdf

¹⁰ Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40th anniversary of the Racial Discrimination Act* (2016). At <https://www.humanrights.gov.au/our-work/race-discrimination/publications/freedom-discrimination-report-40th-anniversary-racial> (viewed 8 February 2017).

¹¹ See James Massola, 'Burqa crackdown: "Facial coverings" restricted in Parliament House public galleries' (Sydney Morning Herald, 2 October 2014) At: <http://www.smh.com.au/federal-politics/political-news/burqa-crackdown-facial-coverings-restricted-in-parliament-house-public-galleries-20141002-10p8pl.html> (viewed 8 February 2017).

¹² See Jessica Rapana, 'Anti-eruv flyer 'one of the worst examples of anti-Semitism' in Sydney' (North Shore Times, 15 September 2016) At: <http://www.dailytelegraph.com.au/newslocal/north-shore/antieruv-flyer-one-of-worst-examples-of-antisemitism-in-sydney/news-story/da7eeac9e11718449ca9f886c58d6716> (viewed 8 February 2017).

¹³ See Tim Wilson, 'Religious freedom isn't a trump card, but it does need to be part of marriage equality and rights debate' (Sydney Morning Herald, 21 October 2015) At: <http://www.smh.com.au/comment/religious-freedom-isnt-a-trump-card-but-it-does-need-to-be-a-part-of-marriage-equality-debate-20151020-gkecyn.html> (viewed 8 February 2017).

¹⁴ See Australian Human Rights Commission, 'Attack on Jewish family condemned by Race Discrimination Commissioner', Media Release (28 October 2013), At: <https://www.humanrights.gov.au/news/media-releases/attack-jewish-family-condemned-race-discrimination-commissioner> (viewed 8 February 2017).

¹⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). At <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (viewed 6 September 2017).

¹⁶ *S.A.S. v. France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [126]. At [https://hudoc.echr.coe.int/eng#{"tabview":"document"},"itemid":"001-145466"}](https://hudoc.echr.coe.int/eng#{) (viewed 15 January 2018).

- ¹⁷ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, UN Doc A/36/684 (1981). At <http://www.un.org/documents/ga/res/36/a36r055.htm> (viewed 8 February 2017).
- ¹⁸ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, UN Doc A/36/684 (1981) article 4. At <http://www.un.org/documents/ga/res/36/a36r055.htm> (viewed 8 February 2017).
- ¹⁹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
- ²⁰ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) article 14(2).
- ²¹ See United Nations Treaty Collection, *Depositary: Status of Treaties – International Covenant on Civil and Political Rights*, ch IV(4). At https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&clang=en (viewed 8 February 2017).
- ²² Human Rights Committee, *General Comment 11: Prohibition of propaganda for war and inciting national, racial or religious hatred* (Art. 20), 19th sess (29 July 1983). At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f4720&Lang=en (viewed 8 February 2017).
- ²³ Human Rights Committee, *General Comment No. 34: Article 19*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [48]. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en (viewed 8 February 2017).
- ²⁴ Human Rights Committee, *Love et al. v Australia*, Communication No. 983/2001 (2003) [8.2]. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f77%2fD%2f983%2f2001&Lang=en (viewed 8 February 2017).
- ²⁵ See, for example, Committee on Economic, Social and Cultural Rights, *General Comment 5: Persons with Disabilities*, UN Doc E/1995/22, 110 (1994) [5]. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4760&Lang=en (viewed 8 February 2017).
- ²⁶ Human Rights Committee, *Toonen v Australia*, Communication No. 488/1992 (1992); Human Rights Committee, *Young v Australia*, Communication No. 941/2000 (2003) [10.4]. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f78%2fD%2f941%2f2000&Lang=en (8 February 2017).
- ²⁷ States parties must 'ensure' the rights: article 2 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). At <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (viewed 6 September 2017).
- ²⁸ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993).
- ²⁹ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [1].
- ³⁰ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [2].
- ³¹ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [5]. Manfred Nowak, *UN Convention on Civil and Political Rights: CCPR Commentary*, (2nd ed, 2005), 414.
- ³² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) article 18(3). Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [4]. In the European context, see *SAS v France* at 124-131 for an overview of the equivalent principles.
- ³³ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [4].
- ³⁴ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27

- September 1993) [2], [5]. Manfred Nowak, *UN Convention on Civil and Political Rights: CCPR Commentary*, (2nd ed, 2005), 414.
- ³⁵ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [5].
- ³⁶ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [5].
- ³⁷ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [6].
- ³⁸ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [1].
- ³⁹ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [8].
- ⁴⁰ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) article 18(1). Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [3].
- ⁴¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) article 18(3). Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [4].
- ⁴² Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [8].
- ⁴³ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [8]. At http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.4&Lang=en (viewed 6 September 2017).
- ⁴⁴ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [8].
- ⁴⁵ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [8].
- ⁴⁶ *Cha'are Shalom Ve Tsedek v. France* (European Court of Human Rights, Application No. 27417/95, 27 June 2000) [80]–[82]. At [https://hudoc.echr.coe.int/eng#{"appno":\["27417/95"\],"itemid":\["001-58738"\]}](https://hudoc.echr.coe.int/eng#{) (viewed 15 January 2018).
- ⁴⁷ *Cha'are Shalom Ve Tsedek v. France* (European Court of Human Rights, Application No. 27417/95, 27 June 2000) [80]–[82]. At [https://hudoc.echr.coe.int/eng#{"appno":\["27417/95"\],"itemid":\["001-58738"\]}](https://hudoc.echr.coe.int/eng#{) (viewed 15 January 2018).
- ⁴⁸ See, for example, *Konttinen v. Finland* (European Commission of Human Rights, Application No. 24949/94, 3 December 1996). At [https://hudoc.echr.coe.int/eng#{"appno":\["24949/94"\],"itemid":\["001-3379"\]}](https://hudoc.echr.coe.int/eng#{) (viewed 15 January 2017).
- ⁴⁹ *Eweida and Others v The United Kingdom* (European Court of Human Rights, Fourth Section, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 27 May 2013) [83]. At [https://hudoc.echr.coe.int/eng#{"appno":\["48420/10"\],"itemid":\["001-115881"\]}](https://hudoc.echr.coe.int/eng#{) (viewed 15 January 2017).
- ⁵⁰ Manfred Nowak, *UN Convention on Civil and Political Rights: CCPR Commentary*, (2nd ed, 2005), 425.
- ⁵¹ *Hasan and Chaush v Bulgaria* [GC], no. 30985/9, ECHR 2005-XI at 84; *Maestri v Italy* [GC], no 39748/98, ECHR 2004-I at 30.
- ⁵² *Güler and Uğur v Turkey* (European Court of Human Rights, Second Section, Application Nos 31706/10 33088/10, 2 March 2015) [45]–[57]. At [https://hudoc.echr.coe.int/eng#{"appno":\["31706/10"\],"itemid":\["001-148610"\]}](https://hudoc.echr.coe.int/eng#{) (viewed 15 January 2018).

⁵³ United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984), [35].

⁵⁴ Manfred Nowak, *UN Convention on Civil and Political Rights: CCPR Commentary*, (2nd ed, 2005), 430

⁵⁵ Manfred Nowak, *UN Convention on Civil and Political Rights: CCPR Commentary*, (2nd ed, 2005), 430-1.

⁵⁶ See Human Rights Committee, *General Comment No 28: Article 3 (The Equality of Rights Between Men and Women)*, 68th sess, UN Doc CCPR/C/21/Rev.1/Add.10, [11]; Human Rights Committee, *Communication No. 1465/2006*, 98th Sess, UN Doc CCPR/C/98/D/1465/2006 (2010) (*'Kaba v Canada'*), [10.1].

⁵⁷ *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). See Committee Against Torture, *General Comment 2: Implementation of article 2 by States Parties*, UN Doc CAT/C/GC/2 (24 January 2008), [18].

⁵⁸ *Convention of the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981). See Committee on the Elimination of Discrimination against Women, *General recommendation No. 14: Female circumcision*, 9th Sess., UN Doc A/45/38 (1990).

⁵⁹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). See Committee on the Rights of the Child, *General Comment No 4: Adolescent health and development in the context of the Convention on the Rights of the Child*, 33rd Sess, UN Doc CRC/GC/2003/4 (1 July 2003), [10].

⁶⁰ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [7].

⁶¹ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [9].

⁶² *Hamidovic v Bosnia and Herzegovina* (App No 57792/15) at [35]. See *Leyla Şahin v. Turkey* [GC], no. [44774/98](#), § 99, ECHR 2005-XI, and *Ahmet Arslan and Others v. Turkey*, no. [41135/98](#), § 43, 23 February 2010.

⁶³ *S.A.S. v. France* (European Court of Human Rights, Grand Chamber, Application No 43835/11, 1 July 2014) [128]. At [https://hudoc.echr.coe.int/eng#{"tabview":"document"},"itemid":\["001-145466"\]](https://hudoc.echr.coe.int/eng#{) (viewed 15 January 2018).

⁶⁴ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993) [8]; United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984), [Principle 10].

⁶⁵ William Schabas, *The European Convention on Human Rights: A Commentary* (online) (Oxford Public International Law, Oxford University Press, 2015).

⁶⁶ Julie Nathan, Research Officer, Executive Council of Australian Jewry, *Report on Antisemitism in Australia 2017*, 26 November 2017

⁶⁷ *Report on Antisemitism*, 30

⁶⁸ *Report on Antisemitism*, 36

⁶⁹ Derya Iner (ed.), *Islamophobia in Australia 2014-2016*, July 2017

⁷⁰ *Islamophobia in Australia*, 42

⁷¹ *Islamophobia in Australia*, 53

⁷² *Islamophobia in Australia*, 73

⁷³ *Islamophobia in Australia*, 77

⁷⁴ Andrew Markus, *Mapping Social Cohesion: the Scanlon Foundation surveys 2017*, 2017, 69

⁷⁵ *Mapping Social Cohesion*, 3

⁷⁶ Australian Human Rights Commission, *Rights and Responsibilities Consultation Report* (2015), 21. At <https://www.humanrights.gov.au/sites/default/files/document/publication/rights-and-responsibilities-report-2015.pdf>

⁷⁷ The Australian Multicultural Council, whose most recent term concluded on 16 December 2017, had an interfaith component within its broader mandate. It is unclear whether this Council will continue for a new term, but in any event there would be value in a body that focuses on the practical enjoyment of the human right to freedom of religion and belief, and can advise the Government in respect of policy and law reform in this area..

⁷⁸ See *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116; *Krygger v Williams* (1915) 15 CLR 366.

⁷⁹ *Discrimination Act 1991* (ACT) s 7(1)(u); *Anti-Discrimination Act* (NT) s 19(1)(m); *Anti-Discrimination Act 1991* (Qld) s 7(i); *Anti-Discrimination Act 1998* (Tas) s 16(o) and (p); *Equal Opportunity Act 2010* (Vic) s 6(n); *Equal Opportunity Act 1984* (WA) s 53.

⁸⁰ *Anti-Discrimination Act 1977* (NSW) ss 4 (definition of 'race') and 7.

⁸¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14; *Human Rights Act 2004* (ACT) s 14.

⁸² *Charter of Human Rights and Responsibilities Act 2006* (Vic) pt 3, div 3; *Human Rights Act 2004* (ACT) pt 4.

⁸³ *Australian Human Rights Commission Act 1986* (Cth) ss 3 (definition is 'discrimination') and 31.

These functions are conferred on the Commission pursuant to Australia's international obligations under *International Labour Organization Convention (No 111) concerning Discrimination in respect of Employment and Occupation*, done at Geneva on 25 June 1958.

⁸⁴ *Australian Human Rights Commission Act 1986* (Cth), ss 3 (definition of 'human rights'), 11(1)(f) and 47; *Human Rights and Equal Opportunity Commission Act 1986 – Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief*, 8 February 1993. At <https://www.legislation.gov.au/Details/F2009B00174> (viewed 8 February 2017).

⁸⁵ *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(f)(ii), 35

⁸⁶ See <http://www.humanrights.gov.au/our-work/legal/projects/human-rights-reports>

⁸⁷ *Fair Work Act 2009* (Cth) s 351(1).

⁸⁸ *Fair Work Act 2009* (Cth) s 153(1).

⁸⁹ *Fair Work Act 2009* (Cth) s 772(1)(f).

⁹⁰ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 8-9.

⁹¹ See Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting statements of compatibility* (2014). At

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources (viewed 8 February 2017).

⁹² Since the beginning of 2016, the Parliamentary Joint Committee on Human Rights has reviewed over 74 other legislative instruments. Parliamentary Joint Committee on Human Rights, *Index of Bills and Legislative Instruments*. At

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments (viewed 8 February 2018).

⁹³ This figure is revealed by searching the indices of bills considered by the Parliamentary Joint Committee on Human Rights on its website. See Parliamentary Joint Committee on Human Rights, *Index of Bills and Legislative Instruments*. At

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Index_of_bills_and_instruments (viewed 8 February 2018).

⁹⁴ See Marriage Amendment (Definition and Religious Freedoms) Bill 2017, Marriage Legislation Amendment Bill 2016, Marriage Legislation Amendment Bill 2016 [No. 2] and Marriage Legislation Amendment Bill 2015. Note that the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 passed both Houses of Parliament on 7 December 2017 and received Royal Assent on 8 December 2017, becoming the *Marriage Amendment (Definition and Religious Freedoms) Act 2017*.

⁹⁵ Criminal Code Amendment (Prohibition of Full Face Coverings in Public Places) Bill 2017. This bill was introduced into the Senate on 8 February 2017 and has not progressed beyond the second reading debate. The PJCHR has indicated that it may request further information to assess the compatibility of this bill with the right to freedom of religion if the bill proceeds to further stages of debate. See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human rights scrutiny report – Report 4 of 2017* (9 May 2017). At

http://www.aph.gov.au/~media/Committees/Senate/committee/humanrights_ctte/reports/2017/4_2017_report04pdf.pdf?la=en (viewed 8 February 2018).

⁹⁶ Social Services Legislation Amendment (No Jab, No Pay) Bill 2015. The PJCHR considered the limitation on the right to freedom of religion to be justified in the circumstances. See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human rights scrutiny report – Thirty-seventh Report of the 44th Parliament* (2 May 2016).

At https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Scrutiny_reports/2016/Thirty-seventh_Report_of_the_44th_Parliament (viewed 8 February 2018). The bill passed both Houses of Parliament on 23 November 2015 and received Royal Assent on 26 November 2015, becoming the *Social Services Legislation Amendment (No Jab, No Pay) Act 2015*.

⁹⁷ Where the discrimination is unlawful under the RDA, the aggrieved person may make a complaint to the Commission. The Commission will inquire into and endeavour to conciliate it. It a complaint

cannot be resolved by conciliation, the aggrieved person may commence proceedings in the Federal Circuit Court or the Federal Court. If successful, the Court may order remedies including compensation.

⁹⁸ (1998) 90 FCR 202.

⁹⁹ *Macabenta v Minister for Immigration & Multicultural Affairs* (1998) 90 FCR 202, 209-210.

¹⁰⁰ Australian Human Rights Commission, *Federal Discrimination Law* (2016) 39-40. At <https://www.humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016> (viewed 8 February 2017). See also *King-Ansell v Police* [1979] 2 NZLR 531; *Mandla v Dowell Lee* [1983] 2 AC 548; *Macabenta v Minister for Immigration and Multicultural Affairs* [1983] 2 AC 548-562; *Miller v Wertheim* [2002] FCAFC 156.

¹⁰¹ For further information see Australian Human Rights Commission, *Freedom from Discrimination: Report on the 40th anniversary of the Racial Discrimination Act* (2015) 62. At

<https://www.humanrights.gov.au/our-work/race-discrimination/publications/freedom-discrimination-report-40th-anniversary-racial> (viewed 8 February 2017); Kate Eastman, 'Mere definition? Blurred lines? The intersection of race, religion and the Racial Discrimination Act (Cth),' *Perspectives on the Racial Discrimination Act: Papers from the 40 years of the Racial Discrimination Act 1975 (Cth) Conference*, Australian Human Rights Commission (2015) 125-147. At <https://www.humanrights.gov.au/our-work/race-discrimination/publications/perspectives-racial-discrimination-act-papers-40-years> (viewed 8 February 2017).

¹⁰² Carolyn Maree Evans, *Legal Protection of Religious Freedom in Australia*, Federation Press, 2012, 69

¹⁰³ Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998) recommendation 2.1. At

https://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/religion/article_18_religious_freedom.pdf (viewed 8 February 2017)

¹⁰⁴ Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998) recommendations 5.2 and 5.3. At

https://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/religion/article_18_religious_freedom.pdf (viewed 8 February 2017)

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¹¹⁰ *Sex Discrimination Act 1984* (Cth) ss 14-27.

¹¹¹ *Sex Discrimination Act 1984* (Cth) s 37(1)(a)-(c).

¹¹² *Sex Discrimination Act 1984* (Cth) ss 23(3)(b).

¹¹³ *Sex Discrimination Act 1984* (Cth) s 37(1)(d).

¹¹⁴ *Sex Discrimination Act 1984* (Cth) s 37(2).

¹¹⁵ *Sex Discrimination Act 1984* (Cth) s 23(3A).

¹¹⁶ *Sex Discrimination Act 1984* (Cth) s 38.

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