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FREEDOM FOR FAITH

Comments on the NT Discussion Paper 'Modernisation of the Anti-Discrimination Act'

Introduction

Freedom for Faith is a Christian legal think tank that exists to see religious freedom protected and promoted in Australia and beyond.

It is led by people drawn from a range of denominational churches including the Australian Christian Churches, Australian Baptist Church Ministries, the Presbyterian Church of Australia, the Seventh-Day Adventist Church in Australia, and the Anglican Church Diocese of Sydney. It has strong links with, and works co-operatively with, a range of other Churches and Christian organisations in Australia, including the Barnabas Fund which supports Christians that face discrimination or persecution as a consequence of their faith globally.

We have been contacted by numerous people of faith in the Territory who were concerned to see any changes to the Anti-Discrimination Act give appropriate consideration of religious freedom concerns.

Why protect religious freedom?

Religious faith is significant to many people in the Territory. The 2016 Census showed Christianity was the most commonly reported religion in the Northern Territory, accounting for almost half of the Territory's population – 109,000 people – while 29 per cent of people reported they had 'No religion'.

Faith based organisations provide remarkable social capital to the Northern Territory. The government should be very careful not to undermine the great good that is done by churches, charities, schools and individuals, motivated by Christian belief. We believe that some of the proposals in the Discussion Paper, if enacted, have the potential to interfere with the ability of faith-based schools and welfare organisations to carry out their mission, and even in some cases to continue to exist.

Religious freedom is a fundamental human right recognised by international human rights documents, and one which is integral to our human dignity. It enables people to live in accordance with deeply held views about what it means to be human. The right is safe-guarded by placing certain limits on government with regard to interference in the public and private exercise of religious freedom, and by ensuring that the government does not privilege one belief system over another.

The best articulation of religious freedom is, arguably, found in the International Covenant on Civil and Political Rights ("ICCPR"). Article 18 reads:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually

or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

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

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

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

Article 18 communicates the fact that freedom of religion is not just about respecting an individual's right to hold private beliefs behind closed doors, but also to live out those beliefs in the public square, including in the workplace. It also recognises that religious freedom is not merely an individual right, but also a group right which enables people to manifest their religion 'in community with others.'

This involves more than the freedom to gather for public worship but also includes 'observance, practice and teaching', including the running of schools, camps, hospitals, aged-care facilities and other religious organisations. In order to maintain their integrity and purpose, such groups ought to be able appoint people who will uphold the faith and ethos of the organisation, and also to teach and uphold moral standards within such communities.

The right to gather together with people who share in a common faith and creed is also protected by Article 22 of the ICCPR which states: 'Everyone shall have the right to freedom of association with others'. Special protection is also afforded to religious minority groups, enabling them to preserve their own cultures, beliefs and traditions. Article 27 of the ICCPR specifically addresses this where it states:

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

Like other human rights, religion freedom is not contingent on popular support. Thus a majority may not impose its religious values on others, nor limit minority religious rights.

Of course, the right to manifest one's religion or belief is not absolute. If it were, violent or other antisocial acts committed in the name of religion would be justifiable. Article 18(3) provides helpful guidance on what constitutes an appropriate limitation on freedom of religion. According to Article 18(3), freedom of religion can only be limited in very restricted circumstances, namely where its expression threatens public safety, order, health or morals or the fundamental rights and freedoms of others. Any limitation on religious freedom must be strictly necessary, and therefore justified only in very serious cases[1]. General Comment 22, which interprets Article 18, states:

[1] The United Nations' Siracusa Principles, which provide further guidance as to what might constitute a lawful restriction on such rights, also support a strict interpretation of this limitation clause. See United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

> 'In interpreting the scope of permissible limitation clauses, State parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2,3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18.'

In other words, while at times it is necessary to balance rights in the case of a conflict, the application of the limitation cannot be such to destroy or impair the legal validity of Article 18. General Comment 22 also recognises the importance of respect for different moral codes where it states:

> 'The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.'

A limitation to freedom of religion thus must not be enlivened to impose a particular worldview, but instead respect alternative moral perspectives that differ from the moral majority. Of course there are many legitimate examples of where freedom to manifest a belief must be limited, but to do so must go no further than 'necessary' to achieve the protective purpose, and should adopt the least restrictive means for achieving that purpose.

Religious freedom consists, at a minimum, of the following five basic freedoms:

1. Freedom to manifest a religion through religious observance and practice;
2. Freedom to appoint people of faith to organisations run by faith communities;
3. Freedom to teach and uphold moral standards within faith communities;
4. Freedom of conscience to discriminate between right and wrong;
5. Freedom to teach and propagate religion.

The affirmation of these basic liberties, which are protected in international law and have long been recognised by the common law, is necessary in order to recognise and respect the importance of religion in the lives of so many Territorians. It is also critical to having a successful and harmonious multicultural society. Multiculturalism, requires both majority and minority groups to adapt to one another. It requires a tolerance for different viewpoints and values on moral and social questions.

Religious Freedom and the Alternative approaches contemplated by the Report

a. Removing religious exemptions

The Report contemplates the possible removal of automatic exemptions for religious and cultural bodies (p21ff) and instead suggests "religious or cultural bodies would instead be required to apply for an exemption with the ADC and justify why their service requires a particular exemption." The heading of the section here is telling - 'Removing content that enshrines discrimination'. The report frames the actions of religious bodies as conduct that would otherwise be discriminatory and the exemptions functioning as a 'licence for prejudice.'

The effect of the removal of exemptions would be the removal of the protections in the law that those exemptions currently provide. This would represent a severe restriction upon religious freedom. We note as a threshold matter that this will raise constitutional questions about the potential application of s116 of the Constitution on laws made by the Territory.

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The removal of the present exemptions would itself be an act of discrimination against religious schools, hospitals, charities and so forth and against those who attend or seek those services from those institutions. It is an elemental aspect of religious freedom that religious bodies have the right to assemble which like-minded people to pursue objectives inspired by their faith. To deprive religious organisations of this right is to discriminate against them.

If religious organisations cannot hire and act in accordance with their mission, rather than conform to such a new regime, they may instead cease their operations. There are many examples of this occurring overseas and when it does occur it is to the detriment of society and of all those who previously had and into the future would otherwise benefit from the continuation of their services.[2]

Proposing to remove exemptions reflects a very much more expansive view of the State's role in regulating community organisations than has ever been known in the past. Michael McConnell, a former academic lawyer and US federal judge, explains that whereas in a previous era, state neutrality, tolerance and the guarantee of equality before the law meant, fundamentally, that the government would not take sides in religious and philosophical differences among the people, now "there is a widespread sense not only that the government should be neutral, tolerant and egalitarian, but so should all of us, and so should our private associations."[3]

Imposing a licensing system with the ADC deciding which services require exemption would require state officials to make theological assessments about what are the genuine beliefs of an organisation and how they should be achieved. The ADC is not qualified to make such assessments nor is such interference warranted. It would lead to considerable uncertainty for the organisation if employment may come under such an uncertain state permission process. For the Territory government and the churches there would be considerable costs for monitoring and compliance. Many practical problems arise. For charities and schools, it will create uncertainty for strategic planning and employment and see greater costs being directed away from delivery of front line services and instead be allocated to regulatory compliance.

Some may assert a belief that all limitations on who is eligible to apply for particular jobs should be abolished or severely restricted in the name of one conceptualisation of 'equality', even if 99.9% of all the other jobs in the community are open to that person. This position involves taking a very restrictive approach to 'genuine occupational requirements' as a ground for exceptions to general anti-discrimination provisions.[4] Removing exemptions wrongly prioritizes individual human rights over group human rights. This can make advocates disregard the competing claims of groups which would justify a right of positive selection of staff in order to enhance the cohesion and identity of a religious or cultural organisation.[5]

Freedom of religion should not be respected only grudgingly and at the margins of anti-discrimination law as a concessionary 'exception' to general prohibitions on discrimination. More attention should be paid to freedom of association and the rights of groups to celebrate and practice their faith and culture together.

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[2] See e.g. http://www.usccb.org/issues-and-action/religious-liberty/discrimination-against-catholic-adoption-services.cfm and http://www.catholic.org/news/national/story.php?id=41680

[3] Michael McConnell, 'Why is Religious Freedom the First Freedom?' (2000) 21 *Cardozo Law Review* 1243 at 1259.

[4] For a discussion see Rex Ahdar & Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013), chapter 10.

[5] This is discussed in Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights' (2010) 15 *Australian Journal of Human Rights* 83.

If the Territory were committed to reform of the framework of concessionary exemptions it would be better to consider replacing them with a positive legal recognition of religious freedom. If sufficiently robust this may be welcomed by the churches as an alternate to the exemptions regime. We have the human right to be free from discrimination; we have the human right of religious freedom and there is a need to account for both. This is not just a matter of terminology. Once you adopt the framework of exemptions, there's always a tendency to remove religious freedom because it is seen to undercut what is then framed as the more important principle of non-discrimination. A better approach would be to acknowledge the weight of two equally significant rights and carefully define how they are to be related.

If freedom for religious organisations and schools to have staffing policies consistent with the organisation's mission, beliefs and values is both accepted and guaranteed, then the need for exemptions which permit discrimination *against* a person because he or she has a certain characteristic is very greatly diminished. There is very widespread support within the Australian Christian community to move away from exceptions and exemptions. The preference is to clearly establish freedom of religion as a right, rather than as a grudging concession. The case against dealing with religious freedom issues only through exemptions was put well by the Australian Christian Lobby in a submission to the Australian Law Reform Commission's Freedoms Inquiry:[6]

> The language of exemptions sends a message of 'special pleading' or preferential treatment towards religious bodies. Rather than being the rule, or the assumption, freedom of religion is relegated to being the exception, or the special accommodation. This is a reversal of the place of fundamental freedoms in a free society such as Australia. If the narrative promoted by the relevant legislation clearly articulated the limits of discrimination law and the assumption of freedom, such resentment or confusion could be ameliorated.

Our consultations over some years with church leaders from a range of denominations would seem to indicate strong support for such an approach. This offers a way forward, both to modernise the law and to find an acceptable compromise between competing religious and secular values. The Commission, in its report, suggested that "further consideration should be given to whether freedom of religion should be protected through a general limitations clause rather than exemptions".[7] Whether this would represent a suitable approach depends to a great extent on how such a limitations clause were to be drafted.

In a submission responding to a Discussion Paper about the consolidation of federal anti-discrimination laws in 2012, Professors Parkinson and Aroney recommended that there be a new definition of discrimination which helps to define what discrimination is and is not.[8] Since then, their definition seems to have attracted a lot of support within churches and other faith organisations.[9] It was quoted in part by the Australian Law Reform

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[6] Cited in the ALRC report, ibid, at [5.110].

[7] Australian Law Reform Commission, Report no 129, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (2016) at [5.154].

[8] Patrick Parkinson and Nicholas Aroney, Submission to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws,* January 2012.

[9] See for example, Christian Schools Australia, 'ALRC provides further support for CSA approach to discrimination law' (2016) at https://csa.edu.au; George Pell, 'Religious Freedom in an Age of Militant Secularism' (2013) 57 *Quadrant* 28 (October 2013).

Commission in its Freedoms Inquiry report (although the impression may have been given inadvertently that the Commission was quoting it in full).[10] The complete definition is as follows:

> (1) Discrimination means any distinction, exclusion, preference, restriction or condition made or proposed to be made which has the purpose of disadvantaging a person with a protected attribute or which has, or is likely to have, the effect of disadvantaging a person with a protected attribute by comparison with a person who does not have the protected attribute, subject to the following subsections.
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> (2) A distinction, exclusion, preference, restriction or condition does not constitute discrimination if:
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> (a) it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or
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> (b) it is made because of the inherent requirements of the particular position concerned; or
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> (c) it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or
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> (d) it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.
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> (3) The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate objective within the meaning of subsection (2)(a).
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> (4) Without limiting the generality of subsection (2), a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of freedom of religion if it is made by a religious body, or by an organisation that either provides, or controls or administers an entity that provides, educational, health, counselling, aged care or other such services, and either:
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> (a) it is reasonably necessary in order to comply with religious doctrines, tenets, beliefs or teachings adhered to by the religious body or organisation; or
>
> (b) it is reasonably necessary to avoid injury to the religious sensitivities of adherents of that religion or creed; or
>
> (c) in the case of decisions concerning employment, it is reasonable in order to maintain the religious character of the body or organisation, or to fulfil its religious purpose.
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> (5) Without limiting the generality of subsection (2), a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of ethnic minorities to enjoy their own culture, or to use their own language in community with the other members of their group, if it is made by an ethnic minority organisation or association intended to fulfil that purpose and has the effect of preferring a person who belongs to that ethnic minority over a person who does not belong to that ethnic minority.

The importance of this approach is that it provides a balancing of different human rights, including rights under Articles 18 and 27 of the ICCPR, within a comprehensive definition. The language used deliberately reflects that of the UN Human Rights Committee in paragraph 13 of the Human Rights Committee's General Comment 18 (Non-Discrimination), which states that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'. The way in which differentiation of treatment is legitimate is spelled out. The approach taken is in some respects similar to s.153 of the *Fair Work Act 2009 (Cth)*.

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[10] Australian Law Reform Commission, Report no 129, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (2016) at [5.111].

If a new definition of discrimination along the lines of the Parkinson/Aroney definition were adopted in the Territory, it would be possible to remove the religious exemptions from that Anti-Discrimination Act. The removal of exemptions would need to be subject to consultation with stakeholders on any unintended consequences that might result therefrom.

b. Religious educational institutions, accommodation and schools

One of the ways that the right to religious freedom and associated rights finds expression is in the formation and running of religious organisations such as schools, camps, hospitals and aged-care facilities. Many such organisations are established with specific religious objects that may include professing, practicing and teaching a particular religious faith.

If the proposals to remove section 37A in the Paper were implemented, religious groups would lose their right to appoint people who they believe will teach and uphold moral standards of the faith, and thereby maintain the religious integrity of the organisation in question. This elevation of the right to equality over and above the right to religious freedom is unjustified.

The threat to freedom to select on the basis of religious belief and practice comes from a view that 'discrimination' should never be lawful unless a particular attribute is an inherent occupational requirement for the job. In other jurisdictions there have been various attempts over the years to limit the scope for religious organisations to select staff on the basis of their religious faith to jobs for which that faith is clearly necessary to perform that work. For example, as long ago as 1999, the New South Wales Law Reform Commission recommended that exceptions in employment under the *Anti-Discrimination Act 1977 (NSW)* be narrowed so that discrimination on the grounds of religion, inter alia, would only be permitted if this was a genuine occupational requirement.[11] The government of the day did not accept this recommendation.

The problems with an inherent requirements test

There are three particular problems with the inherent requirements test. The first is that it allows for freedom to select based upon religious belief as an essential characteristic of the position, but not simply to prefer someone who holds to a religious belief. Christian schools and other organisations vary a great deal in their staffing policies in this respect. There are many Christian schools in which it is an essential requirement that all members of staff adhere to the faith. Part of the ethos in many such schools is that they are Christian communities. It may be as important that the school secretary or nurse is a Christian as that the teachers are. Even gardeners and other such staff who interact with students and parents may be seen as part of a Christian community. All staff are regarded as having a part to play in the mission of the school, with no distinction being drawn between 'professional' and 'administrative' staff.

Schools with this staffing policy probably would satisfy an inherent requirements test if that test were sympathetically construed by an anti-discrimination commission or a court. However, such schools are in the minority among independent schools. The majority of faith-based schools simply *prefer* to employ teachers who practice the relevant faith, and require others to uphold the school's values. This is typically because they cannot always find suitably qualified staff in each subject area who practise the relevant faith. These schools could not defend their employment policies based upon an 'inherent requirements test' if faced with an anti-discrimination suit from a disappointed applicant whose lack of the relevant religious belief was material to the employment decision.

[11] NSW Law Reform Commission Report 92, *Review of the Anti-Discrimination Act 1977 (NSW)* (1999) at [4.128] and [6.433].

Like faith-based schools, Christian welfare and aged care organisations also have a preference for employing staff who adhere to the faith and values with which the organisation is associated, but without making it a requirement except at senior levels. Most Christian organisations operating these services are clearly motivated by their understanding of the inherent, dignity and worth of all people as being made in God's image.

A Christian organisation which is given appropriate autonomy to manage its affairs should not have to justify why, for example, levels 1 to 8 in the employment hierarchy of an organisation do not require a person to be a committed believer, while levels 9 and 10, the most senior management positions, do. For if levels 9 and 10 are equally open to people who have no religious faith, then there may be little or nothing which characterises the organisation as having a faith-inspired leadership or a faith-informed ethos.

A second difficulty with the 'inherent requirements' test concerns sudden vacancies. Consider, for example, the situation where a school that has been established to be a faith community in which all members of staff, both teaching and administrative, are meant to share the beliefs and values of the school. What if it has a sudden vacancy in the middle of the school year because the Geography teacher takes ill, and the school cannot find a replacement teacher at short notice who adheres to the beliefs and values of the school? The concern is that if the school employs a teacher, as a temporary measure, who does not adhere to the beliefs of the school then this demonstrates that faith cannot be an inherent requirement.

A third difficulty with the 'inherent requirements' test is that its application is to some extent dependent upon the values of the decision-maker. In reviewing submissions from organisations on this subject, there seems to be ready acceptance that a Christian school should be allowed to insist upon having a Principal who is a committed Christian, and if the school has a particular denominational affiliation, there seems no objection to insistence that the person be a practising member of that denomination if that policy has been consistently applied in the past.[12] No one seems seriously to argue with the proposition that religious criteria should be included in decisions about employment of a religious studies teacher. However, there is, it appears, a widely held view that there is no need for a Maths or English teacher to have a religious commitment in order to teach his or her subject. For example, in evidence before a Victorian Parliamentary Committee in 2009, the Chair of Victoria's Equal Opportunity and Human Rights Commission argued in relation to faith-based schools:[13]

"We do not see a need for a religious school to be able to discriminate in relation to the choice of a cleaner or for a religious school to discriminate in relation to the choice of a mathematics teacher who has no contact with the practice of the religion or the profession of faith in that school."

That reflects a very narrow understanding of how faith relates to teaching. It follows that if a school needs permission from an anti-discrimination Commissioner to include religious criteria in an advertisement for employment, it might find that the organisation interprets the exemption very narrowly, and through an irreligious lens.

Constraints upon freedom to select do not only impact upon religious schools and welfare organisations. Unless the position of faith-based communities is properly protected in legislation, it may be unlawful for the pastor of a church to advertise for a Christian executive assistant, or for the church to insist that its administrator be a person of faith. Yet church pastoral and administrative teams work very closely together. There seems no reason why a voluntary organisation such as a church should not rely upon selection criteria which are relevant to its mission, purpose and identity. Surely this is what freedom of association means. Most people would think

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[12] The case of *Walsh v St Vincent de Paul Society Queensland (No 2)* [2008] QADT 32 demonstrates the difficulties if an organisation does not apply its criteria consistently.

[13] Scrutiny of Acts and Regulations Committee, Victorian Parliament, *Inquiry into exceptions and exemptions in the Equal Opportunity Act*, 4 August 2009, transcript p. 5 available at: http://www.parliament.vic.gov.au.

it quite absurd that a local Church is prohibited by law from advertising for a Christian staff member, just as it would be quite absurd for an environmental organisation not be able to insist that prospective staff believe in climate change, and are committed to the protection of the environment.

An existential issue

The freedom to select is an existential issue for faith communities of all kinds. If a Christian school cannot advertise for staff with one criterion being their adherence to Christian beliefs, or even to give preference to staff who hold Christian beliefs, then within a fairly short period of time, the staff profile of the school will be indistinguishable from the state school next door. There really is no point in having a Christian school if the only staff who need to be Christians are the School Principal, the Chaplain and the religious studies teacher. There might be a more clearly defined Christian element to the curriculum in such a Christian school, for example by the inclusion of a compulsory Christian studies class and chapel services from time to time, but these are relatively peripheral nods to the importance of faith. Many parents and teachers would say that a school is a Christian school because it has a Christian ethos and believing staff, not merely because its constitution contains provisions that reflect its Christian heritage, or because elements of Christianity are included in its syllabus and school life.

If Christian welfare organisations and health and aged care providers are not permitted to make adherence to the faith a selection requirement at any level of the organisation, they will quickly lose their character as faith-based organisations. If pastors of churches cannot insist upon their personal assistants or administrative staff being adherents to the faith that could compromise the work of the Church. It is also a huge incursion into freedoms which have long been taken for granted.

Because Freedom for Faith is an explicitly Christian organisation, we do not purport to speak for other faiths, but we would imagine that organisations associated with other faiths would hold the same view concerning the importance of having a legal right to select staff on the basis of their adherence to the faith.

Further difficulties arise if exemptions are removed and anti-discrimination laws apply to voluntary organisations. Consider a volunteer organisation which seeks to promote the improvement of people's lives and in which the members are brought together by a shared commitment to the Christian faith. Shared religious belief might not be necessary to help clean the gutters of elderly people or to provide support to needy families; but the shared belief may be what brings the people together and inspires their commitment to community service. Part of the life and work of the organisation might be Bible study and prayer. If such organisations would be breaching the law to insist on a shared religious belief as the basis for membership, then this could only operate to discourage such organisations, with no positive benefit resulting to the community.

A simple reform

The argument about anti-discrimination exemptions is intense and fraught, mainly because there are many in our community, understandably, who want to limit to the greatest extent possible any exemptions from the operation of laws that prohibit discrimination on the grounds of sexual orientation or gender, these being the two major issues. While there are certainly those who would like to deprive all public funding from faith-based schools, and turn faith-based welfare and aged care organisations into entirely secular bodies, these are not views voiced by politicians in the mainstream. Few are seriously opposed to the idea that faith-based schools should be entitled to retain their identity and ethos through their staffing policies, or that Christian welfare and aged care organisations should have a right to maintain their ethos by insisting that the most senior leadership positions in the organisation be held by those who share the same faith inspiration as its founders. This is so whether or not such organisations are in receipt of public funding. Typically governments fund a range of schools, welfare organisations and aged care services, for which people of faith, as taxpayers, contribute as much as non-religious taxpayers.

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Much heat could be taken out of the debate on anti-discrimination law if there was reform to protect the right of faith-based organisations to maintain their identity and ethos through the freedom to select staff appropriate to the mission of the organisation, or to give preference to the employment of such staff. We make this argument at a Commonwealth level in our submission to the Philip Ruddock led inquiry into religious freedom. This approach gains support from the Human Rights and Equal Opportunity Commission report on religion and belief which commented in 1999 that "special provision for religious institutions is appropriate. It is reasonable for employees of these institutions to be expected to have a degree of commitment to and identification with the beliefs, values and teachings of the particular religion...Accommodating the distinct identity of religious organisations is an important element in any society which respects and values diversity in all its forms."[14]

Similarly, it is supported by the UN's Special Rapporteur on freedom of religion and belief. In 2014, Heiner Bielefeldt, the Special Rapporteur at that time, wrote an important report on religious freedom in the workplace. He argued that discrimination on the basis of religious belief in the workplace should be unlawful, but "religious institutions constitute a special case. As their raison d'être and corporate identity are religiously defined, employment policies of religious institutions may fall within the scope of freedom of religion or belief, which also includes a corporate dimension." [15]

Such a law would confer what Hohfeld called a liberty right[16] for a faith-based organisation to select staff on the basis of religious belief should it choose to do so. This is an appropriate application of the rights of freedom of religion and association. As noted in chapter III, Article 6 of the UN Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion (1981) specifically provides for the right to "establish and maintain appropriate charitable or humanitarian institutions" and Article 18.4 of the ICCPR supports the right of parents to educate their children in faith-based schools.

(c) Ordination of priests and ministers of religion

The proposed restrictions of exemptions to religious professionals undertaking religious observances is far too narrow and betrays a failure to recognise the religious freedom of all Australians. Freedom of religion and belief is broader than a freedom to worship. Religious freedom does not stop at the door of the mosque or the church. It should not be limited to religious professionals.

What difference should it make?

The Report claims removing these exemptions would 'make the system fairer by ensuring people of certain attributes have the same opportunities under the Act. It would also ensure that cultural and religious bodies are more accountable for their actions and more inclusive'.

Again, these stated objectives of equity and inclusivity are presented as a trump to religious freedom. The removal of exemptions for religious groups is contrary to these stated purposes. Greater care needs to be taken to ensure that a focus on freedom from discrimination does not diminish the other rights guaranteed by the ICCPR (e.g. freedom of religion, association and cultural expression and practice). We believe that the protection and promotion of freedom of religion is essential to Australia's multicultural society and that protecting freedom of religion is an indivisible part of safeguarding other fundamental freedoms.

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[14] Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief*, (1999) p.109.

[15] Interim Report of the Special Rapporteur on Freedom of Religion or Belief, 5 August 2014 at [68].

[16] Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Essays* (WW Cook, ed, Yale UP, 1923).