



Law Council
OF AUSTRALIA

Religious Freedom Review

Expert Panel

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the Law Society of New South Wales, the Queensland Law Society, the Law Council's National Human Rights Committee and its Equal Opportunity Committee and the International Human Rights Committee of its International Law Section for their assistance with the preparation of this submission.

Executive Summary

1. The Law Council is grateful for the opportunity to provide a submission to the Expert Panel, appointed by the Prime Minister, the Hon Malcolm Turnbull MP, to examine whether Australian law adequately protects the human right to freedom of religion (**the Review**).
2. This submission is guided by the Law Council's existing position in relation to freedom of religion, and its current policies relating to rights and freedoms in domestic and international law. Further, having had the opportunity to meet with the Expert Panel in person, the Law Council has attempted to respond to matters raised at that consultation. While comprehensive responses have not been possible in the time available, it is hoped that the following submission provides a useful analysis of existing protections, and assists the Expert Panel in undertaking the Review.
3. In general, the Law Council is of the view that the existing protections arising from domestic and international law provide strong safeguards for religious freedom in Australia. However, there exist opportunities to consolidate and perhaps strengthen the protections against discrimination and vilification on the basis of religion at the federal level.
4. It is submitted that any option for reform identified by the Expert Panel should promote the understanding that human rights are 'universal, indivisible and interdependent and interrelated'.¹ If the protection of religious freedom is to be strengthened, it should be accompanied by an improved mechanism which provides for the balancing of competing rights through a consolidation of Australia's anti-discrimination legislation or a comprehensive legislative bill of rights that recognises and protects fundamental human rights, and strikes an appropriate balance where intersections arise. The Law Council submits that this a potentially achievable outcome. This could potentially be achieved.
5. The Law Council notes that while the freedom to have or adopt a religion or belief is absolute, the freedom to manifest one's religion may be subject to limits. The Law Council cautions against any recommendation arising from the Review that would allow for the manifestation of religious belief whilst permitting forms of discrimination that are currently unlawful under Australian anti-discrimination law. This is particularly the case in relation to the recent amendments to the *Marriage Act 1961* (Cth) (**Marriage Act**) made by the *Marriage Amendment (Definitions and Religious Freedoms) Act 2017* (**Marriage Amendment Act**) to amend the law relating to the definition of marriage and protect religious freedoms, which the Law Council believes strike an appropriate balance between competing rights and freedoms.
6. The Law Council makes the following key points in this submission:
 - (a) The Expert Panel should consider endorsing the recommendation of the United Nations Human Rights Committee² to consolidate existing federal anti-discrimination provisions into a single, comprehensive enactment, in order to ensure adequate and effective substantive and procedural protection against all forms of discrimination on all the prohibited grounds, including religion.

¹ Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights in Vienna on 25 June 1993, at [5].

² Human Rights Committee, Concluding observations on the sixth periodic report of Australia, 102nd session, UN Doc CCPR/C/AUS/CO/6 (9 November 2017).

- (b) While perhaps outside of the scope of the Review, the Law Council reiterates its support for a specific federal human rights instrument as an opportunity to incorporate Australia's human rights obligations.
- (c) The Law Council has not received input from any of its Constituent Bodies or expert committees identifying any area in which the human right to religious freedom is inadequately protected or disproportionately limited under Australian law (Commonwealth, State and Territory).
- (d) The Law Council is unlikely to support any recommendation arising from the Review that would allow for the manifestation of religious belief whilst permitting forms of discrimination that are currently unlawful under Australian anti-discrimination law. This includes in relation to same-sex marriage, noting that insufficient time has passed to permit any proper assessment of the operation of recent amendments to the Marriage Act.

The context of the Review

7. The announcement and establishment of the Expert Panel occurred in the context of Parliament considering modifications to the Marriage Act to recognise same-sex marriages in Australia. The debate leading up to and beyond the passing of the Marriage Amendment Act on 8 December 2017 reignited questions as to the place of religious freedom in Australia, raising broader questions over the appropriate balancing of fundamental rights.
8. Notwithstanding that immediate context, the Expert Panel's Terms of Reference require it to examine and report on matters beyond the balancing of religious freedom in the context of same-sex marriage. While marriage equality provides a compelling area for analysis, the Review raises for consideration religious freedom and its intersection with a wide range of aspects of public and private life and competing rights and responsibilities.
9. In recognition of this broader context, the Law Council makes the following submissions addressed to the Review's objective to 'examine and report on whether Australian law (Commonwealth, State and Territory) adequately protects the human right to freedom of religion'. However, where relevant, the Law Council draws on the recent amendments to the Marriage Act to highlight several aspects of the arguments for and against a strengthening of freedom of religion in Australia.

Existing protections

10. The High Court has described freedom of religion as the 'essence of a free society', and the concept of religion as being 'of fundamental importance to the law'.³ Freedom of religion has long been recognised as a fundamental human right, internationally and in national jurisdictions, and in Australia is subject to protection under a suite of legislative provisions and, to an extent, under section 116 of the Australian Constitution.
11. Article 18(1) of the *International Covenant on Civil and Political Rights (ICCPR)*⁴ recognises that the right to freedom of religion includes both freedom to have or to adopt a religion or belief, as well as freedom to manifest one's religion or belief in worship, observance, practice and teaching:

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.

12. The freedom to have or to adopt a religion or belief is not capable of being subject to limitation: article 18(2). Freedom to manifest one's religion or beliefs, on the other hand, may be subject to limitation. In this regard, article 18(3) of the ICCPR provides:

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

³ *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)* (1983), 154 CLR 120, at 130.

⁴ Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). Australia ratified on 17 December 1990.

13. In 2016, the Australian Law Reform Commission (**ALRC**) considered freedom of religion as part of its broader report titled 'Traditional Rights and Freedoms – Encroachments by Commonwealth Laws'.⁵ The ALRC concluded that:

*Australians enjoy the freedom to worship and observe religion, and the freedom not to be coerced into engaging in religious practices. There are very few, if any, provisions in Commonwealth laws that interfere with religious freedom in these ways. The main areas of tension arise where religious freedom intersects with anti-discrimination laws, which have the potential to limit the exercise of freedom of conscience outside liturgical and worship settings.*⁶

14. The above extract highlights the tensions which can arise where religious freedom intersects with anti-discrimination laws which have the potential to limit the manifestation of religious belief. As noted above, while the freedom to have or adopt a religion or belief is absolute, the freedom to manifest one's religion may be subject to limits.
15. Existing protections for religious freedom in Australia give effect to this distinction between freedom of religious belief and freedom to manifest religion. At the Commonwealth level, section 116 of the Constitution precludes the Commonwealth from making laws for establishing any religions or for imposing any religious observance, or for prohibiting the free exercise of any religion; and provides that no religious test shall be required as a qualification for any office of public trust under its Commonwealth. However, this section does not constitute a freestanding individual right to freedom of religion.⁷
16. Further Commonwealth protections can be found in various provisions of the *Fair Work Act 2009* (Cth) (**Fair Work Act**),⁸ *Migration Act 1958* (Cth),⁹ *Age Discrimination Act 2004* (Cth),¹⁰ *Sex Discrimination Act 1984* (Cth),¹¹ *Evidence Act 1995* (Cth)¹² and the *Marriage Act*.¹³
17. At the State and Territory level, there are equal opportunity and anti-discrimination laws which protect freedom of religion through various exemptions and protections. This is in addition to protections provided under section 14 of the *Human Rights Act 2004* (ACT) and section 14 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).
18. The case of *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 involved consideration of the interaction of the rights to freedom from discrimination on the basis of sexual orientation and freedom of religion, and in particular the operation of the exemption provisions in the *Equal Opportunity Act 1995* (Vic) (**EO Act**) concerning religious freedom. A majority of the Victorian Court of Appeal held that neither of the exemptions in section 75(2) or section 77 of the EO Act was available to render lawful the appellant's refusal to hire to the respondent a camp facility for the use of same sex attracted young people. The Law Council submits that

⁵ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws: Report 129* (2 March 2016).

⁶ *Ibid*, at 15.

⁷ *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 and *Krygger v Williams* (1915) 15 CLR 366.

⁸ Subsections 351(1), 351(2)(c), 772(1)(f) and 772(2)(b).

⁹ Subsection 36(2)(a).

¹⁰ Section 35.

¹¹ Sections 37 and 38.

¹² Section 127.

¹³ Subsection 36(2)(a).

this decision shows how an appropriate balance can be struck where there is an apparent conflict between the principle of non-discrimination and freedom of religion.

19. Australia is also a party to a number of international human rights instruments requiring State parties to take measures to protect religious freedom. These include the *Convention relating to the Status of Refugees 1951*,¹⁴ *International Labour Organization Convention 111: Discrimination (Employment and Occupation) Convention 1958*,¹⁵ the *International Covenant on Civil and Political Rights 1966*¹⁶ and the *International Labour Organization Convention 158: Termination of Employment Convention 1982*.¹⁷
20. Despite these safeguards under domestic and international law, the Law Council notes that religion is currently not an identifiable protected attribute at the federal level, with the exception of limited protections in relation to adverse action, enterprise agreements and modern awards under sections 153, 195, 351 of the Fair Work Act. The *Australian Human Rights Commission Act 1986* (Cth) confers functions on the Australian Human Rights Commission in relation to the investigation and, where appropriate, conciliation of complaints of discrimination in employment or occupation on a prescribed ground (including religion). However, there is no individual access to enforceable remedies pursuant to that Act.
21. Similarly, religious vilification is not specifically prohibited under anti-discrimination law at the federal level, with complainants who have experienced religious vilification only able to access protection under section 18C of the *Racial Discrimination Act 1975* (Cth) where they can establish they are of a recognised ethno-religious group.¹⁸
22. Further, not all Commonwealth anti-discrimination laws contain religious exemptions, yet those without exemptions may nonetheless intersect with freedom of religion. For example, the *Disability Discrimination Act 1992* (Cth) does not provide for religious exemptions. However, this legislation may intersect with freedom of religious belief in relation to persons who are transgender, intersex or have gender dysphoria, in particular regarding access to services, employment, accommodation and education. The absence of a consistent framework for religious exemptions across Commonwealth anti-discrimination law is in contrast to the approach at the State level, where exemptions for religious bodies are applied across all categories of discrimination.¹⁹ It is apparent that the intersection between religious freedom and other human rights extends well beyond Australian marriage law and other specific areas of anti-discrimination law, and consideration should be given to how, more broadly, religious freedom can coexist and interact with other fundamental rights.
23. When considering the existing protections for religious freedom in Australia, it is clear that – as in respect of protections from discrimination on all other recognised grounds – the regime is fragmented, and produces inconsistencies across the various jurisdictions. The current Review provides a further opportunity to explore options for reforming the

¹⁴ Article 1.

¹⁵ Article 1(a).

¹⁶ Articles 18, 26 and 27.

¹⁷ Article 5(d).

¹⁸ For a discussion on this, see 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), online at <www.humanrights.gov.au/our-work/race-discrimination/publications/perspectives-racialdiscrimination-act-papers-40-years>.

¹⁹ For example, section 56 of the Anti-Discrimination Act 1977 (NSW)

legislative framework for promoting equality in Australia through mechanisms that allow for an appropriate balancing of fundamental rights and consistency across jurisdictions.

24. In this regard, the Law Council notes recent concluding observations of the United Nations Human Rights Committee (**UNHRC**) in which it noted its concern regarding ‘the lack of direct protection against discrimination on the basis of religion at the federal level’.²⁰ The UNHRC recommended that consideration be given to ‘consolidating existing non-discrimination provisions in a comprehensive federal law’, and stated:

*The State party should take measures, including considering consolidating existing non-discrimination provisions in a comprehensive federal law, in order to ensure adequate and effective substantive and procedural protection against all forms of discrimination on all the prohibited grounds, including religion, and intersectional discrimination, as well as access to effective and appropriate remedies for all victims of discrimination.*²¹

25. The Law Council believes there are clear opportunities to consolidate and perhaps strengthen the protections against discrimination and vilification on the basis of religion at federal level.²² Such options are explored in the following section.

Options for protecting religious freedom

26. The Law Council acknowledges arguments in favour of strengthening protections of religious freedom in Australian legislation, either through amendments to existing legislation or through the introduction of free standing legislation. This latter option has previously been recommended by the Human Rights Commission in its 1998 report on freedom of religion and belief²³, however this was later deemed unnecessary by the Joint Standing Committee on Foreign Affairs, Defence and Trade and the then Australian Government.²⁴
27. Options for strengthening existing protections against discrimination and vilification on the basis of religion at the federal level might include protection against discrimination and vilification not only for having a religion or holding a belief, but also for not having a religion or holding a belief. However, any such amendments should not be cast so as to override protections against discrimination on other grounds, such as on the basis of sexual orientation, in the provision of goods and services, where there is a conflict of discrimination norms.
28. As was evident in the 2017 Interim Report of the Joint Standing Committee on Foreign Affairs, Defence and Trade on the ‘Legal Foundations of Religious Freedom in Australia’, the use of exemptions in Australian anti-discrimination legislation as a means of promoting religious freedom is subject to criticism from different sides of the debate.²⁵ While it can be argued that the current reliance on exemptions places religious freedom

²⁰ Human Rights Committee, Concluding observations on the sixth periodic report of Australia, 102nd session, UN Doc CCPR/C/AUS/CO/6 (9 November 2017), at [17].

²¹ *Ibid*, at [18].

²² See, Law Council of Australia Policy Statement: ‘Consolidation of Commonwealth Anti-Discrimination Laws’ (March 2011); Law Council of Australia’s submission to Attorney- General’s Department ‘Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper’ (February 2012).

²³ Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998) recommendation 2.1.

²⁴ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Conviction with Compassion: A Report on Freedom of Religion and Belief* (2000), at 150.

²⁵ Joint Standing Committee on Foreign Affairs, Defence and Trade, ‘Inquiry into the status of the human right to freedom of religion or belief’, Interim Report (November 2017), at [4.79].

in subordination to other prohibited grounds of discrimination, it can equally be asserted that exemptions have the effect of undermining the very purpose and intent of anti-discrimination legislation.

29. In relation to the use of exemptions under anti-discrimination law, the Law Council has received input from a number of constituent bodies and advisory groups that have raised concerns with the existing use of broad and permanent exemptions that permit religious organisations to discriminate against individuals where it is necessary to avoid injury to the sensitivities or susceptibilities of the adherents of a religion.²⁶ This is particularly relevant for religious organisations in receipt of public funding to conduct essential services in education, aged care, child welfare, adoption and employment services. While the law prohibits religious organisations in receipt of Commonwealth funding for aged care from discriminating against individuals²⁷, there is no such prohibition on discrimination for the other services listed above.
30. It is submitted that there is scope for the Expert Panel to consider whether the current use of blanket exemptions strikes the appropriate balance between the freedom to manifest one's religion, and protections for other rights. This is particularly relevant in relation to the treatment of lesbian, gay, bisexual, transgender and intersex (**LGBTI**) people, whose fundamental rights to be free from discrimination should not come at the expense of the manifestation of religious belief,
31. While there remains a diversity of views as to the appropriateness of broad religious exemptions, the Law Council notes that at the very least, existing exemptions under Federal anti-discrimination law remain ad hoc, limited and vulnerable to abrogation.
32. There are therefore opportunities to review the protection of religious freedom in the law, for example, by giving consideration to the addition of a ground of 'religious conviction' as a protected attribute in federal anti-discrimination law. More comprehensively, if freedom of religion is to be further protected under law, it may appropriately form part of a comprehensive legislative statement of rights that protects and balances all fundamental human rights, a policy measure that the Law Council continues to support.²⁸
33. The Law Council also notes that *The Charter of Human Rights and Responsibilities 2006* (Vic) and the *Human Rights Act 2004* (ACT) include protection for religious freedom.²⁹ In the context of the current Review, the Law Council reiterates its support for a specific federal human rights instrument as an opportunity to adopt a comprehensive incorporation of Australia's human rights obligations and provide for adequate remedies. In justifying the need for a charter or bill of rights at the federal level, the Law Council policy in this area states:

The existing legal framework at the federal level fails to guarantee adequate protection for fundamental human rights. Insufficient prominence is afforded to human rights within the existing framework, either as a set of principles to which the arms of government must have regard or as a set of principles by

²⁶ For example, section 35 of the *Age Discrimination Act 2004* (Cth) and sections 37 and 38 of the *Sex Discrimination Act 1984* (Cth).

²⁷ Section 37(2) of the *Sex Discrimination Act 1984* (Cth).

²⁸ See Law Council of Australia Policy Statements: 'A Charter: Protecting the Rights of All Australians' (November 2008) and 'Human Rights and the Legal Profession' (May 2017).

²⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 14; *Human Rights Act 2004* (ACT), section 14.

*which the arms of government are bound. Some further dedicated form of or vehicle for human rights protection is needed.*³⁰

34. In the absence of a Federal Human Rights Act, the symbolic and substantive importance of a consolidated Commonwealth anti-discrimination regime should not be underestimated. In this respect, the consolidation of anti-discrimination laws has been a key initiative within the 2010 Human Rights Framework,³¹ and a response to a recommendation made following the 2009 National Human Rights Consultation.
35. The Law Council continues to support reforms to the current Commonwealth anti-discrimination regime in order to improve the capacity to address all forms of discrimination and streamline exceptions.³² In its Policy Statement 'Consolidation of Commonwealth Anti-Discrimination Law', the Law Council indicated its support for additional grounds of protection, including specific grounds relating to religious conviction.³³
36. The Law Council therefore supports the consolidation of existing Commonwealth discrimination laws in to a single Act, provided that this process preserves or enhances existing protections against discrimination and improves the ability of the regime to promote substantive equality, as well as removing the regulatory burden on business. In the Law Council's view, the protection of religious freedom, as well as other individual rights, would be strengthened through the introduction of this legislation.

Addressing competing rights

37. Under international human rights law, certain human rights are absolute, and no limitation upon them is permissible.³⁴ For all other human rights, limitations may be imposed, provided certain standards are met. As noted above, the right 'to freedom of thought, conscience and religion' in article 18(1) of the ICCPR is absolute. On the other hand, the right 'either individually or in community with others and in public or private, to manifest [one's] religion or belief in worship, observance, practice and teaching' can be subject to limitations, as article 18(3) makes clear, 'as prescribed by law' and which 'are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.
38. Where limitations are permissible, as in the case of the manifestation of religious belief, fundamental rights and freedoms will frequently need to be balanced against each other. In the current context, the right of a person to exercise his or her freedom of religion must be balanced against the rights and freedoms of persons who will be impacted by that exercise. The Law Council notes that while freedom of religion is a fundamental human right and should be protected under law, the manifestation of religion should not be protected at the expense of other rights and freedoms. In this respect, rights and freedoms should be protected and balanced in a coherent legal framework.

³⁰ Law Council of Australia Policy Statements 'A Charter: Protecting the Rights of All Australians' (November 2008), at page 2.

³¹ 'Australia's Human Rights Framework' (April 2010), available at <www.ag.gov.au/Consultations/Documents/Publicsubmissionsonthedraftbaselinestudy/AustraliasHumanRightsFramework.pdf>, at page 9.

³² Law Council of Australia Policy Statement: 'Consolidation of Commonwealth Anti-Discrimination Laws' (March 2011).

³³ *Ibid*, at [8].

³⁴ See the Law Council's *Policy statement on Human Rights and the Legal Profession: Key Principles and Commitments*, May 2017, paragraph 19.

39. If there is a tension or conflict between religious freedom and other rights and freedoms, protecting religious freedom may involve recognising limits on other rights; for example, the right to freedom from discrimination on the ground of sexual orientation. In giving consideration to when limitations on human rights may be permissible, the Law Council endorses the analytical framework adopted by the Parliamentary Joint Committee on Human Rights (**PJCHR**). In general, where a provision appears to limit rights, the PJCHR considers three key questions: 1) whether and how the limitation is aimed at achieving a legitimate objective; 2) whether and how there is a rational connection between the limitation and the objective; and 3) whether and how the limitation is proportionate to that objective.³⁵
40. Consistent with this approach, proportionality plays an important role in human rights and anti-discrimination law. To be justified, a restriction or limitation must have a legitimate aim and the means used to achieve this aim must be necessary and proportionate.³⁶ In this regard, limitations must respond to a pressing public or social need, and be directly related, and proportionate, to the specific need on which they are based.³⁷
41. A demonstration of a balancing approach is provided by the decision of *Catholic Care v The Charity Commission for England and Wales*³⁸ which applied section 193 of the *Equality Act 2010* (UK), requiring any restriction of the provision of benefits by charities to be in pursuit of a charitable instrument and a proportionate means of achieving a legitimate aim.³⁹ In that case, while the objectives of the religious institution were considered legitimate, it was ultimately determined, on the weight of evidence, that 'religious conviction did not provide sufficient justification for the proposed discrimination in the context of a public activity such as adoption'.⁴⁰
42. In Australian equal opportunity and anti-discrimination laws, balancing is sought to be achieved largely through the use of exemptions. The Queensland Law Society has suggested consideration of an alternative approach which would involve replacing such statutory exemptions with a general limitations defence which outlines the necessity, reasonableness, proportionality and legitimacy of the exemptions. The Queensland Law Society suggests that a 'general limitations' defence may allow for a balancing of rights in cases where the individual's rights may be in conflict with the rights of another.
43. Whilst the Law Council is not opposed to consideration of alternative approaches to the current framework of exemptions in anti-discrimination laws, including the possibility of general limitations clauses along the lines suggested by the Queensland Law Society, it would be important to ensure in every case that any general limitations clause is consistent with the carefully calibrated approach of international human rights law to permissible limitations.

³⁵ Parliamentary Joint Committee on Human Rights, 'Annual Report 2015-16', at 6. See the Law Council's *Policy statement on Human Rights and the Legal Profession: Key Principles and Commitments*, May 2017, paragraph 19.

³⁶ Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion*, 48th session, UN Doc CCPR/C/21/Rev.1/Add.4 (27 September 1993), at [8].

³⁷ *Ibid.*

³⁸ *Catholic Care (Diocese of Leeds) v Charity Commission of England and Wales* [2012] UKUT 395 (Upper Tribunal (Tax and Chancery), Sales J, 2 November 2012). For a further example of a recent judicial approach to balancing competing rights (in this instance, freedom of religion and the right of patients to equal access to healthcare), see *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario* 2018 ONSC 579.

³⁹ This test reflects the jurisprudence of the European Court of Human Rights in determining whether differential treatment would be justified for the purposes of Article 14 (non-discrimination) of the European Charter of Human Rights (that is, in order to be justified, a differential treatment must have an objective and reasonable justification).

⁴⁰ [46] of the printed case.

Marriage equality

44. One area in which it has been suggested that religious freedom may be inadequately protected has been in the debate surrounding the passage of the Marriage Amendment Act, in particular in relation to the ability for individuals or businesses to decline services, including civil celebrant services, related to same-sex marriage on the basis of religious belief.
45. The promotion of equality and protection from discrimination on prescribed grounds have been key components of the Law Council's advocacy for many years, and are recognised in many of the Law Council's key policies. In the context of the Review, the Law Council submits that where there is a conflict, protection of freedom of religion must not override protections against discrimination on other grounds (such as on the basis of sexual orientation) in the provision of goods and services.
46. In its submission to the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, the Law Council supported the protection of religious freedom and considered it reasonable to allow ministers of religion to conduct religious marriage ceremonies in accordance with the tenets and doctrines of their religion. However, the Law Council did not consider that this exemption should be extended to civil celebrants on the basis that 'the marriage ceremonies civil celebrants perform are secular, not religious'⁴¹, and that 'extending this exemption to civil celebrants discriminates against same-sex, intersex and transgendered couples without any proper basis'.⁴²
47. The Law Council maintains this position. As noted above, the right to freedom of religion is the right to freedom from *interference* with the right to hold a religious belief and freedom from unreasonable interference with the ability to manifest that religious belief. The Law Council does not consider that requiring civil celebrants, specifically vested with the task of marrying all couples legally entitled to be married under Australian law, interferes with either the freedom to hold a religious belief or manifest it. The Marriage Act already protects the right to manifest religion through the performance of religious marriages. Civil marriages are not religious marriages, and no infringement on the right to freedom of religion occurs.
48. Even if it were assumed that the provision of public services could in some circumstances be restricted on the ground of freedom of religion, any such circumstance would still have to be weighed against the human rights of those seeking access to such services. In this respect, the Law Council considers that the discrimination that would result from denying same-sex couples equal access to civil celebrant services, a role specifically created for the purpose of carrying out all legal marriages in Australia, would outweigh any right of the civil celebrant to manifest their religious belief.
49. The Law Council is aware of a line of argument to the effect that any discrimination caused to same-sex couples through the denial of services by civil celebrants with religious objections would be minimal, and therefore presumably proportionate to the objective of preserving freedom of religion, because other civil celebrants would be able to provide services to the same-sex couples.
50. In the Law Council's view, this does not account for the detriment that may be caused to same-sex couples being confronted with potentially discriminatory advertising of civil celebrant services and their inability to take advantage of a particular celebrant's skills,

⁴¹ Law Council of Australia, submission to Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill (19 January 2017), at [25].

⁴² *Ibid.*, at [23].

experience and geographical location (especially outside metropolitan areas). Further, the Law Council considers that an assessment of whether or not a service provider is engaging in discrimination must be assessed in relation to that service provider, and it is not relevant to that determination that other service providers are not engaging in the discriminatory conduct.

51. In relation to the provision of goods and services, the Law Council continues to hold the view outlined in its submission to the Select Committee that current provisions of the *Sex Discrimination Act 1984* (Cth) are sufficient to protect religious freedoms in the provision of goods and services, and the making available of facilities. Internationally, the provision of commercial services has been held to be at the periphery of protected manifestations of religious belief.⁴³ The Supreme Court of Alaska in *Swanner v Anchorage Equal Rights Commission* held that '[v]oluntary commercial activity does not receive the same status accorded to directly religious activity.'⁴⁴
52. The Law Council considers that the reforms contained in the Marriage Amendment Act represent a reasonable compromise in the context of the marriage equality debate. This includes the approach adopted in relation to civil celebrants and in the provision of goods and services. The Law Council cautions against any attempt to expand the scope of existing religious exemptions, or to increase the ability to manifest one's religion beyond the existing terms of the enacted amendments.
53. Further, legislative amendments to the Marriage Act allowing for same-sex marriage are recent, and sufficient time should be allowed to elapse before consideration is given to further amendment. Any further amendment would need to be based on clear evidence of a disproportionate infringement on human rights, including freedom of religion, not hypothetical grievances. In any case, the Law Council submits that at this point in time, there is no data capable of justifying any such measures.

Conclusion

54. The Law Council is cognisant of the myriad of reviews and reports that have examined the issue of religious freedom in the past decade. While some reports have highlighted incidents that suggest a strengthening of religious freedom is required,⁴⁵ the Law Council has not identified any law which imposes an unreasonable or disproportionate restriction on the freedom of religion.
55. However, the Law Council is not opposed to strengthening the protection of religious freedom, by for example, adding 'religious and non-religious belief' as a protected attribute in federal anti-discrimination law. It is submitted that such a measure should be considered together with the implementation of the recommendation of the UNHRC to 'adopt comprehensive federal legislation giving full effect' to the International Covenant on Civil and Political Rights'.⁴⁶
56. Any reform options put forward by the Expert Panel to further protect religious freedom should be done in such a way as to promote the understanding that human rights are universal, indivisible and interdependent and interrelated. If religious freedom is to be

⁴³ See, e.g. *Ontario (Human Rights Commission) v Brockie* [2002] 22 DLR (4th) 174.

⁴⁴ *Swanner v Anchorage Equal Rights Commission* 874 P.2d 274, 283 (Alaska 1994) (relying on *United States v Lee* (1982), 455 US 252).

⁴⁵ See for example, Australian Human Rights Commission submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade's 'Inquiry into the status of the human right to freedom of religion or belief' (February 2017), 10-12.

⁴⁶ Human Rights Committee, Concluding observations on the sixth periodic report of Australia, 102nd session, UN Doc CCPR/C/AUS/CO/6 (9 November 2017), [17-18].

strengthened, it should be with the view to allowing for an improved mechanism with which to balance competing rights. This could include further recommendations for a consolidation of Australia's anti-discrimination legislation, and an additional push for a comprehensive legislative bill of rights that protects and balances all human rights and fundamental freedoms.

57. Finally, as stated throughout this submission, the freedom to have or adopt a religion or belief is absolute, the freedom to manifest religion or belief in worship, observance, practice or teaching may be subject to legitimate limitations. The Law Council cautions against any recommendation allowing for the manifestation of religious belief that would permit forms of discrimination that are currently unlawful under Australian anti-discrimination law. This is particularly the case in relation to recent amendments to the Marriage Act which the Law Council considers to be striking an appropriate balance between competing rights.