The Equality Campaign

(Australian Marriage Equality and Australians 4 Equality)

Submission to the Religious Freedom Review Panel

Submitted: 14th of February, 2018

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RELIGIOUS FREEDOM REVIEW

SUBMISSION

1. Executive Summary

Following the announcement of the results of the Australian Marriage Law Postal Survey on 15 November, the Parliament moved promptly to pass the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth). Much of the public and parliamentary debate surrounding this Act focused on whether it adequately protected religious freedom. Indeed it was in the context of this public debate that the Prime Minister announced on 22 November 2017 the appointment of this Expert Panel to examine whether Australian law adequately protects the human right to freedom of religion.[1] We welcome the opportunity to make this submission to the Expert Panel as part of the Religious Freedom Review.

This Act was the result of a robust process that delivered marriage equality whilst protecting the religious celebration of marriage. There is no place in Australia for laws that give a licence to discriminate in the name of religious freedom.

The Australian Marriage Law Postal Survey saw the community vote overwhelmingly for fairness and equality for LGBTI people. They did not vote for more discrimination. We submit that the Panel should respect this outcome and consider removing barriers that prevent LGBTI people from accessing services, employment and education and cause significant social harm. The law already goes too far in allowing religious organisations to discriminate through broad exemptions in federal and state discrimination laws.

This submission briefly considers the relevant international and national legal framework, as well as the need to balance the right to freedom of religion with other human rights, including the right to freedom from discrimination and the right to equality, before looking at the lessons that can be drawn from the campaign for marriage equality, including the parliamentary debate and the rejected amendments to the *Marriage Amendment (Definition and Religious Freedoms) Act.*[2]

More specifically, we make the following recommendations to the Expert Panel:

Recommendation 1: *The Marriage Amendment (Definition and Religious Freedom) Act 2017 struck a fair balance and should not be revisited.*

Recommendation 2: *The Panel should not accept recommendations that replicate the amendments proposed during the debate on the Marriage Amendment (Definition and Religious Freedom) Act 2017 that would expand religious exemptions, limit the operation of discrimination or other laws, or require schools to notify parents of content regarding 'non-traditional' marriage.*

Recommendation 3: *Any incorporation of Article 18(3) into Australian law must incorporate the limitations on the manifestation of religious belief and would ideally be part of a balanced*

[1] Prime Minister, "Media Release: Ruddock to examine religious freedom protection in Australia", 22 November 2017. Available from: https://www.pm.gov.au/media/ruddock-examine-religious-freedom-protection-australia

[2] This submission draws on material prepared by the Human Rights Law Centre.

legal framework, such as a Human Rights Act, that protects all fundamental rights and freedoms.

Recommendation 4: *Conscientious belief should not be able to be used as a defence to a claim of unlawful discrimination.*

Recommendation 5: *The exemptions for religious organisations in the Sex Discrimination Act 1984 (Cth) should be narrowed or repealed to prevent discrimination by religious organisations, rather than broadened and/or amended to override state and territory laws.*

Recommendation 6: *No amendments are necessary to the laws governing tax, DGR status or charitable status as a result of the Marriage Amendment (Definition and Religious Freedom) Act 2017.*

Recommendation 7: *Positive legal protections from discrimination on the basis of religious belief (and non-religious belief) should be included in Commonwealth law. Freedom of religion and the right to equality and non-discrimination should be protected under the law as part of a comprehensive bill of rights or Human Rights Act.*

Recommendation 8: *Religious exemptions in state and federal anti-discrimination law should be repealed. In particular, the exemptions should not allow discrimination in publicly funded delivery of goods and services, and particularly those services targeting vulnerable population groups (following the example of Commonwealth funded aged care services in s 37(2)(a) of the Sex Discrimination Act).*

2. Background

2.1 About Australian Marriage Equality and Australians for Equality ('the Equality Campaign')

Australian Marriage Equality is a national organisation that worked for equal marriage for all consenting adults, as we a believe person's gender or sexuality should not affect their legal rights and responsibilities under Australian law. The volunteer based organisation was first formed in 2004 to campaign against proposed amendments to the *Marriage Act 1961* (Cth) limiting marriage as only between a man and a woman. Since then the organisation grew with representation across most States and Territories and played a leading role in growing support for marriage equality in the community and the parliament.

Australians for Equality is a national organisation established to improve the wellbeing and circumstances of LGBTI people in Australia and their families and children. Australians for Equality was established in November 2015, following the plebiscite policy announcement by the Coalition, and works to end discrimination against lesbian, gay, bisexual, transgender and intersex (LGBTI) people in Australia's marriage laws.

In 2016 the two organisations launched the Equality Campaign, a national campaign to achieve marriage equality through a parliamentary vote. In 2017, after the Federal Government decided to resolve the issue of marriage equality by holding the Australian Marriage Law Postal Survey. The Equality Campaign led the 'YES' campaign.

The Yes campaign was a campaign of millions of conversations about real people's lives. The Yes campaign knocked on 102,620 doors, made over 1 million calls with real people chatting with Australians about equality, handed out 5 million leaflets reminding people to post their Yes, distributed 250,000 posters, gave away 150,000 badges to wear Yes with pride, and covered our streets with 1 million Yes stickers. In all 15,600 people volunteered, many for their first ever campaign**.**

The Equality Campaign worked hard to bring Australians together. While the survey and the debate it generated was unnecessary and divisive, achieving marriage equality was a unifying moment for our nation. This was reflected in the results of the Australian Marriage Law Postal Survey: of the eligible Australians who expressed a view on the question, the majority indicated that the law should be changed to allow same-sex couples to marry, with 7,817,247 (61.6%) responding Yes and 4,873,987 (38.4%) responding No. Nearly 8 out of 10 eligible Australians (79.5%) expressed their view. All states and territories recorded a majority Yes response. 133 of the 150 Federal Electoral Divisions recorded a majority Yes response, and 17 of the 150 Federal Electoral Divisions recorded a majority No response.

Following the announcement of the results of the Australian Marriage Law Postal Survey on 15 November, the Parliament moved promptly to pass the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth). Much of the public and parliamentary debate surrounding this Act focused on whether it adequately protected religious freedom. Indeed it was in the context of this public debate that the Prime Minister announced on 22 November

2017 the appointment of this Expert Panel to examine whether Australian law adequately protects the human right to freedom of religion.[3]

The Equality Campaign, together with more than 160 other LGBTI organisations,[4] believed that this Act struck a fair balance between LGBTI couples having equal access to marriage and the need to ensure people can practice their religious beliefs. There is no place in Australia for laws that give a licence to discriminate in the name of religious freedom.

In this context we welcome the opportunity to provide a submission to the Religious Freedom Review.

Representatives of Australian Marriage Equality and Australians for Equality are available to provide any further information to the Expert Panel and, if requested, to appear before the Expert Panel to answer any questions relating to this submission.

2.2 Terms of Reference

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

In undertaking this Review, the Panel should:

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

2.3 Focus of this submission

In the absence of a discussion or issues paper from the Expert Panel, we will focus on whether Australian law adequately protects the human right to freedom of religion in the context of marriage equality for LGBTI couples.

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[3] Prime Minister, "Media Release: Ruddock to examine religious freedom protection in Australia", 22 November 2017. Available from: https://www.pm.gov.au/media/ruddock-examine-religious-freedom-protection-australia

[4] Equality Campaign, "Media Release: LGBTI groups call on Parliament to recognise the will of the Australian people", 27 November 2017. Available from: http://www.equalitycampaign.org.au/lgbtigroupjointstatement

3. General principles

3.1 Legal framework

(a) International human rights law

Freedom of thought, conscience and belief is a fundamental human right. This right is protected under international law and allows people of faith to practice their religion free from persecution and discrimination. For example, Art 18(1) of the International Covenant on Civil and Political Rights (ICCPR) states:[5]

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.

This obligation was elaborated on by the United Nations Human Right Committee in *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*, which is regarded as the best distillation of the international law obligation to protect freedom of religion or belief. Professor Carolyn Evans states that General Comment 22 is "the most comprehensive and detailed international law instrument giving substance to the protection of freedom of religion or belief under art 18 of the ICCPR" and that it "should be understood as an authoritative and expert overview of the obligations under the ICCPR".[6]

Relevantly, these international instruments distinguish the freedom of thought, conscience, religion or belief (which is absolute) from the freedom to manifest religion or belief (which can be limited if such limitations are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others). This distinction will be considered in detail later in this submission.

(b) Australian law

The Australian Constitution recognises freedom of religion in s 116:

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

The language of this provision is largely borrowed from two provisions of the US Constitution; Art VI cl 3 and the First Amendment. Section 116 is limited in two important respects. First, s 116 only applies at a federal level; there is nothing in s 116 that prevents a State from making a law that establishes a religion, imposes a religious observance, prohibits the free

[5] See also the Universal Declaration of Human Rights of 1948 and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981, and the United Nations Human Rights Committee, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)* (Office of the High Commissioner for Human Rights, 1993).
[6] Carolyn Maree Evans, *Legal Protection of Religious Freedom in Australia* (The Federation Press, 2012) 33.

exercise of religion, or imposes a religious test as a qualification for public office.[7] Interestingly, proposals to amend s 116 to make it applicable to the States were rejected at referendums held in 1944 and 1988. Second, s 116 only prohibits the making of laws. This means that s 116 only directly restricts the exercise of legislative power and any impact it has on the exercise of executive or judicial power is indirect.

Section 116 has only been argued in a handful of cases before the High Court and so far no law has been struck down by the High Court as inconsistent with s 116.

Three States or Territories also explicitly protect religious freedom: Tasmania,[8] the Australian Capital Territory,[9] and Victoria.[10]

There is also some protection of religious freedom in federal and state legislation. For example, the Australian Human Rights Commission has identified three areas where protections currently exist:[11]

- discrimination law in most Australian jurisdictions prohibits discrimination on the grounds of religion in areas such as education, employment and access to good and services;
- exemptions to laws that prohibit discrimination on the grounds of age, gender and sexual orientation are given to religious bodies in particular circumstances; and
- state-based religious vilification or hate laws can protect freedom of religion by allowing people to exercise their religion free of fear of threats, intimidation or hostility.

3.2 The right to freedom of religion and its limits

The right to freedom of religion includes the beliefs of all religions as well as the right not to profess any religion or belief. Religious freedom is inherently linked to the enjoyment of other human rights, including freedom of thought, conscience, speech and association. As was explicitly acknowledged in the Religious Freedom Review Terms of Reference, the right to freedom of religion therefore necessarily intersects with other human rights. Although the right to freedom of religion is a fundamental human right that should be protected under law, it should not come at the expense of other rights. Rights need to be protected and balanced in a coherent legal framework.

For the LGBTI community it is particularly important that the right to freedom of religion is protected and balanced against the right to freedom from discrimination and the right to equality. Non-discrimination and equality rights are central features of the major human rights

[7] See *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399.
[8] See s 46 of the *Constitution Act 1934* (Tas).
[9] See s 14 of the *Human Rights Act 2004* (ACT).
[10] See s 14 of the *Charter of Human Rights and Responsibilities 2006* (Vic).
[11] Australian Human Rights Commission, *Religious Freedom Roundtable – Issues Paper* (22 October 2015) 5.

treaties. For example, rights of equality and non-discrimination are included in the following international instruments:

- International Covenant on Civil and Political Rights (articles 2.1, 14, 24, 25 and 26);
- International Covenant on Economic, Social and Cultural Rights (article 2.2);
- Convention on the Elimination of All Forms of Racial Discrimination (articles 1, 2, 4 and 5);
- Convention on the Rights of the Child (article 2);
- Convention on the Elimination of All Forms of Discrimination Against Women (articles 2, 3, 4 and 15);
- Convention on the Rights of Persons with Disabilities (articles 3, 4, 5 and 12); and
- implicitly in the Convention Against Torture (since treatment being discriminatory can also contribute to it being found to be "degrading").

One way in which these rights could be appropriately balanced would be for Australia to adopt a comprehensive bill of rights that protects and balances all fundamental human rights.[12] Although we would support this approach, it seems unlikely given that the Prime Minister has stated that "The Government is particularly concerned to prevent uncertainties caused by generally worded Bill of Rights-style declarations".[13]

(a) The distinction between religious belief and conduct

As outlined above, when considering religious freedom it is important to distinguish between religious belief and religious conduct or action. The freedom to hold religious belief is absolute. This is necessarily so; it is not possible for a legislator or court to regulate or restrict what a person or persons believes or thinks. There is no way for the legislator or court to even know what a person or persons thinks in their hearts and minds. It is, however, possible for a legislator or court to regulate or restrict the way in which a person or persons acts or conducts themselves in accordance with what they believe or think. However just because it is possible to regulate or restrict religious conduct or action, it does not mean that all such conduct or action should be regulated or restricted. Rather the approach adopted under international law is that while the freedom to hold religious beliefs is absolute, the freedom to manifest religion or belief (that is the conduct or action taken in reliance on or in accordance with religious belief) may be limited but 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*" (emphasis added).[14] The rights of equality and non-discrimination do not

[12] See George Williams and Daniel Reynolds, *A Charter of Rights for Australia*, 4th ed (UNSW Press, 2017).
[13] Prime Minister, "Media Release: Ruddock to examine religious freedom protection in Australia", 22 November 2017. Available from: https://www.pm.gov.au/media/ruddock-examine-religious-freedom-protection-australia
[14] Article 18(3) of the ICCPR.

interfere with religious belief and they should be accommodated within the regulation of religious conduct in a way that is directly related and proportionate to the specific need on which they are predicated.

In its 2015 Religious Freedom Roundtable Issues Paper, the Australian Human Rights Commission correctly articulated the importance of equality and non-discrimination in the context of religious freedom in these terms:[15]

> Human rights are underpinned by the assumption of the inherent equality and dignity of all individuals. Consequently, the right to religious freedom must accommodate the right that all people are equal before the law and are entitled to the equal protection of the law without any discrimination. This means that people must be treated equally by law and government irrespective of their faith, age, disability, gender, race, sexual orientation, gender identity, intersex status or other irrelevant personal attribute.

Religious belief should not be used as a justification to water down Australia's discrimination laws.

The distinction between freedom of belief and conduct is especially important due to the potential for far-reaching religious freedom to lead to the suppression not merely of freedom of religion of others but to other rights as well.[16] Nowak contends that this is because of the inherently controversial character of freedom of religion; most religious faiths believe their faith to represent the "absolute truth", therefore necessarily rejecting the faiths of others.[17]

(b) The distinction between public and private spheres

Another critical distinction relevant to the regulation of religious conduct is the distinction between the public and private spheres. This is significant as this distinction marks the point at which the religious beliefs of one person or a group of persons will impact on other people and society generally. Once a religious practice impacts upon other people who do not also believe in that religion, the capacity of a government to regulate those activities are enlivened. This is not to say that public activities of a religion are denied the protection of freedom of religion, rather it means that the impact of these activities on others will be relevant for the legislator or court engaging in the balancing exercise.

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[15] Australian Human Rights Commission, *Religious Freedom Roundtable – Issues Paper* (22 October 2015) 5.
[16] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed (N.P. Engel Press, 2005) 408.
[17] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed (N.P. Engel Press, 2005) 409.

(c) Determining appropriate limitations

The considerations discussed above were correctly summarised by the Joint Standing Committee on Foreign Affairs, Defence and Trade in its Interim Report last year on the *Legal Foundations of Religious Freedom in Australia*:[18]

> The right to hold a religion or belief is absolute. The right to manifest a religion or belief is not absolute, as the manifestation of one's beliefs may impact the enjoyment of the rights of other people. The appropriate limitations on the right to manifest a religion or belief are carefully considered in international human rights jurisprudence, including within the ICCPR itself. Among other requirements, any limitations on the right to manifest one's religion or belief must be specifically prescribed in law, must be reasonable and proportionate, and, significantly, must be necessary to achieve a legitimate aim or respond to a pressing public or social need.

We submit that prohibiting discrimination on the basis of sexuality, gender identity or intersex status, even when done so on the basis of religious belief, is a reasonable and proportionate limitation on religious freedom that is necessary to achieve fairness and equality for LGBTI people. Indeed, this is the moral and political lesson that can be drawn from the results of last year's Australian Marriage Law Postal Survey and the subsequent debate over marriage equality in Parliament over the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

[18] Joint Standing Committee on Foreign Affairs, Defence and Trade, *Interim Report: Legal Foundations of Religious Freedom in Australia* (Parliament of the Commonwealth of Australia, 2017), 29.

4. Lessons from the campaign for marriage equality

Last year 12,727,920 (79.5%) eligible Australians participated in the Australian Marriage Law Postal Survey. Although this was a profoundly difficult time for LGBTI people and their families and friends, it is essential to acknowledge that the Australian community voted overwhelmingly for fairness and equality for LGBTI people. The Australian community did not vote for more discrimination.

This clear mandate for fairness and equality was reflected in the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) that was passed by the Parliament on 7 December 2017. This Act was the result of a robust Senate inquiry and presented a workable compromise that delivered marriage equality for LGBTI couples whilst protecting the religious celebration of marriage. It was also the subject of considerable public debate before, during and after the postal survey, and was passed overwhelming by both Houses of Parliament. In passing this Act, the Parliament rejected the legally unorthodox and unnecessary amendments that were introduced into the Parliament in the name of religious freedom that would have wound back discrimination protections for LGBTI people. This Religious Freedom Review should not be used opportunistically by those opposed to marriage equality to re-litigate these arguments that were rejected first by the Australian community in the postal survey and then again by both the Senate and the House of Representatives.

4.1 Select Committee on the Commonwealth Government's exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill

On 30 November 2016, the Senate resolved to establish the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill to inquire into the Commonwealth Government's exposure draft of the Marriage Amendment (Same-Sex Marriage) Bill. Over 400 submissions were received by the Committee and three days of public hearings were held. The subsequent consensus cross-party Senate report released in February 2017 provided a pathway on how amendments to the *Marriage Act* could allow LGBTI couples to marry while balancing freedom from discrimination and freedom of religion.[19] This formed the basis for the Marriage Amendment (Definition and Religious Freedoms) Bill 2017 which was released in August 2017 by Liberal Senator Dean Smith.

4.2 Marriage Amendment (Definition and Religious Freedoms) Bill

The Marriage Amendment (Definition and Religious Freedoms) Bill was the 23rd bill introduced into Parliament that sought to legislate for marriage equality. Part of what made this Bill historic and ground breaking was that it had widespread consensus; it was supported

[19] Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, *Report on the Commonwealth Government's Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (Parliament of the Commonwealth of Australia, 2017).

by political leaders from the Coalition, the Labor Party and the Greens, as well as LGBTI organisations and faith leaders.[20]

The Bill achieved what the LGBTI community had been working for years: marriage equality, "a union of two people, to the exclusion of all others, voluntarily entered into for life". Importantly it did so in a way that respected people of faith and brought together a wide and diverse range of political viewpoints. It was the rigorous inquiry and the political consensus behind it that meant it was the first bill for marriage equality that was actually able to pass in both Houses of Parliament. It passed in the Senate 43 to 12 and then in House of Representatives where only four Members voted no. Royal assent was given on 8 December 2017.

We submit that the reasoning of the cross-party Senate report, as reflected in the Bill released by Senator Smith and then ultimately in the *Marriage Amendment (Definition and Religious Freedoms) Act* that was passed by Parliament, strikes an appropriate balance between fairness and dignity for LGBTI people and religious freedom in the context of Australia's marriage laws.

The Act has several key features. First, it changes the definition of marriage from a union between "a man and a woman" to a union between "two people". A change that is inclusive of all LGBTQ people and relationships. The Act also recognises marriages of same-sex couples married overseas, including couples married before the Act came into effect.

Second, it contains exemptions to allow faith communities to celebrate marriages in accordance with religious beliefs, while ensuring that marriages performed by civil celebrants are conducted without discrimination. It confirms that ministers of religion can continue to be allowed to refuse to perform marriages that don't conform to their religious doctrine or beliefs. For example, not marrying an LGBTI couple, a person from a different faith or a divorcee.

The Act also creates a new category of "religious marriage celebrants" for ministers of religion from small, independent and emerging churches which are not officially recognised religions. Similar to ministers of religion from recognised denominations, these religious celebrants are permitted to conduct marriages in accordance with their religious belief.

The small number of civil celebrants who wish to continue to perform marriages in accordance with their religious beliefs after the introduction of marriage equality, have a 90-day window to choose to be transferred into the new category of "religious marriage celebrant". All other civil celebrants are required to uphold civil law and are not be allowed to discriminate against LGBTI couples. Anyone registering to become a marriage celebrant after this date who is not a minister of religion will not be able to join this category and cannot discriminate against LGBTI couples.

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[20] Equality Campaign, "Media Release: LGBTI Joint Statement welcoming the Senate Inquiry Report on the draft Marriage Act Amendment", 28 February 2017. Available from: https://www.australianmarriageequality.org/2017/02/28/lgbti-joint-statement-welcoming-the-senate-inquiry-report-on-the-draft-marriage-act-amendment/

This new category of "religious marriage celebrants" was not without controversy among the LGBTI community. However, we submit that it was a practical, good faith compromise that respects religious freedom.

Third, the Act introduces a new category of military officer to allow members of the Australian Defence Force – who previously could only be married by a military chaplain – a secular option. This ensures that LGBTI Defence Force members deployed overseas are also able to marry.

Fourth, the Act replicates the religious exemption already available for bodies established for religious purposes under the *Sex Discrimination Act 1984* (Cth) to refuse to provide facilities, goods and services to LGBTI people. Under the Act and existing anti-discrimination laws, commercial secular businesses could not refuse on the basis of a religious belief. For example, a florist could not refuse to provide flowers because they personally don't support marriage equality. Again, this exemption was controversial among the LGBTI community. However, it has been a well-established part of discrimination law in Australia and marriage equality was not an appropriate legislative vehicle to alter religious exemptions (in much the same way it was equally inappropriate for new provisions that discriminate against LGBTI people being inserted into Australian law through a marriage equality bill).

That said, this Review is an appropriate forum to consider religious exemptions to anti-discrimination legislation, and we will argue later in this submission that the law already goes too far in allowing religious organisations to discriminate through broad exemptions in federal and state discrimination laws.

Recommendation 1:

The Marriage Amendment (Definition and Religious Freedom) Act 2017 struck a fair balance and should not be revisited.

4.3 The rejected amendments to the Marriage Amendment (Definition and Religious Freedoms) Bill

In the parliamentary debate over the Marriage Amendment (Definition and Religious Freedoms) Bill, several amendments were put forward in the name of religious freedom. Each these amendments were correctly rejected.

Many of these amendments were drawn from an alternative marriage equality bill released by Senator James Paterson on 13 November 2017, the Marriage Amendment (Definition and Protection of Freedoms) Bill 2017.[21]

At various times in the public and parliamentary debate over these issues, it was suggested that these proposed amendments should instead be more appropriately considered by the

[21] Senator James Paterson, "Media release: Release of draft bill to legalise same-sex marriage and preserve freedoms", 13 November 2017. Available from: https://senatorpaterson.com.au/2017/11/13/release-of-draft-bill-to-legalise-same-sex-marriage-and-preserve-freedoms/

Religious Freedom Review. We reiterate our opposition to each of these amendments for the following reasons. For ease of reference the following discussion focuses on the amendments as introduced in the House of Representatives, even though similar amendments were also introduced into the Senate (and failed).

(a) New exemptions from discrimination protections on the basis of a traditional view of marriage

These amendments were introduced in the House of Representatives by Andrew Hastie MP. It would have introduced radical new exemptions from discrimination protections on the basis of a traditional view of marriage or free speech and would have removed existing discrimination, hate speech and criminal law protections for LGBTI Australians. While legal protections in the *Sex Discrimination Act* would have still applied, the 'protections' would have switched off other Commonwealth and state and territory laws in some circumstances. They would provided immunity from:

- existing state and territory discrimination protections (such as hate speech and vilification including incitement to violence);
- existing protections from discrimination/adverse action on the basis of sexual orientation under s 351 *Fair Work Act 2009* (Cth), and
- certain criminal offences which provide protections against serious vilification and offensive conduct.

These amendments were unnecessary, unprecedented and unworkable. Individuals and organisations in society can freely express their views in relation to marriage in Australia and changing the law to allow LGBTI couples to marry did not impact on this freedom. Moreover, these amendments privileged one belief over others; that is, they would have allowed a person with a traditional view of marriage to shout hate speech without facing any of the consequences a person who supports marriage equality would face. We already have free speech, as was clearly demonstrated during the Australian Marriage Law Postal Survey, where the majority of Australians were free to support marriage equality even though such a view was inconsistent with the *Marriage Act* at the time.

(b) No detriment clause

The amendments that would have introduced a "no detriment" clause were also introduced in the House of Representatives by Andrew Hastie MP. This would have made it unlawful for a public authority to directly or indirectly propose action or take action which would result in any unfavourable treatment, detriment, disadvantage, obligation, sanction or denial of benefit, because a person or entity holds or expresses a traditional view on marriage. In effect, public authorities would not be able to do anything or propose to do anything which may be a

"detriment". This would, in effect, have allowed religious people and organisations to take any actions with impunity from adverse consequences.

Such a "no detriment" is legally unorthodox, unprecedented and gives broad immunity for religious beliefs to override existing protections from discrimination. Australian law does not currently provide for a broad freedom of belief (or anti-detriment clause) based on one particular religious or political view, nor does any relevant anti-discrimination law. Further, it is not clear how such a clause would work in practice. It could have potentially lead to entrenching new forms of discrimination against LGBTI couples right at the moment when they were hoping for true equality. Such a clause would have also provided one-sided protection of beliefs as it privileges one belief over others. There should not be protections from "freedom of belief" in relation to traditional marriage without providing equivalent protections for "freedom of belief" in relation to non-traditional marriage.

Two short examples illustrate how unworkable such a "no detriment" clause would be. One, a public authority employer would be prohibited from disciplining an employee for expressing a view against marriage equality, but not an employer for an employee expressing a view in support of marriage equality. And two, if a psychologist at a public school believed that gender is binary and fixed and repeatedly told this to a transgender student which caused the student's mental health to decline, the school could not discipline or suspend the psychologist to undergo training for holding this traditional belief about gender.

(c) Parental rights / "Safe Schools" clause

Andrew Hastie MP also put forward amendments that would have introduced a parental rights or "Safe Schools" clause. These amendments would have allowed parents to withdraw children from instruction in schools that might go against their religious beliefs. In practice, this would mean children could be withdrawn from any class across a range of areas that discussed non-traditional views on marriage – health, relationships, politics, society, history, etc. This clause extended to beliefs about family and gender and would have imposed a burden on schools and teachers to notify parents of potentially objectionable material and to condense classes on this content. It is simply unworkable in practice for teachers to stop any class where a student raises any issues about non-traditional marriage, LGBTI people, family or gender across a range of subjects in order to give parents one week's notice. We already trust teachers to teach age-appropriate material to students and they do so in educating young people across Australia without this clause being necessary.

Such an approach was trying to create a solution for a problem that doesn't exist. Parents already choose which schools to send their children to which align with their views. Religious schools already teach in accordance with a person's religious beliefs, and Australia's anti-discrimination laws have broad religious exemptions to facilitate this. Note, in particular, s 38 of the *Sex Discrimination Act*, which provides that:

> Nothing in … [relation to employment, contract workers or employment] renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

In addition to being unnecessary and unworkable, this approach is strongly opposed by the LGBTI community for three reasons. First, it singles out LGBTI issues; a withdrawal from education clause is not required for teaching any other content in schools under federal law. Second, it negatively impacts young people's education as greater education of diversity and inclusion is necessary to ensure young people understand LGBTI people and develop healthy, respectful relationships with their peers. Third, because it again privileges one belief over others. For example, it would allow a person who believes in abstinence before marriage to remove their child from a class that teaches sex education, but would not allow a person who believes that marriage is not only the union of a man and a woman to take their child out of a class that teaches this.

Recommendation 2:

The Panel should not accept recommendations that replicate the amendments proposed during the debate on the Marriage Amendment (Definition and Religious Freedom) Act 2017 that would expand religious exemptions, limit the operation of discrimination or other laws, or require schools to notify parents of content regarding 'non-traditional' marriage.

(d) Protection of religious freedom clause

Sarah Henderson MP proposed an amendment that would have introduced the following clause in the body of the Bill:

> Nothing in this Act limits or derogates from the right of any person, in a lawful manner, to manifest his or her religion or belief in worship, observance, practice and teaching.

In the Senate, Attorney-General George Brandis also tabled this amendment, stating that it this provision was a declaratory "avoidance of doubt" style provision and would not have legal effect.

Again, if this provision was to have no legal effect, it clearly is not necessary. Further, it is another one-sided clause that only protects religious freedom without equally protecting freedom from discrimination.

Finally, although this clause incorporates Article 18(1) of the ICCPR, it fails to properly incorporate the limitation in Article 18(3). Any incorporation of Article 18 into Australian law must incorporate the limitations on the manifestation of religious belief and ideally would be part of a balanced legal framework that protects all fundamental human rights and freedoms.

Recommendation 3:

Any incorporation of Article 18(3) into Australian law must incorporate the limitations on the manifestation of religious belief and would ideally be part of a balanced legal framework, such as a Human Rights Act, that protects all fundamental rights and freedoms.

(e) Conscientious belief

Several of the proposed amendments would have extended various exemptions beyond religious belief to include conscientious belief. For example, Sarah Henderson MP proposed that civil celebrants should be able to refuse to solemnise marriage of same-sex couples based on their religious or conscientious beliefs; Michael Sukkar MP proposed that a new category of "traditional marriage celebrants" for people with religious or conscientious objections to same-sex marriage; and Alex Hawke MP proposed that marriage officers and military chaplains should be able to refuse to solemnise marriages on the basis of religious and conscientious beliefs.

Discrimination should not be allowed on the basis of an individual's conscientious belief for several reasons. First, conscientious belief would provide a new, unprecedented license to discriminate in Australia. It undermines the purpose of our discrimination laws as passed by parliament to protect vulnerable communities from unfair treatment. This is because the purpose of discrimination law is to protect people from unfair treatment on the basis of a particular view of them as inferior or less worthy because of an inalienable attribute, whether that be sex, race or sexual orientation. Further, conscientious belief has only been used in a limited range of statutory contexts in Australia, primarily in relation to medical treatment and certain civic or political activities (such as, voting, jury duty, unionism, conscription). The refusal of medical treatment has always concerned the procedure itself (for example, abortion) rather than the characteristics of the person receiving the treatment.

Second, conscientious belief is so broad and unlimited it could potentially allow discrimination for any reason. This is especially so in modern Australian society where prejudice against a group of people can too often be expressed as a personal "moral" or "conscientious" view.

Third, conscientious belief provides less certainty than religious belief. Religious exemptions for ministers or religion or religious marriage celebrants is more certain as you can point to a particular religious doctrine. A person's individual conscientious belief will change over time. This creates inconsistency and uncertainty for LGBTI couples in accessing services. As its scope is unclear it would cause confusion and uncertainty for LGBTI people who would have

no way of knowing whether they would be refused a service based on a person's individual conscientious belief, and unable to avoid the harm, distress and embarrassment of being refused service.

Fourth, a broad exemption for conscientious belief is inconsistent with international human rights law. For example, the United Nations Human Right Committee in *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)* recognises conscientious objection in relation to conscription only.[22] While the right to hold a particular religious or non-religious belief is absolute, the right to manifest or express this belief in the public sphere will be subject to necessary limitations where the rights of others require protection.

Fifth, it sets a dangerous precedent for conscientious belief to be used as a defence to otherwise unlawful discrimination, weakening discrimination protections for other vulnerable groups (for example, women, people with disabilities, older people, people of faith) or to expand its use to deny service to LGBTI people in other contexts, such as health or human services.

Sixth, the Australian Marriage Law Postal Survey saw the Australian community vote fairness and equality, not for more discrimination. The subsequent *Marriage Amendment (Definition and Religious Freedoms) Act* was to passed remove discrimination. It would undermine the purpose of that Act – not to mention the will of Australian people – to now create more opportunities for potential discriminatory treatment of LGBTI people.

This reasoning was reflected in the conclusions of the Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill:[23]

> The Committee is guided by the limited usage of conscientious belief in Australian law today and notes that to allow conscientious belief to be used to allow discrimination against a class of persons would be unprecedented under Australian law. The Committee would be disinclined to disturb decades of anti-discrimination law and practice in Australia.

Recommendation 4:

Conscientious belief should not be able to be used as a defence to a claim of unlawful discrimination.

[22] United Nations Human Rights Committee, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)* (Office of the High Commissioner for Human Rights, 1993), [11].
[23] Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, *Report on the Commonwealth Government's Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (Parliament of the Commonwealth of Australia, 2017), [3.120].

(f) Broader grounds for religious bodies to discriminate in all areas (not just marriage)

Andrew Broad MP introduced an amendment that would have broadened the grounds on which religious bodies would be able discriminate against LGBTI people in the *Sex Discrimination Act* by: (a) changing the test for discrimination; (b) changing the relationship between the discriminatory act and the religious belief; (c) broadening what bodies are 'religious bodies' who can lawfully discriminate; and (d) allowing a religious body to discriminate if they include the belief in a statement, document or act. These changes would have applied more broadly than just marriage-related areas of public life.

This amendment would have drastically altered and unwound discrimination protections in the *Sex Discrimination Act*. As the existing test is largely replicated in state and territory discrimination laws, this would have resulted in a test that would have been radically out of step with Australian law, legally unorthodox and extremely broad.

This amendment would have dramatically lowered the threshold for discrimination in several ways. First, it would have amended religious exemptions by stating that an act or practice is consistent with religious exemption grounds where that belief is "not fictitious, capricious or an artifice". This term appears to have been incorrectly imported from a decision of the Supreme Court of Canada, *Syndicat Northcrest v Amselem*,[24] to drastically lower the bar. In that case, Justice Iacobucci held that in determining whether a person's religious belief is sincere and in good faith in order for it to be protected under law, it must be "neither fictitious nor capricious, and that it is not an artifice".[25] Australian Courts have not dealt with this Canadian test, which would drastically wind back discrimination protections for LGBTI people.

Second, the amendment would have changed the relevant test from acts or practices in "conformity" with religious belief to being "consistent with religious belief", and from being "in order to avoid injury to" religious susceptibilities, to "because of" religious susceptibilities. This significantly lowers the threshold for when a religious body can rely on an exemption in discrimination protections.

Third, the amendment would have allowed a religious doctrine, tenet or belief to be adopted by a religious body simply by including it in statements, documents or acts. Currently, the courts assess whether a body is acting in conformity with their religious doctrines, tenets and beliefs from a range of different factors, including their Constitution, policies and actions.

Fourth, defining a "body established for religious purposes" as any body "under the direction, control or administration of" a body established for religious purposes would have extended the types of organisations which are defined as a body established for religious purposes.

Fifth, allowing a charity where a secondary purpose or the advancement of religion is "an effectuation of, conducive to or incidental or ancillary to, and in furtherance or in aid of" the other purpose, to be a body established for religious purposes include a category of

[24] *Syndicat Northcrest v Amselem* [2004] 2 S.C.R. 551.
[25] *Syndicat Northcrest v Amselem* [2004] 2 S.C.R. 551, [52].

organisations which would not currently meet the 'religious body' definition in the *Sex Discrimination Act*. For example, the Human Rights Law Centre could fall within this definition. This would considerably broaden the range of bodies able to discriminate lawfully under the *Sex Discrimination Act*.

Sixth, once again this amendment would have singled out LGBTI issues and overridden state and territory laws in relation to LGBTI people in a way that cannot be justified.

Recommendation 5:

The exemptions for religious organisations in the Sex Discrimination Act 1984 (Cth) should be narrowed or repealed to prevent discrimination by religious organisations, rather than broadened and/or amended to override state and territory laws.

(g) Religious charities

Andrew Broad MP and Scott Morrison MP introduced amendments relating to religious charities. The amendments introduced by Andrew Broad MP would have bolstered the ability of religious bodies to satisfy tests for charitable, fringe benefits and deductible gift recipient (DGR) status. The amendments introduced by Scott Morrison MP would have made it unlawful for a Commonwealth, State or Territory government entity to refuse funding or impose a condition on funding because of the person or organisation's traditional view of marriage. These amendments also sought to clarify that religious charities would be able to publicly advocate for on act on traditional views on marriage, without this being a disqualifying purpose under the *Charities Act 2013* (Cth).

These amendments were completely unnecessary and may have had unintended consequences.

Religious charities provide essential services for our community. Their charitable status is not affected by their stance on marriage, in much the same way that charities that support marriage equality didn't have their charitable status revoked prior to the passage of the *Marriage Amendment (Definition and Religious Freedoms) Act* last year. These amendments were confirmed as unnecessary by the Assistant Charities Commissioner,[26] the Taxation Commissioner[27] and Not-For-Profit Law.[28] Further, these amendments were not being asked for by charitable organisations, which already do good work and will continue to do so now that marriage equality has been enacted. Finally, the *Aid/Watch* case[29] and the *Charities Act*

[26] Letter from Murray Baird, Acting Commissioner, Australian Charities and Not-for-profits Commission to Senator Dean Smith, Senator for Western Australia, 24 November 2017.
[27] Letter from Chris Jordan AO, Commissioner of Taxation to Senator Dean Smith, Deputy Government Whip in the Senate, 24 November 2017.
[28] Not-For-Profit Law, "Media release: Marriage equality – proposed amendments to the bill are unnecessary", 29 November 2017. Available from: https://www.nfplaw.org.au/marriage-equality-%E2%80%93-proposed-amendments-bill-are-unnecessary
[29] *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42.

both protect a charity's right to advocacy as long as it is does not promote or oppose a political party or a candidate for political office.[30]

In terms of the potential unintended consequences of these amendments, the main concern arises from the government funding restriction proposed by Scott Morrison MP. This is because the government may have legitimate grounds for ensuring that funding contracts are awarded to organisations that are best placed to deliver the contract, and the government funding provision as proposed would undermine this. The following two examples highlight this tension. First, if a taxpayer funded public health service believed in abstinence outside of marriage and refused to provide sex education, contraception or family planning information, the Department of Health could not decrease or withdraw their funding, even in cases of non-compliance with the funding agreement (even if the funding agreement was for the provision of sexual and reproductive health services and education). And second, if a taxpayer funded childcare centre refused to care for children of a single parent, unmarried parents or same-sex parents on the basis that the family structure of a married man and a woman is a fundamental building block of society, the local council could not reallocate their funding to an inclusive childcare centre which would care for all children regardless of their parents' marital status.

Recommendation 6:

No amendments are necessary to the laws governing tax, DGR status or charitable status as a result of the Marriage Amendment (Definition and Religious Freedom) Act 2017.

4.4 Conclusions on marriage equality and religious freedom

The *Marriage Amendment (Definition and Religious Freedoms) Act* provided a fair, workable compromise that delivered marriage equality for LGBTI couples whilst protecting the religious celebration. The amendments that were put forward in both the Senate and the House of Representatives were correctly rejected by the Parliament for the reasons outlined above. They would have watered down anti-discrimination protections for LGBTI people, created unnecessary uncertainty in the operation of the law and may have had unintended consequences for charities and government funding. The Expert Panel should be very cautious about reopening the debate over these amendments given the Australian public in Australian Marriage Law Postal Survey and the Parliament of Australia in passing the *Marriage Amendment (Definition and Religious Freedoms) Act* clearly supported equality and fairness over more discrimination for LGBTI people.

[30] s 11 of the *Charities Act 2013* (Cth).

5. Balancing freedom of religion with freedom from discrimination

In this submission we have focused on whether Australian law adequately protects the human right to freedom of religion in the context of marriage equality for LGBTI couples. However, the assumptions and principles that have underpinned our submission have wider application, especially in the balancing the right to freedom of religion with other rights, especially the right to freedom from discrimination.

As Professor Evans notes, discrimination laws intersect with religious freedom in two key ways.[31] First, in some Australian jurisdictions, individuals are protected against discrimination on the basis of their religion. Second, in most non-discrimination legislation, certain exemptions are given for religious bodies to discriminate on at least some bases (including sex, sexual orientation and religion) if certain pre-conditions are met. It is worth noting that religious belief is not a ground for evading the *Racial Discrimination Act 1975* (Cth) although there are a number of religious based exceptions under the *Sex Discrimination Act*.

Strong discrimination laws are important for our nation as they promote equality and foster happy, healthy and safe societies. A discussion of the economic and social benefits of anti-discrimination law and its implementation in Australia is available in the Productivity Commission review of the *Disability Discrimination Act 1992*.[32] While noting the difficulty of quantifying costs and benefits for legislation of this kind, the Productivity Commission concluded that overall the economic and social benefits of compliance with the *Disability Discrimination Act* were likely to be very large, and likely to substantially exceed costs of compliance. The Australian Human Rights Commission has concluded that "Substantial benefits are equally likely to flow from elimination of discrimination on other grounds".[33]

5.1 Prohibition of discrimination on the basis of religion

In relation to the first way in which discrimination laws intersect with religious freedom, the prohibition of discrimination on the basis of religion, we would make three comments. First, we acknowledge that non-discrimination on the basis of religion is a fundamental principle of international human rights law. It is a principle that we also share and support. We do not support discrimination in any form. Australia is a successful democracy where people are free to express political, philosophical and religious views, and observe, practice and teach their faith.

Second, this may in fact be an area where there are opportunities to strengthen the protection of religious freedom in the law. For example, outside the area of employment, there is no general protection under Commonwealth law to protect people from being discriminated against on the basis of their religion or belief. Similarly, while most states

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[31] Carolyn Maree Evans, *Legal Protection of Religious Freedom in Australia* (The Federation Press, 2012) 138.
[32] Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No 30, 2004), Chapter 6.
[33] Australian Human Rights Commission, *Review and consolidation of discrimination law* (December 2011), 6.

prohibit discrimination on the basis of religion, New South Wales and South Australia do not fully protect people of faith from discrimination.

Third, as stated above, the best way to protect freedom of religion under law is as part of a comprehensive bill of rights that protects and balances all fundamental human rights.[34]

Recommendation 7:

Positive legal protections from discrimination on the basis of religious belief (and non-religious belief) should be included in Commonwealth law. Freedom of religion and the right to equality and non-discrimination should be protected under the law as part of a comprehensive bill of rights or Human Rights Act.

5.2 Exceptions in non-discrimination law for religious organisations and individuals

At both the Commonwealth and the state or territory level, there are broad exceptions for religious organisations and individuals from non-discrimination law. The precise scope of these exceptions differs from jurisdiction to jurisdiction. However, as a general proposition, we would make the following comments.

First, non-discrimination law already goes too far in allowing religious organisations to discriminate through broad exemptions in federal and state discrimination laws. Religious charities who provide publicly funded welfare and social services can lawfully turn away LGBTI people, single mothers and others where this refusal is in line with the charity's religious beliefs.

Second, religious exemptions act as a barrier to vulnerable people accessing the support services they need. Many unmarried couples, LGBTI people and single parents have faced discrimination from religious charities but are reluctant to speak out or lodge a complaint because they still rely on these services. Others are afraid of seeking support for fear of discrimination and mistreatment, even where faith based service providers do not seek to enforce the exemptions available to them.

Third, any further religious exemptions should not specifically target LGBTI people. This would allow religious organisations to discriminate against people, not because of religious reasons, but because of a person's sexuality, gender identity or intersex status.

Fourth, discrimination should not be allowed on the basis of an individual's conscientious belief for the reasons identified above at 3.3(e).

Fifth, all charities should be treated equally and should have an equal right to advocate. See the discussion above at 3.3(g).

Sixth, where businesses are providing goods and services in the secular marketplace there is no place for discrimination. In this context, individuals should not be able to take advantage of exceptions who believe that their religion (or conscientious belief) requires

[34] See George Williams and Daniel Reynolds, *A Charter of Rights for Australia*, 4th ed (UNSW Press, 2017).

them to discriminate. Such a broad exception would create considerable inconsistency and uncertainty for LGBTI people, single mothers and others in accessing services as they would generally have no way of knowing which businesses would potentially refuse them service and therefore would also be unable to avoid the harm, distress and embarrassment of being refused service.

In this regard, we note the comments of Trevor Evans MP, Member for Brisbane, during the debate on the Marriage Amendment (Definition and Religious Freedom) Bill 2017:

> Australia is not America. The search for fictitious homophobic bakers in Australia continues unfulfilled! Let's be honest here. For a case like that to arise in Australia it would require a gay couple who care more about activism than about the success of their own wedding to find a business operator who cares more about religious doctrine then the commercial success of their own small business and for both of them to commit to having a fight. Typical Australians would genuinely question the bona fides of the players in a case like that, and the slim prospect of that occurring doesn't warrant the pages and pages of commentary and debate that have been dedicated to it.[35]

Currently Australian law does not allow non-religious businesses and individuals to discriminate on the basis of religious or conscientious belief. This would represent a step backwards and mark a return to the days where someone could be turned away from a shop simply because of their race or gender. The existence of the current provisions has never caused floods of litigation in the past and we would encourage the Panel to disregard claims that marriage equality will lead to such an eventuality in the future.

Our primary position is that the religious exemptions that allow discrimination against LGBTI people in employment, education and delivery of goods and services and other areas should be repealed. Limited exemptions may be permitted for the training and appointment of ministers of religion or priests and other activities with a close nexus to religious observance, practice, teaching or worship.

In the alternative, the exemptions should be narrowed in line with the federal policy position on aged care. In 2013, the *Sex Discrimination Act* was amended to include new protections from discrimination on the basis of relationship status, sexual orientation, gender identity and intersex status. The religious exemptions in the SDA excluded activity that related to the provision of Commonwealth Funded Aged Care.[36] This limitation on the exemption has operated successfully for a number of years and should be replicated in other areas of government funded services delivery, particularly to vulnerable population groups (for example, youth, homelessness, family violence and other welfare services).

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[35] Commonwealth of Australia 2017, Parliamentary debates: House of Representatives, 7 December 2015. Available from: https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/716f5e71-dee3-40a3-9385-653e048de81b/&sid=0011.

[36] Section 23(2)(a) of the *Sex Discrimination Act 1984* (Cth).

Recommendation 8:

Religious exemptions in state and federal anti-discrimination law should be repealed. In particular, the exemptions should not allow discrimination in publicly funded delivery of goods and services, and particularly those services targeting vulnerable population groups (following the example of Commonwealth funded aged care services in s 37(2)(a) of the Sex Discrimination Act).