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Australian Human Rights Commission
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Dear Australian Human Rights Commission

Re: Submission to your Inquiry into Freedom of Religion and Belief

Please accept this late submission to the above inquiry. The Sydney Centre for International Law is a leading centre for international law research and policy in Australia and the Asia-Pacific region. This submission addresses Australia's implementation of, and compliance with, its international human rights obligations to protect freedom of religion. We make the following submissions on specific legal issues. We also attach a background paper prepared by one of our Centre researchers which we hope will be of assistance.

1. Constitutional Protection of Freedom of Religion

While s 116 of the Commonwealth Constitution prohibits the Commonwealth from legislating to establish or restrict religion in various ways, the provision operates as a limitation on Commonwealth power to legislate rather than as an independent right of individuals to enforce their freedom of religion (including their freedom not to believe). Moreover, the protection is only a limitation on Commonwealth not State legislation.

Thus, while it is an important protection against federal interference in the free exercise of religion, the Constitution does not provide an 'effective remedy', within the meaning of international human rights law, to persons subject to violations of the internationally protected freedom of religion under the International Covenant on Civil and Political Rights 1966.

2. Domestic Implementation of the International Freedom

In consequence of the limited scope of the constitutional protection of freedom of religion, to comply with Australia's obligations under the ICCPR, it is submitted that Australian law should recognise an individual cause of action to complain about violations of freedom of religion, and which should involve the possibility of a final binding judgment by a court, and which can lead adequate remedies (including compensation) for any violation that is proved.

3. Need for a Federal Anti-Vilification Law Concerning Religion

As one aspect of the fuller domestic implementation of Australia's international human rights obligations in this area, federal law should expressly protect against and criminalize religious vilification. Article 20(2) of the ICCPR requires States to prohibit: 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. While AHRC can inquire into and conciliate complaints about religious discrimination in employment or by the Commonwealth, there is no such protection in other contexts (including involving private perpetrators) and remedies for violations are limited. State protections against religious vilification are patchy and conceptually, religious vilification is distinct from vilification on racial, ethnic or national grounds, which may be related but are often distinct.

Religious prejudice against Muslim Australians increased significantly after 11 September 2001¹ and prohibiting incitement to violence against religious groups sends a vital normative message to the community that religious hatred is unacceptable.² Moreover, it is clear that criminal sanctions for religious vilification are a reasonable, justifiable and proportionate restriction on both freedom of expression and freedom of religion. Free religious expression does not extend to speech or practices which threaten, intimidate or endanger others. In my view, a vilification offence should not protect against minor annoyances or prevent robust criticism of religions, but should be limited to targeting speech which seriously intimidates.

Suppressing speech which proximately encourages violence is a justifiable restriction in a democratic society, since the protection of life is a higher normative and social value which momentarily trumps free expression – but only to the extent strictly necessary to prevent the greater harm. Human rights law does not permit one person to exercise their rights to destroy the rights of another,³ but any restriction on freedom must not jeopardise the right itself.⁴

The 'external affairs' power supports a federal vilification offence to the extent that it implements a relevant treaty obligation in the ICCPR. Further, such an offence would constitute a permissible restriction on both the constitutional prohibition on Commonwealth laws limiting freedom of religion, and the implied freedom of political communication.⁵

3. Impact of Anti-Terrorism Laws

A number of anti-terrorism laws raise concerns in relation to freedom of religion.

(a) Sedition

The reconstituted sedition offence of urging one group (racial, religious, national or political) to use force or violence against another group falsely stigmatises group-based violence as terroristic, when it is a conceptually distinct harm which should be treated separately by the criminal law. As argued elsewhere,⁶ collapsing these categories can only reinforce the stereotyping of certain ethnicities or religions as terrorists.

Further, characterising incitement to group violence as sedition is an error of classification. The idea of sedition centres on rebellion against, or subversion of, political authority; it has little to do with communal violence between groups. The rationale for protecting one group from violence by another is not to prevent sedition or terrorism, but to guarantee the dignity of members of human groups in a pluralist society. The law accordingly manipulates international human rights protections for groups by recasting them as efforts against sedition and terrorism.

The appropriate place for such an offence is within the framework of anti-vilification legislation as noted above. The sedition offence is also not an adequate substitute for a proper religious vilification offence, since its scope is too narrow and does not go far enough in protecting groups from harm. First, it only protects religious (or other) groups from incitements which urge *other* groups to violence, and so excludes incitements aimed to provoke individuals, or groups not mentioned in the legislation.

Second, requiring that the incitement must also threaten the peace, order and good government of the Commonwealth leaves groups unprotected from incitements which do *not* threaten peace, order or good government. For example, sporadic or isolated incitements to violence might not rise to a level of intensity or prevalence which threatens peace, order or good government – even though such incitements profoundly affect their victims.

Third, the offence is confined to criminalising *incitement* to group-based violence, but there is no attempt to criminalise *actual group violence*. While violence against group members can always be prosecuted as ordinary crime under state, territory or federal law, treating group-based violence or ‘hate crimes’ as ordinary offences fails to recognise the additional psychological element and social harm involved in such cases. It is not sufficient to merely consider racial or religious motives as aggravating factors in sentencing, since that approach does not stigmatise the offending conduct as adequately as *naming* the conduct a racial or religious crime.

(b) Prohibiting Terrorist Organisations

Amendments to the federal *Criminal Code* permit the listing of an organisation which ‘advocates the doing of a terrorist act’ as a terrorist organisation. Advocating terrorism includes: (a) counselling or urging it; (b) providing instruction for it; or (c) directly praising it.

Given that it is an offence to be a ‘member’ of a terrorist organisation (10 years’ imprisonment) or to ‘associate’ with one (3 years’ imprisonment) (*Criminal Code* ss 102.3 and 102.8), a member or associate could potentially be prosecuted merely because their organisation praised terrorism – even if the organisation has no other involvement in terrorism; even if the praise did not result in a terrorist act; and even if the person praising terrorism did not intend to cause terrorism.

This is an extraordinary extension of the power of proscription and criminal liability, since it collectively punishes members of groups for actions of their associates beyond their control. It is also a misapplication of criminal law to trivial harm, when criminological policy presupposes that criminal law should be reserved for the most serious social harms.

While it may be legitimate to ban groups which actively engage in, or prepare for, terrorism, it is not justifiable to ban whole groups merely because someone in it praises terrorism. It is well-accepted that speech which directly incites a specific crime may be prosecuted as incitement. It is quite another matter to prosecute a third person for the statements of another; even more so when such statements need not be directly and specifically connected to any actual offence.

This law raises the possibility that places of worship such as mosques, where they qualify as ‘organisations’ (meaning a body corporate or unincorporated body: s 100.1, *Criminal Code*), may be closed down merely because someone in it praised a terrorist act, such as where a preacher asks God to grant victory to the *mujahedeen* in Iraq.⁷ This would collectively punish all worshippers for the view of a wayward leader.

It may also infringe the constitutional protection of the free exercise of religion (s 116, *Constitution*) to the extent that the measure constitutes an unreasonable and disproportionate restriction, which has an excessive impact in relation to the policy objective of countering terrorism. It may be excessively restrict freedom of religious association, since it disproportionately affects all worshippers to control the statements of a few. It could also violate Australia's obligation to protect freedom of association (art 22, *ICCPR* 1966), since again it is *disproportionate* to restrict the association of the harmless many to suppress the association of a harmful few. In any case, a statement such as this does not deserve criminal sanction, unless it provoked another to commit (or attempt) violence.

It is also unclear when an organisation can be said to be 'praising' terrorism. For example, must the organisation as a whole *formally* praise terrorism (for instance, in its policy documents, articles of association or website), or are the words of a senior leader (or even a single member) attributable to the organisation as a whole? Further, it is not made clear whether praise must take place publicly, or whether praise expressed in private is sufficient. The uncertainty in the law increases the likelihood of adverse impacts on religious freedom.

(c) **Classification/Censorship Law**

Classification law has already had an adverse impact on freedom of religious expression, with a number of publications, such as *Defence of the Muslim Lands* and *Join the Caravan*, being banned by the Classification Review Board.⁸ In my view, as argued elsewhere,⁹ those decisions unjustifiably and disproportionately interfered in freedom of expression and freedom of religion, including the freedom to seek, receive and impart information and ideas.

The books in question were not of a sufficiently dangerous or threatening quality so as to justify their prohibition under classification law, and their banning was based on an ahistorical and acontextual misreading of the religious texts of a non-mainstream religion (Islam) in Australia. There was no more justification for banning those texts than there is justification for banning the Christian Bible, which is full of more graphic episodes of terrorist violence.¹⁰

Consequent amendments to classification law, as a result of concerns about terrorism, raise serious concerns about the potential impact on freedom of expression, as argued elsewhere.¹¹ The Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007 amended classification law to refuse classification to materials (such as books and films) that 'advocate' (including 'praise) terrorist acts, in a similar fashion to the terrorist organisations law discussed above. Similar concerns arise.

On one hand, refusing classification to materials which incite, promote or instruct in crime or violence will usually amount to a permissible and justifiable restriction on freedom of expression under international human rights law, assuming that restrictions are necessary and proportionate in the particular case. Such restriction aims to protect the public interest in ensuring public order through the prevention of crime. In a secular democracy, it is plain that religious impulses to violence cannot be justified in the same way that religious convictions can provide an acceptable ground for failing to vote or to work on spiritual holidays.

However, the amendment goes far further than legitimately restricting incitement to terrorist violence. Rather, banning materials which merely tend to encourage terrorism in a general sense (rather than a more direct, specific and intentional way) is less likely to constitute a lawful restriction on freedom of expression, particularly when there is no proximate connection to the likelihood of imminent terrorist violence or crime actually occurring.

While the right of free speech is not absolute and may be limited to prevent serious social harms, it cannot be restricted because of mere speculation that it leads to terrorism. Only expressions which have a direct and close connection to the commission of a specific crime arguably amount to justifiable restrictions on freedom of expression (including religious expression). A power to refuse classification for “praising” terrorism may excessively restrict freedom of religious expression, since it disproportionately affects all believers to control the expressions of a few.

Further, alternative, less invasive means must be first exhausted before recourse is made to the more restrictive measure of prohibiting access to such materials. Arguably, a better way of combating problems of radicalisation is through community education, outreach, empowerment, and the inclusion of such people in our society, community and institutions – and not through the quick fix of refusing classification. *Alternative means* should be fully pursued before freedom of expression is so restricted.

Whereas Australia’s pre-existing classification law aimed to protect against imminent criminal harm, there is no comparable proximity between indirect advocacy or direct praise and actual terrorist harm under the amended laws. There ought to be a definite causation between the materials and the possible commission of terrorism for them to be banned.

(d) Definition of Terrorist Acts

It has been suggested that the inclusion of a motive element in the federal definition of ‘terrorist act’ in the Criminal Code (the requirement of a political, religious or ideological purpose behind a violent act) is an unjustifiable interference in religious freedom, since it casts suspicion on minority religious groups and encourages profiling by law enforcement.

In my view, as argued elsewhere,¹² that argument is wrong. In a secular democracy, targeting violence which is accompanied by a religious motivation is a necessary, legitimate and proportionate restriction on freedom of religion. No religion is entitled to violently attack democratic societies, and the element of religious motivation – that is, attempting to impose by force one’s own religious agenda on the rest of society – deserves to be specifically identified and prohibited by the criminal law in a democracy. Such religious violence deserves special condemnation and stigmatization because it strikes at the secular nature of our democratic politics and seeks to interfere in the freedom of all others in society who do not share that particular religious agenda.

5. Balancing Competing Human Rights: Children, Women, Sexuality, Education

Freedom of religion is not absolute and special attention must be given to the position of children and women within certain religious traditions. There may be a tendency within some religious traditions to conceptualize religion as a collective or group dynamic within which the interests of individual members are subordinate to the interests of the group. When a group-oriented claim of freedom of religion comes into conflict with individual human rights, the law should recognise that individual human rights should not be subjugated to the will of the group. For example:

- No religion should be entitled to exclude women from positions of leadership. Discriminatory treatment on the basis of gender is not justifiable, just as excluding members on the basis of ethnicity or disability would not be seen as justifiable. Such discrimination impairs the basic human dignity of women and is demeaning.

- No religion should be entitled to exclude homosexuals or lesbians from the religion or from positions of leadership. Discriminatory treatment on the basis of sexuality is not justifiable. Such discrimination impairs the dignity of such persons and is degrading.
- Parental rights in relation to their children's religious education (ICCPR, art 18(4)) are not absolute and should not be permitted to prevail over the best interests of the child, which may not correlate with parental religious preferences. In particular, parental consent to medical treatment of children should not be permitted to endanger the health or life of the child. Further, parental decision-making in relation to a child's education should not be permitted to jeopardize the right of a child to receive a modern secular education, as well as exposure to alternative faith systems.

6. Separation of Religion and State

In my view, government funding should not be provided for religious activities, including religious practices within denominational educational institutions, unless such funding is allocated on the basis of parity between religions (for example, on a per capita basis).

Further, laws of general application which seek to impose the preferences of a particular religious group upon society as a whole should be repealed. For example, the NSW law which requires the closure of retail outlets on Easter Sunday imposes a Christian tradition on society as whole, including those many people who do not follow the Christian faith (see the *Shop Trading Act* 2008). Such a law is disproportionate and unnecessary, since it interferes without justification in the capacity of non-Christians to go about their business at Easter. If Christians do not wish to shop on Easter Sunday then they can simply refrain from doing so by choice, but there is no justification for imposing that preference on society as a whole. (On the other hand, that law may be characterised as a proportionate measure, since it does provide for applications for exemption by retailers and it applies to some other public holidays which are not religious days.)

The Commonwealth Parliament is entitled under the 'external affairs' power of the Commonwealth Constitution to override such state laws in implementing Australia's obligation to protect freedom of religion (that is, the freedom not to follow a majoritarian religion) under the ICCPR 1966.

7. Better Protecting Religious Expression and Practices

In a number of other liberal democracies, controversy has surrounded legal or other restrictions on the freedom of religious practitioners to manifest their religion through the wearing of religious clothing or the display of religious symbols. As argued elsewhere,¹³ some such restrictions have been imposed in an arbitrary, excessive, disproportionate and unjustifiable fashion. Any such restrictions should be imposed only if strictly necessary to achieve a legitimate policy objective, such as ensuring public safety or public order – but not merely because some legitimate religious expression is considered 'defiant' or different, as when former Prime Minister Howard described the Muslim burqa as 'confronting'.¹⁴

Please be in touch if you require any further information.

Yours sincerely

Ben Saul

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¹ HREOC, *Isma'el - Listen: National Consultations on Prejudice against Arab and Muslim Australians*, 2004; Scott Poynting and Greg Noble, *Living with Racism: The Experience and Reporting by Arab and Muslim Australians of Discrimination, Abuse and Violence since 11 September 2001* (2004); Tanja Dreher, "'Targeted': Experiences of Racism in NSW after September 11, 2001", (2005) *UTS: Shopfront Monograph Series No 2*, <www.shopfront.uts.edu.au/news/targeted.pdf> at 11 November 2005.

² See Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998) 137, 139; see generally Mark Walters, 'Hate crimes in Australia: Introducing punishment enhancers' (2005) 29 *Crim LJ* 201.

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 5 (entered into force 23 March 1976).

⁴ UN Human Rights Committee, *General Comment No. 10: Freedom of Expression (Art. 19)*, CCPR General Comment No 10 (19th session, 1983) [4].

⁵ By analogy, see *Toben v Jones* (2003) 74 ALD 321 (the Full Federal Court found that the prohibition of racial hatred in Part IIA, *Racial Discrimination Act 1975* (Cth) was a valid exercise of the external affairs power, since it was reasonably capable of being considered as appropriate and adapted to implementing the *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)). See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, upholding ss 9 and 12 of the same Act under the external affairs power.

⁶ Ben Saul, 'Speaking of Terror: Criminalizing Incitement to Violence' (2005) 28 *UNSW Law Journal* 868-886.

⁷ See the statements in Arabic by Muslim leaders translated in R Kerbaj, 'Clerics still preaching hatred of the West', *The Australian*, 3 Nov 2005, p 1; S Kearney and A McDonald, 'Mosques could be banned', *The Australian*, 4 Nov 2005.

⁸ Classification Review Board (CRB), Decision: *Join the Caravan* (19, 20, 23 June and 3 July 2006); Classification Review Board, Decision: *Defence of the Muslim Lands* (19, 20, 23 June and 3 and 5 July 2006).

⁹ Ben Saul, 'Censorship of Religious Texts: The Limits of Pluralism' (2006) 8 *UTS Law Review* 49-65.

¹⁰ See, eg, Numbers 31:17-18; Deuteronomy 2 and 20; 1 Samuel 15.

¹¹ Ben Saul, Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007, 10 July 2007.

¹² Ben Saul, 'The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient – Or Criminalizing Thought?' in A Lynch, E MacDonald and G Williams (eds), *Law and Liberty in the War on Terror* (Federation Press, Sydney, 2007), pp 28-39.

¹³ Ben Saul, 'Wearing Thin: Restrictions on Headscarves and Other Religious Symbols', in J McAdam (ed), *Forced Migration and Human Rights* (Hart, Oxford, 2008), 181-212.

¹⁴ Quote in F Farouque, 'Howard Wants to See the Back of Burqa', *The Age*, 28 February 2006.

Background Paper

Freedom of Religion and Belief in the 21st Century

*Sadhana Abayasekara, Centre Researcher**

A. The Concepts of Religion and Religious Freedom

Religion is a category of belief, essentially associated with the supernatural, and is often held and practiced in common with others in a religious association or organisation. The leading precedent on the definition of ‘religion’ and ‘belief’ in Australian law is the High Court case of *Church of the New Faith*.¹ Here the court preferred a liberal definition, to ensure the right to religious freedom was not exclusive to the established major world religions, although it was wary of adopting too broad a definition.²

The freedom to believe and practice one’s religion is a recognised human right in international law, and at least an implied right in liberal states which ensure the freedom of thought, belief and conscience. This right is articulated in Article 18(1) of the *Universal Declaration of Human Rights 1948* (UDHR) as follows:

Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.³

The freedom to believe and practice a religion operates as both an individual human right and a collective right.⁴ It can be construed as a group right where like-minded individuals form religious associations with communal aspirations. Individuals are expected to develop their religious convictions voluntarily, but not necessarily alone. Membership in a religious community, united by particular teachings, texts or practices, is essential to religious life for many individuals. Religious associations often form in close interaction with cultural and ethnic groups. Thus, belief in and practice of religion is usually best understood as culturally situated, even where it includes private worship.

B. Recognition of the Right to Freedom of Religion

The concept of respecting other faiths and beliefs has developed in the history of religions. Historically, this concept was raised by those of oppressed minority faiths. Religious tolerance and freedom are recognised and respected in the texts and principles of the major religions.⁵ For example, although people of different faiths

* The author would like to thank Professor David Kinley and Dr Ben Saul for their invaluable comments and guidance.

have been persecuted in the name of Christianity in history, the Roman Catholic Church has since qualified the doctrine of *extra ecclesiam nulla salus* ('outside the church, there is no salvation') and publicly condemned discrimination on the grounds of religion.⁶ Scholars suggest that even the monotheistic Christian tradition contains multiple bases of religious freedom.⁷

In principle, liberal societies allow for the coexistence of diverse cultures, races and religions. The principles of individual choice and the protection of conscience, which are fundamental to liberal democracies, entail the right to religious freedom.⁸ This right also entails the freedom to change one's religion, and protection against coercive proselytism.⁹ The concept of religious freedom has become part of the modern discourse on human rights, manifest in the law, including international legal agreements, and anti-discrimination legislation at the Commonwealth and State level in Australia.

The concept of religious freedom underpins Australian multiculturalism. Australia is a secular nation, with a majority Christian population, alongside diverse religious communities.¹⁰ The numbers of Australians affiliated with non-Christian religions (approximately 6% in the 2006 census), and of Australians without a religion (approximately 19%) have been steadily increasing.¹¹ In the modern Australian context, it is particularly important to ensure the protection of minority or non-Christian faiths, as well as non-believers.

The rights of 'non-believers' have been raised in discussions on religious freedom.¹² Policies on religious freedom tend to be weighted in favour of existing religious groups. We should be equally concerned with the issue of how these religious groups regard dissenters, non-believers and minority sects within their own traditions.¹³ The right not to believe or participate in religion is not expressly mentioned in binding international or domestic law on religious freedom, but is arguably an implied right. The UN Human Rights Committee has asserted that 'Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief'.¹⁴ Supporting the approach taken in HREOC's *Article 18* report, we will regard the right to believe and the right not to believe as equal.¹⁵

C. Problems with Religious Freedom

Arguments against the concept of religious freedom come from all corners of the debate, including from religious fundamentalists, religious minorities, atheists and human rights advocates.

1. Relativism

The first main issue is whether religious freedom is compatible with religious conviction. Some of the world's dominant religions, namely Christianity, Islam and Judaism, are monotheistic and committed to irreconcilable religious views. From the position of monotheism, the idea of religious tolerance threatens 'the multifarious evils of relativism, indifferentism, scepticism and compromise in religion'.¹⁶ Tolerance of other religions seems to be an admission of other possible truths, which undermines the strength of one's own supernatural truth claims. However, it is clearly untenable for religious groups to hold such an uncompromising position in a pluralistic society.

2. Religious Fundamentalism and Intolerance

The issue of monotheism leads non-believers and religious minorities or moderates towards an entirely different argument against religious freedom. It can be reasoned that certain religions are essentially exclusionary or intolerant, and thus impede the equal right to freely choose and practice religion. Noted atheist and scientist Richard Dawkins opposes religion in general, due to 'its deliberate and cultivated pandering to humanity's natural tendency to favour in-groups and shun out-groups'.¹⁷ In short, he argues that religion is inherently divisive. The philosophical conundrum is that human rights discourse dictates that there is a need to protect freedom of religion, as a category of freedom of conscience, yet religions tend to be exclusive and intolerant of one another. It is most often religious views which are to blame in cases of religious vilification or discrimination. Must we become atheists to avoid this issue, as Dawkins suggests, or can it be resolved by 'more religion'?¹⁸

A parallel argument is that the policy of religious tolerance itself allows for, or even justifies, religious fundamentalism. This claim is pertinent in the context of the perceived rise of religious fundamentalisms following September 11.¹⁹ The fault lines between Islam and traditionally Western religions are apparent in the debate over whether religions warrant special protections or exemptions from laws. For example, the religious vilification laws in Victoria were invoked to solve a dispute between Christian and Islamic groups.²⁰ Laws against religious discrimination and vilification can actually have an adverse impact on interfaith relations, by emphasising divisions between religious groups.²¹

Regardless of whether it is the concept of religion itself or the policy of religious freedom that is responsible for the rise of fundamentalisms, we must accept that both religion and religious freedom are essential or ineradicable parts of our liberal democratic society. However, it is important to be wary of the risk that laws promoting religious tolerance could further divisions between religions.

3. Religious Freedom as a Collective Right

From a modern human rights perspective, the main difficulties with the right to religious freedom are owing to its special status as both a collective right and an individual human right. The tension between religion as an individual human right and a collective right is manifested in the following issues:

- Does a religious community have a right to self-determination?
- To what extent should a state intervene in a community, for example, in limiting religious autonomy in order to protect individual autonomy?
- Can religious communities assert their group rights to religious freedom where they restrict the individual liberty of certain members of the group, such as women?
- The autonomy of a religious group is justified on the basis that its members freely chose to participate in it; yet how can the voluntariness of religious conviction and practice be assessed?

This paper pursues a human rights approach to religious freedom in Section D.

4. Broader Risks of Religious Freedom

The broader risks associated with establishing religious freedom can be grouped as follows:

- ‘Anarchy’: If the definition of religious tolerance is too relaxed, religious individuals could absolve themselves from the law.
- ‘Inequality’: Granting exemptions and preferential treatment to religious groups could create a tiered system of law-making.
- ‘Abuse’: Individuals could commit unacceptable abuses in the name of religion.
- ‘Misuse’: The justification of religious freedom may not always be used for *bona fide* purposes.

D. A Human Rights Approach to Freedom of Religion

1. The Importance of Religion to Human Rights Discourse

Fundamental human rights can be derived from religious foundations.²² It is only in modern times that a non-religious human rights discourse has developed. Religion can still be constructive in ensuring the protection and promotion of universal human rights, including basic respect for other human beings. Those committed to human rights should not dismiss or work against religion, but should engage with a full range of religious perspectives and acknowledge their contribution to the rights discourse.²³

2. Justifying the Special Protection for Religious Freedom

Should religion be recognised as a special area of rights protection, or is religious freedom adequately protected by other established freedoms? It may be argued that religious freedom is already promoted and protected by existing rights and fundamental freedoms, most notably the freedom of belief, thought and conscience,²⁴ freedom of expression,²⁵ and the freedoms of association and peaceful assembly.²⁶ Even if we assume that this is true, it is important to explicitly recognise religious freedom as a right, and to clarify its boundaries and interactions with other rights.

There are several complementary objectives supporting the special protection of religious freedom: firstly to allow for free thought, expression of beliefs and free association around religious teachings (for the full autonomy and flourishing of religious communities, in terms of ‘positive liberty’); and secondly to discourage religious hatred and discrimination against individuals, especially those in religious minorities (for the removal of barriers to employment, education and so on, in terms of ‘negative liberty’).²⁷

3. The Overlap between Religious and Racial Discrimination

Even though it is often intertwined with race, religion must be protected as a special category since it is not always covered by racial anti-discrimination laws.²⁸ Religious discrimination and vilification laws are necessary to give effect to anti-racism

measures. Religion is a distinct category of belief, as it can be intrinsically interconnected with membership in particular cultural and ethnic groups. We cannot assume that membership to a religious community is an absolutely independent choice, distinguished from being born into a particular ethnocultural group. Holding to certain religious beliefs can be a legitimate choice made under the influence of family or wider cultural pressures.

We must accept that it is not possible to separate religion from race and culture, especially where there is a deep-rooted historical connection. It has been proposed that we can imply an extended application of the international covenant against racial discrimination to religious discrimination, where there is overlap between race and religion.²⁹ However, prohibitions on racial discrimination and vilification in domestic and international law are insufficient to cover most cases of religious discrimination. If we accept that racism is a fundamental human rights issue, we can justify explicitly extending the anti-discrimination principle to religion. For example, consider the surge in racism directed against people of Middle Eastern appearance and the Muslim community following September 11. Anti-racism legislation prohibits attacks against people on the ground of race, but does not cover the vilification of Muslims of non-Arabic descent. In the context of the problematic association between terrorism and Islam, it is a matter of urgency for states to explicitly protect against the stigmatisation of religious communities and ensure their free operation.³⁰

4. The Legal Parameters of Religious Freedom

Establishing a right to religious freedom is bound to create conflicts with the law as it stands. The most contentious situations are where the law prohibits what a religion permits (for example, polygamy), or where the law requires what a religion prohibits (for example, wearing a headscarf in schools).³¹ These are not necessarily deadlocked confrontations. The law itself is made, amended and interpreted with regard to contemporary norms, including religious and cultural norms; at the same time, religious beliefs are developed by citizens situated within the existing legal framework.

The difficulty is in striking a balance between the equal application of the law and religious exemptions from the law. If the definition of religious tolerance is too relaxed, religious individuals could absolve themselves without proper justification, creating an unfair 'tiered' legal system. The right to religious freedom should not be taken to be absolute. Thus, we need to follow a principled approach to limit inequality and avoid unjust outcomes. For example, HREOC's *Article 18* report strikes the right balance in limiting the exemption to other anti-discrimination laws granted to religious organisations (for example, for employment in religious schools) based on a consistent application of the core doctrines of the religion.³²

5. Balancing Competing Human Rights

Where the right to religious freedom clashes with other human rights, we can take guidance from Ignatieff's suggestion that in most cases the rights of the individual (as the more vulnerable agent) ought to be prioritised above that of the collective.³³ According to Ignatieff, it is only necessary to conceive of religion as a group right insofar as it gives effect to individual rights, including the freedom to choose one's spiritual beliefs. The ultimate justification and purpose of group rights is the rights of

the individuals who compose it. Thus, the right to practice religion should not cancel out the individual's right to leave a religious institution.

A key conflict arises between religious freedom and freedom of expression. Protecting freedom of expression is essential to allowing for a diversity of religions in liberal society, yet, paradoxically, it is also in tension with protecting religious freedom. The right to religious freedom could be used to justify restrictions on freedom of speech. For example, it is argued that establishing religious vilification or incitement to religious hatred as a criminal offence will in effect limit religious debate, which is essential for ensuring religious pluralism.³⁴ On the issue of censorship laws aimed at promoting religious tolerance, it could be said that banned religious texts could in fact incite further animosity between communities, if perceived as an attack by the state on religious freedom.³⁵

Where there are such competing human rights claims, we advocate a pragmatic approach. We argue that religious vilification should be criminalised, but with defined exemptions to allow for good faith expressions for academic, scientific, artistic, or genuine public interest purposes, as recommended in the *Article 18* report.³⁶ Similarly, on the issue of censorship, we must consider the full implications of officially banning texts in the current social context.

Following this approach, our submission to this inquiry evaluates the practical effect of granting legal protection to the right to freedom of religion.

NOTES

¹ See *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120.

² 'The mantle of immunity would soon be in tatters if it were wrapped around beliefs, practices and observances of every kind whenever a group of adherents chose to call them a religion': *Church of the New Faith* at 132 (per Mason ACJ and Brennan J).

³ This article is enshrined in Article 18(1) of the *International Covenant on Civil and Political Rights 1966* (ICCPR). (The ICCPR is binding in international law on all parties to the convention, whereas the UDHR is merely persuasive on Member States of the UN.)

⁴ For further discussion of this tension between interpretations of the freedom of religion, see Joel Beversluis, *Sourcebook of the World's Religions: An Interfaith Guide to Religion and Spirituality* (New World Library, Novato, CA, 2000), 322.

⁵ For an overview of the development of the concept of tolerance and freedom in the history of religions, see Joint Standing Committee on Foreign Affairs, Defence and Trade, *Conviction with Compassion: A Report on Freedom of Religion and Belief* (The Parliament of the Commonwealth of Australia, Canberra, 2000), 21-50.

⁶ Pope Paul VI, 'Declaration on the Relation of the Church to Non-Christian Religions – *Nostra Aetate*' (Holy See, Vatican City, 1965).

⁷ See, for example, Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, Oxford, 2005), 22-37.

⁸ Ahdar and Leigh, *Religious Freedom in the Liberal State*, 64.

⁹ This right is not explicitly referred to in the text of the UN Conventions, but is included in the General Comment by the Human Rights Committee, and the right to be generally free from coercion is enshrined in Article 18(2) of the ICCPR: see Dennis De Jong, 'Freedom of Religion and Belief in the Light of Recent Challenges: Needs, Clashes and Solutions' in N Ghana, A Stephens and R Walden (eds) *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers, Leiden, 2007), 188-189.

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- ¹⁰ See overview of the Australian religious context in Kevin Boyle and Juliet Sheen (eds) *Freedom of Religion and Belief: A World Report* (Routledge, London, 1997), 166-176.
- ¹¹ Data from the 2006 'Census of Population and Housing' in Australian Bureau of Statistics (ABS), *Year Book Australia 2008* (ABS, Canberra, 2008).
- ¹² See, for example, Joint Standing Committee on Foreign Affairs, Defence and Trade, *Conviction with Compassion*, 130-132.
- ¹³ David Little, 'Rethinking Human Rights' (1999) 27(1) *Journal of Religious Ethics* 151-177, 169.
- ¹⁴ UN Human Rights Committee, General Comment 22 on Art. 18 of the ICCPR, para. 2; reproduced in Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (Oxford University Press, Oxford, 2000), 372.
- ¹⁵ Human Rights and Equal Opportunity Commission (HREOC), *Article 18: Freedom of Religion and Belief* (HREOC, Sydney, 1998), 25 [R.2.5].
- ¹⁶ As put by Ahdar and Leigh, *Religious Freedom in the Liberal State*, 22.
- ¹⁷ Richard Dawkins, *The God Delusion* (Bantam, London, 2006), 297.
- ¹⁸ For the latter view, see for example, Martin Marty, 'Religious Dimensions of Human Rights', in John Witte Jr and Johan D van der Vyver (eds), *Religious Human Rights in Global Perspective: Religious Perspectives* (Martinus Nijhoff, The Hague, 1996), 9; 16.
- ¹⁹ Gabriel A. Almond, R. Scott Appleby, Emmanuel Sivan, *Strong Religion: The Rise of Fundamentalisms Around the World* (University of Chicago Press, Chicago, 2003).
- ²⁰ *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284.
- ²¹ Peter Cumper, 'Inciting Religious Hatred: Balancing Free Speech and Religious Sensibilities in a Multi-Faith Society' in N Ghanea, A Stephens and R Walden (eds) *Does God Believe in Human Rights?* (Martinus Nijhoff Publishers, Leiden, 2007), 250-252.
- ²² See Michael Perry, *Toward a Theory of Human Rights: Religion, Law, Courts* (Cambridge University Press, Cambridge, 2007).
- ²³ Given the pluralistic nature of modern society, we cannot and should not exclude religious perspectives from the process of constructing international rights and norms: Diane F. Orentlicher, 'Comments: Relativism and Religion' in Michael Ignatieff and Amy Gutmann (ed), *Human Rights as Politics and Idolatry* (Princeton University Press, Princeton, 2001), 141-160.
- ²⁴ ICCPR, Art. 18; UDHR, Art. 18.
- ²⁵ ICCPR, Art. 19; UDHR, Art. 19.
- ²⁶ ICCPR, Art. 22 and 21 respectively; UDHR, Art. 20(1).
- ²⁷ To use the classic distinction between two types of freedom in Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, London, 1969).
- ²⁸ International covenants and domestic legislation protecting against racial discrimination include: *International Convention on the Elimination of All Forms of Racial Discrimination 1965* (ratified by Australia on 30 September 1975); *Racial Discrimination Act 1975* (Cth); *Racial Hatred Act 1995* (Cth); and statutes in every Australian State and Territory, such as the *Anti-Discrimination Act 1977* (NSW).
- ²⁹ Jose D. Ingles, *Study on the Implementation of Article 4 of the Convention on the Elimination of All Forms of Racial Discrimination, CERD, Positive Measures Designed to Eradicate All Incitement to, or Acts of Racial Discrimination*, UN Doc. A/CONF.119/10/CERD/2 (1986), 38. For analysis of the relevance of the international convention on racial discrimination to religion, see Nathan Lerner, *Religion, Secular Beliefs and Human Rights: 25 Years After the 1981 Declaration* (Martinus Nijhoff Publishers, Leiden, 2006), 82-84.
- ³⁰ See Chapter 8 on religion and terrorism in Nathan Lerner, *Religion, Secular Beliefs and Human Rights: 25 Years After the 1981 Declaration* (Martinus Nijhoff Publishers, Leiden, 2006), 167-172.

³¹ For a more comprehensive list of potential clashes between law and religion, see Table 6.1. in Ahdar and Leigh, *Religious Freedom in the Liberal State*, 157-158.

³² HREOC, *Article 18*, 113.

³³ See Michael Ignatieff and Amy Gutmann (ed), *Human Rights as Politics and Idolatry* (Princeton University Press, Princeton, 2001), 67.

³⁴ See, for example, Ben Saul, 'Censorship of Religious Texts: The Limits of Pluralism' (2006) 8 *UTS Law Review* (*Racism, Religious Intolerance and the Law*), 49-65; Ahdar and Leigh, *Religious Freedom in the Liberal State*, Chapter 12.

³⁵ Saul, 'Censorship of Religious Texts', 61.

³⁶ As recommended in HREOC, *Article 18*, 139 [R5.3].