



# **Australian Government**

## Australian Government response to the Religious Freedom Review

DECEMBER 2018

## INTRODUCTION

The Australian Government recognises that there is an opportunity to enhance the statutory protection of freedom of thought, conscience and religion, which for the purposes of this document will be referred to summarily as ‘freedom of religion’.

The Expert Panel that conducted the Religious Freedom Review importantly noted in its Report that:

*“Freedom of thought, conscience and religion is a right enjoyed by all, not just those of faith. It protects those who live a life of faith and those who live by other beliefs or, indeed, no beliefs. It protects those who face coercion that impairs their freedom to choose their religion or beliefs. It protects those whose views on faith or belief change over their lifetime. It is not a protection for religions. It is a protection, a human right, for the religious, the non-religious and those who subscribe to other systems of belief.”*

The *International Covenant on Civil and Political Rights* has been in force for Australia for almost 40 years. The Covenant commits countries to respect, protect and fulfil the fundamental civil and political rights of individuals, including: the right to life; freedom of religion; freedom of expression; the right to peaceful assembly; freedom of association; and the right to non-discrimination and equal protection of the law.

Article 18 of the *International Covenant on Civil and Political Rights* states that:

- 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
- 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
- 3. Freedom to manifest one's religion or beliefs may be subject 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.*
- 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

Furthermore, Article 2 of the *International Covenant on Civil and Political Rights* states that:

- 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*

In recognising the importance of freedom of religion, the Australian Government also recognises that the current statutory and administrative landscape in Australia provides a framework for the protection of a variety of human rights. Amongst other things, this statutory architecture includes multiple anti-discrimination Acts. These Acts essentially operate by defining a distinct protected attribute (such as race, sex, age or disability) and then seeking to protect persons from certain defined acts and omissions which may constitute unlawful discrimination on the basis of that attribute. This protection can be qualified by defined exemptions, which acknowledge that some conduct that may otherwise be *prima facie* discriminatory has itself been protected and permitted in order to protect other important rights.

An example of this is the Labor Government amendments to the *Sex Discrimination Act 1984* made in 2013. These amendments expanded the basis upon which discrimination would be determined as unlawful and correspondingly expanded the exemptions from those general prohibitions for religious organisations such as religious schools. The exemption for educational institutions established for religious purposes was first introduced in the original *Sex Discrimination Act*, and set out exemptions for discrimination against employees and contract workers on the grounds of ‘sex, marital status or pregnancy’, and against students on the grounds of ‘marital status or pregnancy’. The Labor Government’s *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* expanded the scope of those exemptions for educational institutions established for religious purposes to include discrimination on the grounds of ‘sexual orientation’, ‘gender identity’, and ‘relationship status’.

Two important features of the statutory architecture of Australia’s federal anti-discrimination system should be noted as a matter of context and background to the substance of this response.

First, religion is not covered as a protected attribute in the four current federal anti-discrimination Acts. It is, however, the subject of several exemptions of the type described above. For example, the *Age Discrimination Act 2004* and the *Sex Discrimination Act* both contain a general religious exemption for any acts or practices of a body established for religious purposes that conform to the doctrines, tenets or beliefs of the relevant religion, or are necessary to avoid injury to the religious susceptibilities of adherents of that religion.<sup>1</sup> In the *Sex Discrimination Act*, this explicitly includes exemptions for inherently religious practices, such as the training and ordination of priests, ministers of religion or members of a religious order and the selection or appointment of persons to perform duties or functions for any religious observance. As stated above, the *Sex Discrimination Act* also includes specific exemptions for educational institutions established for religious purposes in relation to the employment of staff and contractors, and the provision of education and training.<sup>2</sup> Further, although religion is not a protected attribute under federal anti-discrimination law, the *Fair Work Act 2009* provides a number of protections from discrimination on the basis of religion in employment. The *Fair Work Act* prohibits employers from taking adverse action against an employee or prospective employee on the basis of religion, including terms in

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<sup>1</sup> See section 37 of the *Sex Discrimination Act 1984* and section 35 of the *Age Discrimination Act 2004*.

<sup>2</sup> See section 38 of the *Sex Discrimination Act*.

modern awards or enterprise agreements which discriminate against an employee on the basis of religion, and terminating an employee's employment for reasons including their religion.<sup>3</sup>

Second, freedom of religion is one right among many others and so, in practice, this right co-exists with a broad suite of other human rights. Importantly though, freedom of religion is not subordinate or secondary to the other rights which it will necessarily be balanced with. Ultimately, in consideration of the best manner in which to frame, balance and protect co-existing rights, the Australian Government considers there is a requirement to ensure some enhanced standing protection for Australians' right to freedom of religion, by giving it more weight in our community than it currently receives.

As the Religious Freedom Review noted, respecting diversity, including with respect to religious belief, is not only fundamental to recognising the inherent dignity of the individual, but also contributes to the democratic life of our community. The Religious Freedom Review further noted that there is no standalone law that gives comprehensive effect throughout Australia to the human right to freedom of religion.

Therefore, as recommended by the Expert Panel that conducted the Religious Freedom Review, the Australian Government will introduce a Religious Discrimination Bill into the Parliament. This Bill will ensure people's right to freedom of religion is adequately protected in our community by the establishment of legislation that adopts the same framework that exists in other Commonwealth anti-discrimination legislation. The Bill will provide substantive protection against discrimination by rendering it unlawful to discriminate on the basis of a person's religious belief or activity, including on the basis that a person does not hold a religious belief or participate in a religious activity; and will include a framework of appropriate exemptions as exists in other anti-discrimination legislation. Further information regarding the proposed Religious Discrimination Bill is set out below in response to recommendation 15 of the Report.

## **SUMMARY OF GOVERNMENT RESPONSE**

To summarise the various specific responses contained in this document: at the most fundamental level, the Australian Government accepts the central conclusion of the Religious Freedom Review, that there is an opportunity to further protect, and better promote and balance, the right to freedom of religion under Australian law and in the public sphere.

### *Government position on recommendations*

Because several of the recommendations of the Religious Freedom Review relate exclusively to the States and Territories, the Australian Government has accepted those recommendations in principle in recognition of the fact that while the Australian Government will take a leadership role in advocating in favour of a relevant outcome addressed to a State or Territory, it cannot unilaterally give effect to that outcome.

As will be clear from responses to specific recommendations, an in principle acceptance represents the intention in some instances to consult with States and Territories, and reflects

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<sup>3</sup> See section 153 of the *Fair Work Act 2009* in relation to discriminatory terms in modern awards; sections 186, 194 and 195 in relation to discriminatory terms in enterprise agreements; section 351 in relation to adverse action; and section 772 in relation to unlawful termination of employment.

shared responsibility for the area of policy between the Commonwealth and State and Territory governments, and therefore the desire to proceed initially in a way that seeks a co-ordinated and co-operative approach.

Further, in some instances, where the Religious Freedom Review has identified an issue (which the Government agrees exists) and the Review has suggested a specific statutory approach, the Government has characterised its response to the recommendation as being in principle agreement or as giving further consideration to the recommendation where either:

- the Government intends to give effect to the recommendation in a different manner to that proposed by the Panel; or
- the Government considers that, given the complexity of the issues, the recommendation requires further consideration.

In summary, the Australian Government accepts either directly or in principle 15 of the 20 recommendations of the Religious Freedom Review and, while agreeing with the principles underpinning the remaining five recommendations, is of the view that further consideration is necessary to address the complexities associated with those recommendations.

#### *Implementation of recommendations*

The manner in which the Government will implement the recommendations of the Religious Freedom Review falls into three categories:

1. Fourteen recommendations to be implemented as soon as practicable (being recommendations 2 to 4, 9 to 14 and 16 to 20);
2. One recommendation to be implemented following consultation to seek bipartisan support for the Religious Discrimination Bill (being recommendation 15); and
3. Five recommendations which require further consideration (being recommendation 1 and recommendations 5 to 8).

In relation to the first and second categories of recommendations set out above, the Australian Government intends to respond in a practical way by, amongst other things:

- developing a General Amendment Bill for introduction to Parliament as soon as practicable, containing amendments to existing Commonwealth legislation relating to freedom of religion, including amendments to marriage law, charities law and objects clauses in existing anti-discrimination legislation;
- developing a Religious Discrimination Bill to provide comprehensive protection against discrimination based on religious belief or activity. The Government will work with the Opposition, crossbench and stakeholders in a consultative process which aims to allow for bipartisan agreement on a Bill which can be introduced into the Parliament with broad cross-party support;
- establishing a standalone position of Freedom of Religion Commissioner at the Australian Human Rights Commission;

- supporting the Australian Human Rights Commission to increase awareness of the importance of freedom of religion;
- commencing a process with all State and Territory Governments seeking their consideration to review and amend their own existing policies and legislation which pertain to freedom of religion to ensure a high degree of consistency across Australia; and
- referring recommendations that pertain to the States and Territories to a proposed Council of Attorneys-General Working Group and the Council of Australian Governments (COAG) Education Council, as appropriate, to consider all relevant recommendations.

In relation to the third category of recommendations set out above, the Australian Government considers that this group of recommendations require further consideration.

Recognising the complexity of the issues surrounding the framework of exemptions for religious bodies in anti-discrimination law in all Australian jurisdictions, the Government will consult with the States and Territories on the terms of a potential reference to the Australian Law Reform Commission (ALRC), where recommendation 1 and recommendations 5 to 8 can be referred with a view to considering what drafting options may be available that would achieve the twin purposes of limiting or removing altogether (if practicable) legislative exemptions to discrimination based on a person's identity while also protecting the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos. The Government notes that any potential changes to the *Fair Work Act* require a formal process of engagement and consultation with the States and Territories. As an independent statutory law reform body, the ALRC will be one option considered as a potential forum to conduct community consultation in a methodical manner on specific drafting options designed to balance rights to freedom from discrimination and rights to freedom of religion in this complex area of the law with impartiality and legal expertise.

As noted above, a reference to the ALRC of recommendation 1 and recommendations 5 to 8 will allow for a process of community consultation on a model(s) of specific legislative changes. The Australian Government undertakes to work with the States and Territories, the Opposition, crossbench and all interested stakeholders in a consultative process which aims to allow for an agreement to specific legislative changes in due course which could be introduced to Parliament with broad cross-party support.

The Australian Government thanks the Expert Panel for conducting the Religious Freedom Review, and the Australian people who took the time to have their say on this important issue in such a comprehensive and respectful way. The Expert Panel has produced a significant Report that will form the basis for a better understanding and protection of freedom of religion in our community.

Further detail regarding the Australian Government's responses to each of the Religious Freedom Review's recommendations is outlined below.

**The Hon Scott Morrison MP**  
**Prime Minister**

**The Hon Christian Porter MP**  
**Attorney-General**

## **BACKGROUND**

The Religious Freedom Review was announced by the former Prime Minister, the Hon Malcolm Turnbull, on 22 November 2017.

The Review's Terms of Reference were provided to the Expert Panel and released publicly on 14 December 2017.

The Terms of Reference for the Review were:

### ***Objective***

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

### ***Scope***

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.

### ***Membership of the Panel***

The review will be conducted by an Expert Panel, chaired by the Hon Philip Ruddock, which will consist of:

- Emeritus Professor Rosalind Croucher AM
- The Hon Dr Annabelle Bennett AO SC
- Fr Frank Brennan SJ AO
- Professor Nicholas Aroney

The Panel will be supported by a secretariat led by the Department of the Prime Minister and Cabinet.

### ***Timing***

Following the Prime Minister's agreement to an extension of the reporting date, the Panel will report its findings to the Prime Minister by 18 May 2018.

The Panel held around 90 consultation meetings and received over 15,000 submissions before providing its report to the former Prime Minister on 18 May 2018.

The final Report made 20 recommendations to Australian, State and Territory governments.

## Recommendations for implementation as soon as practicable

The Australian Government accepts 14 recommendations of the Religious Freedom Review (being recommendations 2 to 4, 9 to 14 and 16 to 20), and will implement its responses to them as soon as practicable.

### Recommendation 2

Commonwealth, State and Territory governments should have regard to the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* when drafting laws that would limit the right to freedom of religion.

The Government **accepts** this recommendation as it pertains to the Commonwealth.

The Government **accepts in principle** this recommendation as it pertains to the States and Territories.

There are a number of existing mechanisms for human rights scrutiny in the development of federal legislation. These measures ensure that draft bills and legislative instruments do not infringe upon human rights, including the right to freedom of religion.

For example, the Office of Parliamentary Counsel refers draft legislation to the Attorney-General's Department where a provision might discriminate against an individual on the basis of their religious belief, or where human rights matters are raised.

In addition, under the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Parliamentary Joint Committee on Human Rights examines bills and legislative instruments for compatibility with the rights and freedoms recognised or declared in the seven core international human rights treaties to which Australia is a party, including the right to freedom of religion.

The Australian Government will engage with existing processes, including through the Office of Parliamentary Counsel, to ensure that the drafting and scrutiny of federal legislation necessarily has regard to the *Siracusa Principles* where proposed laws may limit the right to freedom of religion.

The Attorney-General will correspond with State and Territory Attorneys-General seeking their agreement to future consideration of the *International Covenant on Civil and Political Rights* in their respective legislative processes, including any relevant jurisprudence and the *Siracusa Principles*.

### **Recommendation 3**

Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.

The Government **accepts** this recommendation as it pertains to the Commonwealth.

The Government **accepts in principle** this recommendation as it pertains to the States and Territories.

The *Sex Discrimination Act*, *Disability Discrimination Act 1992* and *Age Discrimination Act* currently include objects clauses. These clauses include objects such as to eliminate discrimination, to promote recognition and acceptance within the community of the principle of equality, and to give effect to relevant international instruments. In addition, section 10A of the *Australian Human Rights Commission Act 1986* provides that the Australian Human Rights Commission must perform its functions with regard to the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.

The Australian Government will introduce a Bill containing amendments to existing Commonwealth anti-discrimination legislation (being the *Sex Discrimination Act*, *Disability Discrimination Act*, *Age Discrimination Act* and *Racial Discrimination Act 1975*) to ensure each respective piece of anti-discrimination legislation has an objects clause to reflect the equal status in international law of all human rights, including freedom of religion.

An objects clause will also be included in the proposed Religious Discrimination Bill (referred to with respect to recommendation 15 below).

The Attorney-General will correspond with State and Territory Attorneys-General seeking their consideration of the use of objects, purposes or other interpretive clauses in their anti-discrimination legislation and will propose the establishment of a Council of Attorneys-General Working Group to consider all relevant recommendations of the Review.

### **Recommendation 4**

The Commonwealth should amend section 11 of the *Charities Act 2013* to clarify that advocacy of a ‘traditional’ view of marriage would not, of itself, amount to a ‘disqualifying purpose’.

The Government **accepts** this recommendation.

Broadly, section 5 of the *Charities Act 2013* defines a charity as an entity:

- that is a not-for-profit entity;
- all of the purposes of which are charitable purposes for the public benefit (or incidental or ancillary to such purposes);
- none of the purposes of which are ‘disqualifying purposes’; and
- that is not an individual, a political party or a Commonwealth entity.

Currently, the definition of ‘disqualifying purpose’ in subsection 11(a) of the *Charities Act* includes ‘*the purposes of engaging in, or promoting, activities that are unlawful or contrary to public policy*’. However, as noted by the Religious Freedom Review, mere advocacy of a position contrary to Australian Government policy (even if a policy is reflected in specific

legislative provisions) does not meet the threshold of a disqualifying purpose. Indeed, advocating a change to law or policy in furtherance of another charitable purpose may itself be a charitable purpose.

For the avoidance of all doubt, the Australian Government will introduce legislative amendments to section 11 of the *Charities Act* to clarify that engaging in, or promoting, activities that support marriage as previously defined in the *Marriage Act 1961* will not, of itself, amount to a ‘disqualifying purpose’ under the *Charities Act*.

### **Recommendation 9**

State and Territory education departments should maintain clear policies as to when and how a parent or guardian may request that a child be removed from a class that contains instruction on religious or moral matters and ensure that these policies are applied consistently. These policies should:

- a) include a requirement to provide sufficient, relevant information about such classes to enable parents or guardians to consider whether their content may be inconsistent with the parents’ or guardians’ religious beliefs, and
- b) give due consideration to the rights of the child, including to receive information about sexual health, and their progressive capacity to make decisions for themselves.

The Government **accepts in principle** this recommendation as it pertains to the States and Territories.

While this recommendation is directed to the States and Territories, the Australian Government considers it would be in the best interests of children, schools and the community that clear and consistent policies be implemented across all Australian jurisdictions in relation to when and how a parent or guardian can request the removal of a child from any class that contains instruction on religious or moral matters that the parent or guardian may reasonably consider contrary to the religious doctrines, tenets or beliefs of that family. Accordingly, the Australian Government considers that there should be consistent and appropriate information that allows parents or guardians across all jurisdictions to make appropriate and properly informed decisions in relation to the education of their children.

Therefore, the Australian Government will take a leadership role by developing model Guidelines that could form the basis of a national framework to ensure that parents’ and guardians’ rights to request the removal of a child from a class that contains instructions on religious or moral matters are consistently applied and understood in all Australian schools regardless of jurisdiction.

The Minister for Education will correspond with State and Territory Education Ministers encouraging them to review their existing policies as to when and how a parent or guardian may request that a child be removed from a class that contains instruction on religious or moral matters that the parents or guardians may reasonably consider contrary to the religious doctrines, tenets or beliefs of that family, and ensure that these policies are applied consistently, in line with the Religious Freedom Review’s recommendation and in accordance with the proposed model Guidelines to be developed by the Australian Government.

The Minister for Education will put this recommendation on the agenda of the next meeting of Education Ministers at the COAG Education Council for their consideration.

### **Recommendation 10**

The Commonwealth Attorney-General should consider the guidance material on the Attorney-General's Department's website relating to authorised celebrants to ensure that it uses plain English to explain clearly and precisely the operation of the *Marriage Act 1961*. The updated guidance should include:

- (a) a clear description of the religious protections available to different classes of authorised celebrants, and
- (b) advice that the term 'minister of religion' is used to cover authorised celebrants from religious bodies which would not ordinarily use the term 'minister', including non-Christian religions.

The Government **accepts** this recommendation.

No authorised celebrant is required to solemnise any marriage.

Under the *Marriage Act*, there are three categories of authorised celebrants:

- Ministers of religion authorised by a Recognised Denomination proclaimed for the purposes of the *Marriage Act* (see the *Marriage (Recognised Denominations) Proclamation 2018*) (Category A);
- State and Territory Officers (Category B); and
- Commonwealth registered marriage celebrants (Category C).
  - Religious marriage celebrants (Category D) are a sub-category of Commonwealth registered marriage celebrants, and include ministers of religion authorised by a religious body or organisation that is not a Recognised Denomination prescribed under the *Marriage Act*. 'Religious marriage celebrant' was established as a new category of authorised celebrant under the *Marriage Amendment (Definition and Religious Freedoms) Act 2017*.

A Category A or Category D celebrant who refuses to solemnise a marriage because to do so would not conform to the doctrines, tenets or beliefs of their religious body or organisation does not contravene the *Sex Discrimination Act*. This religious protection extends to authorised celebrants who perform marriages for smaller and emerging religious bodies or organisations, as well those who are authorised by a recognised denomination under the *Marriage Act*. These authorised celebrants may include, for example, priests, pastors, reverends, rabbis, sheiks and imams.

The Religious Freedom Review noted concerns that there was a lack of understanding within the community as to how the law operates. This included confusion as to the religious protections that apply to each category of celebrant and to ministers of religion, as well as whether some religious bodies were able to avail themselves of the religious protections under the *Marriage Act*.

This recommendation has been implemented by the Attorney-General's Department.

In May 2018, the Attorney-General's Department released a draft version of the '*Guidelines on the Marriage Act 1961 for authorised celebrants*' for consultation.

In July 2018, the Attorney General's Department published the revised '*Guidelines on the Marriage Act 1961 for authorised celebrants – July 2018*' based on feedback received and in line with the Panel's recommendation.

The Guidelines are available at:

<https://www.ag.gov.au/FamiliesAndMarriage/Marriage/marriagecelebrants/Pages/Celebrant-resources.aspx>

### **Recommendation 11**

The Commonwealth Attorney-General should consider whether the Code of Practice set out in Schedule 2 of the *Marriage Regulations 2017* is appropriately adapted to the needs of smaller and emerging religious bodies.

The Government **accepts** this recommendation.

Paragraph 39G(1)(a) of the *Marriage Act* requires Commonwealth-registered marriage celebrants (being Category C celebrants referred to in the response to recommendation 10 above) to adhere to the Code of Practice for marriage celebrants, which is prescribed in Schedule 2 of the *Marriage Regulations 2017*. This includes Commonwealth-registered marriage celebrants who perform religious ceremonies for smaller and emerging religious bodies.

The Expert Panel was concerned that the requirement in the Code of Practice for celebrants to give couples information and guidance to enable them to choose or compose their marriage ceremony might be taken to require ministers of religion to agree to a form of ceremony that does not align with the particular rites of the religious body for which they perform marriages.

The Government will amend the *Marriage Regulations* to clarify that Commonwealth-registered marriage celebrants who perform religious marriages are not required to depart from using a specific form and ceremony that has been authorised by their religious body or organisation.

### **Recommendation 12**

The Commonwealth should progress legislative amendments to make it clear that religious schools are not required to make available their facilities, or to provide goods or services, for any marriage, provided that the refusal:

- (a) conforms to the doctrines, tenets or beliefs of the religion of the body, or
- (b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

The Government **accepts** this recommendation.

Section 47B of the *Marriage Act* provides that bodies established for religious purposes may refuse to make facilities available or provide goods or services for the purposes of (or for purposes reasonably incidental to) the solemnisation of a marriage where:

- the refusal conforms to the doctrines, tenets or beliefs of the religion of the body; or
- the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

The Australian Government will amend the *Marriage Act* to make it clear that the ability to refuse to make facilities available or provide goods or services for the purposes of the solemnisation of a marriage applies to educational institutions established for religious purposes (as described in section 38 of the *Sex Discrimination Act*).

### **Recommendation 13**

Those jurisdictions that have not abolished statutory or common law offences of blasphemy should do so.

The Government **accepts in principle** this recommendation as it pertains to the States and Territories.

As noted by the Religious Freedom Review, blasphemy is an offence that addresses ridicule or insult to religious groups, customs or beliefs and is out of step with a modern, tolerant, multicultural society.

Blasphemy is not an offence under Commonwealth law. However, as stated below in response to recommendation 14, the Australian Government will amend the Commonwealth *Shipping Registration Regulations 1981* in line with the Panel's recommendation so that references to blasphemy in those Regulations are removed.

Currently, as noted in the Religious Freedom Review, some blasphemy laws may continue to exist in New South Wales, Victoria, South Australia, the Northern Territory and the Australian Capital Territory.

While there have been no prosecutions under these laws in Australia since Federation, the Government considers that State and Territory laws specifically prohibiting blasphemy place too great a burden on freedom of expression and infringe upon people's enjoyment of other fundamental rights. Therefore, the Attorney-General will correspond with State and Territory Attorneys-General seeking their agreement to abolish statutory or common law offences of blasphemy.

Further to the above, the Australian Government will propose the establishment of a Council of Attorneys-General Working Group to consider all relevant recommendations of the Review.

### **Recommendation 14**

References to blasphemy in the *Shipping Registration Regulations 1981*, and in State and Territory primary and secondary legislation, should be repealed or replaced with terms applicable not only to religion.

The Government **accepts** this recommendation as it pertains to the Commonwealth.

The Government **accepts in principle** this recommendation as it pertains to the States and Territories.

The only federal law which includes a reference to blasphemy is the *Shipping Registration Regulations 1981*, which prohibit the registration of vessels with names that are '*blasphemous or likely to be offensive to members of the public*'.

The Australian Government will amend the *Shipping Registration Regulations 1981* in line with the Panel's recommendation.

The Attorney-General will correspond with State and Territory Attorneys-General seeking their consideration to repeal references to blasphemy in line with the Panel's recommendation.

Further to the above, the Australian Government will propose the establishment of a Council of Attorneys-General Working Group to consider all relevant recommendations of the Review.

### **Recommendation 16**

New South Wales and South Australia should amend their anti-discrimination laws to render it unlawful to discriminate on the basis of a person's 'religious belief or activity' including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for the appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.

The Government **accepts in principle** this recommendation as it pertains to two States.

The Attorney-General will correspond with the New South Wales and South Australian Attorneys-General seeking their consideration to amend their anti-discrimination laws to render it unlawful to discriminate on the basis of a person's religious belief or activity, including on the basis that a person does not hold any religious belief, in line with the Panel's recommendations.

Further to the above, the Australian Government will propose the establishment of a Council of Attorneys-General Working Group to consider all relevant recommendations of the Review.

### **Recommendation 17**

The Commonwealth should commission the collection and analysis of quantitative and qualitative information on:

- (a) the experience of freedom of religion in Australia at the community level, including:
  - (i) incidents of physical violence, including threats of violence, linked to a person's faith
  - (ii) harassment, intimidation or verbal abuse directed at those of faith
  - (iii) forms of discrimination based on religion and suffered by those of faith
  - (iv) unreasonable restrictions on the ability of people to express, manifest or change their faith
  - (v) restrictions on the ability of people to educate their children in a manner consistent with their faith
- (b) the experience of freedom of religion impacting on other human rights, and
- (c) the extent to which religious diversity (as distinct from cultural diversity) is accepted and promoted in Australian society.

The Government **accepts** this recommendation.

The Attorney-General will refer an inquiry into freedom of religion to the Australian Human Rights Commission, to be conducted by the new Freedom of Religion Commissioner (once established pursuant to recommendation 19 below), to collect and analyse information on the experience of freedom of religion in Australia at the community level, the experience of freedom of religion impacting on other human rights and the extent to which religious diversity (as distinct from cultural diversity) is accepted and promoted in Australian society.

### **Recommendation 18**

The Commonwealth should support the development of a religious engagement and public education program about human rights and religion in Australia, the importance of the right to freedom of religion and belief, and the current protections for religious freedom in Australian and international law. As a first step, the Panel recommends that the Attorney-General should ask the Parliamentary Joint Committee on Human Rights to inquire into and report on how best to enhance engagement, education and awareness about these issues.

The Government **accepts in principle** this recommendation.

The Australian Government will ask the Freedom of Religion Commissioner (once established pursuant to recommendation 19 below) at the Australian Human Rights Commission to develop a religious engagement and public education program, informed by the outcomes of the Commissioner's inquiry outlined in response to Recommendation 17, about human rights and religion in Australia, the importance of the right to freedom of religion, and the current protections for freedom of religion under Australian and international law.

### **Recommendation 19**

The Australian Human Rights Commission should take a leading role in the protection of freedom of religion, including through enhancing engagement, understanding and dialogue. This should occur within the existing commissioner model and not necessarily through the creation of a new position.

The Government **accepts in principle** this recommendation.

The Australian Government will support the Australian Human Rights Commission's leading role in the protection of freedom of religion, in particular through the response to Recommendations 17 and 18 above.

To strengthen the protection of freedom of religion in Australia, the Australian Government will also establish the separate statutory position of Freedom of Religion Commissioner at the Australian Human Rights Commission through the proposed Religious Discrimination Bill.

### **Recommendation 20**

The Prime Minister and the Commonwealth Attorney-General should take leadership of the issues identified in this report with respect to the Commonwealth, and work with the States and Territories to ensure its implementation. While the Panel hopes it would not be necessary, consideration should be given to further Commonwealth legislative solutions if required.

The Government **accepts** this recommendation.

The Australian Government has accepted either directly or in principle 15 of the 20 Religious Freedom Review recommendations and will consult with the States and Territories on the terms of a potential reference to the ALRC to consider the remaining five recommendations with a view to considering what drafting options may be available that would achieve the twin purposes of limiting or removing altogether (if practicable) legislative exemptions to discrimination based on a person's identity while also protecting the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos.

The Australian Government will also work with all of the States and Territories with respect to the recommendations for which they are responsible or which require further consideration. In this regard, the Australian Government will propose the establishment of a Council of Attorneys-General Working Group to consider all relevant recommendations of the Review.

## **Recommendation for DIRECT consultation and implementation**

The Australian Government accepts, and will consult with the Opposition, crossbench and stakeholders to implement, recommendation 15 of the Religious Freedom Review.

### **Recommendation 15**

The Commonwealth should amend the *Racial Discrimination Act 1975*, or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.

The Government **accepts** this recommendation.

The Australian Government will introduce a Religious Discrimination Bill into the Parliament which will provide for comprehensive protection against discrimination based on religious belief or activity, as recommended by the Panel.

The Religious Discrimination Bill will render it unlawful to discriminate on the basis of a person's religious belief or activity, including on the basis that a person does not hold any religious belief. In general terms, it is anticipated that this Bill would follow the structure of existing federal anti-discrimination legislation. In this regard, it is proposed that a new Religious Discrimination Bill will protect against discrimination on the basis of the attribute of religious belief or activity. The Bill will list the specific protections from discrimination, including the defined areas of public life in which it would be unlawful to discriminate. For example, this list may include education, employment, access to premises, the provision of goods, services and facilities and accommodation. The proposed Bill will also include appropriate exemptions to allow discrimination in certain circumstances, including for religious bodies, educational institutions and charities.

However, it is not the intention of the Government to include in such a Bill a provision regarding offensive, humiliating or insulting behaviour, such as that contained in section 18C of the *Racial Discrimination Act* because, as the Expert Panel has noted, the entrenchment of laws regarding blasphemy would be a retrograde step which the Government considers would place too great a burden on freedom of expression in Australia.

Relatedly, the Government will consult with the States and Territories on the terms of a potential reference to the ALRC to give further consideration to how best to amend current Commonwealth anti-discrimination legislation to prohibit the commencement of any legal or administrative action, pursuant to State-based anti-discrimination legislation analogous to section 18C of the *Racial Discrimination Act*, that seeks to claim offence, insult or humiliation because a person or body expresses a view of marriage as it was defined in the *Marriage Act* before being amended in 2017.

The Australian Government undertakes to work with the Opposition, crossbench and stakeholders in a spirit of bipartisanship, and will endeavour to introduce legislation into the Parliament that enjoys broad cross-party support.

## **Recommendations for further CONSULTATION AND LEGAL consideration**

### **Recommendation 1**

Those jurisdictions that retain exceptions or exemptions in their anti-discrimination laws for religious bodies with respect to race, disability, pregnancy or intersex status should review them, having regard to community expectations.

### **Recommendation 5**

The Commonwealth should amend the *Sex Discrimination Act* 1984 to provide that religious schools can discriminate in relation to the employment of staff, and the engagement of contractors, on the basis of sexual orientation, gender identity or relationship status provided that:

- (a) the discrimination is founded in the precepts of the religion
- (b) the school has a publicly available policy outlining its position in relation to the matter and explaining how the policy will be enforced, and
- (c) the school provides a copy of the policy in writing to employees and contractors and prospective employees and contractors.

### **Recommendation 6**

Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools in employment on the basis of race, disability, pregnancy or intersex status.

Further, jurisdictions should ensure that any exceptions for religious schools do not permit discrimination against an existing employee solely on the basis that the employee has entered into a marriage.

### **Recommendation 7**

The Commonwealth should amend the *Sex Discrimination Act* to provide that religious schools may discriminate in relation to students on the basis of sexual orientation, gender identity or relationship status provided that:

- (a) the discrimination is founded in the precepts of the religion
- (b) the school has a publicly available policy outlining its position in relation to the matter
- (c) the school provides a copy of the policy in writing to prospective students and their parents at the time of enrolment and to existing students and their parents at any time the policy is updated, and
- (d) the school has regard to the best interests of the child as the primary consideration in its conduct.

### **Recommendation 8**

Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools with respect to students on the basis of race, disability, pregnancy or intersex status.

As noted above, Australia's federal anti-discrimination architecture follows a statutory structure of certain exemptions to general prohibitions against discriminatory conduct based on a person's protected attribute.

Relevantly, in the *Sex Discrimination Act*:

- Section 37 currently provides that the general prohibition against discrimination contained in that Act relating to work or other areas (such as discrimination in education, or in goods, services and facilities) does not affect:
  - the ordination or appointment of priests, ministers of religion or members of any religious order;
  - the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
  - the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
  - any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion; and
- Section 38 currently provides that it is not unlawful for educational institutions established for religious purposes to discriminate in certain circumstances against:
  - employees or contract workers on the basis of their sex, sexual orientation, gender identity, marital or relationship status or pregnancy; or
  - students on the basis of their sexual orientation, gender identity, marital or relationship status or pregnancy, if the discrimination is in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Additionally, the *Fair Work Act* contains provisions which prohibit discrimination in a range of areas of employment such as: prohibiting discriminatory terms in modern awards (section 153) and enterprise agreements (sections 186(4), 194(a) and 195); adverse action against employees on the basis of protected characteristics (section 351); and termination of employment on the basis of protected characteristics (section 772). Each of these provisions includes a general religious exemption for institutions that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, where the discrimination is in good faith and to avoid injury to the religious susceptibilities of adherents of that religion or creed.

Recommendation 1 makes a general recommendation that all Australian jurisdictions that maintain exceptions or exemptions in their anti-discrimination laws for religious bodies with respect to race, disability, pregnancy or intersex status should review them, having regard to community expectations.

As is noted below, Recommendation 1 in essence urges a process of national review for all jurisdictions as a procedural method to attempt to strike an improved balance between two equally important objectives, being that:

- legislative exemptions to discriminate against a person based upon that person's identity should be minimised to the extent reasonably practicable; and

- religious institutions must be afforded sufficient legislative protection to allow them the freedom to maintain their religious ethos, to the extent reasonably practicable.

This general recommendation is then narrowed in recommendations 5 and 6, which recommendations combine to advocate that religious educational institutions should have some clear legislative protection to allow them the freedom to maintain their religious ethos in respect of staff and employment issues, but suggests a particular statutory method for improving the balance between the two principles stated above.

In parallel, the generally-framed recommendation 1 is narrowed in recommendations 7 and 8, which recommendations combine to advocate that religious educational institutions should have some clear legislative protection to allow them the freedom to maintain their religious ethos in respect of students but again suggests a particular statutory method for improving the balance between the same two principles.

In respect of recommendations 7 and 8, which recommend limiting the legislative exemptions with respect to students while also ensuring sufficient legislative protection is afforded to religious educational institutions to allow them the freedom to maintain their religious ethos, it is relevant to this response to note that the Government entered into a process with the Opposition to seek to legislate these two principles.

That process was a good-faith attempt to effect a balanced and reasonable change capable of bipartisan support. In this process, the Government committed to going further than the terms of recommendation 8 of the Review, and undertook to remove all of the exemptions contained in subsection 38(3) of the *Sex Discrimination Act* (not merely some of them, as was the specific request by the Leader of the Opposition in his letter to the Prime Minister dated 12 October 2018). During this process, the Government sought the Opposition's agreement to a minor amendment to the existing *Sex Discrimination Act* section dealing with how decision makers are routinely required to assess the reasonableness of rules of general application (such as workplace rules and rules designed to govern student conduct in educational institutions).

More specifically, as a direct response to recommendations 7 and 8, the Government proposed to the Opposition the complete removal of subsection 38(3) of the *Sex Discrimination Act* accompanied by a minor amendment to section 7B of that Act that did no more than require that a decision maker, asked to determine the reasonableness of a school rule, would, amongst various matters already required to be considered under the terms of section 7B, also need to consider whether the school rule was imposed to avoid injury to the religion in question and whether the school had regard to the best interests of the child.

Unfortunately, the Opposition withdrew without notice from the efforts to legislate a balanced approach in respect of recommendations 7 and 8 of the Review.

Despite this, on 5 December 2018, the Prime Minister again proposed a bipartisan solution to legislate changes to the *Sex Discrimination Act* that would have removed discrimination against students while also protecting religious schools' ability to maintain their ethos. Specifically, the Prime Minister sought the Opposition's support for a Bill, entitled the *Sex Discrimination (Protecting Students) Bill 2018*, to:

1. remove the discrimination exemption in section 38(3) of the Act;
2. make the above-mentioned minor amendment to section 7B of the Act; and
3. insert a clause to protect the ability of religious educational institutions to teach in accordance with their faith (which clause was adopted by the Opposition in a

proposed Second Reading Amendment to a Private Member's Bill introduced in the Senate by Senator Wong).

In a further effort to reach a parliamentary solution, the Prime Minister proposed that if the Opposition was unable to reach a unified position to support the Bill, the Prime Minister would introduce it as a Private Member's Bill and allow all members to vote according to their conscience, provided that the Leader of the Opposition allowed his members to do so.

Unfortunately, the Leader of the Opposition rejected both the Bill and the offer of a conscience vote on it. In doing so, he stated, "*I don't think the Parliament at this point has been able to come across a mechanism which sufficiently reassures religious schools [of] their ability in fact to teach faith.*" As a result, Mr Shorten suggested that it was necessary to "*take the time and find the mechanism which does its very best to make sure that no child is discriminated against, but that religious educational institutions feel that they're able to teach their curriculum in their faith.*"

The Government maintains that the Bill proposed by the Prime Minister achieves both of those objectives, and it remains open to facilitating passage of the Bill by either of the means offered by the Prime Minister. Nevertheless, the position of the Leader of the Opposition makes it clear that it has become necessary to seek an alternative mechanism designed to produce specific legislative drafting on this issue capable of garnering bipartisan support.

In this regard, the Government recognises the complexity of the legal and drafting issues surrounding the framework of exemptions for religious bodies in anti-discrimination law across all Australian jurisdictions. The Government also notes that central to the Review's recommendations 1 and 5 to 8 is an acknowledgment that any legislative changes in this area are best conducted in a way which ultimately harmonises and makes more consistent parallel laws in each Australian jurisdiction. In this regard, the Government notes that any potential changes to the *Fair Work Act* require a formal process of engagement and consultation with the States and Territories.

Accordingly, the Government will consult with the States and Territories on the terms of a potential reference to the ALRC to consider recommendations 1 and 5 to 8 of the Review with a view to settling upon a legislative mechanism that would, on a nationally consistent basis, achieve the twin purposes of limiting or removing altogether (if practicable) legislative exemptions to prohibitions on discrimination based on a person's identity, while also protecting the right of religious institutions to reasonably conduct themselves in a way consistent with their religious ethos.

The Australian Government undertakes to continue to work with the States and Territories, the Opposition, crossbench and all interested stakeholders in a consultative process which aims to allow for an agreement to specific legislative changes that would then be introduced to Parliament with broad cross-party support.