

**AMNESTY
INTERNATIONAL**



Submission to the
RELIGIOUS FREEDOM REVIEW

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Submitted by

Amnesty International Australia

Contact: Joel Clark

Title: Government Relations Adviser

Email: joel.clark@amnesty.org.au

Phone: 02 8396 7644 / 0421 525 598

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About Amnesty International

Amnesty International is the world's largest independent human rights organisation, comprising more than seven million supporters in more than 160 countries.

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international human rights instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights. Amnesty International is impartial and independent of any government, political persuasion or religious belief. Amnesty International Australia does not receive funding from governments or political parties.

Since 1961 Amnesty International has campaigned on behalf of thousands of prisoners of conscience – people who are imprisoned because of their political, religious or other conscientiously held beliefs, ethnic origin, sex, colour, language or sexual orientation. Amnesty recognises that the right to freedom of thought, conscience and religion as set out in Article 18 of the Universal Declaration.

Amnesty International also campaigns against direct or indirect discrimination on the basis of race, sex, sexual orientation and gender identity, religion or belief, political or other opinion, ethnicity, national or social origin, disability, or other status. Amnesty calls for states to take measures that prohibit discrimination as well as positive measures to address long-standing or systemic disadvantages, and to prevent discrimination by non-state actors. Our work on non-discrimination is grounded in human rights treaties including the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

We work both publicly with our supporter base of over 7 million people, and privately with families and lawyers in determining the most strategic approach to bring about change at any given time and within the consent which we are given. Mobilising our large supporters base to take actions themselves and in their community - write letters, sign petitions, take to social media, mainstream media, and online activities - is what Amnesty has become known for and leads to our effective campaigning.

1. Summary

- 1.1 Amnesty International welcomes the opportunity to provide this submission to the Expert Panel on Religious Freedom in order to assist it to examine and report on whether Australian law (Commonwealth, State and Territory) adequately protects the human right to freedom of religion. This submission will draw on Amnesty International's work globally and in Australia.
- 1.2 Amnesty International campaigns against direct or indirect discrimination on the basis of race, sex, sexual orientation and gender identity, religion or belief, and we advocate for states to fulfil their obligations to prohibit racial and religious vilification. Amnesty International is concerned about the growth of divisive political discourse in Australia and around the world that dehumanises and scapegoats religious and other minority groups for social, economic and security concerns they have no control over.
- 1.3 Australia has an international legal obligation to protect the right to freedom of thought, conscience and religion, protect against all forms of discrimination and prohibit racial and religious vilification.
- 1.4 Amnesty International notes that under international law, it is clear that freedom of religion may be subject to limitations where they are "prescribed by law", and necessary to protect "the fundamental rights and freedoms of others". The right to freedom of religion is therefore not absolute, and may be mediated in order to uphold other fundamental rights.
- 1.5 There is a clear distinction between the absolute right to hold a religion or belief (including a non-religious belief or a rejection of religious belief) and the right to manifest such belief. While the right to freedom of thought and belief is absolute, in international law the freedom to manifest one's religion or beliefs may be subject to legitimate limitations.
- 1.6 Amnesty International identifies the recent passage of the *Marriage Amendment (Definition and Religious Freedoms) Bill 2017* as an example of public debate and legislation that highlights the tension between the right to freedom of religion and other human rights.

Recommendations

- 1.7 In order to adequately protect all human rights in Australia, Amnesty International recommends that:

A Human Rights Act

- (1) The Government legislate a Human Rights Act for Australia, to ensure rights to freedom of religion and other fundamental rights are protected and appropriately balanced. The objectives of a human rights act should contain as a minimum: right to recognition and equality, right to life, right to freedom of movement, right to privacy and reputation, right to religion and belief, right to peaceful assembly and freedom of association, cultural rights (right to enjoy culture, declare and practise religion and use their language), rights to education and the rights of children in the criminal process, and their access to health care.

- (2) The Queensland Government accepts recommendations 1 - 5 of the Legal Affairs and Community Safety Committee's inquiry into a possible Human Rights Act for Queensland to legislate for a Human Rights Act in Queensland.
- (3) The New South Wales, Tasmanian, South Australian, Western Australian and Northern Territory Governments begin a process to legislate a Human Rights Act, reflective of the objectives outlined in recommendation 1, for their respective jurisdictions.

Parliamentary Scrutiny of Human Rights

- (4) The Government amend the *Human Rights (Parliamentary Scrutiny) Act 2011* to stipulate what must be included in statements of compatibility, including a detailed and evidence-based assessment of proposed provisions that interfere with rights.
- (5) The Government reconsiders Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* in respect to who, or what agency, has responsibility for drafting statements of compatibility, with the purpose of improving the quality of the statements.
- (6) The Australian Government consider amending parliamentary procedures to allow for more time for scrutiny of legislation, including by, legislating that outside of a 'clearly defined emergency', a bill should not be passed unless the Committee has considered the bill, the relevant Minister has responded to questions raised, and the parliament has had the opportunity to read and debate the recommendations made in any relevant report.
- (7) The Government amend the Standing Orders of the House of Representatives and the Senate to require all bills that receive feedback from the Human Rights Committee that the bill interferes with human rights, be referred for review by a legislation or general purpose committee.
- (8) The New South Wales, Tasmanian, South Australian, Western Australian, Northern Territory and Queensland Governments begin a process to legislate, in their respective jurisdictions, the creation of parliamentary committees that scrutinise all bills and legislative instruments for compatibility with human rights.

Prohibition of religious vilification

- (9) The Government introduce a Religious Freedom Act, based on the recommendations of the Human Rights and Equal Opportunity Commission's report *Article 18: Freedom of Religion and Belief (1998)*, that expressly prohibits racial and religious vilification in Australia and protects against racial and religious vilification in Australia in line with Australia's obligations under Article 20(2) of the ICCPR.
- (10) State and Territory Governments begin a process to review the harmonisation of anti-discrimination legislation to ensure that the prohibition of racial vilification is extended to religious vilification, as well as prohibiting the incitement of racial or religious hatred, is consistent in each jurisdiction.

Anti-discrimination and the provision of services

- (11) The Government amend anti-discrimination legislation to prohibit religious organisations or educational institutions in receipt of public funding or providing services on behalf of the government discriminating in the provision of those services in ways that would otherwise be unlawful.

Freedom of Religion and marriage equality

- (12) The Government amend the *Marriage Amendment (Definition and Religious Freedom) Act 2017* to prohibit religious marriage celebrants refusing to provide the service of solemnising a marriage on religious grounds.
- (13) The Government amend *Marriage Amendment (Definition and Religious Freedom) Act 2017* by deleting removing the words, 'purposes reasonably incidental to the solemnisation of a marriage', in 47B(1).

2. International Legal Frameworks

- 2.1 The right to freedom of religion, conscience and belief is enshrined in Article 18 of the Universal Declaration of Human Rights (UDHR)¹ and the International Covenant on Civil and Political Rights (ICCPR)². Both the ICCPR and the UDHR also protect the right to be free from discrimination, including on the basis of religion (Articles 2 and 7 respectively). There is a specific relationship between the freedom of religion or belief and other human rights, and constraints on protection of freedom of religion or belief can have a significant impact on the enjoyment of other universal human rights.
- 2.2 The right to freedom of religion, conscience and belief, also includes theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief.³

Limitations on freedom of religion

- 2.3 Amnesty recognises the distinction between the absolute right to hold a religion or belief (including a non-religious belief or a rejection of religious belief) and the right to manifest such belief. While the right to freedom of thought and belief is absolute, in international law, the freedom to manifest one's religion or beliefs may be subject to legitimate limitations. Such limitations must be prescribed by law and be necessary for the protection of:
- national security or public order (or public safety in the case of freedom of association);
 - public health or morals; or
 - the rights and freedoms of others.⁴

Non-discrimination

- 2.4 The right to equality and non-discrimination offers protection from discrimination on the basis of religion. Article 2 of the ICCPR provides an obligation on Australia 'to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.
- 2.5 Article 7 of the UDHR and Articles 2.1 and 26 of the ICCPR and other related human rights treaties recognise the right to equality and non-discrimination.
- 2.6 Article 26 of the ICCPR provides that all people 'are equal before the law and are entitled without any discrimination to the equal protection of the law'. It requires State Parties to prohibit and guarantee protection against discrimination on the basis of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'.

¹ United Nations General Assembly Resolution 217 A(III), 10 December 1948

² United Nations, Treaty Series, (1996) vol. 999, p. 171.

³ See Article 18(3) of the International Covenant on Civil and Political Rights (ICCPR), and UN Human Rights Committee, General Comment 22 (48) CCPR/C/21/Rev.1/Add.4 27 September 1993

⁴ *Ibid.*

- 2.7 It is now well established that phrase ‘other status’ has been interpreted by human rights treaty bodies to include attributes such as age, disability, and sexual orientation, gender identity or intersex status.
- 2.8 Article 27 of the ICCPR provides particular protection for ethnic, religious, or linguistic minorities to ‘enjoy their own culture, to profess and practise their own religion or to use their own language’.
- 2.9 The United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief further provides that States shall take ‘effective measures to prevent and eliminate discrimination on the grounds of religion or belief,’ including the enactment or repeal of legislation.⁵ Under the Declaration, States shall also take ‘all appropriate measures’ to prevent intolerance on the basis of religion or belief.
- 2.10 The Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (the Yogyakarta Principles) state that sexual orientation and gender identity are integral to every person’s dignity and humanity and must not be the basis for discrimination or abuse.⁶

Freedom of expression

- 2.11 Religious groups and individuals also enjoy the protection of the right to freedom of expression and the right to freedom of association (Articles 19 and 22 of the ICCPR).
- 2.12 Freedom of expression is a fundamental human right. It is essential to, and interrelated with, the realisation and exercise of all human rights. Every human being has the right to hold opinions, receive information and express themselves freely. Like all human rights, freedom of expression must be protected and balanced alongside other rights. Governments may impose some legitimate restrictions on certain forms of speech, as long as they are demonstrably necessary to ensure respect for the rights of others, such as the right to be free from discrimination, or for the protection of certain specified public interests.⁷ Any such restrictions on freedom of expression must be prescribed by law and must conform to the strict tests of necessity and proportionality.⁸ Importantly, governments also have a positive obligation to prohibit advocacy of national, racial or religious hatred.⁹
- 2.13 The Yogyakarta Principles calls on States to take all necessary legislative, administrative and other measures to ensure the right of persons, regardless of sexual orientation or gender identity, to hold and practise religious and non-religious beliefs, alone or in association with others, to be free from interference with their beliefs and to be free from coercion or imposition of beliefs.¹⁰

⁵ United Nations General Assembly UN Doc. A/RES/36/55 (adopted 25 November 1981)

⁶ International Commission of Jurists, *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, 2007, Principle 2

⁷ ICCPR Article 19(3).

⁸ United Nations Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34, 12 September 2011, para. 22.

⁹ ICCPR Article 20(2).

¹⁰ *Yogyakarta Principles*, Principle 21

State obligation to prohibit racial and religious vilification

- 2.14 The ICCPR also requires States to prohibit by law “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.¹¹ Any such restrictions on the exercise of freedom of expression must conform to the strict tests of necessity and proportionality.¹²
- 2.15 Prohibitions of such expression are not merely permissible, but obligatory to protect people from the spread of racial and religious hatred.¹³ At the same time, any limitation that is justified on the basis of this provision must also comply with the criteria regarding limitations on expression which are established under Article 19(3).¹⁴
- 2.16 The United Nations Human Rights Committee interprets the obligation to prohibit advocacy of hatred constituting incitement as “fully compatible with the right of freedom of expression.”¹⁵ Expression can be criminalised where there is intent to incite violence or other harm identified in Article 20(2); and there is a likelihood that others will commit such violence or other harm; and there is a clear and direct link between the expression and that violence or other harm. Discriminatory expression which falls short of the definitions of advocacy of hatred constituting incitement should not be subject to criminal punishment.
- 2.17 According to the UN Human Rights Council, States, media and society have a “collective responsibility to ensure that acts of incitement to hatred are spoken out against and acted upon with the appropriate measures, in accordance with international human rights law.”¹⁶

¹¹ ICCPR, Art. 20(2).

¹² United Nations Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34, 12 September 2011, para. 22.

¹³ UNHRC, General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20) (07/29/1983).

¹⁴ United Nations Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34, 12 September 2011, para. 50.

¹⁵ United Nations Human Rights Committee, *General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20)*, 19th sess, UN Doc HRI/GEN/1/Rev.6, 29 July 1983, para. 2.

¹⁶ Human Rights Council, *Addendum to Annual report of the United Nations High Commissioner for Human Rights: Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred*, UN Doc. A/HRC/22/17/Add.4, para. 35.

3. Protection of Religious Freedoms in Australia

3.1 Freedom of religion in Australia is recognised in the Australian Constitution. Section 116 states that:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.¹⁷

3.2 According to the Human Rights Commission in its submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the status of the human right to freedom of religion or belief, although Australia has an international legal obligation to protect the right to freedom of thought, conscience and religion, there is only limited protection of that right in our domestic law¹⁸.

3.3 Amnesty International supports the definition of ‘freedom of religion’ of the United Nations Human Rights Committee in its General Comment on ICCPR, in which it states:

The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.¹⁹

3.4 For the purpose of this submission, Amnesty International references the Human Rights and Equal Opportunity Commission’s (HREOC) definition of ‘religion or belief’ which is:

“particular collection of ideas and/or practices:

- that relate to the nature and place of humanity in the universe and, where applicable, the relation of humanity to things supernatural;
- that encourage or require adherents to observe particular standards or codes of conduct or, where applicable, to participate in specific practices having supernatural significance;
- that are held by an identifiable group, regardless of how loosely knit and varying in belief and practice, that are seen by adherents as constituting a religion or system of belief”.²⁰

¹⁷ *Commonwealth of Australia Constitution Act 1900*

¹⁸ Australian Human Rights Commission submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Submission 12, para. 5.

¹⁹ General Comment No. 22 (1993) paragraph 1 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.3, 1997, page 36.

²⁰ Human Rights and Equal Opportunity Commission, (1998), *Article 18: Freedom religion and belief*, m R2.5, p.v

- 3.5 Unlike other countries with comparable legal systems, Australia does not have overarching human rights legislation to balance the freedom of religion with other fundamental human rights, such as the right to freedom of expression and the right to non-discrimination.²¹
- 3.6 Victoria and the Australian Capital Territory provide specific protections for freedom of religion through their human rights legislation.²²
- 3.7 Queensland has conducted an inquiry into a Human Rights Act to which the Government has not yet responded.²³
- 3.8 The *New Zealand Human Rights Act 1993* protects New Zealanders from discrimination in specified areas of public life. The Act lists the grounds where discrimination is prohibited subject to some exceptions. Prohibited grounds of discrimination include religious belief and ethical belief (including the lack of religious belief).²⁴ Such an Act would provide vital human rights protections for Australians.
- 3.9 A National Human Rights Consultation in 2008 found widespread community support for a Human Rights Act.²⁵ There is no indication support has dwindled since that time.

Recommendation 1: The Government begin a process to legislate a Human Rights Act for Australia, to ensure rights to freedom of religion and other fundamental rights are protected and appropriately balanced. The objectives of a human rights act should contain as a minimum: right to recognition and equality, right to life, right to freedom of movement, right to privacy and reputation, right to religion and belief, right to peaceful assembly and freedom of association, cultural rights (right to enjoy culture, declare and practise religion and use their language), rights to education and the rights of children in the criminal process, and their access to health care.

Recommendation 2: The Queensland Government accepts recommendations 1 - 5 of the Legal Affairs and Community Safety Committee's inquiry into a possible Human Rights Act for Queensland.

²¹ For example, New Zealand, Canada and the United Kingdom

²² Charter of Human Rights and Responsibilities Act 2006, art 14 (Vic); Human Rights Act 2004, art 14 (ACT).

²³ Legal Affairs and Community Safety Committee, Inquiry into a possible Human Rights Act for Queensland, Report No. 30, 55th Parliament, Queensland, June 2016, available online at:

<http://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2016/5516T1030.pdf>

²⁴ Hon. Amy Adams to Hon. Kevin Andrews MP, 17 February 2017, in *Inquiry into the status of the human right to freedom of religion or belief*, Submission 39, available at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Freedomofreligion/Submissions

²⁵ Out of the 35,014 people who made submissions to the Committee, an overwhelming 29,153 (over 80%) were in favour of a Human Rights Act. See Amnesty International, Feedback on the National Human Rights Action Plan background paper, 18 February 2011, available at:

<https://www.ag.gov.au/Consultations/Documents/NationalHumanRightsActionPlanBackgroundPaperpublicsubmissions/Amnesty%20International.pdf>

Recommendation 3: The New South Wales, Tasmanian, South Australian, Western Australian and Northern Territory Governments begin a process to legislate a Human Rights Act, reflective of the objectives outlined in recommendation 1, for their respective jurisdictions.

Parliamentary scrutiny of the right to freedom of religion

3.10 The Parliamentary Joint Committee on Human Rights is established by the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Committee's main function is to examine all bills and legislative instruments for compatibility with human rights, and to report to both Houses of Parliament on its findings.²⁶

3.11 Human rights considered by the Parliamentary Joint Committee on Human Rights are defined as the seven core human rights treaties to which Australia is a party²⁷:

- International Covenant on Civil and Political Rights
- International Covenant on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination against Women
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities

The right to freedom of religion, and associated rights as outlined in Section 2, are therefore within the scope for scrutiny by the Committee.

3.12 The Committee seeks to determine 'whether any identified limitation of a human right is justifiable' by considering whether there are less restrictive ways to achieve the policy objective, whether there are effective safeguards and controls over the measure, and the extent of the interference with a right.²⁸

3.13 Members of Parliament who proposes to introduce a bill into Parliament must prepare a 'statement of compatibility'²⁹, which includes an assessment of whether the bill is compatible with human rights.³⁰

²⁶ Human Rights (Parliamentary Scrutiny) Act 2011, s7

²⁷ Human Rights (Parliamentary Scrutiny) Act 2011, s3(1)

²⁸ Parliamentary Joint Committee on Human Rights, 'Drafting Statements of Compatibility' (Guidance Note No 1, Parliament of Australia, 2014) pp 2–3.

²⁹ Human Rights (Parliamentary Scrutiny) Act 2011, s8(1)

³⁰ Human Rights (Parliamentary Scrutiny) Act 2011, s8(3)

- 3.14 If the Committee is not satisfied with the human rights compatibility of a bill, it will write to the relevant Minister seeking further detail. The Committee also has the power to request a briefing, call for written submissions, hold public hearings and call for witnesses.³¹
- 3.15 Since January 2013, the Committee has identified over 80 statements of compatibility that did not meet its expectations.³²
- 3.16 The Committee has emphasised the need to include, in statements of compatibility, a detailed and evidence-based assessment of proposed provisions that interfere with rights.³³

Recommendation 4: The Australian Government amend the *Human Rights (Parliamentary Scrutiny) Act 2011* to stipulate what must be included in statements of compatibility including a detailed and evidence-based assessment of proposed provisions that interfere with rights.

- 3.17 Statements of compatibility are also required in New Zealand, the UK, ACT and Victoria. In the ACT and New Zealand, the Attorney-General prepares the statement of compatibility. In Victoria and the United Kingdom, as in the Commonwealth, it is the Minister or the sponsor of the bill who prepares the statement of compatibility.³⁴ The Law Council of Australia suggests a centralised, independent statutory body, such as the Australian Human Rights Council, should prepare the statements.³⁵

Recommendation 5: The Australian Government reconsiders Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* in respect to who, or what agency, has responsibility for drafting statements of compatibility, with the purpose of improving the quality of the statements.

- 3.18 A failure to submit a statement of compatibility with human rights does not affect the validity, operation or enforcement of an Act.³⁶
- 3.19 Time constraints are a major barrier to effective human rights scrutiny of legislations. Parliamentarians have identified that ‘the main thing that would make parliamentary scrutiny more effective is more time’.³⁷

³¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 20 June 2012, 7177 (Harry Jenkins).

³² Australian Law Reform Commission, *Report 129: Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, 3. Scrutiny Mechanisms, 3.69, available at: https://www.alrc.gov.au/publications/efficacy-scrutiny-and-review-mechanisms-0#_ftn107.

³³ Parliamentary Joint Committee on Human Rights, ‘Drafting Statements of Compatibility’ (Guidance Note No 1, Parliament of Australia, 2014), 1.

³⁴ *Report 129: Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, 3. Scrutiny Mechanisms, 3.74

³⁵ *Report 129: Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, 3. Scrutiny Mechanisms, 3.75

³⁶ Human Rights (Parliamentary Scrutiny) Act 2011, s8(5)

³⁷ Carolyn Evans and Simon Evans, ‘Messages from the Front Line: Parliamentarians’ Perspectives of Rights Protection’ in Tom Campbell, KD Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 329, 342.

3.20 Bills may pass into legislation with little or no consideration of the committees' reports. Since 2011, over fifty bills have passed before the Committee had completed its review.³⁸

Recommendation 6: The Australian Government consider amending parliamentary procedures to allow for more time for scrutiny of legislation, including by, legislating that outside of a 'clearly defined emergency', a bill should not be passed unless the Committee has considered the bill, the relevant Minister has responded to questions raised, and the parliament has had the opportunity to read and debate the recommendations made in any relevant report.

3.21 Professor George Williams noted that 'there is little or no evidence that [the reports of the Human Rights Committee] have had a significant impact in preventing or dissuading parliaments from enacting laws that infringe basic democratic rights'.³⁹ A review of bills before the Commonwealth Parliament in the three year period from 2001 to 2003 found that, of the sixty-three Bills considered to burden human rights, forty-three (or approximately 68%) were enacted.⁴⁰

Recommendation 7: The Australian Government amend the Standing Orders of the House of Representatives and the Senate to require all bills that receive feedback from the Human Rights Committee that the bill, as it stands, interferes with human rights, be referred for review by a legislation or general purpose committee.

3.22 Only the Commonwealth, Victoria and Australian Capital Territory have human rights scrutiny committees active in their legislatures.

Recommendation 8: The New South Wales, Tasmanian, South Australian, Western Australian, Northern Territory and Queensland Governments begin a process to legislate the creation of parliamentary committees that scrutinise all bills and legislative instruments, for compatibility with human rights, in their respective jurisdictions.

³⁸ *Report 129: Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, 3. Scrutiny Mechanisms, 3.79

³⁹ *Report 129: Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, 3. Scrutiny Mechanisms, 3.83

⁴⁰ Carolyn Evans and Simon Evans, 'Australian Parliaments and the Protection of Human Rights' in *National Parliament, National Symbols: Lectures in the Senate Occasional Lecture Series 2006–2007* (Department of the Senate, 2007) figure 1.

4. Racial and religious vilification laws: A Religious Freedom Act

- 4.1 As outlined above, Australia has a positive obligation to prohibit and provide remedy for racial and religious vilification in accordance with Article 20(2) of the ICCPR.
- 4.2 The *Racial Discrimination Act* provides civil remedies for offensive behaviour based on racial hatred, however it is not clear whether these protections extend fully to individuals that are subject to discrimination on the basis of their religion.⁴¹
- 4.3 At a Federal level there is no explicit prohibition against inciting racial and religious hatred. Section 85ZE of the *Crimes Act 1914* to use the internet to intentionally disseminate material that results in a person being menaced or harassed, was repealed in 2004 and replaced with section 474.17 of the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act 2004* which makes it an offence to use a carriage service to menace, harass or cause offence. The section can be used for menacing, harassing or offensive content which is racial in its nature, but does not specifically prohibit advocacy of racial or religious hatred.
- 4.4 The states and territories have different legislative frameworks for racial and religious vilification. Queensland,⁴² Victoria, Tasmania and the Australian Capital Territory prohibit both racial and religious vilification - Queensland, Victoria and the ACT under the criminal law, and Tasmania under the civil law. However legislation in New South Wales, Western Australia and South Australia which prohibits racial vilification do not extend to religious vilification. The Northern Territory has no laws against inciting racial or religious hatred.⁴³
- 4.5 In its report on freedom of religion and belief in Australia, the Human Rights and Equal Opportunity Commission (HREOC) recommended that the Commonwealth Parliament

⁴¹ See para 2.107, Parliamentary Joint Committee on Human Rights, Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth), 28 February 2017, (Freedom of Speech Inquiry) available from

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/Freedomspeech/Australia/Report

⁴² *Anti-Discrimination Amendment Act 2001* (Qld), ss.124A 131A, *Racial and Religious Tolerance Act 2001* (Vic), s.7., *Anti-Discrimination Act 1998* (Tas) s.19., Serious vilification on the ground of race or 'religious conviction', Criminal Code 2002, s.SECT 750, *Anti-Discrimination Act 1977* (NSW) s. 20D. Prosecution can only occur with consent of the Attorney General and carries penalties of fines up to \$10,000 for individuals and \$100,000 for corporations and up to six month imprisonment for individuals. See also Legislative Council Standing Committee on Law and Justice, "Racial vilification law in New South Wales". A Parliamentary inquiry into the system found its effectiveness has been hindered by a number of procedural impediments, so NSW is currently overhauling the laws., 3 December 2013, p26, available at

<https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5807/Racial%20vilification%20law%20in%20New%20South%20Wales%20-%20Final.pdf>., *Criminal Code 1913* (WA), ss.76-80, amended in 2004 to include strict liability offences. A private member's bill to amend the Anti-Discrimination Act to make racial vilification unlawful was introduced in the Northern Territory in 2014 but did not pass. See http://www.austlii.edu.au/au/legis/nt/bill_srs/aab2014294/srs.html.

⁴³ Anthony Klann, "NSW government to overhaul race hate laws after Parramatta shooting", *The Australian*, 19 October 2015, available at <http://www.theaustralian.com.au/national-affairs/state-politics/nsw-government-to-overhaul-race-hate-laws-after-parramatta-shooting/news-story/10d8d7d3dee7b1d4be235c8621846d4b>; see also <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryReport/ReportAcrobat/5807/Racial%20vilification%20law%20in%20New%20South%20Wales%20-%20Final.pdf>.

should enact a Religious Freedom Act which would recognise and give effect to the right to freedom of religion and belief.⁴⁴ Amnesty International supports this recommendation.

4.6 HREOC recommends⁴⁵ that a Religious Freedom Act should, at least:

- affirm the right of all religions and organised beliefs as defined to exist and to organise and determine their own affairs within the law and according to their tenets.
- cover the full range of rights and freedoms recognised in ICCPR article 18 and Religion Declaration articles 1, 5 and 6.
- permit only those limitations on the right to manifest a religion or belief which are prescribed by law and necessary to protect public safety, health or morals or the fundamental rights and freedoms of others.
- be applicable to individuals, corporations, public and private bodies and all other legal persons who may be subject to Commonwealth legislation.

4.7 In conducting its review of Traditional Rights and Freedoms, the Australian Law Reform Commission recommended the Parliament could consider “whether existing Commonwealth laws serve their purposes, including in discouraging the urging of violence towards targeted groups distinguished by race, religion, nationality, national or ethnic origin or political opinion. Greater harmonisation between Commonwealth, state and territory laws in this area may also be desirable.”

4.8 Amnesty International agrees with this approach, and we urge the Panel to consider recommending the harmonisation of Commonwealth, state and territory laws to close the gaps in racial and religious vilification protections. There is strong imperative to improve these legal protections now, at a time when religious minority groups in Australia, particularly Muslim Australians, report growing discrimination and hate crimes.⁴⁶

Recommendation 9: The Government introduce a Religious Freedom Act, based on the recommendations of the Human Rights and Equal Opportunity Commission’s report *Article 18: Freedom of Religion and Belief*, that expressly prohibits racial and religious vilification in Australia and protects against racial and religious vilification in Australia in line with Australia’s obligations under Article 20(2) of the ICCPR.

Recommendation 10: State and Territory Governments begin a process to review the harmonisation of anti-discrimination legislation to ensure that the prohibition of racial vilification is

⁴⁴ Human Rights and Equal Opportunity Commission, *Article 18: Freedom religion and belief*, 1998, p.v, available at:

https://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/religion/article_18_religious_freedom.pdf.

⁴⁵ *Article 18: Freedom religion and belief*, R2.2-R2.6, p v-vi

⁴⁶ See for example testimony provided to the Freedom of Speech inquiry, p. 38 and p. 132, available from http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/Freedomspeech/Australia/Report; See also the Islamophobia Register, available from: <http://www.islamophobia.com.au/>

extended to religious vilification, as well as prohibiting the incitement of racial or religious hatred, is consistent in each jurisdiction.

5. Balancing freedom of religion and other rights

- 5.1 As discussed in Section 2, the right to freedom of religious belief is absolute, whereas the right to manifest one's religious beliefs may be subject to legitimate restrictions, where these are prescribed by law and necessary for the protection of other fundamental rights. This can create challenges for lawmakers where the manifestation of religious beliefs can come into conflict with other fundamental rights, such as the right to non-discrimination or the right to freedom of expression.
- 5.2 Below Amnesty International will identify areas in which the right to freedom of religion is interfered with and may be legitimately restricted.

Anti-discrimination law

- 5.3 Commonwealth anti-discrimination law makes it unlawful to discriminate against a person on the basis of a person's personal attributes, such as their sex or sexual orientation in areas of public life, including employment, education and the provision of goods, services and facilities. Under the Sex Discrimination Act 1984 (Cth) (SDA), it is unlawful to discriminate against a person on the basis of a person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, breastfeeding, and family responsibilities.⁴⁷
- 5.4 Exemptions from federal anti-discrimination legislation, including the SDA, for religious bodies and educational institutions established for religious purposes, are used and justified to protect freedom of religion by balancing that right with the right to non-discrimination. These issues have proved contentious.
- 5.5 Sections 23(3)(b), 37 and 38 of the SDA provides exemptions for religious bodies and education institutions. An example of the effect of these exemptions is that a religious school, for instance, may lawfully choose not to employ a teacher who has married someone of the same-sex, in circumstances where this would be discriminatory conduct for a non-religious organisation.
- 5.6 Religious bodies and education institutions act as government-funded service providers across many sectors in all Australian jurisdictions. For example, ten of the fifteen coordination areas of the National Disability Insurance Scheme in New South Wales are only serviced by religious organisations.⁴⁸
- 5.7 In its submission to the ALRC, The Wilberforce Foundation proposed a model exemption based on a so-called 'conscience clause', arguing that the SDA should provide that discrimination is only unlawful and actionable if the service which has been denied is not reasonably obtainable elsewhere. In its view, a provision of this nature will ensure that the right of religious freedom is on an equal footing with the right of non-discrimination.⁴⁹
- 5.8 Amnesty International supports the recommendation of the Public Interest Advocacy Centre to prohibit religious organisations or educational institutions in receipt of public funding or

⁴⁷ *Sex Discrimination Act 1984* (Cth) ss 5–7.

⁴⁸ Australian Department of Human Services, *NDIS in New South Wales*, available at: <https://www.ndis.gov.au/about-us/our-sites/NSW.html>, accessed on 22 January 2018.

⁴⁹ *Report 129: Traditional Rights and Freedoms - Encroachments by Commonwealth Laws*, 3. Scrutiny Mechanisms, 4.58

providing services on behalf of the government discriminating in the provision of those services in ways that would otherwise be unlawful.⁵⁰

- 5.9 The Australian Human Rights Commission's 2011 report, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination*, noted a divergence in stakeholder opinions on exemptions for religious organisations, reporting that the majority of the participants who commented on the issue opposed exemptions.⁵¹

Recommendation 11: The Australian Government amend anti-discrimination legislation to prohibit religious organisations or educational institutions in receipt of public funding or providing services on behalf of the government discriminating in the provision of those services in ways that would otherwise be unlawful.

Exemptions related to marriage equality

- 5.10 Marriage equality was achieved in Australia on the 7 December 2017 through the passage of the *Marriage Amendment (Definition and Religious Freedoms) Bill 2017*.
- 5.11 The Act defines marriage as 'a union of two people, to the exclusion of all others, voluntarily entered into for life'.⁵²
- 5.12 According to the Explanatory Memorandum of the Bill, it aims to protect religious freedoms in relation to marriage by: enabling ministers of religion to refuse to solemnise a marriage in conformity with their religion's doctrine, their religious beliefs or in order to avoid injury to the susceptibilities of their religious community (e.g. marriages of same-sex, previously divorced or interfaith couples); create a new category of religious marriage celebrants whom will be able to refuse to solemnise a marriage where their religious beliefs do not allow them to do so; enable bodies established for religious purposes to refuse to provide facilities, goods or services consistent with their religion's doctrine or if this refusal conforms with religious doctrine, tenets or beliefs or is necessary to avoid injury to the feelings of their religious communities. This is consistent with existing religious exemptions in section 37 of the Sex Discrimination Act 1984 (Cth).
- 5.13 Amnesty International does not object to the exemption of ministers of religion from the obligation to solemnise marriages on grounds of religious belief or doctrine. Given the primary position of religious ministers as keepers and teachers of their faith, such an exception is appropriate and in accordance with Article 18 of the ICCPR.
- 5.14 Amnesty opposes giving civil celebrants, or any public officials for that matter, the power to discriminate on the basis of sexual orientation, gender identity or intersex status on the grounds of religious belief or doctrine. This does not accord with Australia's human rights obligations and commitment to equality, and has set a dangerous precedent for future laws.

⁵⁰ Public Interest Advocacy Centre, *PIAC's submission to the Australian Human Rights Commission religious freedom roundtable*, 2015, available at: https://www.piac.asn.au/wp-content/uploads/15.10.06_ltr_to_cmr_wilson_ahrc_re_freedom_of_religion_roundtables.pdf

⁵¹ Australian Human Rights Commission, *Addressing Sexual Orientation and Sex and/or Gender Identity Discrimination*, 2011, p 33

⁵² *Marriage Amendment (Definition and Religious Freedoms) Bill 2017*, s3

5.15 The Sex Discrimination Act already exempts religious bodies from the obligation to provide goods, services and facilities in a non-discriminatory way in relation to “any 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”. These exemptions already provide significant protection to the religious freedom of religious bodies in relation to marriage ceremonies.

Recommendation 12: The Government amend the *Marriage Amendment (Definition and Religious Freedom) Act 2017* to prohibit religious marriage celebrants refusing to provide the service of solemnising a marriage on religious grounds.

Recommendation 13: The Government amend *Marriage Amendment (Definition and Religious Freedom) Act 2017* by deleting removing the words, ‘purposes reasonably incidental to the solemnisation of a marriage’, in 47B(1).

6. Freedom of religion globally

6.1 Freedom of religion is under threat in numerous countries around the world.⁵³

6.2 Amnesty International submits the following examples to show where the intersection of the freedom to religion and other rights is imbalanced in favour of religious freedom, creating societal problems and/or the potential of human rights abuses to occur.

- In **Egypt**, the government continues to restrict religious minorities and prosecuted people for defamation of religion. Individuals face imprisonment for “debauchery” on the basis of their perceived sexual orientation⁵⁴. There have been repeated attacks targeting Coptic Christian including two recent bomb attacks on churches in Cairo⁵⁵.
- Across **Europe**, Muslims and migrants are vulnerable to racial profiling and discrimination by police, both in connection with anti-terrorism powers and during regular law enforcement operations, including identity checks. Initiatives to combat violent extremism often include reporting obligations on public institutions, which risk alienating Muslim communities and curbing freedom of expression. The Bulgarian and the Swiss Parliament adopted legislation in 2016 banning the wearing of full-face veils in public. Draft legislation banning full-face veils was introduced into the Dutch Parliament and in Germany. In France, several coastal municipalities sought to ban the wearing of “burkinis” on the beach⁵⁶.
- In the **United States of America**, the Trump Administration has sought to put in place a dangerous and discriminatory immigration policy by Executive Order, including temporarily suspending entry (with some exceptions on a case by case basis) of individuals from six majority-Muslim countries: Iran, Libya, Somalia, Sudan, Syria, and Yemen. While the Executive Order has been held up in the courts, this discriminatory policy has damaged the reputation of the USA as a country that respects basic norms of religious freedom and non-discrimination.
- In **China**, freedom of religion is systematically violated. Draft amendments in 2016 to legislation contained provisions to increase state power to control and sanction some religious practices, again in the name of national security to curb “infiltration and extremism”. If passed, it could be used to further suppress, in particular, the rights to freedom of religion and the belief of Christian communities unrecognized by the state, Tibetan Buddhists and Uighur Muslims. In the Xinjiang Uighur Autonomous Region, the government detained ethnic Uighur writers and Uighur language website editors. Ethnic Tibetans face ongoing discrimination and restrictions on their rights to freedom of thought, conscience and religion, expression, association and peaceful assembly. Tibetan blogger, Druklo was sentenced to three years’

⁵³ *Amnesty International Report 2016/17; The State of the World’s Human Rights* available at https://static.amnesty.org.au/wp-content/uploads/2017/02/air201617-english_2016-17.pdf?x85233

⁵⁴ *Amnesty International Report 2016/17*, page 145

⁵⁵ *Amnesty International Report 2016/17*, page 149

⁵⁶ *Amnesty International Report 2016/17*, page 44

imprisonment in 2016 for “inciting separatism”, including for his online posts on religious freedom and the Dalai Lama. In the Xinjiang Uighur Autonomous Region, the government continues to violate the right to freedom of religion, and cracked down on unauthorized religious gatherings⁵⁷.

- In **Indonesia**, discriminatory legislation continues to be used to restrict the activities of members of minority religious groups who faced harassment, intimidation and attacks. In January, a mob set alight nine houses belonging to members of the Gafatar movement in Menpawah District, West Kalimantan. A decree was issued by the Minister of Religious Affairs, the Attorney General and the Minister of Home Affairs proscribing the Millah Abraham religious belief, adhered to by former members of Gafatar. Members of the Ahmadiyya community, whose teachings are viewed as “deviant” by the government, were intimidated and threatened in various locations⁵⁸.
- In **Myanmar**, discrimination, religious intolerance and anti-Muslim sentiment has intensified, and contributed to what Amnesty International has called crimes against humanity⁵⁹. The authorities failed to take effective action to counter advocacy of religious hatred, or to bring the perpetrators of attacks against religious minorities to justice⁶⁰.
- In **Samoa** there are concerns about creating a 'Christian state' excluding or denying others their right to freedom of religion. Currently, Christianity is acknowledged in the Preamble to the Constitution⁶¹. Creating a 'Christian State' would have a negative impact on other human rights issues like gender equality and access to sexual and reproductive health care. In **Fiji** political parties are also advocating for a 'Christian state' and there is potential for this to flare up ethno-nationalist conflict in advance of elections in 2018. In addition, the arrest of 70 people on sedition charges - who are still to face trial, has been made on the basis that they are advocating for a separatist religious state.

⁵⁷ Amnesty International Report 2016/17 pages 118-120.

⁵⁸ Amnesty International Report 2016/17, pages 188-189.

⁵⁹ Amnesty International, (2017), *My World is finished*, available at: <https://www.amnestyusa.org/wp-content/uploads/2017/10/Amnesty-My-World-Is-Finished-Myanmar-18.10.20171.pdf>.

⁶⁰ Amnesty International Report 2016/17, page 264.

⁶¹ *Constitution of the Independent State of Samoa*. Available at: <http://www.palemene.ws/new/wp-content/uploads/Document/2016-Constitution-of-Samoa-Eng.pdf>. The Preamble's opening paragraphs refer to “within the limits prescribed by God's commandments” and for should be an “Independent State based on Christian principles its societal values”.

7. Conclusion

- 7.1 The freedom to religion in Australia must be mediated in order to uphold other fundamental rights. A Human Rights Act, Religious Freedom Act, and improved parliamentary scrutiny of human provide express powers to ensure a balance is struck.
- 7.2 Amnesty International emphasises that great care needs to be taken in preparing legislation to ensure that measures to promote religious freedom do not adversely impact on the rights of others and in particular the prohibition against non-discrimination. In addition, any imposed limitations on the exercise of freedom of religion needs to be limited to the areas permitted under international law.