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**Inquiry into the status of the human right to freedom of religion or belief**

I am a lecturer in constitutional and human rights law at the University of Tasmania, and a former legal officer in the Department of Foreign Affairs and Trade. This submission constitutes my academic opinion and does not necessarily reflect the views of the University of Tasmania.

The Committee's Terms of Reference include (at point 4) an "inquiry into Australian efforts to protect and promote the freedom of religion or belief in Australia." The Chairman of the Committee, in the Foreword to the Interim Report, notes that threats to religious freedom are "most apparent with the advent of non-discrimination laws which do not allow for lawful differentiation of treatment by religious individuals and organisations." The final chapter of the Interim Report refers to submissions (e.g. by Dr Alex Deagon and the Wilberforce Foundation) that religious freedom permits those who believe in 'traditional marriage' to discriminate in the delivery of goods and services for same sex marriage ceremonies and celebrations.

The human right to freedom of religion does not allow individuals or businesses to refuse goods or services in contravention of equality laws. In fact, the frequently cited examples concerning bed & breakfast owners, bakers, florists and photographers are from countries - such as the United States and the United Kingdom - with legislative protection of religious freedom. These cases demonstrate that religious freedom, when applied within a wider framework of interdependent and indivisible human rights, does not justify departure from anti-discrimination rules in the public sphere.

For example, Baroness Hale stated in *Bull v Hall* that: "[w]e do not normally allow people to behave in a way which the law prohibits because they disagree with the law. But to allow discrimination against persons of homosexual orientation . . . because of a belief, however sincerely held, and however based on the biblical text, would be to do just that."<sup>1</sup>

The attached document, which is my submission to the Ruddock Panel, addresses this point in more detail.

Yours sincerely



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<sup>1</sup> [2013] UKSC 73 at [37].

## SUBMISSION TO RUDDOCK PANEL

### Introduction

1. The Australian Law Reform Commission, in its *Report on Traditional Rights and Freedoms*, concluded that: “Australians enjoy the freedom to worship and observe religion, and the freedom not to be coerced into engaging in religious practices.”<sup>2</sup> The ALRC report also notes that a tension exists in relation to the intersection between religious freedom and anti-discrimination law. The Chair’s Foreword to the interim report of the current Senate Committee Inquiry on Religious Freedom (the Fawcett Inquiry) also echoes this concern.<sup>3</sup>

### Calls for individuals and businesses to be exempt from anti-discrimination law

2. Religious bodies in Australia enjoy wide exemptions from anti-discrimination and marriage laws. Individuals do not. This submission focuses on the calls for private individuals, (including marriage celebrants, public servants and businesses) to be allowed to discriminate on the basis of their religious, or otherwise genuinely held, beliefs.

3. Family Voice Australia argues that “religious exemptions should be recognised for any legal person – natural or corporate – who holds a genuine and conscientious belief that some of the protected attributes [under *Anti-Discrimination legislation*] are morally unacceptable.”<sup>4</sup> Family Voice therefore propose: “a simple provision for exemption from the *Marriage Act 1961*, *Sex Discrimination Act 1984* and any other applicable antidiscrimination law for persons, natural or corporate, whose conscientious beliefs do not allow them to comply with the Acts, or with particular provisions of the Acts.”<sup>5</sup>

4. Similarly, in both the ALRC inquiry on *Traditional Rights and Freedoms* and the Fawcett Inquiry, Professors Aroney and Parkinson proposed a ‘general limitations’ clause. While its wording is more complex than the Family Voice proposal it too would allow discrimination by individuals in a wide range of circumstances.<sup>6</sup>

5. During the December 2017 parliamentary debate on the *Marriage Amendment (Definitions and Religious Freedoms) Bill*, two slightly different mechanisms were put forward to permit goods and service refusal. One was to include an express right to act or refuse to act in relation to same sex marriage (e.g. s 88M of the bill proposed by Senator Paterson and s 88 KA(3) of Mr Hastie MP’s amendment proposal). The second mechanism was to enact into law an expanded version of the right to manifest religion by adding to the international law

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<sup>2</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, Report No 129 (2016) 129 [5.3].

<sup>3</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the Status of the Human Right to Freedom of Religion or Belief* (2017) viii.

<sup>4</sup> Family Voice Australia, Submission No 2 to Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill, Parliament of Australia, 20 December 2016, 10.

<sup>5</sup> Ibid.

<sup>6</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the Status of the Human Right to Freedom of Religion or Belief* (2017) 85 [7.35]; Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*, Report No 129 (2016) 149-51 [5.108]-[5.114].

definition of ‘manifest religion and belief’ the words ‘this includes any act or refusal to act’ (e.g. s 88JA in both the Paterson Bill and the Hastie proposal).<sup>7</sup>

6. This submission argues that allowing individuals to use religious freedom to justify otherwise prohibited discrimination, would be a significant departure from current Australian practice and is not supported by either international or comparative human rights law.

### **No precedent for exemptions from anti-discrimination law for individuals**

7. Arguments that individuals or businesses should be exempt from anti-discrimination law if that law clashes with a religious belief are not new.

8. Courts and parliaments have rejected these claims. For example, in *Burke v Tralagga*,<sup>8</sup> the NSW Equal Opportunity tribunal rejected an exemption argument from people who, on religious grounds, refused to rent their premises to an unmarried couple. Existing Commonwealth, state and territory anti-discrimination laws do not provide exemptions for individuals or businesses who wish to discriminate on the basis of their beliefs. The only exception to this is s 84 of the Victorian *Equal Opportunity Act 2010* (Vic). This section allows individuals to discriminate where this is reasonably necessary to comply with the doctrines, beliefs or principles of their religion.

9. Not only is s84 an outlier amongst Australian anti-discrimination law, but it is narrow in scope. The Statement of Compatibility to the Equal Opportunity Act explains that s 84 applies only to core religious beliefs and that the discrimination must be objectively necessary to comply with doctrines, beliefs or principles of the religion.<sup>9</sup> This narrow interpretation was confirmed by majority of the Court of Appeal of the Supreme Court in Victoria in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*.<sup>10</sup>

10. The following sections will show that neither human rights law, existing categories of conscientious objection nor the practice of other countries provide a basis for justifying exemptions from the general law for individuals or businesses.

### **The right to ‘manifest’ religion is limited in scope**

11. Assertions that religious freedom extends to a right to refuse to provide goods and services are becoming more frequent and have been made at the highest levels. For example, United States President Donald Trump, in his recent Religious Freedom Day Proclamation, asserted that: “no American — whether a nun, nurse, baker, or business owner — should be forced to choose between the tenets of faith or adherence to the law”<sup>11</sup>. Similarly, the Australian Christian Lobby has urged its supporters to write to this Panel and claim that freedom of religion is a “freedom to live out one’s faith in public”.<sup>12</sup>

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<sup>7</sup> The external affairs power is unlikely to support the enactment into law of a modified article 18. While it is not necessary that Parliament enact a treaty in its entirety, the law must conform to the particular international obligation on which it relies: Mason J in *Commonwealth v Tasmania (Tasmanian Dam)* 158 CLR at 131.

<sup>8</sup> [1986] 1 EOC 92-161.

<sup>9</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, 773 (Rob Hulls, Attorney-General).

<sup>10</sup> [2014] 50 VR 256, 364-68 (Neave JA).

<sup>11</sup> <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-proclaims-january-16-2018-religious-freedom-day/>.

<sup>12</sup> Lyle Shelton, ‘Please Speak Up for Religious Freedom’ *Australian Christian Lobby* <[http://www.acl.org.au/please\\_speak\\_up\\_for\\_religious\\_freedom](http://www.acl.org.au/please_speak_up_for_religious_freedom)> (retrieved 28 January 2018).

12. Chelsea Pietsch, former Executive Officer at Freedom for Faith summed up this view in a recent publication entitled *Exploring The Nature And Limits Of Religious Freedom: A Defence Of Freedom Of Thought, Belief, Speech, Conscience And Association*. She claimed that freedom of religion extends to ‘every aspect of our lives’.<sup>13</sup>

13. These statements are inconsistent with international human rights law. People may seek to live out their lives in accordance with their beliefs, but human rights law protects only certain types of manifestation of those beliefs. It is quite clear that protected manifestations do not include the provision of goods or services in the public sphere.<sup>14</sup>

14. Article 18 of the International Covenant on Civil and Political Rights (ICCPR) limits protected manifestations “to worship, observing, practicing and teaching.” The United Nations Human Rights Committee in its General Comment 22 further demonstrates that manifesting religion does not extend to the delivery of goods and services in the public sphere:

The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.<sup>15</sup>

15. The United Nations *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* confirmed this narrow scope by defining ‘manifestation’ of religion and belief as activities that relate to worship, the establishment of charitable institutions, writing and disseminating publications, teaching, observing days of rest and appointing leaders.<sup>16</sup> All of these are acts ‘integral to the conduct of religious groups of their basic affairs’ and nothing in this definition suggests that it extends to the provision of goods and services in the public sphere.

16. This limited meaning of ‘manifesting’ religion and belief is confirmed by the decisions of regional and national courts applying human rights standards. For example, the European Court of Human Rights (ECHR) in its 2013 decision in the case of *Eweida*, stated that:

[i]t cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a “manifestation” of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only

<sup>13</sup> <https://freedomforfaith.org.au/library/exploring-the-nature-and-limits-of-religious-freedom>.

<sup>14</sup> See also recent comment by Elizabeth Evatt AC that: “selling cakes or engaging in other commercial transactions in relation to same sex marriages can hardly be seen as a manifestation of religious belief” at <https://johnmenadue.com/elizabeth-evatt-why-not-protect-all-our-rights-and-freedoms/>.

<sup>15</sup> Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993)

<sup>16</sup> *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR, 36<sup>th</sup> sess, 73<sup>rd</sup> plen mtg, Supp No 51, UN Doc A/RES/36/55 (25 November 1981).

remotely connected to a precept of faith fall outside the protection of Article 9 § 1. In order to count as a “manifestation” within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form [*citations not shown*].<sup>17</sup>

17. Limiting the scope of the right to manifest religion is also consistent with the European Court of Human Rights decision in *Pichon v France*. In that case the Court held that religious freedom did not protect pharmacists who claimed that their 'religious beliefs justified their refusal to sell contraceptives' as 'the sale of contraceptives is legal', and the pharmacists could 'manifest [their] beliefs in many ways outside the professional sphere'.<sup>18</sup> The Court further pointed out that 'the main sphere protected by Article 9 is that of personal convictions and religious beliefs' and '...acts that are closely linked to those matters such as acts of worship or devotion forming part of the practice of a religion or a belief'.<sup>19</sup>

18. United Kingdom courts have consistently rejected religious freedom claims by Christian business owners who discriminated against same sex couples.<sup>20</sup> There is a tendency in these cases for judges to gloss over the question whether such discrimination is a manifestation of religion and, instead, to go straight to their conclusion that equality law validly limits religious freedom. According to religion and law scholar Professor Malcolm Evans the reluctance to engage with this question is understandable because it is tantamount to saying that a particular belief 'is not cogent, serious, cohesive or important.' He warns, however, that failure to do address the question of the scope of the right to manifest religions is dangerous because it 'encourages frivolous claims, or extends a mantle of legitimacy over views that are potentially problematic.'<sup>21</sup>

19. One judge who did not avoid the question of the scope of the right to manifest religion was Lady Justice Rafferty in the case of *Preddy v Bull*.<sup>22</sup> In coming to the conclusion that refusing a room to a gay couple in a B&B was not a manifestation of religion she relied on the reasoning in *Pichon* as well as *C v United Kingdom*, *Sahin v Turkey* and *Christian Education South Africa v Minister of Education*.<sup>23</sup> Lady Justice Rafferty also endorsed the reasoning of Law LJ in *McFarlane v Relate Avon Ltd*:

But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled.<sup>24</sup>

20. The words of article 18, and the manner in which these have been interpreted in international jurisprudence, indicate that the right to manifest religion does not extend to the provision of a good or service in the public sphere.

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<sup>17</sup> *Eweida v United Kingdom* [2013] I Eur Court HR 215, 252-3 [82].

<sup>18</sup> [2001] X Eur Court HR 381, 388.

<sup>19</sup> *Ibid*.

<sup>20</sup> See *Bull & Anor v Hall & Anor* [2013] UKSC 73, *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 and *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880.

<sup>21</sup> Malcolm Evans, *The Freedom of Religion or Belief in the CHR since Kokkinakis. Or “Quoting Kokkinakis”*, Religion and Human Rights 12 (2017) 83- 98 at 89.

<sup>22</sup> [2012] 1 WLR 2514.

<sup>23</sup> [2012] 1 WLR 2514, 2529 [47].

<sup>24</sup> [2012] 1 WLR 2514, 2530-1 [49].

## Courts applying human rights standards reject exemptions for individuals

21. Even if the right to manifest religion were to extend to the refusal of otherwise publicly available goods or services, courts in Australia and overseas have consistently held that, in these circumstances, anti-discrimination laws prevail.

22. In *Cobaw*<sup>25</sup> the Victorian Court of Appeal held that a commercial campsite owned and operated by the Christian Brethren could not refuse a booking from a support group for same sex attracted young people.<sup>26</sup> This decision is consistent with the approach of the European Court of Human Rights (*Pichon*<sup>27</sup>, *Eweida*<sup>28</sup>), courts in the United Kingdom (*Preddy v Bull*<sup>29</sup>) and Northern Ireland (*Lee v McArthur*<sup>30</sup>). The only exception relates to commercial services that involve writing or printing words or images that conflict with a core belief (e.g. the Canadian decisions of *Brockie*<sup>31</sup> and *Owens*<sup>32</sup>).

23. The United States Supreme Court has recently heard arguments on the issue of whether religious freedom entitles cake shops to refuse to sell cakes to celebrate same sex weddings (*Masterpiece Cakeshop*<sup>33</sup>), and the United Kingdom Supreme Court will hear an appeal in *Lee v McArthur* this year. However, both these cases (like the cases of *Brockie* and *Owens*) are likely to turn on the right to freedom of speech rather than on the protection of religious freedom.

24. Demands for an exemption for marriage registrars on religious freedom grounds have been equally unsuccessful. As Stijn Smet has shown, “in States like the UK, Canada the US and the Netherlands, ... courts and legislators have firmly and unequivocally rejected civil servants' freedom of religion claims.”<sup>34</sup>

## No parallel can be drawn with existing categories of conscientious objection

25. Some have argued that refusal to provide goods or service otherwise available to the public is justified on the basis of the conscientious objection to homosexuality and/or same sex marriage.

26. Steve McAlpine, in a recent Freedom for Faith publication, argues that freedom of religion is “about the freedom not to be forced by the state to go against our consciences.”<sup>35</sup> Similarly, the Rev. Michael Kellahan, executive director of Freedom for Faith, argues that opposition to same sex marriage is similar to conscientious objection by medical professionals to performing or advising on an abortion. The Coalition for Marriage, in its publication *Consequences: Changing the Law on Marriage Effects Everyone*, similarly

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<sup>25</sup> *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615.

<sup>26</sup> (2014) 50 VR 256.

<sup>27</sup> *Pichon And Sajous v France*: ECHR 2 Oct 2001.

<sup>28</sup> *Eweida v United Kingdom* [2013] ECHR 37.

<sup>29</sup> *Preddy v Bull* [2012] EWCA Civ 83.

<sup>30</sup> *Lee v McArthur & Ors* [2016] NICA 29.

<sup>31</sup> *Ontario Human Rights Commission v. Scott Brockie*, Ontario Superior Court of Justice, Divisional Court, [2002] O.J. No. 2375.

<sup>32</sup> *Owens v. Saskatchewan (Human Rights Commission)*, 2002 SKQB 506.

<sup>33</sup> [https://www.supremecourt.gov/oral\\_arguments/audio/2017/16-111](https://www.supremecourt.gov/oral_arguments/audio/2017/16-111).

<sup>34</sup> Stijn Smet, “Conscientious Objection to Same-sex Marriages: Beyond the Limits of Toleration”, *Religion and Human Rights* (2016) Vol 11 issue 2, 114- 139 at 116. Smet notes that South Africa is the only country that has such an exemption but that it would be unlikely to withstand a constitutional challenge.

<sup>35</sup> <https://freedomforfaith.org.au/library/freedom-of-religion-effects-more-of-us-than-you-think>.

asserts that: “the law should not force a person to participate in an activity that goes against their beliefs.”<sup>36</sup>

27. These arguments are not persuasive. Traditional categories of conscientious objection (e.g. to military service, blood transfusions, performing abortions) differ in key respects from the exemptions to non-discrimination rules. First, traditional categories of conscientious objections excuse objectors from directly engaging in the objectionable action. Exemptions for individuals, as called for in the current debate, are of a different kind because they concern actions - such as supplying a cake or a flower arrangement to a same sex wedding reception - that are merely incidental to a morally prohibited activity. While marriage celebrants directly facilitate same sex marriage, a key difference between celebrants and those who have a valid conscientious objection, is that marriage celebrants are authorised by the state to carry out a state function.

28. Secondly, accepted categories of conscientious objection do not involve prohibited discrimination (and therefore harm) against another person, whereas service refusal exemptions would clearly do so. United States Professors Nejaime (UCLA) and Siegel (Yale) describe these kinds of objections as ‘complicity based conscientious objections’ and their work demonstrates that accommodating such claims has the capacity to inflict material and dignitary harm.<sup>37</sup>

29. There are further reasons against permitting conscientious objection to discrimination laws. New Zealand religion and law scholar Professor Rex Adhar recently warned that expanding conscientious objection can ‘give rise to an expanding number of claims over some highly contentious activities’, not to mention, ‘some perverse or outlandish outcomes.’<sup>38</sup>

30. This leads to the next point, which is that if Australia provides exemptions from the law on the basis of genuine objection to same sex marriage, similar exemptions would need to be provided for all genuine objections to any law. This is clearly problematic.

### **Exemptions for individuals would undermine the legal system.**

31. Equality before the law is a fundamental principle of the common law, the rule of law and human rights law.<sup>39</sup> It is for this reason that all coherent and genuine beliefs, whether religious or non-religious in character, are entitled to equal protection. This is illustrated by the recent case of *R v Adam Easton* where a NSW Magistrate held that an agnostic’s sincere

<sup>36</sup>

<https://d3n8a8pro7vhmx.cloudfront.net/coalitionformarriage/pages/361/attachments/original/1505297007/Handbook.pdf> at page 72.

<sup>37</sup> NeJaime and Siegel, *Conscience Wars: Complicity Based Conscience Claims in Religion and Politics*, The Yale Law Journal (2015) 124: 2516.

<sup>38</sup> Rex Adhar, ‘Is Freedom of Conscience Superior to Freedom of Religion?’ (Speech delivered at the Sixth Annual Religious Liberty Lecture, University of Notre Dame, Sydney, 10 October 2017) 11 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3054348](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3054348).

<sup>39</sup> Chief Justice Robert French, ‘The Rule of Law as a Many Coloured Dream Coat’ (Speech delivered at the Singapore Academy of Law 20<sup>th</sup> Annual Lecture, Singapore, 18 September 2013) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj18sep13.pdf>>; Chief Justice James Allsop, ‘Values in Public Law’ (Speech delivered at the James Spigelman Oration 2015, Sydney, 27 October 2015) <<http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20151027>>; Chief Justice Murray Gleeson, ‘Courts and the Rule of Law’ (Speech delivered at the University of Melbourne, Melbourne, 7 November 2001) <[http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj\\_ruleoflaw.htm](http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_ruleoflaw.htm)>; AV Dicey, *Introduction to the Study and the Law of the Constitution* (Palgrave MacMillan, 10<sup>th</sup> ed, 1959).

and deeply held objection to voting fell within the statutory exception for persons who believe it is their religious duty to abstain.<sup>40</sup>

32. Unless it can be shown that there is something about same sex marriage that differentiates it from other beliefs, and makes it alone worth protecting, then there would be no reason to deny exemptions for all sorts of sincerely held beliefs. If you allow refusal of service in relation to same sex marriage then similar discrimination would also have to be allowed, for example, on the basis of divorce and pre- or extra-marital sex. Similarly, those in the community whose sincere beliefs require female circumcision, polygamy and under-age marriage would be equally entitled to exemptions from the general legal rules.

33. This is problematic. First, it raises the practical question of how to determine whether a belief is sufficiently coherent and genuine to warrant protection. A second, and more serious, problem is that there is no relevant limiting principle. As a result, allowing people exemptions from general rules on the basis of their genuinely held religious and non-religious beliefs undermines the purpose of the legal system and the rule of law.<sup>41</sup>

34. This problem is not hypothetical. Some recent examples from Australia and overseas illustrate this point.

- In November 2017, a Sydney man justified vandalising a mural because it was ‘sacrilegious’ and he was ‘defending his religion’.<sup>42</sup>
- A Tasmanian family refused to pay rates because they genuinely believe that the land on which their house and business stand belong to God.<sup>43</sup>
- A recent Dutch case involves a similarly strongly held religious objection to lodging tax forms online because the Internet was considered evil.<sup>44</sup> This belief extended to not being able to authorise another person to lodge the form online on the person’s behalf.
- Pacifists have argued that their beliefs prevent them from paying tax, because part of the taxes will be used to fund defence forces.<sup>45</sup>
- A Hindu woman in the United States argued that a no fault divorce law could not be applied in her case because it was contrary to the Hindu faith.<sup>46</sup>
- In 2010, a Dutch builder refused to renovate the house of a gay couple because it was against his religion.<sup>47</sup>
- Also in the Netherlands, a protestant political party refused to select women as candidates for elections.<sup>48</sup>

35. In each of these cases courts enforced the legal rule despite the genuinely held contrary belief of the persons concerned.

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<sup>40</sup> *R v Adam Easton* [2017] NSWLC 19.

<sup>41</sup> US academic Brian Leiter, explains these obstacles more fully in his book *Why Tolerate Religion?* His conclusion is that applying a truly equal approach to all beliefs means that no exemption from a general rule on the basis of a contrary belief is permissible.

<sup>42</sup> <http://www.abc.net.au/news/2017-11-19/nsw-police-charge-man-after-he-paints-over-george-michael-mural/9165654>.

<sup>43</sup> <http://www.abc.net.au/news/2017-06-22/rates-paid-on-gods-land-in-tasmania/8641506>.

<sup>44</sup> <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBNNE:2016:1570>.

<sup>45</sup> *Boughton, R (on the application of) v Her Majesty's Treasury*, Court of Appeal - Administrative Court, July 25, 2005, [2005] EWHC 1914 (Admin).

<sup>46</sup> <https://www.vermontjudiciary.org/sites/default/files/documents/op17-134.pdf>.

<sup>47</sup> ECLI:NL:RBARN:2010:BN8113.

<sup>48</sup> *Staatkundig Gereformeerde Partij v Netherlands*, (10 July 2012) ECtHR (AD) at [75], [77].

### **Most other countries do not permit exemptions for individuals**

36. Enacting exemptions from anti-discrimination law for individuals would make Australia an outlier among countries that permit same sex marriage. Overwhelmingly, the 29 countries that permit same sex marriage only provide exemptions for ministers of religion.<sup>49</sup>

37. While a tiny number of states in the United States have exemptions in place for government officials or adoption agencies,<sup>50</sup> general exemptions for businesses are highly contested. All attempts at legislating such exemptions have led to nation-wide boycotts and litigation and, if enacted, are usually quickly reversed. For example,

- A Louisiana Executive Order that exempted commercial businesses<sup>51</sup> was met with strong opposition and speedily reversed;<sup>52</sup>
- A similarly broad Religious Freedom Restoration Act in Indiana led to such wide scale boycotts that it was amended within a week of its enactment;<sup>53</sup> and
- A Mississippi law,<sup>54</sup> which provides wide exemptions for sincerely held religious and moral convictions, is subject to litigation and boycotts. For example, the New York City government has a travel ban on all non-essential travel to Mississippi.<sup>55</sup>

### **Conclusion**

38. It is for good reasons that anti-discrimination laws in Australia do not permit exemptions based on the subjective intent of an individual. Neither the words of article 18 of the ICCPR, nor the manner in which article 18 has been applied in other countries that allow same sex marriage, permits discriminatory refusal of goods and services in the public sphere. To enact such exemptions would be inconsistent with Australia's international human rights obligations, undermine the purpose of anti-discrimination legislation and, applied equally to all sincere beliefs, erode the legal system itself.

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<sup>49</sup> Gogarty and Hilkemeijer, *Conservative Amendments to the Same Sex Marriage Bill would make Australia's laws the world's weakest*, The Conversation, November 26, 2017.

<sup>50</sup> Leslie Griffen, "Marriage Rights and Religious Exemptions in the United States" *Oxford Handbooks Online*, 2017 page 7.

<sup>51</sup> Ibid.

<sup>52</sup> <https://www.reuters.com/article/us-louisiana-lgbt/louisiana-governor-signs-order-protecting-lgbt-rights-idUSKCN0XA22H>.

<sup>53</sup> [http://www.huffingtonpost.com/au/entry/mike-pence-religious-freedom-law-indiana\\_us\\_57c839b9e4b0a22de09446d8](http://www.huffingtonpost.com/au/entry/mike-pence-religious-freedom-law-indiana_us_57c839b9e4b0a22de09446d8).

<sup>54</sup> <https://www.thedailybeast.com/scotus-lets-mississippi-hb-1523-americas-most-anti-lgbt-law-stay-in-place>.

<sup>55</sup> <http://www.thecollegefix.com/post/40896/>.