1. I give permission for the review panel to publish my submission and to quote from it, identifying me as the author.

**Human rights theory**

2. The question as to whether religious freedom is adequately protected under Australian law cannot be addressed in isolation from the question of the legal theory upon which protection of human rights is based.

3. In the modern era, protection of rights has been justified by reference to secular concepts of natural law, developed by theorists such as Hobbes, Locke and Kant. Kant’s theory is of particular usefulness. The foundation of Kant’s argument was the concept of human dignity, by which he meant that all people are equal and that therefore no person has the right to use another for their own ends. From this it follows that each individual is entitled to personal autonomy and self-realisation and, conversely, is entitled not to have their liberty interfered with by their fellow citizens.

4. The implication of this for the legal system according to Enlightenment thinkers, was that individuals are entitled to the protection of such fundamental rights as are necessary for them to live life autonomously - examples being the rights to life, personal liberty, free expression, religion et cetera. From this it follows that there must be restraints on the power of the state.

5. The concept of natural rights was applied during the post-World War II trials at Nuremberg and elsewhere, in which the defence that crimes against humanity were lawful under German law was rejected. The trials marked a rejection of positivism, and an assertion that all people, in every society, are entitled to respect for human rights, which are superior to the law of any jurisdiction as it may exist from time to time.

6. This principle was embodied in the *Universal Declaration on Human Rights* of 1948 and the *International Covenant on Civil and Political Rights* and the *International Covenant on Social, Economic and Cultural Rights* of 1966. Significantly, these documents do not exempt democracies from compliance with the norms they contain. In other words, a denial of rights to a group or individual as a result of a law enacted by democratic processes is no less offensive to human dignity than a denial of rights brought about by a tyrant. Respect for human rights necessarily requires that the democratic will be subject to limitations, and the only way to do that is through the inclusion in a constitution of an entrenched and justiciable bill of rights.

7. What the various rights identified in national and international human rights documents have in common is that they are all justified as incidents of the same overarching legal theory – in other words, the theory does not justify each right as an atomised item. Each of the commonly-identified fundamental rights simply reflects a dimension of human activity. Thus one either accepts the entitlement of people to the full range of human rights or one does not. There is no theoretical basis upon which protection must be given to some rights but denied to others.
8. For this reason, the Commonwealth Constitution is deficient in that it does not protect the full range of rights implied by human dignity. The Convention process which led to the drafting of the Constitution was remarkable for the complete absence of debate on human rights theory. Thus participants in the Convention debates did not consider there to be anything wrong in rejecting a proposal that the constitution should contain a right to due process, it being argued that since such a right could be read as requiring equality before the law, it would prevent the Commonwealth from discriminating against Asian and Indigenous people.

9. The Constitution is also incoherent from the perspective of theory in that it was not drafted in accordance with any over-arching theory of rights. Such rights as are protected in the Constitution were not motivated by respect for human dignity, but rather as pragmatic devices to address apprehensions about federalism (s 92 freedom of inter-State trade, commerce and intercourse and s 117 non-discrimination on grounds of residence in another State) and possible denominational capture of the Commonwealth (s 116). Even the s 80 right to jury trial for indictable offences provides no real protection, because there is no constitutional restriction on how the Commonwealth categorises offences.

10. To the extent that the Constitution reflects any theory, it reflects positivism in that, provided the Commonwealth Parliament confines itself to its enumerated powers and does not transgress the few express and implied rights protected by the text, it is at liberty to legislate as it pleases, without any restraint imposed by natural rights. Positivism is still positivism, whether it is democratic positivism or the positivism of a tyrant. In fact, the concept of democratic positivism is itself contradictory: Democracy cannot be justified with reference to an a-moral theory such as positivism, because positivism itself is neutral as to forms of government. The entitlement to vote and all the other rights of political participation that democracy relies on cannot be justified other than by an appeal to an overarching theory of rights. So democratic rights have no greater value than other rights, because all rights are justifiable only by reference to human dignity.

11. In light of the above, any discussion of the degree to which freedom of religion is protected in Australia must be undertaken with the understanding that such protection as is given to that freedom exists against a deeply-flawed constitutional background and that proper conformity to human rights theory requires that the Constitution be amended so as to include within it a full bill of rights.

12. Unless that is done, a correct balance can never be struck between religious freedom, which is protected by the Constitution, and the many other freedoms which are not. This is because those other freedoms are obviously vulnerable to unqualified legislative over-ride, whereas restrictions on freedom of religion will be invalid unless they can satisfy the proportionality test (most recently formulated in *McCloy v New South Wales* [2015] HCA 34). For this reason, there is an inevitable imbalance between freedom of religion (and other textual and implied freedoms protected by the Constitution) and those freedoms which are not constitutionally protected. This imbalance can be remedied only by the inclusion in the Constitution of a full bill of rights, using the amendment procedure contained in s 128. The bill of rights should the freedoms recognised in the international human rights documents mentioned in paragraph 6 above and in documents such as the *Canadian Charter of Rights and Freedoms* 1982 or the bill of rights contained in the *Constitution of the Republic of South Africa* 1996. It should also include a limitations clause incorporating a proportionality test.

13. Matters are different at State level. Of the express rights contained in the Commonwealth Constitution, only ss 92 and 117 bind the States. Thus, because s 116 applies only to laws enacted by the Commonwealth, State parliaments enjoy unrestrained power to limit freedom of religion, as was affirmed in *Grace Bible Church v Reedman* (1984) 54 ALR 571. Effective protection for freedom of religion would therefore require constitutional amendment so as to extend the reach of s 116 to the States or, more correctly in light of what is said in the previous paragraph, effective protection for freedom of religion and the maintenance of a correct balance between it and other
freedoms requires the inclusion in the Commonwealth Constitution of a full bill of rights binding both the Commonwealth and States.

**Freedom of religion**

14. To the extent that religious freedom is currently protected at Commonwealth level, to what extent is that protection effective? Section 116 prohibits (i) the establishment of any religion, (ii) the imposition of any requirement to engage in religious observances, (iii) the enactment of any law prohibiting the free exercise of religion and (iv) the imposition of religious qualifications for public office.

15. This protection is comprehensive. One area of ambiguity that remains to be resolved is the question of to what extent s 116 offers protection against a law which requires people to perform an activity which is contrary to their religious beliefs, as distinct from prohibiting them from engaging in religious activities. While protection against the latter is provided by the third limb of s 116, whether s 116 offers protection against the former is unresolved. The issue was presented to the High Court in *Kryger v Williams* (1912) 15 CLR 366, which involved a Jehovah’s Witness who claimed exemption from a statute requiring military training on the ground that his religious beliefs forbade him from bearing arms. Barton J held (at 372-3) that the appellant’s s 116 rights had not been infringed because the law requiring that he undergo military training did not prohibit him from practising his religion. With respect this misses the point - the court did not properly grapple with the issue of whether the very act of enrolment in the armed services infringed the appellant’s freedom of religion. In order to resolve this ambiguity, s 116 (or its equivalent in a full bill of rights) should be amended so as to include a fifth prohibition, against laws which compel a person to engage in conduct which is contrary to their religious beliefs. The issue of compulsion by law contrary to religious beliefs is an important one which is addressed in paragraphs 26-45 below.

16. This would not mean that all laws which required conduct contrary to religious beliefs would be invalid – as in the case of the other aspects of s 116 (and indeed, constitutional rights generally) everything would depend upon an application of the proportionality test in determining whether a limitation on a freedom was consistent with the Constitution.

17. One other dimension of s 116 which is often overlooked is that by prohibiting the establishment of any religion, s 116 impliedly mandates a secular state. In other words, it requires that public policy and legislation be based on rational values, rather than on faith-based values. It is therefore incorrect for people to make statements such as that Australia is a Christian or Judeo-Christian society. That may be true as a cultural observation (although it becomes less true as time goes on), but from a legal policy point of view it is contrary to the philosophy underling s 116. It is therefore important that people involved in all levels of government be educated on this principle.

18. None of the State constitutions protect human rights in the sense of containing an entrenched and justiciable bill of rights. Documents such as the *Human Rights Act 2004* (ACT) and the *Victorian Charter of Rights and Responsibilities 2006* (Vic) are not true bills of rights because they are capable of over-ride by ordinary legislation and do not empower the courts to invalidate laws inconsistent with their provisions (indeed, that power is specifically denied). At most these documents amount to an interpretative aide.

19. The consequence of this is that at State level, there is a free for all in relation to rights in the sense that State parliaments can enact laws limiting rights and creating imbalances between them. Again, only a comprehensive bill of rights which binds the States can ensure effective protection of rights and the maintenance of a proper balance between them.
Balancing freedom of religion against other rights

20. Given the current constitutional environment, what is the proportionate balance between religious freedom and other rights, and does State legislation strike the correct balance?

21. Fundamental to a determination of this question is an appreciation of the distinction between private and public spheres. In general, the more personal the exercise of a right, the broader ought to be the protection afforded it. Conversely, the greater the impact the exercise has on the rights of others, the greater warrant there will be for legislative limitation in order to strike a balance between that right and legitimate public concerns, including respect for the rights of others. It is useful to explore this distinction before examining how State law has balanced competing rights.

22. As an example of the operation of the private / public distinction, one can cite Griswold v Connecticut (1965) 381 US 479, a case in which the plaintiffs challenged a State law regulating the sale of contraceptives. The Supreme Court held that by regulating the private conduct of individuals (the clinic’s customers) the statute infringed the right to privacy - here used in the broad sense of autonomy to make personal choices - impliedly protected by the Fifth, Ninth and Fourteenth Amendments, and that the statute was therefore invalid. The idea that the legislature should interfere in the most intimate areas of human interaction by limiting the autonomy of consenting adults to make decisions relating to their sexual conduct attracted strong criticism from the court. The decision in Griswold can also be seen as a finding that the inherent human dignity of people entitles them to a ‘zone of privacy’ (per Douglas J at 484), inviolate even from the will of a majority of their fellow citizens. The plaintiffs in Griswold were fortunate in that the United States has a Bill of Rights against which legislation can be challenged. By contrast, if a case such as Griswold arose in Australia, the courts would have no option but to affirm the validity of the statute.

23. The reasoning in Griswold was adopted when the issue of same-sex marriage came before the Supreme Court in Obergefell v Hodges 576 US _ (2015). In that case, Kennedy J held that the due process clause of the Fourteenth Amendment extends to ‘personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs’ (at 1-2) and that since ‘the right to personal choice regarding marriage is inherent in the concept of individual autonomy’ (at 12) the right to autonomy must extend to the choice of whom to marry. The court also addressed the argument that issues such as same-sex marriage should be left to legislatures, saying that the freedom to exercise fundamental rights should not be contingent on democratic process (at 23-26) and that ‘An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act’, because ‘fundamental rights may not be submitted to a vote; they depend on the outcome of no elections’ (at 24).

24. In passing one can note the contrast between the approach in Australia and the United States: Although participation in the recent plebiscite on marriage equality was a necessary means to securing a political end, it was offensive that people should have to beg their fellow citizens to grant them the fundamental right to marry.

25. Turning now to what limits should be placed on freedom of religion in accordance with the public / private sphere distinction identified at paragraph 21 above, religions are self-evidently private associations. Membership is contingent upon adherence to a set of beliefs. For this reason, religions are exclusionary (or at least, potentially exclusionary) organisations. A religion’s beliefs may appear irrational and even discriminatory to outsiders. But so long as adherence to the religion is voluntary, the state has no role in proscribing the beliefs it propounds, or in determining who may or may not be accepted as a member. The law ought also impose no restriction on the expression of religious beliefs however objectively irrational or discriminatory those beliefs may be, so long as expression of them does not amount to incitement to crime. This principle should cover all institutions established by religious bodies, including religious schools. Adherence to
religious doctrines by members of the religion within their own institutions are private matters into which the law ought not to intrude, subject to the qualification that religion not be used as a cover for breaches of criminal law.

26. So far as interactions by believers with people who are not members of their religious community are concerned, these are matters which are not private in nature, and in relation to which an increased level of legal regulation is therefore justified. Of particular importance here are situations in which owners of businesses claim that laws which prohibit discrimination on grounds such as religious belief or sexual orientation limit freedom of religion on the ground that the law requires them to do something contrary to their religious beliefs. The argument is also often cast in terms that such laws breach freedom of contract. A case of this type recently arose in the United States: In *Mullins v Masterpiece Cake Shop* 2015 COA 115; 370 P.3d 272, the owner of a wedding-cake shop refused to make a cake for a same-sex couple. The Colorado Court of Appeals found that in so doing, the respondent had breached legislation which prohibits discrimination on grounds of sexual orientation in places of ‘public accommodation’ – broadly defined in the legislation as any place where a business offers goods or services to the public. The case has now been appealed to the United States Supreme Court.

27. Relationships of this nature are self-evidently different from those occurring within the confines of a religious community. One of the hallmarks of a religion is that it is a defined community based on acceptance of a set of beliefs - which of necessity means excluding those who do not accept those beliefs. In other words, the right to exclude non-believers – on any grounds - can be said to be fundamental to the capacity of a religious group to define itself. By contrast, the raison d’être of business is to solicit custom from the public and so rejection of customers by a business on discriminatory grounds such as race, gender or sexual orientation (as compared, for example, to exclusion on the business-related ground of lack of creditworthiness), is not only unnecessary for engagement in business but is indeed surely antithetical to it. Such conduct thus causes offence which is all the more egregious because it is gratuitous.

28. It is incorrect, as some have argued, that freedom of contract warrants exemption from anti-discrimination law. Even leaving aside anti-discrimination statutes, the common law does not recognise a right to discriminate. The duty to serve the public without discrimination has long existed under the common law doctrine of ‘common callings’, according to which operators of businesses which provided services that were necessary for goods to get to market – prime examples being carriers of goods and people, farriers and inn-keepers et cetera - were obliged to provide their services at a reasonable price and on a non-discriminatory basis. This rule was applied in *Constantine v Imperial Hotels Ltd* [1944] KB 693, in which the court held unlawful the denial of service by a hotel to a customer on grounds of race.

29. More recently however, in jurisdictions which have constitutional provisions prohibiting discrimination, plaintiffs have successfully challenged discrimination in private contractual relationships on the ground that they infringe statutes enacted in support of the right to equality. Courts have pointed to the affront to dignity that is caused by discrimination in finding that it is unlawful for businesses to discriminate on prohibited grounds such as race, gender, disability and sexual orientation.

30. This was the basis of a line of decisions on private contractual relationships by the United States Supreme Court during the civil rights era. In *Shelley v Kraemer* 334 US 1 (1948) for example, the court held that racially discriminatory covenants incorporated into housing contracts by private developers were unenforceable under the equal protection clause of the Fourteenth Amendment. In *Boynton v Virginia* 364 US 454 (1960) the court held that it was unlawful for a bus company to discriminate between passengers along racial lines in its provision of facilities at bus terminals. In *Heart of Atlanta Motel Inc. v United States* 379 US 241 (1964) the court held that a motel breached federal anti-discrimination law in denying accommodation to African-American travellers.
31. The mere fact that these cases involved contractual relationships did not immunise them from the reach of anti-discrimination law. In other words, although consensus lies at the heart of contracts, which might therefore be said to be 'private' in nature, once a business offers goods or services to the public, it steps into the public arena and breaches equality rights if it discriminates on a prohibited ground. For this reason, the argument that the religious beliefs of a person engaging in public commerce in Australia entitle them to discriminate on grounds of sexual orientation has no more validity than did the argument that the right to hold segregationist political beliefs entitled business owners to refuse custom to African Americans in the United States in the 1950s.

32. In Australia, discrimination on grounds of sexual orientation is prohibited by s 5A of the *Sex Discrimination Act 1984* (Cth). In addition, 6 of the Act prohibits discrimination on grounds of marital and relationship status. These provisions, as read with s 22 of the Act, which prohibits discrimination in the provision of goods, services and facilities, would prohibit businesses from engaging in discrimination against same-sex couples.

33. State and Territory statutes also contain anti-discrimination provisions. Section10(3) of the Commonwealth Act states that that Act does not intend to exclude the operation of State and Territory laws, so long as the latter are capable of operating concurrently with the Commonwealth Act. Although this submission does not survey the law of each State and Territory, generally speaking State and Territory legislation closely parallels the Commonwealth Act. Thus, to take New South Wales as an example, s 47 of the *Anti-Discrimination Act 1977* (NSW) prohibits discrimination on grounds of marital or domestic status in the provision of goods and services, while s 49ZP similarly prohibits discrimination on grounds of homosexuality.

34. As it currently stands, Australian law is therefore consistent with the notion that private contractual relationships should be subject to equality rights and so the law would prohibit businesses from discriminating against same-sex couples. I would argue that that position strikes an appropriate balance between religious freedom and other rights and should therefore be maintained.

35. A more difficult circumstance that needs to be considered is where religious organisations themselves operate institutions which, on the face of it, engage in public business – schools and old-age facilities being obvious examples. Are such institutions to be classified as ‘private’, and thus free to discriminate, or should they be classified as ‘public’ and thus subject to anti-discrimination law in the same way as are other businesses? Should a religious school be permitted to prohibit parents in a same-sex relationship from enrolling their children at the school? Should an old-age facility owned by a religious body be entitled to refuse to accommodate same-sex couples in married quarters of that facility?

36. I would argue that an initial key distinction that needs to be made is between institutions which are owned by religious bodies and where admission is genuinely restricted to members of that religion on the one hand and those where the institution offers its services to the public at large on the other. In the former case, even though the institution is engaged in business, the exclusionary manner in which it defines its clientele takes it out of the public realm and into the private, in which circumstances freedom to discriminate should be permitted. The key condition here is that the institution must genuinely restrict the operation of its business to members of the religion – if the institution is to enjoy the benefit (as it sees it) of the right to discriminate, it should not be permitted to cross the barrier between private and public business by seeking custom from non-believers, which commercial considerations might tempt it to do.

37. In contrast to institutions which restrict their custom to members of a religion, many institutions, while operated by religious bodies, accept custom from the public at large. Catholic and other religious schools are a good example of this – although established as places where parents can have their children educated in accordance with the tenets of their faith, in practice most such schools accept students from families who are not adherents. The fact that in such instances parents are advised that their children will have to attend classes in which instruction in religious doctrine
is provided does of course not mean that they or their children thereby become members of the church. I would argue that where a business operation owned by a religious organisation enjoys the commercial advantage of soliciting custom from all-comers rather than only from religious adherents, the rule prohibiting discrimination by public businesses discussed above should apply.

38. The law on exemptions from anti-discrimination law for institutions run by religious organisations differs between jurisdictions in Australia. So far as the Commonwealth is concerned, s 37(1)(d) of the *Sex Discrimination Act 1984* (Cth) exempts from the provisions of the Act 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.

39. It should however be noted that section 37(2)(a) excludes from the ambit of the exemption the provision of aged-care services where those services are funded by the Commonwealth.

40. Section 38(3) of the Commonwealth Act permits educational institutions established for religious purposes to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

41. Sections 37(1)(d) and 38(3) seem to contemplate that, in order to avail of the exemptions they provide, religious bodies would have to prove that an act or practice was required by their doctrine—which raises the invidious prospect of courts determining what the tenets of a religion are.

42. At State and Territory level, each jurisdiction carves out exceptions to their general prohibitions on discrimination, although generally replicating the provisions contained in the Commonwealth Act. Space does not permit a survey of the law of all jurisdictions, but two examples will suffice: In New South Wales, s 56(c) of the *Anti-Discrimination Act 1977* (NSW) is identical to s 37(1)(d) of the Commonwealth Act. In the case of aged-care facilities, s 59 provides that accommodation for aged persons may be restricted on grounds of sex, marital status or race—although one should note that, if an aged-care facility received Commonwealth funding, it would not be able to discriminate on grounds of marital status because of s 37(2)(a) of the Commonwealth Act.

43. In Victoria, s 82(2) of the *Equal Opportunity Act 2010* (Vic) is cast in similar terms to s 37(1)(d) of the Commonwealth Act, in that it religious bodies to discriminate on grounds of religious belief, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity. Section 83(2) makes the same provision in relation to schools run in accordance with religious principles. It should however be noted that ss 82 and 83 must be read in light of s 84, which states that discrimination justified by religious principles means discrimination which is reasonably necessary for a person to comply with the doctrines, beliefs or principles of their religion—which again raises the prospect of curial determination of what a religion’s doctrines require.

44. None of these provisions, either Commonwealth or State, distinguish between institutions which restrict entry to adherents of a religion from those which offer services to the public as a whole. To that extent, the exemptions offered by these statutes are too broad. On the other hand, they are too narrow in that they envisage judicial inquiry into what is and is not part of a religion’s beliefs.

45. I would argue that the Commonwealth should amend the *Sex Discrimination Act 1984* (Cth) so as to provide that religious bodies and institutions operated by them could discriminate on grounds
of religious belief, sex, sexual orientation, lawful sexual activity, marital status, parental status or
gender identity, if they offer their services only to their adherents. There should also be no statutory
test of whether such discrimination was required by the tenets of the religion. However, where
such institutions offer services to the public at large, discrimination should not be permitted. This
would give legislative effect to the distinction between private and public business activities of
religious entities in accordance with the principles discussed above. This would also provide an
opportunity to ensure a uniform national approach to the question, as amendments to the
Commonwealth Act could be drafted in such a manner as to declare that they over-ride inconsistent
State and Territory laws on this topic.

Recommendations

46. In summary, in order to adequately protect freedom of religion and to ensure a balance between it
and other rights, I would recommend the following changes to Australian law:

(i) The Commonwealth Constitution should be amended so as to include a full bill of rights,
modelled on documents such as the Canadian Charter of Rights and Freedoms 1982 or the
bill of rights contained in the Constitution of the Republic of South Africa 1996. It should
also contain a limitations clause which embodies a proportionality test.

(ii) The constitutional bill of rights should bind the Commonwealth as well as the States and
Territories.

(iii) Section 116 (or its equivalent in a new bill of rights) should include a prohibition against
laws which compel a person to engage in conduct which is contrary to their religious
beliefs.

(iv) An appropriate balance between freedom of religion and other rights requires that the law
(as amended where necessary)

   (a) impose no restriction on the expression of religious beliefs, however
   objectively irrational or discriminatory those beliefs may be, so long as
   expression of them does not amount to incitement to crime.

   (b) not permit owners of businesses to discriminate against customers on the
   grounds listed in current anti-discrimination law

   (c) permit businesses owned by religious organisations to discriminate on grounds
   prohibited by anti-discrimination law only if they restrict their custom to
   members of their faith, but not otherwise

   (d) in cases where businesses operated by religious institutions do engage in
discrimination permitted under (c) above, not require that the institution prove
that the discrimination is mandated by the beliefs of the religion concerned.