"Understanding Human Rights in Context"

A Submission to the Human Rights Inquiry of the Queensland Parliament, Australia

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Introduction:

I thank the Parliament of Queensland for inviting submissions in relation to the question of whether or not to adopt some sort of Human Rights legislation and what sort of principles ought to be counted as important in relation to this. This submission is focused on important principles. It discusses human rights and human communities, for it is in understanding the role and nature of communities in relation to some aspects of scholarly and practical concern regarding human rights, as these are developing in practice, that we can understand the role and nature of human rights: context is key to understanding what should be avoided or adopted and this Submission is designed to raise concerns about the context of human rights today.

This Submission does not develop the arguments for or against particular legislation but focuses on principles that should apply whatever frameworks are adopted in future. The principles would apply, as well, to judges vested with interpreting human rights type principles developed under the common law as well as to any kind of legislative framework. Whether it is the common law or a human rights enactment that is at issue, the understanding about the role of the principles of human rights alongside the nature of human communities will still be *the* relevant context for analysis.

As will be seen, this Submission raises serious concerns about how human rights are being developed in other countries and, in particular, how diversity is being threatened by those who have agendas to push and see human rights legislation as a handy means of doing so. Something in the nature of the abstraction of principles from communities enables this to occur. This Submission pushes back on such abstraction and calls into question the legitimacy of avoiding the lived context of communities. In several instances this Submission identifies direct challenges to human rights themselves *in the name of human rights*.

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There is much to be said for protecting the role of legislative bodies as opposed to transferring policy making to judicial or quasi-judicial bodies such as Human Rights Tribunals under the guise of human rights "discrimination" protection or "advancing equality" where both concepts are detached from the context that is essential to a diverse and plural society. This Submission outlines some of the concerns drawing particularly on the experiences of human rights in Canada and South Africa. No comment is made on the outworking of human rights in Australia but it is assumed, I think fairly, that the tendencies identified elsewhere, particularly to lack of respect for individual and community difference, will be evident as well in Australia though it will be for those more expert than myself in this jurisdiction to make that assessment alongside what is spelled out from other countries.

It may be asserted that "things are fine" in both Canada and South Africa, but as one who has been experienced as an academic and legal advisor to a wide variety of groups in both countries, I can assure this Inquiry that things are anything but fine. There is considerable concern that the vague language of "human rights" as with the vague language of "equality" is being used to provide a blank slate upon which those with transformational aims can attempt to force their versions of culture on society in general using the power of law to do so through human rights cases.[1] For this reason, great care must be taken in any approach to "human rights" today and this Submission seeks to raise some of these foundational concerns for the consideration of this Inquiry and, perhaps, beyond it.

Recommendations in Brief:

1. ***create the category of "unjust discrimination" not simply "discrimination" so as to distinguish between just and unjust discriminations.***

2. ***any legal developments should include a presumption in favour of diversity.***

3. ***respect the organic approach to religious exemptions so that all employees in such an organisation have their beliefs respected not just those in "leadership" roles. Do not make any employment related exemptions turn on the functions of the job where there is a shared ethos organisation.***

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[1] Claims for "equality" that turn out to rank at least second behind quests for "reform" are not new. See: C.B. Macpherson, *The Real World of Democracy* (Toronto: Canadian Broadcasting Corporation, 1965) 59 in which he observes: Marxian and Rousseauean concepts have "one thing in common"...." "[b]elieving as they do that the most important thing is the reformation of society, and realizing that this requires political power, they are not prepared to encourage or even allow such political freedoms as might hinder their power to reform the society. Thus political freedoms come a poor second to the drive for the new kind of society they believe to be necessary for the realization of equal human rights. Freedom is sacrificed to equality; *or, more accurately, present freedoms are sacrificed to a vision of fuller and more equal freedom in the future*. Freedom, in this view, contradicts itself..."(59, emphasis added). It is useful to recall Rousseau's formulation of and commitment to "civil religion" with the corresponding demand that religions other than, of course, civil religion "...must withdraw from civic life." See: Douglas Farrow "Of Secularity and Civil Religion" in Farrow (ed). *Recognizing Religion in a Secular Society* (Montreal: McGill-Queens, 2004) 140 – 182 at 157-158.

4. ***Ensure that the duty of the accommodation of conscience is spelled out as both a public and private necessity and, in relation to medical (and pharmaceutical) services, the right to conscientious objection and non-referral should be recognised explicitly and protected.***

5. ***limit offensive speech restrictions to "incitement to commit violence or physical harm".***

A. Background:

The Importance of Understanding the Proper Scope of Human Rights: It should *not be* "The New Secular Religion of Our Time"

Writing as an academic new to Australia but one experienced with law as a theorist and practitioner in Canada, South Africa and Europe, it is important to see the development and extension of human rights as part of a Western movement to protect human rights but one that, paradoxically, often threatens the very diversity it purports to respect.

Who can object to "protecting human rights"? In this day and age it has become a mantra but one must be careful that what is established contains genuine safeguards for diversity as many of those who argue for human rights extension have, usually as an implied goal, forced changes to the beliefs of others with which they disagree. Forcing others to agree by force of law with moral propositions or actions that ought to be open for dissent in a free society is the very definition of an authoritarian state. History shows all too clearly that it is in the protection and respect for difference on those subjects that matter most to many of us, that an "open society" remains free. Shutting down dissent and failing to grant accommodation is the preferred tactic of those who wish to use law, rather than popular debate and changeable legislative frameworks, to obtain cultural dominance.

This submission argues that for many people human rights are viewed as threatening; this need not be the case and if the goal is to create a culture of human rights that is respected then that culture must *itself* give respect - in particular the structure of any human rights instruments must learn from the experiences in other countries and do what it can to put into place protections to show respect for diversity against those who often will try to use Human Rights itself to *attack* diversity or *coerce* changes in how people think.[2]

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[2] The terms "attack" and "coerce" are chosen carefully and reflect, unfortunately, the sort of approach some academics have argued for in other countries. Consider the following passages from leading South African Constitutional scholars Pierre de Vos and David Bilchitz. De Vos calls for attacks against those who hold different views on "same-sex marriage" and writes: "[I]f everyone has the right to be different and if we must move away from the idea that heterosexuality forms the normative basis for policy formulation, then the very institutions which valorise a certain manifestation of heterosexuality . . . in our society *must be under attack*. A prime candidate for re-invention or reconstruction must surely be the institutions of "marriage" and the "family," the

Legislation can be changed within the rough and ready flexibility of democratic politics: constitutions are less flexible - and the vague application of balancing and proportionality tests transfers vast areas of social control to unelected judges or tribunal members. Over the door of every human rights tribunal should be the phrase: "tread carefully here for the right to disagree is essential to freedom".

Considering how and whether to adopt Bills of Rights or Human Rights Protections can be a useful exercise provided that such extension maintains respect for diversity and understands the danger of human rights themselves becoming ideological and, in fact, coercive. Case law from other countries, particularly Canada, has shown just such unwarranted extensions of Human Rights. In Canada it is routine for religious believers and their communities to feel threatened by human rights complaints in which the goal of the complaint often seems to be forcing new conceptions of morality on communities that ought to be protected to develop and maintain their own belief systems as free as possible from coercion by the state (understood as law and politics).

American political theorists Stephen Macedo and William Galston[3] and English philosopher John Gray[4] have all warned of the dangers of illiberal "convergence" or the tendencies towards "civic totalism" that lurk within many approaches that use the rhetoric of "liberalism" or "human rights" today. Canadian Michael Ignatieff has warned of "Human Rights as Ideology". These writers and many others have rightly identified the danger of attempts to force other citizens to "toe the line" in relation to matters that should properly remain open. Abortion, euthanasia and the nature of marriage are three contemporary issues that show the capacity or incapacity of democratic regimes to respect properly the morally different viewpoints of citizens. In each case the historical record ought to give us considerable pause for concern as the principles of accommodation are often lacking or not present at all in relation to these issues.

William Galston, for example, has warned that:

> ...an account of liberal democracy built on a foundation of political pluralism should make us very cautious about expanding the scope of state power *in ways that mandate uniformity*.[5]

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very institutions which have been deployed to regulate and police intimate relations in our society." See: Pierre de Vos, "Same-Sex Sexual Desire and the Re-Imagining of the South African Family", 20(2) *South African Journal of Human Rights* (2004) 179 at 187 emphasis added. David Bilchitz, for his part, seeks to use law to "*coerce* change in hearts and minds" see: "Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere: A Reply", *South African Journal of Human Rights*, (2012) 296 – 315 at 314 (emphasis added): both, with respect, misunderstand the proper role of law in a diverse and free society but their approach is one that should be noted as there are many proponents of legal coercion. For this reason, any laws need to be drafted anticipating inappropriate uses and should go out of their way to build in maximal protection for diversity and associational difference.

[3] William A. Galston "Religion and the Limits of Liberal Democracy" in D. Farrow (ed) *Recognizing Religion in a Secular Society* (Montreal: McGill-Queens University Press, 2004) 41- 50 at 43-44, 49. The term "civic totalism' Galston acknowledges he has taken from another American theorist, Stephen Macedo.

[4] John Gray, *Two Faces of Liberalism* (New York: The New Press, 2000)

[5] Galston, above, note #3 at 49, emphasis added.

With respect to the relationship between an abstraction such as "equality" and the lived communal reality of diversity, South Africa's former Constitutional Court Justice, Albie Sachs had this to say about diversity in a decision dealing with the rights of gays and lesbians:

> [E]quality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. *It does not presuppose the elimination or suppression of difference.* Respect for human rights requires the affirmation of self, not the denial of self. *Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference.* [6]

One may believe, even vehemently, that everyone should accept his or her view of same-sex conduct or (to take another deeply held belief based on an equality right) that the priesthood within Roman Catholicism should be female as well as male or that issues such as abortion and euthanasia should not allow for dissent; one may argue for that viewpoint in public and private spheres. One is not, however, entitled to force those who are in disagreement to have their views and presumably organisations "purged" from society or "coerced" to change or by being forced to co-operate with the beliefs of others by force of law - at least so Gray and Galston counsel in their approaches to liberalism.

Human Rights Ought not to be an "Unofficial State Religion" or Become an Ideology that Seeks to Force Convergence or Cultural "Transformation".

Former Canadian Justice Minister and a noted Human Rights expert, Irwin Cotler once referred, without irony or criticism, to human rights as "the new secular religion of our time".[7] This ought to raise concerns for those who believe in the appropriate jurisdictional division between "church and state". Yet another leading Canadian authority on Human Rights, Michael Ignatieff, in what could be seen as a rejection of Cotler's un-nuanced statement, has warned of the significant danger of viewing human rights as "ideology" or as some kind of replacement religion.[8] He writes:

> [h]uman rights is misunderstood, I shall argue, if it is seen as a "secular religion." It is not a creed; it is not metaphysics. To make it so is to turn it into a species of idolatry: humanism worshipping itself. Elevating the moral and metaphysical claims made on behalf of human rights may be intended to increase its universal appeal. In fact, it has the opposite effect, raising doubts among religious and non-Western groups who do not happen to be in need of Western secular creeds.[9]

There is a reason that Human Rights ought not to be perceived or treated as "a new secular religion": it does not have the competence to do what religions do. For another thing, human rights cannot be a singular religion as it is for everyone and is generalised across a jurisdiction - national or state based. As such it must be for the benefit of *all* citizens whether they are religious or not. It is in

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[6] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998) 1517, 1574–1575 (Sachs J). (emphasis added).

[7] Irwin Cotler, "Jewish Nongovernmental Organizations" in John McLaren and Harold Coward, (eds), *Religious Conscience, the State and the Law* (New York: SUNY Press, 1999) 77 – 96 at 77.

[8] Michael Ignatieff, "Human Rights as Politics and Idolatry" in Amy Gutman, (ed) *Human Rights as Politics and Idolatry* (Princeton, Princeton University Press, 2001) 3 – 98

[9] Ibid at 53.

the nature, therefore, of a common denominator, and ought not to have either implicitly or explicitly a "transformational" (religious) mandate. It must work with civic associations (including religions) as it finds them not start out with an implicit or explicit idea that it has a mandate to "change society."

For reasons in part articulated by Ignatieff, human rights can properly have no such mandate in a pluralistic and diverse society. To make it "transformative could result in an insufficient respect for differing contexts - contexts that in themselves, do have a right to the metaphysical traditions that speak of personal and group "transformation" but through, typically, the languages of religious commitments and in some cases Divine revelation. For human rights to take on this mantle would mean that it will inevitably become not only "idolatrous", as Ignatieff understands it, but given its legal mandate, dangerously *theocratic* in practice - threatening religions as it does so and, paradoxically, undercutting the very enlightenment project of de-coupling the state from religions.

Human rights should not occupy expressly or by default the roles of religions. For all these reasons and others great care must be taken, therefore, to ensure that wide latitude is given to alternative belief systems (religious and otherwise) so as to ensure their ability to operate without fear of hindrance or reprisal. Human rights needs to focus on developing new approaches that assist diversity in reality not only in name while hosting homogenizing conceptions of culture under a guise of diversity respect. Sadly, such nuanced care is no longer the standard template in Canada where it is now routine for religious believers and their communities to face unrelenting challenges to their open and free operation or even to their right to the existence of their projects - such as, most recently, founding a Christian based law school.[10] Australia could easily be taken down the same road and must think carefully and differently lest the errors currently occurring in places like Canada get repeated here.[11]

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[10] Despite litigating its right to graduate education students from its University over a decade and a half ago, see: *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772, Trinity Western University ("*TWU*") (a private evangelical protestant university in Western Canada) is now having to litigate all over again for the right to have a Christian based law school - this despite having its accreditation already approved by those with statutory authority to do so. Prejudice against the religious views about acceptable sexual morality are being dressed up as "discrimination" and the nature of legal accreditation as "public" interpreted so as to shut down the properly public aspect of religious involvement in Canadian society. This case alone ought to provide Australians with a case-study of how human rights conceptions can be widely used to shut down diversity and attack those with now unpopular views related to sexuality. The case is currently before the Canadian courts in three provinces. Though not a human rights case per se, the problem of an overextension of law so as to oppress religious diversity can happen, as shown in Canada, in both human rights and Charter of Rights frameworks. For a review of some of the issues and an argument against this domination of dissenting associations by elites, see the author's: "Law Deans, Legal Coercion and the Freedoms of Association and Religion in Canada" *The Advocate,* Vol. 71, Part 5, pp. 671-675, September 2013 at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328945 (accessed April 14, 2016).

[11] A recent volume published in Canada actually suggests that something known as "deep equality" should be embraced. According to the rather vague arguments in the book, " [deep equality] requires an abandonment of language that establishes hierarchies of difference, such as 'tolerance' and 'accommodation' see: Lori G. Beaman (ed) *Reasonable Accommodation: Managing Religious Diversity* (Vancouver: University of British Columbia Press, 2012) 213. Part of this quest for "deep equality" involves the suggestion that "...the content of religions should be opened to fair and public assessment" and that this is "an admission that this is already taking place in the courts" at 218-219. This Submission calls for "deep diversity" as, in part, a response to the frankly totalitarian dimensions of "deep equality" which emerges from the pages of this Canadian volume. This book and some of its more

This is not the place to embark on a detailed analysis of how this happened but something like the expansion of law in attempts to replace *by law* concepts that were developed within the metaphysical richness of religions plays a large part in this shift: one need only consider how contemporaries ground the notion of "respect for the person" or "dignity of the person" when religious grounds provided the corner stone of human rights in the past. The "liberal consensus" that many felt comfortable with has now been widely regarded as having broken down. Thus, Paul Horwitz has written, somewhat boldly, that:

> ...we are now in the twilight of the liberal consensus as we have known it. It may survive, with important revisions. Or it may collapse all together, and new prophets will arise to predict what will come after it. *One thing, however, seems certain: the liberal consensus that emerged after the enlightenment, gelled in the nineteenth century, and reached a more or less stable form in the twentieth century, cannot last much longer as a basic, unquestioned assumption about the way we live.* From within and beyond its borders, the liberal consensus is under attack. On all sides we are hearing calls, sometimes measured and sometimes shrill, for a revision or an outright rejection of the terms of the liberal treaty.[12]

The traditions that gave us "civic virtues" are no longer understood and even within these traditions the language of "virtue" has been replaced, almost entirely, by the vague and amorphous language of "values" with few recognising the tremendous catastrophe this poses to our understanding of shared meaning. Professor Edward Andrew of the University of Toronto has noted: "... there has been only partial awareness [in the Western academy] that the language of values entails that nothing is intrinsically good and nobody is intrinsically worthy." [13] Such a diagnosis ought to concern anyone who believes that human beings are intrinsically worthy but is trying to articulate this in the "language of values".

Identifying the general problems of "convergence" and "civic totalism", referred to above, and recognising the authoritarian dimensions of notions such as "deep equality" (as discussed in Canada) give us some tools to analyse these moves when they arise in politics, law, religious studies and sociology to name a few disciplines now interested in human rights. Here, an observation by David Novak appropriately sums up what has been discussed:

> A society dedicated to the protection and enhancements of its participatory cultures surely commands more respect and devotion than does a society established merely to protect and enhance property. *When, however, a civil society no longer respects that communal priority, it inevitably attempts to replace that sacred realm by becoming a sacred realm itself. As such, it attempts to become the highest realm in the lives of its citizens.* In becoming what some have called a "civil religion," civil society usurps the role of historic traditions of faith. It becomes what it was never intended to be, *for the hallmark of a democratic social order is the continuing limitation of its governing range. Without such limitation, any society tends to expand its government indefinitely.* But such limitation cannot come from within; it can only come from what is both outside it and

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startling claims is discussed in considerable detail in the author's PhD thesis, [11] Iain T. Benson, "An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion" (Unpublished PhD thesis, Witwatersrand, 2013) at pages 120-125.

[12] Paul Horwitz, *The Agnostic Age: Law Religion and the Constitution* (Oxford: Oxford University Press, 2011) 22, (emphasis added).

[13] Edward Andrews, *The Genealogy of Values*. (Lanham: Rowman and Littlefield, 1995) 170.

> above it. *Today that external and transcendent limitation can be found in the freedom of citizens in a democracy to find their primal identity by being and remaining a part of their traditional communities. This is what has come to be known in democracies as religious liberty.*[14]

To Novak's insight that civil society as civil religion becomes a "sacred realm" itself, we need to add that law becomes the divinity in such a metastasised vision. The antidote to the drug of civic or legal inflation and corresponding deflation of respect for associations and difference is a re-understanding of what is actually taking place when matters that raise the boundary questions between law, religion and society arise. Human rights is now at the cutting edge of attempts to remake society by law and for the reasons set out we should be highly suspicious of these developments and ensure that the utopian dimensions of the projects are avoided where possible and blocked where necessary.

B. Specific Analysis of Recommended Provisions:

1) Not all Discrimination is Bad: The need for Specificity in Relation to the Term "Discrimination"

Not all discrimination is bad and should be the subject of legal penalties. This is widely misunderstood. People must make discriminations and distinctions all the time - such as in routine matters related to job hiring, the granting of licences, the making of any legislative category that touches on age or disability or, in appropriate settings, relevant and important decisions and distinctions based on sex or even religion.

A diverse and open society is one that can manage the many forms of accommodation necessary to ensure appropriate freedoms and their exercise. Restrictive societies, on the other hand, fail to provide for such accommodation and grand sounding languages using the rhetoric of "non-discrimination" or "equality" - both vague terms, may often be used to reduce the very things they claim to expand; the Canadian volume suggesting a removal of "tolerance" and "accommodation" is a good example of this. Thus, George Orwell's use of the term "equality" in his justly famous short-novel *Animal Farm* in which "all animals are equal and some are more equal than others" alerts or ought to alert us to the risks of this sort of rhetorical take-over of freedom by languages of pseudo-egalitarianism.

2) The Need to Respect Diversity and Difference in Clear and Express Language and Recognise that they are *Prior* to Equality; The Creation of a Legal Presumption in Favour of Diversity.

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[14] David Novak, "Human Dignity and the Social Contract" in Farrow (ed), *Recognizing Religion* (Montreal: McGill-Queens Press, 2004) 51-68 at 56-57 emphasis added. On the tensions between liberalism, pluralism, religions and "transformative constitutionalism" see the insightful Chapter "Liberalism, Pluralism and Religion" in Ronald Beiner, *Philosophy in a Time of Lost Spirit: Essays on Contemporary Theory* (Toronto: Toronto University Press, 1997) 44-50.

Terms such as "equality" must be understood as *following upon context* not as somehow *prior* to context. Just as there should be a presumption in favour of diversity in any proposed law, there should be express recognition of differences in relation to beliefs of religion and conscience and, therefore, ample protection where conscience is under threat from "one size fits all" application. This means that in areas such as controversies in the medical area (euthanasia and abortion) or related to aspects of culture (such as the nature of marriage, or the gender roles within religions or memberships of religious clubs and societies[15]) safeguards need to be provided for in relation to exemptions and allowances for difference. It can be anticipated, as has been seen in other jurisdictions, that human rights becomes little more than a tool to beat diversity into submission if the legal mechanisms do not set out that diversity is the recognised *prior* condition: *deep diversity* is the goal here.

For this principle to be properly understood, it is important to make clear that diversity respected as difference is the *setting within which* equality is understood *not the other way around*. It should be remembered that, in fact, in all Constitutions and Human Rights frameworks "religion" *is* an "equality right" so the placing of these in opposition as if that is the conflict misunderstands the correct relationship between them. Again, it is the associational context that provides the frame within which equality is assessed not some abstract conception of "equality" dropped like a mist on culture including associations.

Mere difference of opinion may, for example, be stigmatized in clever rhetoric to avoid the nuanced moral distinctions some believe to be important and that define the different moral approaches of different belief-communities. Thus, in relation to the morality of sexual acts, it is a frequent thing to hear one side of the debate - that with the longest moral tradition and greatest number of associations gathered round these conceptions, - typecast as "homophobic" by those who have a different view. Yet the term "homophobia" when unpacked discloses a failure to respect any allowable position from which to disagree with the morality of homosexual sexual acts. Similarly, poor philosophy conflates desire with the right to exercise a desire in relation to "sexual orientation" yet allows such exercise only in relation to some desires (not polygamy or polyamory or pedophilia for example) not others - so moral distinctions are still present but due to the nature of the debates, largely incoherent if they are present at all. These are worrying realities about which legislators should be aware in these difficult and contested areas.

Freedom depends upon lived diversity and laws that protect that diversity in significant ways not in the erection of frameworks that say they respect diversity in theory but fail to do so in practice. The Canadian dilemma is the gradual domination of pseudo-diversity in court and human rights decisions. This lack of respect is also, unfortunately, visible in Australia as the section on the lack of proper conscience protection in health care, below demonstrates.

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[15] Presently under attack bty the students Union at Sydney University http://www.theage.com.au/national/education/university-of-sydney-evangelical-students-vote-to-keep-jesus-20160325-gnr38u.html

3) The Need to Respect the Overall Ethos or Organic Nature in Employer Exemption Cases Rather than the Less Respectful "Core Functions" Approach

It has been recognised that a "job-parsing" or "integral role" test narrows religious liberty unduly and fails to respect the differences between the kinds of religious organisations that exist. In many, the religious "mission" and "ethos" is not limited to only a few "leaders" but is an integral part of the whole organisation and its function. Therefore, to focus only on "key roles" misses this proper respect for religious diversity. A better approach and that recommended by Canadian scholars Alvin Esau and the author of this Submission is the "organic" or "shared ethos" approach set out in the latter's PhD thesis.[16]

In this approach the questions that should be asked of religious organisations is "what kind of an organisation is it?" and if the religious ethos is shared by everyone through manifestation, teaching and practice (such as teaching, prayer, sacred-text study, retreats etc.) then it is inappropriate to limit religious employment exemptions to only "key positions" since everyone in the organisations is practicing religion "organically". This being the case limiting the tests, as many tribunals have done, to "key personnel" tests is a significant reduction in the respect for religious liberty and respect that should be shown to religious organisations that function in this "organic" way.

4.) The "Duty of Accommodation" in Health Care is already Badly Handled in Australia: The Need for Conscience Protection and Express No Duty-of-Referral Recognition.

Respect for diversity in a medical context requires careful handling of difference and dissent and attention, often missing, to where the onus lies for obtaining "access to services". Too frequently, it is just assumed that the primary medical or health care specialist bears that onus where other means could be implemented with a bit of ingenuity.

In relation to medical ethics, both the practice of abortion and euthanasia (the former now legal in some countries or, as in Australia, officially illegal but with very wide exceptions) can fail to respect the capacity of citizens to dissent in relation to them. It is all too common to see, as one does in Australia, a failure to recognise that requiring referrals for abortion (as it would be for euthanasia) is to treat the autonomous moral views of the health care worker (doctor, nurse or pharmacist) as irrelevant - to accord no respect for dignity to the dissenting professional and to load all the "autonomy value" on to the patient: this cannot be correct when two autonomies are in conflict. This error, however is all too common and ought to provide serious concern about how moral issues are weighed at the moment in

[16] Iain T. Benson, "An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion" (Unpublished PhD thesis, Witwatersrand, 2013) at Chapter 5 at 126 – 152 which refers to Professors Esau's work. Please contact the writer if an electronic copy of this thesis is wanted.

Australia.[17] The current failure to respect diversity in relation to accommodation in medicine may be seen as reflecting an attitude of "non-accommodation" and this might well extend to other areas. Such errors can only be countered or protected against by clear language spelling out the need to provide respect for dissent and the duty of accommodation in all areas of public and private employment.

5.) Another Language Aspect: Offensive Speech and the Need to Define This Tightly so that "Hurt Feelings" Do Not Become Equated with "Hatred"

Some Human Rights approaches wish to protect people from being exposed to offensive speech. For example, the Canadian decision overturning certain language in a Provincial Human Rights statute failed to completely overturn the vague and chilling language of that statute. Here the Saskatchewan Court of Appeal decision overturned a trial decision which had upheld the ruling of a Human Rights Tribunal. The Supreme Court of Canada chose to disregard the arguments of many groups and

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[17] Forced referrals in relation to abortion are stipulated in the Victoria and New South Wales policy regarding abortion. Recommendations in Canada from the recent (November2015) "Experts" Report on euthanasia following the Supreme Court of Canada's decision in *Carter* v. *Canada (Attorney General)* [2015] 1 SCR 331, somewhat shockingly show no respect for dissent from providing euthanasia on the part of individual physicians or denominational facilities themselves: the Supreme Court was less draconian. Canada awaits legislation in relation to euthanasia at the time of writing and many have expressed serious concerns about the scant regard being given to dissent and difference in this controversial area - Australia will sooner or later face the same issues and the same pressures to coerce the dissenting citizens by law. In Victoria, Section 8 of the Abortion Law Reform Act, 2008 (Vic) requires health practitioners with a conscientious objection to abortion to refer patients seeking that procedure to a health practitioner, in the same discipline, who they know does not share their conscientious objection. The NSW Government Ministry of Health, Policy Directive Pregnancy – Framework for Terminations in New South Wales Public Health Organisations 7 [4.2] available at http://www.health.nsw.gov.au/policies/pd/2014/pdf/PD2014_022.pdf (the NSW Policy requires NSW, medical practitioners who are subject to the relevant policy, to take every reasonable step to direct patients seeking that procedure to a health practitioner, in the same discipline, who the practitioner reasonably believes does not share that conscientious objection. Thus there is a complete failure to respect the conscientious objections of medical specialists - they are required to be in the chain of causation for the very procedure they find conscientiously unacceptable. This is unfair and unacceptable. Should health authorities have any concerns about a particular patient obtaining legal (but controversial) services the onus is on them *not on the practitioner* to provide alternatives. There is no reason, for example, why simple provision of a phone number by the NSW/Health and the keeping of a list of non-objecting professionals at the other end of the phone and on the internet cannot "join the dots" in these circumstances without necessitating objecting personel involvement. The provisions on "conscientious objection "are coercive and provide no respect for dissent - it is just this sort of coercion that any approaches to law needs to guard against. That Victoria and NSW are out of step with the practice in other countries may be seen by comparison with the Canadian Medical Association "Policy on Induced Abortion" (1988) which contains no duty to provide "effective referrals" in such situations: The Policy provides that: "A physician whose moral or religious beliefs prevent him or her from recommending or performing an abortion should inform the patient of this so that she may consult another physician. No discrimination should be directed against doctors who do not perform or assist at induced abortions. Respect for the right of personal decision in this area must be stressed, particularly for doctors training in obstetrics and gynecology, and anesthesia." http://policybase.cma.ca/dbtw-wpd/PolicyPDF/PD88-06.pdf at page 2 (accessed April 16, 2016).

academics and left in place a very heavily criticized approach to "hate speech": See: *Saskatchewan (Human Rights Commission) v. Whatcott* [2013] 1 SCR 467.[18]

The Supreme Court of Canada upheld but narrowed the legislation by striking out the words "ridicules, belittles or otherwise affronts the dignity of" as being unconstitutional since that language created too low a threshold and was not aligned with the purposes of the *Saskatchewan Human Rights Act.* The result is that "hatred" in Canada is defined as "extreme manifestations of the words "detestation" and "vilification", a threshold that would not include merely repugnant or offensive expression". Moreover, tribunals were directed to consider "the effects of the expression not its inherent offensiveness" (per Rothstein J. for the unanimous Supreme Court of Canada at paras 56-59). This was not the approach free speech and religious groups called for as it continues to suppress speech that falls short of incitement.

The Respondent on the appeal was a man who had been, as a youth, a former male prostitute. Now an Evangelical he manifested his religious faith by placing certain leaflets in places such as apartment buildings pointing out that in the local gay newspapers older men were soliciting young men for sex. His pamphlets were deemed offensive but the debate was whether they constituted "hatred". Despite striking down a portion of the legislation the Supreme Court of Canada found against the man for calling some gays "sodomites" and saying that some of them were "out to get your children". Many thought that these expressions, while clearly not polite, ought not to have been construed as "hatred". *Whatcott* had argued he was trying to protect young men from his own fate at the hands of older men he believed were predatory. There is wide-spread dissatisfaction with the result in Canada.

Meanwhile, also in Canada and in relation to the Federal jurisdiction, a Report prepared for the Federal Government by academic Richard Moon recommended repeal of Section 13, the "hate speech" Section of the *Canada Human Rights Act.* Professor Moon argued that, if complete repeal was not to occur, such speech should be limited to "advocating violence" and that the more appropriate approach and place for such restrictions was under the *Criminal Code* and in the Criminal courts not before Tribunals which he found on his review to have, inter alia, insufficient safe-guards to protect fundamental rights. See: http://www.safs.ca/moonreport.pdf The Section was repealed in June 2013. Clearly the area of "offensive speech" is far from settled in Canada.

In addition, the *South African Charter of Religious Rights and Freedoms,* a civil society Charter under Section 234 of the *South African Constitution*, signed by all the Religions of that country in 2010,

[18] The undersigned declares an interest as he was counsel for the Respondent (Whatcott) on the appeal to the Supreme Court of Canada. He was also one of the principle drafters of the *South African Charter of Religious Rights and Freedoms* and remains active on the Council promoting the *Charter*.

also recommends that the freedom of expression be limited only according to hatred defined as constituting "incitement to violence or [that causes] physical harm".[19] The full provision reads:

> 6.4 Every person has the right to religious dignity, which includes not to be victimised, ridiculed or slandered on the ground of their faith, religion, convictions or religious activities. No person may advocate hatred that is based on religion, *and that constitutes incitement to violence or to cause physical harm.* (emphasis added)

The developed and developing view, therefore, based on the Canadian Federal approach and that recommended by the religions in South Africa is that the best approach is to limit "hate speech" to incitement of violence or physical harm and subject it to Criminal proceedings not administrative Tribunals under vague categories such as "hurt feelings" where it is likely to chill valid free speech or be used in relation to contemporary notions such as "homophobia" which has been discussed above.

Recommendations:

1 Human Rights expansion fails to respect diversity so diversity must be expressly recognised as a good to be maintained; any ***developments should include a presumption in favour of diversity.***

2 Since not all "discriminations" can be said to be legally wrong, ***create the category of "unjust discrimination" not just "discrimination" so as to distinguish between just and unjust discriminations.***

3 Human Rights tests in relation to exemptions usually fail to respect the ethos of organisations as they tend to have a bias towards individual rather than group rights - in particular a specific "job-parsing" approach to employment exemptions that focuses on so-called "core functions" fails to respect properly the nature of certain kinds of religious organisations; ***do not make any employment related exemptions turn on the functions of the job where there is a shared ethos organisation - here respect the organic approach to religious exemptions so that all employees in such an organisation have their beliefs respected not just those in "leadership" roles.***

4 As the duty of accommodation is essential in all areas of public or private function and existing practice in Australia (particularly in relation to medical issues) shows a marked failure to provide accommodation and respect for conscience; ***the duty of the accommodation of conscience should be spelled out as both a public and private necessity and, in relation to medical (and pharmaceutical) services the right to conscientious objection and non-referral should be recognised and protected.***

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[19] The Charter may be found and described here: And it may be found here: http://www.strasbourgconsortium.org/content/blurb/files/South%20African%20Charter.pdf (accessed April 15, 2016).

5 Since "hate speech" chills expression and there has been wide criticism of "feelings" based tests for insult or injury, it is important ***to limit offensive speech restrictions to "incitement to violence or physical harm".***

The foegoing is respectfully submitted,

[redacted]

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