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## **Submission to the Senate Committee on Legal and Constitutional Affairs:**

Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff

**21 November 2018**

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### **Thorne Harbour Health**

Thorne Harbour Health is one of Australia's largest health and wellbeing service providers for the lesbian, gay, bisexual, trans and gender diverse, intersex, and other sex, sexuality and gender diverse (LGBTI+), and people living with HIV (PLHIV) communities. Its services include general practice, health promotion, counselling, housing support, family violence, and alcohol and other drug rehabilitation and harm reduction programs. Thorne Harbour Health primarily serves the populations of Victoria and South Australia, but also leads national projects. In partnership with other organisations, Thorne Harbour Health works to support all members of LGBTI+ and PLHIV communities, and is committed to improving the health and wellbeing of all LGBTI+ people and PLHIV.

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# 1. Introduction

Thorne Harbour Health welcomes the opportunity to contribute to the Senate Legal and Constitutional Affairs Committee's inquiry into legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff, including on the basis of sexual orientation and gender identity and other attributes covered by the *Sex Discrimination Act 1984* (Cth).

While out of scope, consideration should also be given to religious exemptions under the *Fair Work Act 2009* (Cth) that allow faith-based discrimination in relation to employment.<sup>1</sup> This could be done as part of a more comprehensive review of, or inquiry into, legislative exemptions that allow faith-based discrimination.

Parts of this submission have been adapted or modified from sections of Thorne Harbour Health's (formerly the Victorian AIDS Council's) February 2018 submission to the Religious Freedom Review.

## 2. Summary of recommendations

1. Repeal section 38(3) of the *Sex Discrimination Act 1984* (Cth).
2. Repeal sections 38(1) and 38(2) of the *Sex Discrimination Act 1984* (Cth).
3. Amend section 37(1)(d) of the *Sex Discrimination Act 1984* (Cth) to clarify that the exception does not apply to the treatment of students, teachers or other staff by faith-based educational institutions.
4. Preferable to Recommendation 3, instead amend section 37(1)(d) of the *Sex Discrimination Act 1984* (Cth) to read: the selection or appointment of people by a religious body specifically established to propagate religious beliefs or views, to positions that substantially involve the practice of religion, such as religious observance, instruction, leadership, pastoral care or lobbying.
5. Conduct a more comprehensive review of, or inquiry into, legislative exemptions that allow faith-based discrimination, including within the scope of religious exemptions under anti-discrimination and employment law in relation to the provision of employment, education, goods, services or facilities. If conducted as a review, the review panel should include representative members of LGBTI communities.
6. Reject the proposed amendment to section 7B of the *Sex Discrimination Act 1984* (Cth).
7. Religious organisations that discriminate on grounds other than inherent or genuine occupational requirements, and in the absence of temporary exemptions, should not receive public funding.

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<sup>1</sup> *Fair Work Act 2009* (Cth) ss 153(2)(b), 351(2)(c), 772(2)(b).

### 3. Religious exemptions

Currently, religious bodies have exemptions under federal,<sup>2</sup> as well as state and territory-based,<sup>3</sup> anti-discrimination laws that allow them to discriminate on grounds such as sex, sexual orientation, gender identity, or marital status.

#### 3.1. Repeal sections 38(1)(2) and (3) of the *Sex Discrimination Act 1984*

In relation to the *Sex Discrimination Act 1984* (Cth), section 21 states that:

- (1) It is unlawful for an educational authority to discriminate against a person on the ground of the person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:
  - (a) by refusing or failing to accept the person's application for admission as a student; or
  - (b) in the terms or conditions on which it is prepared to admit the person as a student.
- (2) It is unlawful for an educational authority to discriminate against a student on the ground of the student's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:
  - (a) by denying the student access, or limiting the student's access, to any benefit provided by the educational authority;
  - (b) by expelling the student; or
  - (c) by subjecting the student to any other detriment.

However, there are broad exemptions for faith-based educational institutions under section 38(3):

- (3) Nothing in section 21 renders it unlawful for a person 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.

No student should be refused admission to, or face expulsion from, an educational institution on the basis of their sexual orientation, gender identity, intersex status or any of the other attributes protected under section 21 of the *Sex Discrimination Act 1984* (Cth). Section 38(3) should be repealed in line with the bipartisan commitment to end legislative discrimination against students.

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<sup>2</sup> *Sex Discrimination Act 1984* (Cth) ss 37, 38(3); *Age Discrimination Act 2004* (Cth) s 35.

<sup>3</sup> *Discrimination Act 1991* (ACT) ss 32-33; *Anti-Discrimination Act 1996* (NT) ss 37A, 51; *Anti-Discrimination Act 1991* (Qld) ss 41, 109; *Anti-Discrimination Act 1998* (Tas) s 52; *Equal Opportunity Act 2010* (Vic), ss 82-84; *Equal Opportunity Act 1984* (WA) s 73; *Equal Opportunity Act 1984* (SA) ss 50, 85ZM; *Anti-Discrimination Act 1977* (NSW) s 56.

### **Recommendation 1**

Repeal section 38(3) of the *Sex Discrimination Act 1984* (Cth).

Sections 38(1) and 38(2) contain similarly worded exemptions to section 38(3) in relation to employment. Thorne Harbour Health does not believe that permanent religious exemptions that allow discrimination against people on the basis of attributes protected by the *Sex Discrimination Act 1984* (Cth) are in keeping with community expectations and standards. If religious employers wish to have exemptions under anti-discrimination laws, they should apply for temporary exemptions.

### **Recommendation 2**

Repeal sections 38(1) and 38(2) of the *Sex Discrimination Act 1984* (Cth).

## **3.2. Amend section 37 of the *Sex Discrimination Act 1984***

Section 37 of the *Sex Discrimination Act 1984* (Cth) states that:

- (1) Nothing in Division 1 or 2 affects:
  - (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
  - (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
  - (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
  - (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

This exemption provides even broader scope for discrimination against LGBTI students, teachers and other staff than section 38. For that reason, repeal of section 38 of the *Sex Discrimination Act 1984* (Cth) alone is not enough to end unjust discrimination against LGBTI students, teachers and other staff; at a minimum, it is necessary to also amend section 37(1)(d) to clarify that this exemption does not apply to the treatment of students, teachers or other staff by faith-based educational institutions.

### **Recommendation 3**

Amend section 37(1)(d) of the *Sex Discrimination Act 1984* (Cth) to clarify that the exception does not apply to the treatment of students, teachers or other staff by faith-based educational institutions.

It is worth noting that under section 37(1) subclauses (a), (b) and (c) essentially constitute inherent or genuine occupational requirements in relation to religious employment. Section 37(1)(d) is an outlier that deals more broadly with 'religious susceptibilities', whatever that might mean. The need for section 37(1)(d) is far from clear.

Employment law already allows employers to make employment decisions to uphold an organisational ethos and values: employees have a duty of fidelity, to be loyal and act in the best interests of,<sup>4</sup> and to act in good faith toward,<sup>5</sup> their employer. As such, specific religious employment exemptions under anti-discrimination laws are not only unnecessary to uphold organisational values, they are beside the point. It is a categorical mistake to conflate adhering to certain values with possessing certain attributes. If faith-based institutions wish to impose specific requirements in relation to employment on the basis of attributes protected under the *Sex Discrimination Act 1984* (Cth), they should apply for temporary exemptions.

While Thorne Harbour Health is not convinced permanent religious exemptions should remain under anti-discrimination laws, if they are to remain then they should be strictly limited to genuine occupational requirements.

### **Recommendation 4**

Preferential to Recommendation 3, instead amend section 37(1)(d) of the *Sex Discrimination Act 1984* (Cth) to read: the selection or appointment of people by a religious body specifically established to propagate religious beliefs or views, to positions that substantially involve the practice of religion, such as religious observance, instruction, leadership, pastoral care or lobbying.

Notably, if the *Sex Discrimination Act 1984* (Cth) is amended as proposed above, religious bodies will still have broad powers to discriminate in relation to employment under religious exemptions in the *Fair Work Act 2009* (Cth).<sup>6</sup> The result of existing religious exemptions is that, for example, religious schools are able to expel students or terminate the employment of staff for being gay, transgender or pregnant while unmarried. For staff this is the case

<sup>4</sup> *Helmet Integrated Systems Ltd v Tunnard* [2006] EWCA Civ 1735 at [26] per Moses L.J.; *Imam-Sadeque v Bluebay Asset Management (Services) Ltd* [2012] EWHC 3511 (QB) at [123]-[125] per Popplewell J. 5 *Shepherd Investments Ltd v Walters* [2006] EWHC 836 (Ch) at [131] per Etherton J.

<sup>5</sup> *Mahmud v Bank of Credit and Commerce International S.A.* [1998] A.C. 20 at 46 per Lord Steyn; *Tisco Ltd v Communication and Energy Workers Union* (1993) 2 E.R.N.Z. 779 CA at 782; *Eastwood v Magnox Electric Plc* [2005] 1 A.C. 503 at 523 per Lord Nicholls. The High Court of Australia has now repudiated the existence of the trust and confidence implied term: *Commonwealth Bank of Australia v Barker* [2014] HCA 32; 88 A.L.J.R. 814; 312 A.L.R. 356.

<sup>6</sup> *Fair Work Act 2009* (Cth) ss 153(2)(b), 351(2)(c), 772(2)(b).

even if they teach subjects unrelated to religious *instruction*, such as general religious education, science or mathematics, or if they are cleaners and gardeners. Religious charities can also discriminate in relation to whom they employ and to whom they provide their services.

#### **Recommendation 5**

Conduct a more comprehensive review of, or inquiry into, legislative exemptions that allow faith-based discrimination, including within the scope of religious exemptions under anti-discrimination and employment law in relation to the provision of employment, education, goods, services or facilities. If conducted as a review, the review panel should include representative members of LGBTI communities.

### **3.3. Reject the proposed amendment to section 7B of the Sex Discrimination Act 1984**

Thorne Harbour Health has learned from media reports of proposed draft changes to the 'reasonableness test' under section 7B of the *Sex Discrimination Act 1984* (Cth).<sup>7</sup> These proposed amendments would amend section 7B(2) to add a new subsection as follows:

- (d) if the condition, requirement or practice is imposed, or proposed to be imposed, in relation to a student by an educational institution that is a primary school or a secondary school and that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:
  - (i) whether the condition, requirement or practice is imposed, or proposed to be imposed, in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed; and
  - (ii) whether, in imposing, or proposing to impose, the condition, requirement or practice, the educational institution has regard to the best interests of the student.

Thorne Harbour Health strongly opposes the amendment proposed above. As the Australian Lawyers Alliance noted in its submission to this inquiry, the proposed amendment would not only allow faith-based discrimination to continue against students, teachers and other staff, but it will also have the effect of broadening the attributes and circumstances in which faith-based discrimination against students, teachers and other staff in educational institutions can occur.<sup>8</sup>

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<sup>7</sup> James Elton-Pym, 'Religious schools could still discriminate against students under PM's draft laws' *SBS News* (online), 25 October 2018 <<https://www.sbs.com.au/news/religious-schools-could-still-discriminate-against-gay-students-under-pm-s-draft-laws>>.

<sup>8</sup> Australian Lawyers Alliance, Submission No 3 to the Senate Legal and Constitutional Affairs Committee, *Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff*, 15 November 2018, para 11. pp.7-8.

Furthermore, the notion that an educational institution can have regard to the best interests of its students whilst discriminating against them is contradictory and harmful. It is clearly not in the best interests of schoolchildren to violate their rights to non-discrimination and the highest attainable standard of health.

#### **Recommendation 6**

Reject the proposed amendment to section 7B of the *Sex Discrimination Act 1984* (Cth).

### **3.4. Religious exemptions cause harm**

Discrimination has a clear and significant impact on the mental health of sexually and gender diverse children, as well as adults. As the Archdeacon of Albury, Peter MacLeod-Miller said recently, “If discrimination is bad for children at what age does it become good for adults?”<sup>9</sup>

All staff and students deserve safe workplaces and learning environments. Faith-based discrimination does not need to be widespread for the exemptions under anti-discrimination and employment law to be deemed problematic. The mere fact the law allows for such discrimination, and that some religious educational institutions have used their exemptions to engage in such discrimination, creates a culture of fear that leads to students and staff feeling unsafe and hiding their LGBTI status.<sup>10</sup>

Religious exemptions under anti-discrimination and employment law are harming LGBTI people. Evidence clearly shows that members of LGBTI communities have significantly higher rates of depression, anxiety, self-harm, suicidal ideation and suicide than the general population.<sup>11</sup> LGBTI people have poorer health outcomes not because of their LGBTI status, but because of the prejudice and discrimination they endure as a result of it. As a 2017 joint statement signed by 37 leading Australian community health organisations stated, “Discriminatory legislation is an impediment to LGBTI people achieving the highest attainable standard of health.”<sup>12</sup> Indeed, legislative discrimination is a breach of several other human rights.

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<sup>9</sup> David Crowe, ‘Fairfax-Ipsos poll: Huge majority of Australians oppose laws banning gay students and teachers’ *The Age* (online) 14 October 2018. <<https://www.smh.com.au/politics/federal/fairfax-ipsos-poll-huge-majority-of-australians-oppose-laws-banning-gay-students-and-teachers-20181014-p509kv.html>>.

<sup>10</sup> James Elton-Pym, ‘Gay teachers at Muslim, Catholic schools describe pressure to stay quiet’, *SBS News* (online), 16 October 2018. <<https://www.sbs.com.au/news/gay-teachers-at-muslim-catholic-schools-describe-pressure-to-stay-quiet>>.

<sup>11</sup> National LGBTI Health Alliance, *Snapshot of mental health and suicide prevention statistics for LGBTI people*, (2016) <<https://lgbtihealth.org.au/wp-content/uploads/2016/07/SNAPSHOT-Mental-Health-and-Suicide-Prevention-Outcomes-for-LGBTI-people-and-communities.pdf>>.

<sup>12</sup> The Equality Campaign, *Marriage discrimination is harmful to LGBTI Australian’s health*, (2017) <<https://vac.org.au/site/assets/uploads/516e8fb1-healthstatement-2.pdf>>.



### 3.5. Religious exemptions are contrary to Australia's human rights obligations

Religious exemptions in educational institutions are contrary to Australia's obligations under international human rights law, namely its obligations to:

- Recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health;<sup>13</sup>
- recognise the right of everyone to education... [and] agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms;<sup>14</sup>
- respect and ensure the rights set forth in the present Convention [on the Rights of the Child] to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status;<sup>15</sup>
- [ensure that] in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration;<sup>16</sup>
- take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child;<sup>17</sup>
- recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health;<sup>18</sup> and
- recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity.<sup>19</sup>

Furthermore, a school environment in which teachers can be discriminated against on the basis of being who they are is inconsistent with the right of children to have an educational environment where they can develop to their fullest potential.

### 3.6. Religious exemptions violate secular principles

In addition to violating human rights, religious exemptions also violate basic principles fundamental to secular liberal democracies, namely:

- **The rule of law** – the law must be applied equally to everyone and nobody can be above the law, even if they disagree with it.
- **The harm principle** – freedom does not convey a right to harm others.

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<sup>13</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), art 12(1).

<sup>14</sup> *Ibid* art 13(1).

<sup>15</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 2(1).

<sup>16</sup> *Ibid* art 3(1).

<sup>17</sup> *Ibid* art 19(1).

<sup>18</sup> *Ibid* art 24(1).

<sup>19</sup> *Ibid* art 28(1).

- **The neutrality principle** – the law should not favour or privilege any one religion over others or over non-religious belief; freedom of conscience, religion and belief should apply equally to all citizens.

Religious exemptions violate all three of these fundamental principles: they privilege religious bodies, and in some cases religious individuals, exempting them from laws that apply to everyone else and in so doing place them ‘above the law’; in sanctioning religious bodies to discriminate against vulnerable minorities, they allow them to harm people from those groups; and they clearly privilege religious belief over non-belief in public spheres where non-religious people have a right to freedom *from* religion.<sup>20</sup>

### 3.7. Permanent religious exemptions are unnecessary

Organisations not privileged with permanent exemptions provided to religious bodies under federal anti-discrimination laws can apply to the Australian Human Rights Commission for temporary exemptions that permit them to discriminate in certain circumstances. For example, temporary special measures aimed at accelerating equality between men and women are not considered discrimination. If religious schools believe they have grounds for exemptions under anti-discrimination laws, they should similarly have to apply, and provide sufficient justification for, such exemptions.

### 3.8. Faith-based discrimination happens

Despite assertions to the contrary, religious exemptions under Australia’s anti-discrimination laws have been relied upon. As Thorne Harbour Health detailed in its submission to the Religious Freedom Review and emphasised in its meeting with the Review’s expert panel, Christian schools have defended their right to expel LGBTI students,<sup>21</sup> refused admission to students with same-sex parents,<sup>22</sup> and terminated the employment of teachers who are unmarried mothers<sup>23</sup> or gay.<sup>24</sup> While instances of such discrimination appear to be rare, as noted earlier, they need not be widespread to foster a culture of fear. Under the existing legislative framework, the threat of discrimination, particularly if there is a change in an organisation’s administration, looms large over the heads of LGBTI schoolchildren and employees.

<sup>20</sup> UN Human Rights Committee (HRC), *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48<sup>th</sup> sess, UNC Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993), para 5.

<sup>21</sup> Josephine Tovey, ‘Schools defend right to expel gays’, *Sydney Morning Herald* (online), 7 July 2013. <<https://www.smh.com.au/national/nsw/schools-defend-right-to-expel-gays-20130706-2pirh.html>>.

<sup>22</sup> ‘Gay parents accuse school of enrolment snub’, *ABC News* (online), 13 December 2011, <<https://www.abc.net.au/news/2011-12-13/gay-parents-accuse-school-of-enrolment-snob/3728660>>; Nathan Hondros, ‘Gay dad not welcome at Mandurah Christian school’, *Mandurah Mail* (online), 28 October 2015, <<https://www.mandurahmail.com.au/story/3454887/gay-dad-not-welcome-at-mandurah-christian-school/>>.

<sup>23</sup> Sundstrom, ‘Union in plea for sacked teacher’, *Sunshine Coast Daily* (online), 2 May 2012. <<https://www.sunshinecoastdaily.com.au/news/union-sacked-teacher-caloundra-christian-college/1365471/>>

<sup>24</sup> Brian Greig, ‘You’re gay? You’re out! Gay teacher sacked due to WA law loophole’, *WA Today* (online), 22 November 2017. <<https://www.watoday.com.au/national/western-australia/youre-gay-youre-out-gay-teacher-sacked-due-to-wa-law-loophole-20171122-gzqe1o.html>>.

## 4. Arguments for religious exemptions are flawed

Some attempt to justify the current broad religious exemptions by arguing that they help to uphold a shared ethos in line with a particular religious faith, or that they preserve religious identity. The first of these arguments only justifies narrower exemptions than the current broad exemptions, and the second should be rejected in its entirety.

### 4.1. Maintaining a shared ethos

It has been argued by some that religious exemptions under anti-discrimination and employment law are necessary to uphold an organisational ethos underpinned by shared values. In other words, it is argued that just as political parties are not required to employ people from different political parties, religious bodies should be able to positively discriminate in the employment of people with shared religious beliefs and practices.

Shared beliefs and practices do indeed constitute a genuine occupational requirement for people whose job it is to promote religious, political or social causes. However, this does not justify the current broad religious exemptions contained in the *Sex Discrimination Act 1984* (Cth), or indeed similar exemptions contained in other Australian anti-discrimination and employment law. Rather, this argument succeeds only in justifying narrow exemptions in relation to the employment of people by religious bodies *established specifically* to propagate religious beliefs, to positions that *substantially involve* the practice of religion, such as religious observance, instruction, leadership, pastoral care or lobbying.

### 4.2. Preserving religious identity

Religious bodies often argue their employees are part of a community of believers bound by common beliefs and practices. They further argue that this gives them the right to positively discriminate and only employ people who share their religious beliefs and practices, regardless of whether or not those beliefs and practices are inherent or genuine occupational requirements essential to the position. They argue that this right to positive discrimination is necessary to preserve the religious identity of their organisation. However, religious bodies that demand the right to positive discrimination object to it being extended to non-religious organisations, despite the fact they also have values and identities they wish to preserve.

During the marriage equality debate, many were rightly outraged at calls for people opposing marriage equality to lose their corporate jobs. Yet many corporations see marriage equality as a manifestation of their values of diversity and non-discrimination, which they also view as being essential to their businesses. The obvious question then, is why religious bodies should be able to discriminate against people who do not share their beliefs and values, but corporations should not be able to do the same?

To be clear, we are not arguing that corporations should have the same belief-based exemptions to anti-discrimination laws as religious bodies. Rather, we are arguing that religious bodies should likewise not have such exemptions, except in cases the discrimination is based on beliefs and practices that are inherent or genuine occupational requirements.

The primary purpose of schools and hospitals is to educate and provide health care, not to propagate religious beliefs. Likewise for any service provider, their primary purpose is to provide a service, not to impose their religious beliefs onto their clients. And it will always be a relevant job attribute to understand an organisation’s history, traditions and culture. Preserving religious identity does not require a right to positive discrimination.

### 4.3. Voluntary public activities

It is not a *requirement* of Christianity that Christians run schools. Indeed, it is not a requirement of any religion that its adherents provide employment, education, goods, services or facilities. Religious bodies instead choose to enter these public spheres and engage with the general public, which for the most part do not share their beliefs.

It is a reasonable expectation that religious bodies adhere to the same rules as the general public should they choose to enter the public sphere.<sup>25</sup> The removal of religious exemptions that allow discrimination in the provision of education, goods, services, facilities, and employment (other than discrimination limited to the inherent requirements of a position) would therefore not violate religious freedom, because religious bodies choose to engage in such public activities in the first place.

### 4.4. Public funding

Many religious bodies benefit from public funding. This means that “LGBTI taxpayers are being asked to fund religious organisations that can discriminate against them as employers.”<sup>26</sup> Government funded discrimination cannot be justified in the name of diversity, because not all views deserve public support, least of all discriminatory views based on ignorance at best and prejudice at worst. Governments would not, for example, fund anti-Semitic organisations to ensure a diversity of views about Jewish people in the public sphere are maintained; they likewise should not fund homophobic and transphobic organisations. In any case, recipients of public funds should abide by the same rules as the general public.

#### **Recommendation 7**

Religious organisations that discriminate on grounds other than inherent or genuine occupational requirements, and in the absence of temporary exemptions, should not receive public funding.

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<sup>25</sup> Compare *Christian Youth Camps Limited v Cobaw Community Health Services Limited* [2014] VSCA 75 at [269] (Maxwell P; Neave JA agreeing): “[M]oving from the field of religious activity to the field of secular activity...has the consequence...that in relation to decisions made in the course of the secular undertaking, questions of doctrinal conformity and offence to religious sensitivities simply do not arise.”

<sup>26</sup> Elizabeth Sutherland, ‘Bigotry in the Name of God: the Case Against Religious Exemptions’, *New Matilda*, 3 June 2016.

## 5. Conclusion

The progressive realisation of human rights for LGBTI people does not limit religious freedom. The permanent exemptions in sections 37 and 38 of the *Sex Discrimination Act 1984* (Cth) allow discrimination in a manner that is not in keeping with international human rights law or community standards. While the right to hold a belief is absolute, the right to manifest that belief (whether religious or otherwise) is not, and must be balanced with other rights, such as the right to non-discrimination and the right to the highest attainable standard of health. Accordingly, sections 38(1), (2) and (3) of the *Sex Discrimination Act 1984* (Cth) should be repealed, and section 37(1)(d) should be amended to either 1) clarify that it does not apply to the treatment of students, teachers or other staff by faith-based educational institutions, or preferably 2) bring this clause in line with clauses 37(1)(a), (b) and (c) and amend it so it also constitutes what is essentially a genuine occupational requirement in relation to religious employment.

More broadly, except for inherent or genuine occupational requirements in relation to employment, religious exemptions under anti-discrimination and employment law are inconsistent with fundamental principles that underpin secular liberal democracies. The removal of these exemptions, which currently privilege religious bodies, will not limit religious freedom because there is nothing inherent in religion that obliges believers to do things like run schools, hospitals, or commercial enterprises. If religious bodies are unwilling to follow the same rules as everyone else, then they are at liberty to withdraw from public spheres and not provide services or operate businesses, and to continue their belief and worship in a way that does not infringe upon the fundamental principles of secular liberal democracies, and indeed upon the human rights of others.