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By email

Mr Victor Madrigal-Borloz
United Nations Independent Expert, Sexual Orientation and Gender Identity
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Dear Mr Magrigal-Boloz

Submission to thematic report on freedom of religion or belief (FoRB) and sexual orientation and gender identity (SOGI)

Thank you for your work in advancing respect for the human rights of people regardless of their sexual orientation or gender identity.

As a leading civil society organisation working to achieve equality for LGBTIQ+ people in Australia and which has its genesis in Australia's campaign for marriage equality, Equality Australia is pleased to make a submission to your thematic report on the FoRB and SOGI.

The freedom of religion and belief has been invoked frequently by opponents of LGBTIQ+ equality in Australia and elsewhere, particularly in recent public debates. In this submission, we provide some context to the Australian legal and political landscape in which these debates have taken place and the harm they have caused, particularly for LGBTIQ+ people of faith.

Fundamentally, we submit that the FoRB has been invoked in misleading ways to justify human rights contraventions towards people based on their sexual orientation or gender identity. We believe that a better understanding of, and discourse regarding, the FoRB and its interaction with other human rights and freedoms is necessary. This thematic report presents an opportunity to advance that dialogue.

THE AUSTRALIAN LEGAL AND POLITICAL LANDSCAPE

Australia has made great progress, particularly since the 1970s, in recognising and respecting the human rights of people based on their sexual orientation and gender identity, although notable gaps remain today.

Homosexuality was decriminalised in every jurisdiction of Australia between the 1970s and 1990s. Today, every jurisdiction in Australia allows historical homosexual offences to be expunged, and an equal age of consent for sexual activity was achieved in every jurisdiction by 2016.

Beginning in the mid-1990s, same-sex couples and families were gradually recognised equally in areas of law that afforded rights and entitlements to spouses and children.

Comprehensive national de facto¹ relationship recognition was achieved in 2008, with marriage equality finally achieved in 2017. Same-sex couples can also be recognised as the parents of their children born through certain assisted conception procedures and same-sex couples are eligible to adopt and foster children in all parts of Australia.²

Every jurisdiction of Australia prohibits discrimination against people on the basis of sexual orientation and gender identity in areas of public life such as employment, education and the provision of goods and services. Comprehensive national anti-discrimination laws were passed in 2013, although each state and territory of Australia also has its own laws providing anti-discrimination protections. Some of these protections date back to the 1980s.

Religious exceptions

A notable exception in Australia's legal discrimination protections are exemptions given to faith-based schools and organisations allowing them to discriminate against people based on their sexual orientation and gender identity. These legal exemptions exist in national laws, as well as in laws in most states and territories of Australia.³ These exemptions generally apply where the discrimination conforms with religious doctrines and beliefs or would otherwise injure religious 'susceptibilities'.

Fortunately, several states and territories have started to narrow these exemptions,⁴ with the federal government also committed to narrowing exemptions currently available to religious schools. Where these exemptions have been removed, they have promoted sector-wide improvements for LGBTQ+ inclusion. For example, many faith-based providers of aged care services have adopted LGBTQ+ inclusive practices following 2013 changes that prohibited faith-based aged care providers from discriminating when providing Commonwealth-funded aged care services.⁵

The remaining legal exemptions are significant because many jobs, educational opportunities and social services, such as healthcare and disability care, are delivered by faith-based organisations in Australia. In the education context, one in three students and two in five teachers in Australia are enrolled at or employed by a non-government school, most of which are religiously affiliated.⁶ One in four LGBTQ+

¹ In Australia, married and unmarried couples who live together as committed couples are mostly provided with the same rights and entitlements under law.

² Australia generally recognises as legal parents those people who conceive together through sexual intercourse, those people who have children together using assisted conception procedures, those people who have legally adopted their children, and those people who are recognised as parents under surrogacy parentage orders. Western Australia does not allow same-sex male couples to apply for surrogacy parentage orders, being the only jurisdiction that has laws discriminating against parents based on their sexual orientation.

³ See e.g. Federal: *Sex Discrimination Act 1984* (Cth), ss 37(1)(d), 38; *Fair Work Act 2009* (Cth), ss 153(2)(b), 195(2)(b), 351(2)(c) and 772(2)(b). State and territory laws: *Discrimination Act 1991* (ACT), s 32(1)(d); *Equal Opportunity Act 1984* (WA), s 72(d); *Anti-Discrimination Act 1991* (Qld), s 109(1)(d); *Anti-Discrimination Act 1977* (NSW), ss 38C(3)(c), 38K(3), 49ZH(c), 49ZO(3) and 56(d); *Equal Opportunity Act 1984* (SA), ss 34(3), 50(1)(c); *Equal Opportunity Act 2010* (Vic), s 82(1)(d); *Anti-Discrimination Act 1992* (NT), s 51(d).

⁴ Examples include recent reforms in Victoria, the Australian Capital Territory and the Northern Territory, with reforms proposed in Western Australia.

⁵ *Sex Discrimination Act 1984* (Cth), ss 23A(3A) and 37(2).

⁶ Australian Government (2022) 'Schools', Australian Bureau of Statistics; Independent Schools Australia (2022) 'Independent Schools Snapshot'.

students (24.5%) report attending a religious school.⁷ Further, the majority of non-government school funding comes from federal and state or territory governments, with public funding accounting for 62.2% of non-government school funding in 2020.⁸

These exemptions have been relied on recently by faith-based organisations to enable discrimination, including in many cases in which Equality Australia has provided assistance. In many cases, these exemptions have been used by faith-based organisations to discriminate against their own, that is, against LGBTQ+ people of faith.

For example:

- In 2020, **Karen Pack**, a committed Christian, was fired from her role as a lecturer at a Baptist tertiary college in Sydney because she became engaged to a same-sex partner.
- In 2021, **Steph Lentz**, a lesbian and committed Christian, was fired from her job as an English teacher at a Christian school in Sydney because she would not affirm the 'immorality' of homosexuality. Relying on legal exemptions, the school argued this was an 'inherent, genuine occupational requirement' of her role.

Conversion practices

Another area in which the interaction between religion and LGBTQ+ human rights arises in Australia is in the area of LGBTQ+ conversion practices.

In 2018, the Human Rights Law Centre and La Trobe University *Preventing Harm, Promoting Justice* report concluded that up to 10% of LGBT Australians were vulnerable to harmful conversion practices.⁹ It found that at least ten organisations in Australia and New Zealand currently advertise the provision of LGBTQ+ conversion practices, and that conversion practices and ideology are being mainstreamed within particular Christian churches.¹⁰ In 2019, the Victorian Health Complaints Commissioner found contemporary forms of LGBTQ+ conversion practices can include counselling, psychology or psychotherapy, formal behaviour-change programs, support groups, prayer-based approaches and exorcisms.¹¹

Two states of Australia have passed specific laws outlawing conversion practices,¹² while another has taken steps to outlaw these practices in health settings only.¹³

⁷ Adam Hill et al (2021) 'Writing Themselves In 4: The Health and Wellbeing of LGBTQIA+ Young People in Australia', Australian Research Centre in Sex, Health and Society, La Trobe University.

⁸ Australian Government (2022) 'Report on Government Services: School Education', Productivity Commission.

⁹ Jones et al (2018) *Preventing Harm, Promoting Justice: Responding to LGBT conversion therapy in Australia*, Melbourne: GLHV@ARCSHS, La Trobe University and the Human Rights Law Centre, p. 3.

¹⁰ Id, p. 19.

¹¹ Victorian Health Complaints Commissioner (2019) *Report on the Inquiry into Conversion Therapy – Executive Summary*, p. 1.

¹² *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT); *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic).

¹³ *Public Health Act 2005* (Qld), Chapter 5B.

Public attitudes

In 2017, an unnecessary and non-binding national plebiscite was conducted prior to the legislation of marriage equality. It returned a 61.6% response in favour of allowing same-sex couples to marry, with 79.52% of registered Australian voters participating in the survey. Every state and territory of Australia returned a majority 'yes' vote, with 133 out of 150 regional districts (known as electorates) returning a majority 'yes' vote in favour of marriage equality.

The results confirmed previous research showing that great attitudinal shifts had taken place in Australian society on matters relating to sexual orientation and gender identity. On the whole, Australia society has made great strides towards the inclusion of people regardless of their sexual orientation or gender identity.

However, notable differences in public attitudes do exist, sometimes influenced by religiosity, but not always in ways that can be readily assumed. For example:

- research conducted on attitudes to marriage equality in 2014 revealed a majority of those identifying with major religions in Australia, including Catholics and Anglicans, supported marriage equality.¹⁴ This suggested that religious adherents could be at odds with the institutional positions of their faith, and at odds with each other on issues concerning sexual and intimate relationships.
- research conducted on attitudes to trans equality in 2020 revealed a strong majority of Australians supported equal rights and protections for transgender people. The research showed that, while support for trans equality is stronger among the non-religious, it remained strong even among those describing themselves as very or somewhat religious.¹⁵

RELIGIOUS SUPPORT AND OPPOSITION FOR LGBTQ+ EQUALITY

There is a diversity of views on issues of sexuality and gender among religious communities and institutions in Australia. Several large religious denominations in Australia have adopted affirming positions towards sexuality and gender diversity, while some religious communities are still debating these issues or hold discriminatory positions towards people based on their sexual orientation or gender identity.

In some cases, faith-based organisations and leaders have invoked religion to oppose measures designed to achieve equality for LGBTQ+ people. These interventions have been often very painful for LGBTQ+ people of faith.¹⁶ People of faith with affirming views have also faced backlash when they have stood up in support of LGBTQ+ people.¹⁷

¹⁴ Crosby/Textor, [Same-sex marriage research 2014](#), 27 June 2014.

¹⁵ Equality Australia, ['New research shows overwhelming support among Australians on trans equality'](#), 18 January 2021.

¹⁶ In the context of conversion practices, see in particular: Timothy Jones et al (2021) [Healing Spiritual Harms: Supporting recovery from LGBTQ+ change and suppression practices](#), Melbourne: The Australian Research Centre in Sex, Health and Society, La Trobe University. See also, Joel Hollier et al (2022) 'Mechanisms of religious trauma amongst queer people in Australia's evangelical churches', *Clinical Social Work Journal* 50, 275-285.

¹⁷ For example, the Catholic Education Diocese of Parramatta in Sydney faced backlash from parents and priests when it opposed an anti-trans bill put forward by a New South Wales member of parliament. The Bishop of Parramatta changed the organisation's position after calls for his resignation:

In past years – particularly when they assumed that their attitudes represented majoritarian views – religious opponents alleged that equality for LGBTQ+ people would undermine family life, be damaging to children, and/or promote homosexual ‘lifestyles’.

For example, in 2008, when the state of New South Wales debated laws to enable same-sex couples to adopt, two faith-based service providers threatened to withdraw their adoption services if they were required to facilitate adoption to same-sex couples.¹⁸ These faith-based service providers were successful in seeking legal exemptions allowing them to discriminate against intended parents,¹⁹ notwithstanding that there were only four available adoption service providers and assessing eligibility for adoption is effectively an outsourced public statutory function.²⁰

More recently, religious opponents of LGBTQ+ equality have made two particular claims seeking to justify discrimination against LGBTQ+ people in international human rights law. The first being a claim regarding the freedom of religious people and institutions to believe and practice their religious beliefs (even when they discriminate towards LGBTQ+ people). The second being a claim regarding the rights of parents to instruct their children on matters concerning sexuality and gender in accordance with their beliefs (even if it causes psychological harm to LGBTQ+ young people). Prominent examples of these narratives include the national debate on marriage equality in 2017²¹ and the debate on prohibiting conversion practices²² in the state of Victoria in 2021.²³

TOWARDS AN INCLUSIVE HUMAN RIGHTS JURISPRUDENCE

There is very little international human rights jurisprudence discussing the interaction between the FoRB and LGBTQ+ people. For example, views and general comments by UN treaty bodies say very little. Alarming, the UN Special Rapporteur on Violence against Women and Girls’ recent intervention on Scottish legal gender recognition laws shows just how superficially this area of jurisprudence is being discussed.²⁴

References to article 18 of the ICCPR often pit people of faith against LGBTQ+ people, as if these groups were mutually exclusive or one group were not equally entitled to the same freedom FoRB as the other (including the freedom to *disagree* with discriminatory beliefs as a condition of employment, enrolment or service provision). Many regional

<https://www.smh.com.au/national/nsw/parents-are-the-primary-educators-catholics-backflip-on-latham-s-anti-trans-bill-20210506-p57pcy.html>.

¹⁸ New South Wales Parliament Standing Committee on Law and Justice (2009) *Adoption by same-sex couples*, at [6.43]-[6.52].

¹⁹ *Anti-Discrimination Act 1977* (NSW), section 59A.

²⁰ *Adoption Act 2000* (NSW), sections 45 and 45F.

²¹ For example, see the [Religious Freedom Review: Report of the Expert Panel](#) dated 18 May 2018 and the multiple iterations and inquiries in respect of the failed [Religious Discrimination Bill 2019-2022](#).

²² Conversion practices, sometimes referred to as ‘conversion therapy’, are those practices designed to change or suppress a person’s sexual orientation or gender identity.

²³ The Victorian debate on prohibiting conversion practices prompted misleading claims from some religious opponents that the legislation would criminalise prayer and send parents to gaol for talking to their children, deliberately misconstruing the law which protects LGBTQ+ people from the physical and psychological harms of discredited and damaging conversion practices.

²⁴ Special Rapporteur on violence against women and girls, its causes and consequences, OL GBR 14/2022, 29 November 2022, p. 6.

and superior domestic courts have engaged in similarly dichotomous ‘religion v equality’ analysis. We think this needs to change.

The FoRB must be enjoyed by everyone without distinction of any kind, including based on sexual orientation or gender identity.²⁵ LGBTQ+ people who experience discrimination have, in addition to rights of equality and non-discrimination, a right to whatever religion or belief they may have (or not have). In cases where claims based on religious beliefs are being used as a justification for discrimination, decision-makers should consider how rights of LGBTQ+ people to their own freedom of thought, conscience and religion might impact the outcome.

It is antithetical to a human rights framework to rely on one human right or freedom as a basis for justifying the denial of a human right or freedom to another. That is the particular significance of article 18(3) of the ICCPR. In that context, many fundamental rights and freedoms may be invoked depending on the circumstances, including rights to privacy,²⁶ health,²⁷ education,²⁸ work (including just and favourable conditions of work),²⁹ an adequate standard of living (including food, clothing and housing),³⁰ taking part in cultural life,³¹ and the freedom of expression.³² All these rights must be extended without discrimination of any kind.³³

In Australia, exemptions allowing religious schools and organisations to discriminate against LGBTQ+ people have been framed from the perspective of the institutions and their governing authorities and may not turn their minds to the freedom of individual staff, students or service users to hold their own beliefs, including to disagree on some aspects of religious doctrine within their community of faith. As we submitted above, much of the research suggests a great diversity of views among and within religious communities on SOGI issues.

We would welcome a thematic report which reiterated that the FoRB is a freedom which ought to be enjoyed by all, without distinction of any kind, including on the basis of sexual orientation and gender identity, and which provides no basis for discrimination against LGBTQ+ people.

Yours sincerely,



Anna Brown
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Ghassan Kassisieh
Legal Director

²⁵ ICCPR, art 2(1).

²⁶ See, eg, *International Covenant on Civil and Political Rights (ICCPR)*, art 17.

²⁷ *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, art 12.

²⁸ ICESCR, art 13-14.

²⁹ ICESCR, arts 6-7.

³⁰ ICESCR, art 11(1).

³¹ ICESCR, art 15(1)(a).

³² See, eg, ICCPR, art 19.

³³ ICCPR, art 2(1); ICESCR, art 2(2).