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Submission to the Department of Attorney-General and Justice of the Northern Territory

Discussion Paper: Modernisation of the *Anti-Discrimination Act*

Submission from

The Church of Jesus Christ of Latter-day Saints

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The Church of Jesus Christ of Latter-Day Saints welcomes and appreciates the opportunity to make submissions to the Northern Territory Department of Attorney-General and Justice regarding the proposals found in the Discussion Paper on the Modernisation of the *Anti-Discrimination Act* (September 2017) (the Discussion Paper). While we take issue with certain elements of the Discussion Paper and its "alternative approaches", we acknowledge the good faith concerns and fair-minded intent that underlie the thinking of the drafters and proponents of the Discussion Paper. The fulfillment of the public responsibilities owed to the constituencies of any government (to include Australia and the other great democracies of the world), surely mandates efforts to address these challenging issues. Such a process requires the balancing or respecting of differing, and in some cases, opposing views and beliefs. We applaud the seeking of public comments to assist the decision-making process and commend the Northern Territory for this approach. Hence our gratitude for the opportunity to make this submission.[1]

SOME BACKGROUND INFORMATION ABOUT THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

We believe that it is useful to provide you with a brief background sketch of the Church of Jesus Christ of Latter-day Saints (for convenience in reference, herein, the "Church") and its membership. At present the Church has a worldwide presence of over sixteen million members, with some 30,304 congregations. Of relevance here, there are some 115,532 Church members in Australia with 310 separate

[1] SPECIAL CREDITS
We here note that we owe a great debt of gratitude for the extensive and extraordinary work of Mark Fowler, an Adjunct Associate Professor at the Notre Dame Law School and Director at Neumann & Turnour Lawyers, in Brisbane. We engaged Professor Fowler as our outside counsel to provide us with a comprehensive review and analysis of the issues and concerns for the Church and for the principles of Religious Freedom that motivate our submission. We are pleased to have had the benefit of his wealth of experience, expertise, knowledge and wisdom concerning these issues under Australian culture, social conditions, political environment, law and jurisprudence. We will be utilizing excerpts from the material he has drafted for our benefit. We will properly note the use of his contributions in this submission.

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congregations; 4 of those congregations and 2,462 of those members located in the Northern Territory. All local congregations of the Church are presided over and led by lay volunteer leaders who are paid no compensation and serve for finite periods of time.

We are a "missionary" or "proselyting" Church, holding firmly to the Christian belief and attendant duty, to share with our neighbours the good news of the atonement of Jesus Christ and the attendant happiness that we derive from our religion. As of April 2017, there were 70,946 full-time volunteer missionaries in our Church serving all over the world. The majority of them are young men and women between the ages of 18 and 21 who put aside their normal lives for a significant period of time (2 years for young men and 18 months for young women) to voluntarily participate in the missionary endeavour.

In addition to these proselyting missionaries, there are about 33,695 volunteer service missionaries serving throughout the world in a wide variety of activities in support of the Church, its membership, and the activities and work of the Church, including significant humanitarian and educational efforts.

The doctrines and principles that guide the Church, its leaders and membership, place a high priority on learning and education, in every field. Our doctrine and scripture encourage our members to seek learning and wisdom. It is, as a result, a deep-seated and personal imperative for each member. Accordingly, the Church has devoted significant resources to create the means for members to become educated. In addition to religious education in seminary and institute gatherings and facilities around the world, the Church has founded three (3) major accredited, operating U.S. Universities. In some places it operates primary schools where quality educational opportunity is not readily available. The Church is now also pioneering and expanding a worldwide "online" educational system designed to bring the benefits of learning and education to members and non-members across the world.

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The humanitarian efforts of the Church are extensive. These efforts are funded almost entirely by the contributions of its members in fulfillment of the doctrinally-founded belief that we are to rescue the weary, succour the poor, heal the afflicted and nurture the weak. The donations of Australian members of the Church have given rise to the establishment of LDS Charities Australia, a legally recognized and authorized Public Benevolence Institution that is fully engaged in providing millions of dollars of humanitarian aid across the underdeveloped and poverty-stricken portions of the world. During 2017, some $35,000,000 AUS, was poured into humanitarian aid efforts by LDS Charities Australia to relieve hunger, illness, disability, suffering and poverty.

The foregoing word picture of "the Church" is only a brief snapshot of the panorama of living, breathing activities, organisations, associations and work that are the natural extension of the religious faith, conscience, consciousness and life-essence of the religious believers who are our members. We believe that, the Church's organizations, associations, institutions and legal entities are the result of Divine inspiration. They create vitally important personal space and community for the realization, extension and development of the essence of the "heart" of each person (each unique conscience and soul). They are as much the substance of religious belief and conscience as Sunday worship, sacraments, religious ritual or rites, and other narrow notions of "religious observance." They are the living, dynamic extension of the essential conscience and identity of the religious believer. We recognize, of course, that this is not unique to our Church. It is, in fact, true of all authentic religious persons.

THE HISTORIC BASIS FOR OUR DEVOTION TO DEMOCRATIC PRINCIPLES DEALING WITH PREJUDICE, PERSECUTION AND WRONGFUL DISCRIMINATION

This Church, its religious doctrines and belief system, and its members are not strangers to unlawful discrimination. Origins of the Church are in the remarkable spiritual experiences of Joseph Smith, a young farm boy, who "dared" to share his

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experiences with others in a time of great "religious excitement" in which the multiple religious denominations in and around his home were loudly proclaiming the truth of their beliefs. From that time (1820) and well into the late 1800's, those individuals who chose to follow Joseph Smith and become believers were the victims of great persecution. They were unlawfully deprived of property, religious rights, freedom of association, and in some cases, their lives. Solely because they were members of the Church, they were denied the protections of state and federal governments. Mob violence was common, and the members were chased from one location to another, repeatedly moving away from their persecutors, having been forbidden by Church leaders to take up arms in their own defence.

Ultimately, Joseph Smith and his brother were martyred by mob violence. Church members were again driven from their homes. Despite repeated appeals to the federal government and to the respective state governments, there was no refuge in nor assistance from the relevant governments. Tragically, in one instance the governor of one state joined in the persecution with the issuance of an "extermination order" against the Church members.[2] Having no refuge from the storm of persecution, the Church and its members finally undertook an epic migration across the uninhabited central plains of the United States to the then Utah territory where they were able to settle in peace. Separated by geographic barriers and by distance from others, for a time they found the space necessary to live and fully implement and realize their chosen beliefs.

Sadly, world history confirms that religions, their believers, their associations, organisations and legal entities have repeatedly been subjected to similar manifestations of irrational and unfounded hatred and persecution. Nevertheless, out of the unrelenting efforts of religions and civil and human rights movements in

[2] It is worth noting here that, notwithstanding the failures of government, the members of of the Church have held fiercely to their articles of faith which state that (i) "We believe in being subject to kings, presidents, rulers, and magistrates, in obeying, honouring, and sustaining the law;" and (ii) "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where, or what they may." These principled beliefs have borne fruit as modern governments of the 20th Century and into the 21st Century began to acknowledge and recognize the importance of religious freedom.

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the 20th century, there has emerged a clear understanding of the incredible power for good that is associated with religious believers and their associations and organizations. With that understanding has come validation and acknowledgment of the truth that human potential is best actualized when the freedom of belief and conscience evident in religious feeling is given "space" for realization. Such realization has been accompanied by a movement that has given birth to carefully considered and thoughtfully drafted laws and principles. Those laws and principles have found broad worldwide affirmation and acceptance at all governmental levels - local, national and international. The genius of the design of such systems of law is that they grant the broadest possible space to religious believers, alone and in and through their religious association and organizations, to act upon and actualize beliefs; bounded only by reasonable normative civil constraints in protection of others' life, liberty, and property. The "faith" that our Church, its leadership and members have retained in governments (see footnote 2) has now found validation and affirmation. This historic and principled movement has resulted in the development of the widely known and acclaimed International Covenant on Civil and Political Rights of the United Nations (the "Covenant"). Australia, among a long list of other nations, has formally ratified the Covenant which is in the nature, therefore, of an international treaty. Article 18 of the Covenant enshrines religious freedom.

Article 18 provides as follows:

"1. Everyone shall have the right to freedom of thought, conscience and religion. **This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.**

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. **Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others**.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious

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and moral education of their children in conformity with their own convictions." (Emphasis added)

We believe that Article 18 of the Covenant, as part of the international compact in force in Australia is the relevant and, arguably, lawfully required[3] standard against which the Discussion Paper proposals should be tested. Section 18 is, figuratively, conceptually and literally, the creation of the space necessary to allow individuals holding religious beliefs, individually and in their associations and organisations, to "live their religion" fully and robustly.

We nevertheless, acknowledge that the regrettable penchant of the majority to punish the minority of those who are "different" or "vulnerable" in the grand milieu of human society and culture has resulted in a similar need for governmental response. The Discussion Paper fairly and properly addresses anti-discrimination protection for individuals sharing religious belief to the existing protection for racial attributes. Further, recognizing both potential vulnerability and need for protection, it also adds protection for individuals with other shared attributes such as disability, sexual orientation, gender identity and intersex status.

We therefore agree that the proposals in the Discussion Paper should carefully consider protection of additional classes of individuals with special identity attributes who are and have been vulnerable to unlawful treatment based upon those special attributes. Nevertheless, there is still cause for concern and some alarm over elements of the proposals in the Discussion Paper.

THE CONTENT OF THE DISCUSSION PAPER OF CONCERN

This submission is focused upon questions 4, 14 and 16 of the Discussion Paper, including the basis for and the substance of the proposals addressed by those questions.

[3] Mark Fowler has advised as follows: "Australia has ratified the ICCPR and is bound by the First Optional Protocol to the ICCPR. Article 50 of the ICCPR provides that '[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.' This means that the Northern Territory has obligations under the ICCPR, and further that the Commonwealth has obligations to ensure that the Northern Territory complies with the ICCPR."

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Those three questions are as follows:

"Question 4: Should vilification provisions be included in the Act? Should vilification be prohibited for attributes other than on the basis of race, such as disability, sexual orientation, religious belief, gender identity or intersex status?"

"Question 14: Should any exemptions for religious or cultural bodies be removed?"

"Question 16: What are your views on expanding the definition of 'work'?"

ITEM ONE – VILIFICATION LEGISLATION

ITEM ONE-POINT ONE. "Vilification," appropriately defined, is the appropriate target of legal sanction.

We address the second question under Question 4 first, which asks whether vilification proscriptions should be extended beyond "race," to include disability, sexual orientation, religious belief, gender identity or intersex status. We are generally wary of any attempt to regulate speech and expression of ideas because of (i) the compelling importance of free expression and (ii) the inherent subjective analysis. However, we recognize that harm can result to individuals and societies from "hate speech." Subject to an adjustment of the definition of what constitutes vilification (as will be discussed hereafter in this Submission), we could support such an expansion.

ITEM ONE – POINT TWO. To define "vilification" as language which "offends, insults, or humiliates" another person or a group of people is an unsustainable "low bar" that would violate fundamental notions of free speech and expression.

While we all would wish to be free of statements and language about us that "offends, insults or humiliates," these words are too vague and subjective to be the basis for limiting speech and expression, and likely will not survive the rigorous requirements of the well-established principles of free speech. In other words, the

great weight of both international and Australian legal policy and authority dealing with issues of speech and expression would invalidate this legislative proscription on speech and expression. Standards for restricting speech and expression which have proven to be consistent with free speech notions require that the proscribed speech be of a kind that incites unlawful conduct. A more extensive narrative and argument, provided to us by our outside counsel, Mr. Fowler, is attached to more fully support the position that we have summarized hereinabove. (Please see Appendix A attached and incorporated herein by this reference.)

ITEM ONE – POINT THREE. The negative practical consequences of a "low bar" definition of vilification justifies adherence to an accepted higher threshold for what is prohibited vilification.

In addition to the free speech objections noted above, on a purely practical, but important note, we observe that a low standard of what constitutes vilifying language will ultimately not serve any of those whom the legislation seeks to shelter from vilification. Indeed, the potential is for a resultant trivialization of both the purported protection and the processes in place to effectuate such protection. If the standard is too low or subjective, the practical result will be multiplication of disputes and the clogging of the regulator and court dockets with unending and patently unsustainable claims. The recent case of a complaint against Archbishop Porteous of the Catholic Church is apropos. In that instance, the Archbishop was summoned to appear before a Tasmanian anti-discrimination body to answer for the circulation of a booklet distributed by the Australian Catholic Bishops Conference providing a defence of the Catholic Church's traditional view of marriage. While the complaint was thereafter dismissed, there was significant cost incurred by all involved, economic, psychological and otherwise.

Consider the matter from another perspective. Religious belief itself is proposed as a protected characteristic under this legislation. If the vilification-bar is

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set too low, a vigorous defence of LGBT rights could be similarly characterized as vilification of religious believers. We believe that to be an inappropriate result.

As previously stated, we have no objection to the implementation of speech limitations that are legitimate and reasonable impositions on freedom of speech. We affirm that the only "reasonable" limitations on freedom of speech and expression should be confined to speech that incites unlawful conduct.

ITEM TWO – PROPOSED LEGISLATIVE REMOVAL OF EXISTING RELIGIOUS EXEMPTIONS AND THE EXPANSION OF THE DEFINITION OF "WORK".

ITEM TWO - PREFACE. We oppose the removal of any of the religious exemptions because they are essential to protect the individual and communal exercise of freedom of religion. We will treat Questions 14 and 16 of the Discussion Paper together.

ITEM TWO – PRELIMINARY COMMENT. The title to the narrative that poses Question 14, "Removing Content that Enshrines Discrimination," requires a response because it reveals an unfair bias and prejudices the legitimate perspective of the purpose and meaning of religious exemptions. A rational discussion and debate about such exemptions cannot be fairly conducted when the effort to prevent discrimination against some individuals and groups commences with a bold statement that impliedly denigrates the legitimate rights of religious believers.

Fairness demands that the body considering the issues not commence deliberations relying upon bias or upon unproven assumptions. The notion that the religious and cultural exemptions "enshrine unlawful discrimination[4]" is a popular

[4] We here note the irony that care must be taken to assure that one must "discriminate" between the unending variety and kinds of "discrimination" that are the everyday conduct of all human beings. We make choices of all kinds each day. We discriminate when we choose our breakfast food or whether to eat breakfast at all. We discriminate when we select our friends and our associates. We discriminate when we choose our clothing and our appearance. In its ordinary sense "discrimination" is an inherent element of the freedom of

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"catch phrase" in the current religious freedom debates in Australia. We respectfully urge the Northern Territory government not to base its decision-making on a "catch phrase" that misrepresents reality and forecloses debate by impliedly slandering those with contrary interests and views. It asserts, rather than reasons to, a conclusion about the very issues proposed for discussion. Employing that "catch phrase" will deny millions of Australians the respect and tolerance that is due their beliefs about human nature, truth, marriage, family, and divine sovereignty, to name just a few. It also impliedly and inaccurately asserts that religious believers have some sort of deep-seated animus (cloaked in religion) toward protected groups. Disagreement with and refusal to adopt contemporary trends of thought is neither hatred nor bigotry and should not be subject to the dictates of an Orwellian government's prohibition of "thoughtcrimes."

A characterisation of our Church, its associations, organizations, leaders and members, as worshipping at a shrine to unlawful discrimination is a patently inaccurate portrayal and, to borrow a phrase, "offends, insults and humiliates." To demonstrate an alternative reality, please note the following statement of position that our Church has taken. The statement is well-documented and widely disseminated to our members and to the world (including on our public website, lds.org):

"Because we are frequently asked for our position on these matters, the Church of Jesus Christ of Latter-day Saints asserts the following principles based on the teachings of Jesus Christ, and on fairness for all, including people of faith:

1. *We claim for everyone the God-given and Constitutional right to live their faith according to the dictates of their own conscience, without harming the health or safety of others.*

2. *We acknowledge that the same freedom of conscience must apply to men and women everywhere to follow the religious faith of their choice, or none at all if they so choose.*

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choice that pervades a free society. We must be conscious in these debates and discussions that for a government to proscribe a particular kind of discrimination is to also eliminate or restrict a freedom of choice.

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3. *We believe laws ought to be framed to achieve a balance in protecting the freedoms of all people while respecting those with differing values.*

4. *We reject persecution and retaliation of any kind, including persecution based on race, ethnicity, religious belief, economic circumstances or differences in gender or sexual orientation.*

We call on local, state and federal government to serve all of their people by passing legislation that protects vital religious freedoms for individuals, families, churches and other faith groups while protecting the rights of our LGBT citizens in such areas as housing, employment and public accommodation in hotels restaurants and transportation – protections which are not available in many parts of the country."

These statements, principles and beliefs are not empty aphorisms or window dressing for public consumption. They are repeatedly and widely taught and emphasized. They are expected to be and are part of the religious and life conscience of the members of our Church and represent human values that we honestly seek to "enshrine". Of course, we are not so naïve as to assert that all of our membership and lay leadership has reached a state of perfection with respect to these doctrines. Work remains to be done. However, one of the valuable central tenets of religion is to do that very work. It is an inescapable and essential element of the religious conscience that we are striving to bring about the progress and improvement of ourselves and mankind, in general.

Finally, we also respectfully submit that, other religions (their believers and associations) have similar core teachings, principles and doctrines publicly declared and taught and truly "enshrined" as fundamental elements of the conscience of their adherents.

In conclusion, the foregoing narrative should make it clear that the proposed removal of religious and cultural exemptions should not be, expressly or impliedly, founded on a view that religions and cultural organizations and their believers and adherents are bastions of "enshrined" invidious discrimination.

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ITEM TWO – ARTICLE 18 OF THE ICCPR AND THE RESULTING ACCOMMODATION BALANCE. We submit that Article 18 of the ICCPR is, arguably, controlling law, policy and precedent. The content of Article 18 is fully consistent with a case for religious exemptions to anti-discrimination laws which broaden rather than narrow such exemptions. Additionally, further accommodation of broad form of religious exemptions do not, factually or practically, impose an unreasonable burden on the freedoms of the expanded classes of individuals having the attributes outlined in the Discussion Paper.

ITEM TWO – PART ONE – A discussion of the content and requirements of the ICCPR and its relevance and application to the balancing of the competing interests at issue.

We reference the content of Article 18 of the ICCPR and specifically emphasize the language of the first paragraph of Article 18 which provides, in part:

"1. Everyone shall have the right to freedom of thought, conscience and religion. **This right shall include freedom** to have or to adopt a religion or belief of his choice, **and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.**" (Emphasis added.)

This Article of the ICCPR parallels and confirms that religious freedom requires exemptions from anti-discrimination law allowing believers to establish a community that requires adherence to religious standards in order to manifest their religious belief in public as well as privately. According to paragraph 3 of Article 18, the limitations on the manifestation of the freedom of religious association with others comprising a community of believers are "only...such limitations as are prescribed by law **and** are **necessary** to protect public safety, order, health or morals or fundamental rights and freedoms of others." The question presented by the somewhat narrow religious exemption in force in the Northern Territory and the further restriction of religious exemption proposed by the Discussion Paper, is whether or not the free exercise of associational rights of religious believers in the

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active "manifestation" of their religious beliefs must give way to anti-discrimination interests of the protected classes identified in the Discussion Paper.

The practical reality of the anti-discrimination freedom being asserted here does not withstand scrutiny.

We observe that there is a meaningful and identifiable commonality between anti-discrimination legislation for protected classes of persons and the legislated broad religious exemption rules that have been granted to religious believers. Those legislative initiatives guard and enforce legitimate space for the individuals in the protected class where social norms have failed to do so. But the rights of conscience and belief of religious organisations and their members, exercised in good faith and without animus toward a protected group or class, may compete with those protections in some settings. Indeed, accommodating such conscience and belief is itself a form of human-right protection to which the state is morally committed. In this sense, anti-discrimination legislation and religious exemptions are siblings. Neither type of governmental intervention is a grant of unwarranted privilege or arbitrary special treatment. Each represents the well-considered and justified defining and securing of the reasonable space necessary in a free society to accommodate (i) the beliefs, conscience, and identity of the protected classes of individuals and (ii) the conduct of life (including rights of association and expression) that flow from those beliefs, conscience and identity. When legitimate interests of this kind come into conflict, as they inevitably will, the task of the state is to find appropriate accommodations. Those accommodations will not fully satisfy the interests of everyone, but they can create a fundamental sense of fairness and legitimacy.

ITEM TWO – PART TWO – THE SPECIFICS OF THE COMPETING INTERESTS.

We believe it is essential to focus carefully on the specific ways in which accommodating religious belief and exercise compete with the interests of those to

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be protected by non-discrimination legislation and examine, in detail, the substance and content of the competing right claims.

The most pressing accommodation issues are between certain fundamental religious beliefs and the interests of those to be protected against discrimination on bases of sexual orientation, gender identity, and intersex status. Those in the LGBTI community legitimately seek to live free of discrimination on those bases. Religious organisations and their members legitimately seek to believe and conduct themselves – individually and organisationally – consistent with their deeply held doctrines and values.

In most circumstances, the interests of the LGBTI community can and should be accommodated, such as in access to housing, employment, public services, private commerce, etc. But there are also circumstances in which accommodation in favour of religious organisations and believers is appropriate.

Some specific examples clearly demonstrate the competing interests.

As example 1, a legal entity that provides temporal (i.e., not exclusively ecclesiastical or pastoral functions) support functions for a church puts in place a set of standards for eligibility for employment that require membership in the church and, additionally requires conduct conforming to the beliefs, tenets and doctrines of the church.

As example 2, a university, owned and operated by a church, does not require membership in the church as a condition to admission and participation at the university. However, it requires adherence to a code of conduct applicable to all students at the university that may limit sexual relations to those in a traditional marriage relationship. Someone living in a homosexual relationship would be excluded from employment in the first example and excluded from admission or continued participation and study at the university in the second example.

In considering these examples, it is essential to understand that most churches and religious organizations employ personnel who, regardless of specific assignment, are vital to the church's religious ministry. Church employees may

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include clergy, but also non-clergy employees, who undertake logistical, temporal and operational functions in support of or for the clergy, impart direction from church headquarters, teach doctrine, give counsel, ensure consistency of practices, produce doctrinal and instructional materials, receive sacred confidences, carry out assignments, acquire, design and maintain worship facilities that express the church's reverence to God, administer or teach in the church's educational system, and generally cultivate an atmosphere of spirituality and consecration that energizes the ministry through all programs and activities. It is wholly unrealistic to legislatively characterize or conclude that the operation and function of such religious organizations is not "religious activity" in the deepest sense. Membership as a believer or requirements to meet the unique religious standards and qualifications for employment (or for participation by volunteers desiring to assist in the work of the organization) are a fundamental necessity to full manifestation of the beliefs of the subject religion and the creation of the community of believers that puts it into practice.

As to educational institutions and facilities established by religions, they are literal fulfillment and appropriate manifestations of religious beliefs concerning the high importance of learning and education. What makes a higher-education institution owned and operated by a religion distinctive – what is at the core of its very existence – is the desire to create and maintain an environment in which the religion's doctrines and standards of behaviour are respected and accepted as the norm and serve to inform and provide the foundation and ambience for the dispensing and teaching of secular knowledge. Treating membership in such a community, whether as a student, faculty, or member of staff as somehow detachable from those doctrines and standards would be fundamentally inconsistent with the institution's purpose and clearly limits and restrains this important manifestation of religious belief and association.

We again refer to Article 18, paragraph 3 of the ICCPR: "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by

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law **and** are **necessary** to protect...fundamental rights or freedoms of others." (Emphasis added). The U.N. Human Rights Commission has provided interpretive rules for provisions of the ICCPR.[5] With respect to "limitations clauses" (paragraph 3 of Article 18 being such a limitations clause), the interpretive principles include a statement that "all limitation clauses shall be interpreted strictly and in favour of the rights at issue." Where the word "necessary" is used with respect to the limitation, it means that it is "based on one of the grounds justifying limitations recognized by the relevant article of the Covenant," "responds to a pressing social need," "pursues a legitimate aim," and "is proportionate to that aim." We submit that the facilitation of a non-believer's employment or participation in a religious community is not, in any way, a response to a pressing public or social need. This is an example of the use of anti-discrimination protections to force an accommodation of a simple desire or need for employment or participation where there are alternatives for fulfilling that desire elsewhere in the relevant community. No "pressing public or social need" is apparent. Additionally, the aim of this "limitation" on these protected religious interests (i.e., a job or participation opportunity that could be elsewhere accommodated) is entirely disproportionate to the damage done to the religious association right.

In the context of these facts, circumstances and controlling law, the Northern Territory should work to amend its anti-discrimination laws to be consistent with the exercise of the religious freedom rights of association that are affirmed by Article 18's application. The expansion of current religious belief exemptions to be consistent with Article 18's protections is the proper course.

ITEM THREE – SUMMARY OF RECOMMENDATIONS

In summary, our recommendations are simple and straightforward and supported by the foregoing narrative and reasoning.

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[5] UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 41st sess, E/CN.4/1985/4 (28 September 1984).

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With respect to Question 4, regarding vilification, we urge the adoption of a definition of vilification that would avoid conflict with settled and wide-spread notions of freedom of speech and expression. In conjunction with that definitional modification, make vilification law applicable only to speech that incites hatred, violence, terror or invidious discrimination.

With respect to Questions 14 and 16, we urge the abandonment of the currently proposed modifications to the religious exemption provisions of the existing Northern Territory anti-discrimination law. We also urge a modification to the current anti-discrimination law to the broader scope to match the wider coverage afforded by other jurisdictions both in Australia and internationally (abandoning the notion that the exemption only applies to "religious practice observance"[6]). Specifically, we urge the formal adoption of the religious freedom protections of Article 18 of the ICCPR (together with other civil and human rights provisions of the ICCPR) to bring the Northern Territory into full and affirmative compliance with the ICCPR.

We again express gratitude to the Legal Policy Department of the Attorney General and Justice for the Northern Territory. The opportunity to make this submission is highly valued. We trust that the content will truly help inform the proposed legislative development process.

[6] Alternatively, it would be an acceptable solution to add a broadened definition of religious observance and action to include the work and actions of religious associations, organizations and entities owned and operated by a Church in support and furtherance of its religious purposes, doctrines and objectives.

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APPENDIX A

TO SUBMISSION TO THE DEPARTMENT OF ATTORNEY-GENERAL AND JUSTICE OF THE NORTHERN TERRITORY REGARDING DISCUSSION PAPER: MODERNISATION OF THE *ANTI-DISCRIMINATION ACT*

SUBMISSION ON BEHALF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS

The following narrative and analysis regarding freedom of speech and expression which have a direct bearing on the Discussion Paper proposals concerning "vilification" are excerpts from the work of Mark Fowler (with minor edits)

1.1 Freedom of speech is a fundamental condition of modern democratic society. In *R v Secretary of State for the Home Department; Ex Parte Simms* Lord Steyn offered the following analysis:

> First, [free speech] promotes the self-fulfilment of individuals in society. Secondly, in the famous words of Holmes J (echoing John Stuart Mill), 'the best test of truth is the power of the thought to get itself accepted in the competition of the market.' Thirdly, freedom of speech is the lifeblood of democracy. The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country.[1]

1.2 Expressing similar sentiments, Ronald Dworkin has emphasised the relationship between open public deliberation and democratic governance in the following terms:

> Free speech is a condition of legitimate government. Laws and policies are not legitimate unless they have been adopted through a democratic process, and a process is not democratic if government has prevented anyone from expressing his convictions about what those laws and policies should be.[2]

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[1] *R v Secretary of State for the Home Department; Ex Parte Simms* [2002] 2 AC 115, 126 (Lord Steyn).

[2] https://www.theguardian.com/world/2006/feb/14/muhammadcartoons.comment.

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1.3 The particular concern held with the proposals in the Discussion Paper is that the measure for determining unlawful conduct will operate as a significant limitation on free speech in the Northern Territory. For example, on the specific use of the word 'offence', former New South Wales Supreme Court Chief Justice, James Spigelman, has said:

> The freedom to offend is an integral component of freedom of speech. There is no right not to be offended... When rights conflict, drawing the line too far in favour of one, degrades the other right.[3]

1.4 For the reasons set out below, we submit that in 'setting the bar too low' the proposals put in the Discussion Paper are:

(a) contrary to international law; and

(b) subject to constitutional challenge.

To illustrate our concerns we first look to the extensive existing judicial and academic consideration use of the words 'offend, insult, humiliate or intimidate' in section 18C of the *Racial Discrimination Act 1975* (Cth) (RDA) and then to judicial consideration of similar provisions, both within Australia and internationally. Importantly, the phrase used in section 18C is verbatim identical to the proposal put in the Discussion Paper. Most notably, in 2016 the ALRC summarised our concerns when it reached the following conclusion:

> there are arguments that s 18C lacks sufficient precision and clarity, and unjustifiably interferes with freedom of speech by extending to speech that is reasonably likely to 'offend'. In some respects, the provision is broader than is required under international law, broader than similar laws in other jurisdictions, and may be susceptible to constitutional challenge.[4]

<u>International Law Considerations</u>

[3] James Spigelman, *'2012 Human Rights Day Oration'* (Speech delivered at the Australian Human Rights Commission's 25th Human Rights Award Ceremony, Sydney, 10 December 2012).
[4] 4.176.

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1.5 We turn first to consider the interplay of the proposed vilification law with the internationally protected right of freedom of speech. The relevant rights are contained in the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD) and the *International Covenant on Civil and Political Rights* (ICCPR), both of which instruments Australia has ratified.

Article 4(a) of the CERD provides the international requirement to prevent racial hatred:

> Article 4
>
> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
>
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

1.6 Article 20 of the ICCPR similarly provides:

> 1. Any propaganda for war shall be prohibited by law.
>
> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

1.7 Article 19 of the ICCPR provides the relevant rights to freedom of speech:

> 1. Everyone shall have the right to hold opinions without interference.

> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (ordre public), or of public health or morals.

1.8 In elaborating on the requirements of this right the United National Human Rights Council has stated:

> The exercise of the right of freedom of opinion and expression is one of the essential foundations of a democratic society, is enabled by a democratic environment, which offers, inter alia, guarantees for its protection, is essential to full and effective participation in a free and democratic society, and is instrumental to the development and strengthening of effective democratic systems.[5]

1.9 Forrester, Zimmerman and Finlay conclude:

> Section 18C therefore appears to greatly overreach the boundaries that Article 4 sets for prohibited expression. Indeed, it is no exaggeration to say that s 18C's approach to implementing Article 4 is not just legislative overreach, but legislative overkill. However, even if it were only a case of legislative overreach, then this is sufficient to say that s 18C is not reasonably capable of being a suitable or fitting way of implementing Article 4. Hence, s 18C fails the conformity requirement." In this regard, Section 18C goes well beyond the type of law envisaged by Article 4(a). It has no element of intent. Further, and once again, it takes an overkill approach. Acts that offend, insult or even humiliate in many cases simply do not lead to racial discrimination or violence. The key consideration here is the high harm threshold set by the use of the words 'advocacy', 'hatred' and 'incitement'. The wording of Article 20(2):

[5] UN Human Rights Council, Resolution 12/16, preamble.

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> [A]ppears directed to prohibiting speech that urges, recommends or espouses intense dislike or detestation against others on the basis of nationality, race or religion such that it stimulates or prompts others to engage in discrimination, hostility or violence.[6]

1.10 The inconsistency of prohibitions on insulting speech with international law has received judicial affirmation. *Coleman v Power* concerned Queensland legislation prohibiting 'threatening, abusive or insulting words' in a public place. Therein Kirby J observed that the widest possible meaning of the term 'insulting'—would go beyond the permissible limitations on freedom of speech set out in Article 19.3 of the ICCPR.[7]

Judicial Consideration of Hate Speech

1.11 Although not directed to the specific question of whether prohibitions on offensive or insulting language are consistent with freedom of speech as internationally protected, there exists a wealth of judicial and academic concern with such laws. The following provides a sample of some of the key statements illustrating the concerns held. They also serve to demonstrate the vulnerability of the proposals put in the Discussion Paper to litigated challenge.

1.12 The first area that has attracted much consideration is whether the notion of 'vilification' encompasses offensive or insulting speech. These judgements do not necessarily consider the direct question of whether such provisions are sufficiently aligned with the relevant international covenants (a matter dealt with in the preceding section), however they will be relevant for any Court or legislature considering that question. Expressing similar concerns to those affirmed recently by the ALRC, a unanimous Canadian Supreme Court recently held that a provision that targeted speech that 'ridicules, belittles or otherwise affronts the dignity of' was overbroad.[8] In delivering the judgement of the Court Rothstein J remarked:

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[6] Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, submission to Parliamentary Joint Committee on Human Rights Inquiry into Freedom of Speech in Australia.

[7] Coleman v Power (2004) 220 CLR 1, [242].

[8] <*Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 519-20 [107]-[111] (Rothstein J).

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> Restricting expression because it may offend or hurt feelings does not give sufficient weight to the role expression plays in individual self-fulfilment, the search for truth, and unfettered political discourse. Prohibiting any representation which "ridicules, belittles or otherwise affronts the dignity of" protected groups could capture a great deal of expression which, while offensive to most people, falls short of exposing its target group to the extreme detestation and vilification which risks provoking discriminatory activities against that group. Rather than being tailored to meet the particular requirements, such a broad prohibition would impair freedom of expression in a significant way.[9]

The Court ruled that the provision infringed the right to freedom of speech contained in the Canadian Charter. Justice Rothstein held:

> Expression criticizing or creating humour at the expense of others can be derogatory to the extent of being repugnant. Representations belittling a minority group or attacking its dignity through jokes, ridicule or insults may be hurtful and offensive. However, ... offensive ideas are not sufficient to ground a justification for infringing on freedom of expression. While such expression may inspire feelings of disdain or superiority, it does not expose the targeted group to hatred...While ridicule, taken to the extreme, can conceivably lead to exposure to hatred, in my view, "ridicule" in its ordinary sense would not typically have the potential to lead to the discrimination that the legislature seeks to address.[10] ...
>
> I find that the words "ridicules, belittles or otherwise affronts the dignity of" in s. 14(1)(b) are not rationally connected to the legislative purpose of addressing systemic discrimination of protected groups. The manner in which they infringe freedom of expression cannot be justified under s. 1 of the Charter and, consequently, they are constitutionally invalid.[11]

Uncertainty of Application

1.13 The second chief concern that finds expression within a range of judgements considering 'hate speech' prohibitions is the concern that terms such as 'offence, insult, humiliate, intimidate, hate' etc can be so subjective as to offer no direction to the community as to the acceptable boundaries of permissible expression. To that end, they have given rise to concerns as to the maintenance of the rule of law – if a

[9] *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 519-20 [109] (Rothstein J).
[10] *Whatcott* [2013] SCC 11; [2013] 1 SCR 467, 519-20 [90-92] (Rothstein J).
[11]

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community is not able to ascertain the requirements placed upon it, its respect for the law is vastly diminished. Community and business certainty in the objective application of the law is undermined. As noted by the ALRC in 2016:

> In particular, there are arguments that s 18C lacks sufficient precision and clarity, and unjustifiably interferes with freedom of speech by extending to speech that is reasonably likely to 'offend'. The provision appears broader than is required under international law to prohibit the advocacy of racial hatred and broader than similar laws in other jurisdictions, and may be susceptible to constitutional challenge.

1.14 In *Taylor v Canadian Human Rights Commission*[12] the Canadian Supreme Court was asked to consider a provision making unlawful communication likely to expose any person to hatred or contempt. Justice McLachlin held:

> [Hatred and contempt] are vague and subjective, capable of extension should the interpreter be so inclined. Where does dislike leave off and hatred or contempt begin? ... The phrase does not assist in sending a clear and precise indication to members of society as to what the limits of impugned speech are. In short, by using such vague, emotive terms without definition, the state necessarily incurs the risk of catching, within the ambit of the regulated area expression falling short of hatred.[13]

1.15 In our view her comments are equally applicable to the proposal put in the Discussion Paper, to the extent it aims to regulate speech that might 'offend', 'insult', 'ridicule' and 'humiliate'. Her Honour further noted:

> [T]he chilling effect of leaving overbroad provisions "on the books" cannot be ignored. While the chilling effect of human rights legislation is likely to be less significant than that of criminal prohibition, the vagueness of the law means that it may well deter more conduct than can legitimately targeted, given its objectives.[14]

1.16 Turning to the Australian context, in the 2013 Australian case of *Monis v The Queen* Justice Hayne stated:

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[12] [1990] 3 SCR 892 ('*Taylor*'). *Taylor* was decided along with *Keegstra* [1990] 3 SCR 697. Like *Keegstra*, the Canadian Supreme Court split 4:3, holding in *Taylor* that s 13 of the *Canadian Human Rights Act* did not violate the Canadian *Charter of Rights and Freedoms*.

[13] *Taylor v Canadian Human Rights Commission* [1990] SCR 892, 961-2.

[14] *Taylor* [1990] SCR 892, 961-2.

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> On its own, regulating the giving of offence is not a legitimate object or end....The conclusion that eliminating the giving of offence, even serious offence, is not a legitimate object or end is supported by reference to the way in which the general law operates and has developed over time. The general law both operates and has developed recognising that human behaviour does not accommodate the regulation, let alone the prohibition, of conduct giving offence. Almost any human interaction carries with it the opportunity for and the risk of giving offence, sometimes serious offence, to another. Sometimes giving offence is deliberate. Often it is thoughtless. Sometimes it is wholly unintended. Any general attempt to preclude one person giving any offence to another would be doomed to fail and, by failing, bring the law into disrepute. Because giving and taking offence can happen in so many different ways and in so many different circumstances, it is not evident that any social advantage is gained by attempting to prevent the giving of offence by one person to another unless some other societal value, such as prevention of violence, is implicated.[15]

Constitutional Law

1.17 As noted above, in 2016 the ALRC concluded that section 18C 'may be vulnerable to constitutional challenge on two fronts':

> [4.204] The second relates to the implied freedom of political communication. In this context, the High Court has observed that 'insult and invective' are a legitimate part of political discussion and debate.[16] The inclusion of the words 'offend' and 'insult' raises a possibility that the High Court, in an appropriate case, might read down the scope of s 18C, or find it invalid.[17]

1.18 The authority cited by the ALRC is *Coleman v Power.* In that decision, McHugh J stated that '[t]he use of insulting words is a common enough technique in political discussion and debates'[18] and '...insults are a legitimate part of the political discussion protected by the Constitution. An unqualified prohibition on their use cannot be justified as compatible with the constitutional freedom.'[19] Gummow and Hayne JJ held

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[15] *Monis v The Queen* [2013] HCA 4, at [221-222] per Hayne J.

[16] Coleman v Power (2004) 220 CLR 1, [36], [102] (McHugh J), [197] (Gummow and Hayne JJ); Monis v The Queen (2013) 249 CLR 92, [85]–[86] (Hayne J).

[17] Cf Monis v The Queen (2013) 249 CLR 92. As discussed above, the statute considered in Monis concerned using a postal service to 'cause offence'.

[18] [2004] HCA 25; (2004) 220 CLR 1, 54 [105] (McHugh J)

[19] [2004] HCA 25; (2004) 220 CLR 1, 54 [105] (McHugh J)

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'[i]nsult and invective have been employed in political communication at least since the time of Demosthenes.'[20] Kirby J stated:

> One might wish for more rationality, less superficiality, diminished invective and increased logic and persuasion in political discourse. But those of that view must find another homeland. From its earliest history, Australian politics has regularly included insult and emotion, calumny and invective, in its armoury of persuasion. They are part and parcel of the struggle of ideas.[21]

[20] [2004] HCA 25; (2004) 220 CLR 1, 78 [197] (McHugh J)
[21] [2004] HCA 25; (2004) 220 CLR 1, 91 [239] (McHugh J)