

This joint submission is prepared on behalf of the Australian Christian Lobby, FamilyVoice Australia, and the Wilberforce Foundation. All three organisations have strong records of submissions, political lobbying and public engagement around human rights and freedoms issues at a Federal and State level in Australia.

This report focuses on several human rights issues:

- a) Australia's Constitutional, Legislative, and Institutional Framework of human rights.
- b) The Australian Human Rights Commission.
- c) Equality and Non-Discrimination
- d) Freedom of Association, Freedom of Conscience, and Freedom of Speech
- e) Rule of Law
- f) Gender Equality and Violence Against Women
- g) Surrogacy
- h) Protection of Family and Marriage
- i) Adoption
- j) Refugees and Asylum Seekers

Constitutional, Legislative and Institutional Framework

1. Australia is one of the world's oldest and most stable democracies. Historically, it has had a strong record of protecting and advancing fundamental human rights. This is in large part a result of its constitutionally guaranteed:
 - i. Free and independent judiciary;¹
 - ii. Separation of powers, which the High Court has repeatedly affirmed;²
 - iii. Trial by jury;³
 - iv. Freedom of political communication through all levels of government, which has been rigorously defended;⁴ and
 - v. Freedom from prescribed religion.⁵
2. As a common law jurisdiction, Australia also enjoys those freedoms arising in a common law framework. These are guaranteed insofar as the principle of legality requires that a common law freedom may only be abrogated by an express act of parliament.⁶
3. Although international covenants and human rights instruments which Australia has ratified are not necessarily enacted in domestic law, domestic courts take note of them in the

¹ Chapter III, *Commonwealth of Australian Constitution Act*.

² *Kable v The Director of Public Prosecutions for New South Wales* (1996) 189 CLR 51.

³ Section 80, *Commonwealth of Australian Constitution Act*.

⁴ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

⁵ Section 116, *Commonwealth of Australian Constitution Act*.

⁶ *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3, per Heydon J.

development of the common law.⁷ The legislature also formally considers these covenants since the January 2012 introduction of the *Human Rights (Parliamentary Scrutiny) Act 2011*, which requires the scrutiny of all federal legislation for its compatibility with seven core human rights treaties.

4. As a vigorous and open parliamentary democracy, relevant human rights issues are freely and openly agitated in parliamentary debate.
5. Australia has a vigorous and open free press which guarantees that human rights issues are brought forward in the national discourse.
6. Australia has an independent Human Rights Commission.
7. Australia is a jurisdiction with a well-developed system of parliamentary democracy, fundamental freedoms and human rights mechanisms. As such, Australia is well served by upholding the primacy of its institutions whilst looking to international treaties for guidance where needs arise.
8. Australia therefore has sound system of constitutional, legislative, legal and institutional protection for human rights. **Australia should not necessarily incorporate international human rights treaties to which it is a party into domestic law. Existing mechanisms for considering such treaties are sufficient in light of Australia's own domestic institutions and context.**

Australian Human Rights Commission

9. Australia has a Human Rights Commission, established as an independent statutory body.⁸
10. The Human Rights Commission has recently subjected itself to substantial criticism by reason of its own actions and clear appearances of political partiality.⁹ Such criticism is entirely proper within a parliamentary democracy.
11. In addition, the Australian government is currently undertaking substantial budgetary consolidation and savings measures due to economic pressures. No instrumentality can expect to be entirely immune from budget cuts, including the Human Rights Commission.
12. **Australia should ensure that the Human Rights Commission remains accountable to its obligation as a non-partisan, independent statutory body through free and robust democratic scrutiny.**

Equality and Non-Discrimination

13. Australia has anti-discrimination statutes in each state and territory, as well as federal racial discrimination, disability discrimination, sex discrimination and age discrimination acts. Human rights jurisprudence is therefore weighted strongly in favour of the right to be free from discrimination.

⁷ *Nicholson v Knaggs* [2009] VSC 64 - the Victorian Supreme Court took into account convention on the rights of persons with disabilities as part of developing the common law.

⁸ *Australian Human Rights Commission Act 1986*.

⁹ Chris Kenny (November 22, 2014), 'Human Rights Commission Chief Gillian Triggs Drowning in Evidence', *The Australian*, <http://www.theaustralian.com.au/national-affairs/human-rights-commission-chief-gillian-triggs-drowning-in-evidence/story-fn59niix-1227131308575>; Jared Owen and Pia Akerman (January 14, 2015), 'Senator Targets Flip Flop Gillian Triggs', *The Australian*, <http://www.theaustralian.com.au/national-affairs/immigration/senator-targets-flip-flop-gillian-triggs/story-fn9hm1gu-1227183948753>.

14. However, freedom from discrimination is only one of many protected rights and freedoms under the International Covenant on Civil and Political Rights (ICCPR), to which Australia is a signatory.
15. As a result of this emerging imbalance, Australian jurisprudence is moving towards an unjustly expansive view of the right to be free from discrimination, to the detriment of traditional freedoms. There is limited understanding within Australian law that not every differentiation of treatment amounts to unlawful discrimination.
16. The recent case of *Christian Youth Camps v Cobaw*,¹⁰ where the court understood the right to be free from discrimination as more expansive than the right to freedom of religion and conscience¹¹, is a retrograde step in this regard. It does not comprehend the reality that a differentiation of treatment in the good faith pursuit of a legitimate purpose, like the exercise of one's conscience or religious freedom, ought not to be classified as unlawful discrimination.¹²
17. The *Christian Youth Camps* view of the right to be free from discrimination is unjustly expansive, and at odds with international human rights instruments.
18. **Australia should reframe the definition of discrimination under its various State and Federal anti-discrimination acts, such that it does not unjustly infringe on fundamental rights and freedoms. The definition ought to expressly allow that not every differentiation of treatment is unlawful discrimination, particularly where the differentiation of treatment occurs in the good faith pursuit of fundamental rights and freedoms.**
19. This would be a substantially more robust position than the current system of narrow exemption clauses.
20. The appointment of a Freedom Commissioner within the Human Rights Commission is one positive step in this regard.
21. The Federal government recently directed the Australian Law Reform Commission to conduct a Freedoms Inquiry, another positive step in this regard.

Democratic Rights and Freedoms

Freedom of association

22. The Tasmanian *Reproductive Health (Access to Terminations) Act 2013* penalises any kind of protest within 150 metres of an abortion clinic, with large fines and jail for those who breach the law.¹³ This violates freedom of association and potentially Australia's constitutionally guaranteed freedom of political speech.

23. **Australia should move to ensure that peaceful protests near abortion clinics are unrestricted.**

Freedom of conscience

¹⁰ *Christian Youth Camps Ltd & Ors v Cobaw Community Health Services Ltd & Ors* [2014] VSCA 75.

¹¹ *Ibid* at 180-198 per Maxwell P.

¹² The Human Rights Committee recognises this distinction in paragraph 13 of the General Comment 18, "[N]ot every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."

¹³ Section 9.

24. Under the same law, any doctor with a conscientious objection to taking part in an abortion must direct a patient seeking an abortion to an abortion service provider, imposing sanctions on doctors who refuse to do so.¹⁴
25. The Victorian *Abortion Law Reform Act 2008* similarly requires doctors to refer women to doctors who will perform abortions.¹⁵
26. These laws directly violate the freedom of conscience of many doctors.
- 27. Australia should move to ensure that the integrity of the conscience of medical professionals is upheld and respected in law in all circumstances.**

Free Speech

28. The federal *Racial Discrimination Act* contains a section prohibiting speech which may “offend” or “insult” another person on the basis of race.¹⁶ This has resulted in the stifling of public discourse¹⁷ and directly inhibits freedom of political speech and freedom of speech generally on arbitrary and subjective grounds.
- 29. Australia should repeal section 18C of the *Racial Discrimination Act* on the ground that it substantially restricts free speech and open debate.**

Rule of Law: Counter-Terrorism

30. In 2014, Australia experienced the first act of terror on its own soil.¹⁸ The federal government is actively monitoring extremist groups within the context of an elevated terror alert level.
31. Australia therefore must be cognisant of the fact that certain groups are intent on derogating from or extinguishing the rights and freedoms of others, and the rights and freedoms of our society.
32. The protection of its citizenry is the fundamental role of any government.
- 33. Australia should therefore enact and enforce carefully considered counter-terrorism legislation and operations in circumscribed fact situations.**

Gender Equality and Violence Against Women

34. A major threat in Australia to the rights of women and to gender equality is the growing sex industry. The idea that women can be bought and sold to satisfy the desires of men is incompatible with a well-developed societal understanding of gender equality.
35. Prostituted women in Australia tend to enter the industry because of financial hardship. They suffer disproportionately high rates of violence, abuse, rape,¹⁹ and post-traumatic

¹⁴ Section 7.

¹⁵ Section 8.

¹⁶ Section 18C.

¹⁷ *Eatock v Bolt* [2011] FCA 1103.

¹⁸ Two people were killed by gunman Man Haron Monis in December 16, 2014. See ABC (December 16, 2014), ‘Sydney siege: Two hostages and gunman dead after heavily armed police storm Lindt cafe in Martin Place’, *abc.net.au*, <http://www.abc.net.au/news/2014-12-16/sydney-siege-gunman-two-hostages-dead/5969162>.

¹⁹ See e.g. Max Waltman (2011), ‘Sweden’s prohibition of purchase of sex: The law’s reasons, impact, and potential’, *Women’s Studies International Forum* 34 (2011) 449-474; and Basil Donovan (2010), *The Sex Industry in Western Australia: A Report to the Western Australian Government*, National Centre in HIV Epidemiology and Clinical Research, University of New South Wales, [http://www.nchecr.unsw.edu.au/nchecrweb.nsf/resources/SHPReport/\\$file/WASexReport.pdf](http://www.nchecr.unsw.edu.au/nchecrweb.nsf/resources/SHPReport/$file/WASexReport.pdf);

stress disorder,²⁰ as well as having higher rates of drug use.²¹ They have often come from a history of child abuse²² and often being prostitution work while still minors.

36. There is growing evidence that the sex industry is closely linked to human trafficking.²³ There are now reported cases of people being convicted of slavery as a result of the sex trade.²⁴
37. Australia is a destination for human trafficking, including sex trafficking.²⁵
38. There is increasing evidence that the Nordic Approach to prostitution law, pioneered in Sweden in 1999 and now enacted in Norway, Iceland, Northern Ireland and Canada, is the most effective system to combat human trafficking and the purchase of women's bodies through the sex industry.²⁶ The Nordic Approach criminalises the purchase of sex, while maintaining laws against procurement and exploitation of women for the purpose of prostitution. It is normally accompanied by support programmes to help prostituted women exit the industry.
39. In contrast, it is legal to purchase a woman's body for sex in all states and territories in Australia, although there are different legal regimes across the eight jurisdictions.
- 40. Australia should make progressive steps towards gender equality and the extinguishment of violence against women by enacting the Nordic Approach to prostitution law in all states and territories.**

Surrogacy

41. Despite being illegal, the use of commercial surrogacy is increasing in Australia.
42. Surrogacy entails the renting of a human body, specifically of a woman's womb, and often involves the exploitation of women who are vulnerable by reason of poverty.
43. Surrogacy also results in the forced loss of part or all of a child's biological heritage, denying the child's right to know and be cared for by his or her biological parents wherever possible. This violates a fundamental right contained in the *Convention on the Rights of the Child* (CRC).²⁷

²⁰ See Donovan, above n 15.

²¹ Ibid.

²² Waltman, above n 15, p 451.

²³ See Seo-Young Cho, Axel Dreher, Eric Neumayer (January 2012), *Does Legalized Prostitution Increase Human Trafficking?*, Courant Research Centre, University of Goettingen, Germany; Crime and Misconduct Commission (2004), *Regulating Prostitution: An Evaluation of the Prostitution Act 1999 (QLD)*;

²⁴ *The Queen v Tang* (2008) 237 CLR 1. [2008] HCA 39 (28 August 2008)-on appeal from the Victorian Court of Appeal; *Nantahkum v The Queen* (2013) 279 FLR 148-ACT; see also *Director of Public Prosecutions (Cth) v Xu* (2005) 154 A Crim R 173.

²⁵ Cho, above n 19; US Department of State (2012), *Trafficking in Persons Report*, <http://www.state.gov/documents/organization/192594.pdf>, p 73-75.

²⁶ Concerning the effectiveness of the Approach at combating prostitution in Sweden, see: European Parliament, Policy Department C – Citizen's Rights and Constitutional Affairs (2005), *National Legislation on Prostitution and the Trafficking in Women and Children*, http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2005/360488/IPOL-JOIN_ET%282005%29360488_EN.pdf, p 98; Ministry of Justice (2010), *Selected extracts of the Swedish government report SOU 2010:49: The Ban against the Purchase of Sexual Services. An evaluation 1999-2008*, <http://www.government.se/content/1/c6/15/14/88/0e51eb7f.pdf>, p 20; and on reduced trafficking, see: Ministry of Justice (2010), *Selected extracts of the Swedish government report SOU 2010:49*, p 29.

²⁷ Article 7.

44. There have been several high profile cases in Australia of serious and tragic abuses of children born by surrogacy,²⁸ and of surrogate babies being abandoned prior to being adopted by commissioning parents.²⁹

45. Australia should criminalise both domestic and international surrogacy arrangements entered into by its citizens and make substantial steps towards enforcing the ban.

Protection of Family and Marriage

46. Australia does not have laws permitting same-sex marriage.

47. Article 23 of the ICCPR states that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.

48. In any public policy affecting children the best interests of children should be the paramount consideration. This principle is articulated in article 3 of the CRC, as well as in domestic legislation.³⁰

49. There is now substantial evidence that children fare better when raised by a mother and a father, and the outcomes for children raised by same-sex parents are significantly worse than for those raised by opposite-sex parents.³¹

50. A growing number of testimonies of children raised by same-sex couples, who are now adults, attest to the pain and harm that growing up without either their mother or their father caused.³²

51. Therefore, Australia should not introduce same-sex marriage laws in order to preserve the natural family and uphold to the fullest extent possible the rights of children.

52. Additionally, in jurisdictions where same-sex marriage has been legislated, a restriction on fundamental freedoms has followed. Most apparently, article 18 of the ICCPR is violated when religious organisations, businesses, and individuals are prevented from operating or speaking in accordance with their beliefs about marriage.

53. Same-sex marriage laws have clashed with the religious freedom of business owners and service providers around the world, including ministers,³³ civil celebrants,³⁴ venue owners,³⁵ bakers,³⁶ photographers,³⁷ and florists.³⁸

²⁸ See Jacob Kagi (24 September 2014), ‘Baby Gammy case: Father David Farnell reported to child protection authorities by niece, Colin Barnett reveals’, *ABC*, <http://www.abc.net.au/news/2014-09-24/calls-for-child-protection-minister-to-quit-over-baby-gammy-case/5764950>; Nick Ralston (30 June 2013), ‘Named: the Australian paedophile jailed for 40 years’, *Sydney Morning Herald*, <http://www.smh.com.au/national/named-the-australian-paedophile-jailed-for-40-years-20130630-2p5da.html>.

²⁹ See Kagi, above n 22; Samantha Hawley and Suzanne Smith (9 October 2014), ‘Australian High Commission knew of disturbing Indian surrogacy case, Chief Justice of Family Court says’, *ABC*, <http://www.abc.net.au/news/2014-10-08/high-commission-knew-of-surrogacy-case-in-india/5799438>;

³⁰ See e.g. ss 60CA, 65AA, 67V, and 67L of the *Family Law Act 1975*.

³¹ See D Paul Sullins (2015), *Emotional Problems among Children with Same-sex Parents: Difference by Definition*, *British Journal of Education, Society and Behavioural Science* 7(2):99-120; Mark Regnerus (2012), ‘How different are the adult children of parents who have same-sex relationships? Findings from the New Family Structures Study’, *Social Science Research*, 41 (2012) 752-770.

³² See Heather Barwick (March 17, 2015), ‘Dear Gay Community: Your Kids Are Hurting’, *The Federalist*, <http://thefederalist.com/2015/03/17/dear-gay-community-your-kids-are-hurting/>. See also the *amicus curiae* briefs filed by Katy Faust, Robert Oscar Lopez, BN Klein, and Dawn Stefanowicz in the US federal court case *De Leon v Perry*, No 5:13-cv-982.

³³ Jeff Jacoby (October 26, 2014), ‘Idaho ministers shouldn’t be forced to officiate gay marriages’, *Boston Globe*, <http://www.bostonglobe.com/opinion/2014/10/25/idaho-ministers-shouldn-forced-officiate-gaymarriages/Jz4egIBIQwTzZOD0553zRJ/story.html>.

54. Therefore, Australia should not introduce same-sex marriage laws in order to protect the basic fundamental rights of freedom of conscience and religion.

Adoption

55. Adoption by same-sex couples is legal in three Australian states and the Australian Capital Territory. Two states are currently considering amending their adoption laws to allow same-sex couples to adopt.

56. As discussed above, the best interests of children should be of primary concern in public policy. The best interests of children are protected by ensuring they have the right, wherever possible, to be raised by a mother and father.³⁹

57. Therefore, Australia should roll back laws in states and territories permitting same-sex adoption, in order to fulfil its obligations to uphold the best interests of children. Australia should ensure that the adoptive environment into which children are placed mirrors as closely as possible the natural family.

Refugees and Asylum Seekers

58. Australia ought to be congratulated on its robust border protection policies, which have contributed to bringing to a close the gross human rights abuses and deaths at sea occurring under more open policies.

59. Under the current government, the number of irregular maritime arrivals has been dramatically reduced, with just one since the beginning of 2014.⁴⁰

60. The corresponding number of deaths at sea has also been dramatically reduced, from hundreds per year to just one since the start of 2014.⁴¹

61. By the end of January 2015, the number of children in detention had been reduced from nearly 2000 in July 2013 to 211.⁴² The overall immigration detention population has dropped by more than half over a similar period.⁴³

³⁴ BBC (January 15, 2013), 'Christian discrimination claims heard by Europe court', <http://www.bbc.com/news/uk-19467554>.

³⁵ Alliance Defending Freedom (October 2, 2014), 'NY farmers to court: honor our religious freedom', <http://www.adfmedia.org/News/PRDetail/9332>.

³⁶ See CBS Denver (May 30, 2014), 'Bakery Will Stop Making Wedding Cakes After Losing Discrimination Case', <http://denver.cbslocal.com/2014/05/30/bakery-will-stop-making-wedding-cakes-after-losing-discrimination-case/>.

³⁷ Adam Liptak (November 18, 2013), 'Weighing Free Speech in Refusal to Photograph Lesbian Couple's Ceremony', New York Times, <http://www.nytimes.com/2013/11/19/us/weighing-free-speech-in-refusal-to-photograph-ceremony.html>.

³⁸ Lornet Turnbull (April 9, 2013), 'State sues florist over refusing service for gay wedding', The Seattle Times, http://seattletimes.com/html/localnews/2020743969_floristlawsuitxml.html.

³⁹ Above n 27.

⁴⁰ See ABC (5 February 2015), 'Operation Sovereign Borders: log of boat arrivals and other asylum seeker incidents', ABC, <http://www.abc.net.au/news/2013-10-25/log-of-boat-arrivals-and-other-asylum-seeker-incidents/5014496>.

⁴¹ International Organization for Migration (2014), *Fatal Journeys: Tracking Lives Lost during Migration*, http://publications.iom.int/bookstore/free/FatalJourneys_CountingtheUncounted.pdf, p 190; and associated media report by Stefanie Balogh (October 14, 2014), 'Dramatic Decrease in Asylum-Seeker Deaths', The Australian, <http://www.theaustralian.com.au/national-affairs/immigration/dramatic-decrease-in-asylumseeker-deaths/story-fn9hm1gu-1227089412935>

⁴² Department of Immigration and Border Protection (31 January 2015), *Immigration Detention and Community Statistics Summary*, <https://www.immi.gov.au/About/Documents/detention/immigration-detention-statistics-jan2015.pdf>, p 8.

62. Australia should maintain its current strong border protection policies in order to prevent victimisation through people smuggling, deaths at sea, and the perpetuation of mandatory detention, especially of children.

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