

## Submission on Inquiry into Freedom of Religion

### RELIGIOUS FREEDOM REVIEW PANEL

Department of Prime Minister and Cabinet

[Introductory comments deleted]

1. Article 18 of the *Universal Declaration of Human Rights* ('UDHR') and *International Covenant on Civil and Political Rights* ('ICCPR') establish the right to hold both religious and non-religious belief. This right is absolute. However, the right to exercise ('manifest') that belief is subject to limitation by the state to preserve public health, safety, morals (see below) and the rights of others.
2. There is no specific legislative prohibition from the adoption or practice of religious beliefs according to law in Australia. No specific legislative 'protection' of religion in the form of exceptions is required with the legislation of same-sex marriage. Nevertheless, some government policies and practices, as well as overbroad exemptions from anti-discrimination law based on particular religious beliefs, make Australia in effect what Max Wallace calls a 'soft theocracy'.<sup>1</sup> Religion receives government-sanctioned privilege and exerts unwanted religious influence on non-believers and the non-religious, compromising the separation of religion and state required in a secular liberal democracy.
3. Ministers of religion should be able to refuse to solemnise a marriage or to impose additional conditions on solemnisation, without breaching any obligation established in part IV of the Marriage Act, or the prohibitions against discrimination on the basis of sexual orientation, gender identity, intersex status or marital or relationship status contained in the Federal Sex Discrimination Act. Marriage under the Marriage Act would still be available to couples by civil marriage celebrants (or by ministers of religion who choose to solemnise same-sex marriages).
4. It is unjustifiable discrimination for a religious institution or minister to refuse to solemnise a marriage based on personal conscientious objection unrelated to the manifestation of his or her particular religion.
5. Civil celebrants should not be permitted to discriminate on the basis of religious belief. A civil celebrant only performs the civil marriage process, and is understood as a 'public authority' for the purposes of human rights obligations. Prohibiting discrimination on the basis of conscience in solemnising a same-sex marriage would be a permissible and proportionate limitation on the right to freedom of thought, conscience and religion.
6. There should be no exemption for religious schools from discrimination in employment or school enrolment on the basis of transsexual, transgender and intersex applicants, even if the school does not receive public funding. Such exemption means institutions violate the principle that they should award positions on the basis of ability to do the job, maintains divisiveness and oppression of those with different religious beliefs – at times with public money – and encourages divisiveness and prejudice in schools and workplaces.
7. A "religious freedom" objection to outlawing such discrimination is that those of minority sexual orientations may seek to undermine the religious ethos of the establishment. It is contended that
  - a) employees may be required by an employer to refrain from criticising religious doctrine on sexuality, but they should not be banned, or required to disown their sexual orientation; and
  - b) individuals should be free to express doctrinal objections to sexual practice, but in schools the

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<sup>1</sup> ... 'where church and government purposes coincide to garnishee taxpayers' money and resources, structurally through tax exemptions and functionally through grants and privileges': Wallace, Max (2010) *Realising Secularism: Australia and New Zealand* Australia and New Zealand Secular Association, 72. ; *Soft Theocracy*, presentation at the Australian Humanist Convention, Brisbane, 29 May 2016. Posted on YouTube 30 September 2016.

state is entitled to require that the legal rights and dignity of all students, and the reality of social diversity, should be fostered.

### Terms used in this Submission.

**‘Belief Freedoms’** means freedoms both of and from religion, as established by Article 18 of both the UDHR and ICCPR.

**‘Personal beliefs’** includes personal existential and prescriptive beliefs. *Personal existential beliefs* constitute a worldview or philosophy, secular or religious, about the nature of existence, and our individual relationship to the natural, social and political environment. *Personal prescriptive beliefs* involve values that follow from these personal existential beliefs, and influence personal behaviour.

**‘Personal morality’**: Personal existential and prescriptive beliefs give rise to personal morality: the principles which guide individuals in their personal activities.

**‘Public Morality’**: establishes the requirements for citizenship of the state, and shapes how we relate to the state and society in general. It is concerned with protecting belief freedoms along with the public interest (e.g. public welfare, autonomy, equality, the rule of law and protection of the rights of all). This means that, sometimes, how we manifest our religious or other personal beliefs may be restricted by the public interest. In other words, the right to freedom *from* the influence of religion or belief is just as strong as the right to freedom *of* religion or belief.

## BACKGROUND TO SUBMISSION

**Article 18 of the Universal Declaration of Human Rights (‘UDHR’) and International Covenant on Civil and Political Rights (‘ICCPR’) establish the right to both religious and non-religious beliefs.**

There is clear evidence that Article 18 in both cases applies to non-religious beliefs.<sup>2</sup>

The UN *General Comment 22* on Article 18 UDHR (par 2) states that it applies to ‘nontheistic and atheistic beliefs, as well as the right not to profess any religion or belief.’ The terms ‘belief’ and ‘religion’ are to be ‘broadly construed’. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.<sup>3</sup> Hence the conclusion that ‘religion or belief’ refers to all personal beliefs as described above.

There is an *absolute* right to ‘hold opinions without interference’ and not to be forced to join an association. There is a *limited* right to express and manifest ideas, as endorsed by the rights to speech, expression and association.<sup>4</sup> As it stands, with their specific references to conscience and religion, Article 18 of both the UDHR and ICCPR are commonly taken to apply only to religion, or at best confuses the nature of ‘belief’ and imply that religion warrants some sort of priority.

As Australia has ratified both the UDHR and ICCPR, the adoption of Article 18, and indeed the adoption of a Bill of Rights for Australia enacting the ICCPR is warranted

<sup>2</sup> See Wallace, Meg *Freedom From Religion: Rethinking Article 18*, (2015) Cilento Publishing, Sydney, (2015), 128: [7.15].

<sup>3</sup> The European Court of Human Rights, considering the similarly worded Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, (1953) stated that ‘it is also a precious asset for atheists, agnostics, sceptics and the unconcerned.’ *Kokkinakis v Greece*, 25 May 1993, Series A no. 260-A, 431.

<sup>4</sup> These rights are set out in Arts. 19, 20, and limited in Art. 29 UDHR. They are set out with limitations in Arts 19-22 ICCPR.

### *Article 18 is often misrepresented*

Article 18 of both the UDHR and ICCPR are either misunderstood or misrepresented as providing special status to religion by permitting unrestrained practice of conscience and privileging religious belief and practice. This has been clearly refuted by the United Nations General Assembly and the UN Human Rights Committee.

Article 18 has been used to promote sectarian interests, influence and power, unquestioning access to government resources and policy, and to demand associated immunity from the general law. Its limitation provision is overlooked to a greater or lesser degree, so it has become a pretext for demanding privileged treatment, enhancing the economic, social and political influence of religion.

Indeed, those citizens of a secular, pluralist liberal democracy should not expect that society should cater unreservedly to their different personal values (this is indeed not feasible). Rather, they should seek to find a fair balance between the rights of all, so that no-one's rights are unfairly restricted.

If, for example, they draw exception to the social expectations of their trade, such as baking wedding cakes for legally accepted weddings they disapprove of, they have the options of baking cakes for other purposes, or adopting another trade (related to baking or otherwise) instead. They may even agree to bake such cakes, and wish the couple well. Similarly, those who do not believe in the sanctity of religious activities, should respect the interests of those who do.

The concern for religious people that children be educated to obey their doctrines, is recognised, but, as society is pluralist and inclusive of many 'faiths', discrimination laws should not be used to cause division and hatred, but children encouraged to face the reality of difference, and learn to work towards the welfare of all, and the universal exercise of equality before the law.

There is no question we need belief rights, with guidelines, resolutions and charters of freedom that apply to religious and non-religious self-determination equally. But when given the authority of internationally recognised and enforceable rights and obligations, those rights should be expressed as a function of maximising freedom for all ideas, speech, assembly and association. The rights to freedom of speech, assembly and association are subject to similar limitations to Article 18 rights.

### **Limitation of the belief rights**

It is clear that to ensure that political rights are available equally to everyone, it is essential that the expression of one's beliefs do not impinge on the rights or welfare of others. Individuals have as much right to freedom from the influence of others' personal beliefs as they have a right to hold and manifest their own personal beliefs.

It follows that belief freedoms are intended to ensure that no-one imposes their existential or prescriptive beliefs on others. It ensures both freedom *of*, and freedom *from*, 'religion or belief'. This can only happen through separation of religion or other personal beliefs and the state.

**Australian law adequately protects the right to hold and manifest a religious belief, but does not adequately protect the non-religious from discrimination on the basis of their beliefs. Proposed exemptions to anti-discrimination law based on religious belief are overbroad, and should be restricted to conduct directly related to protecting activity directly associated with the 'worship, observance, practice and teaching' of personal belief that does not impinge on the rights of others.**

There are no laws explicitly banning religious belief or practice in Australia, nor are there laws prohibiting the holding or practicing of personal beliefs, apostasy or blasphemy. The practice of one's beliefs is subject 'only' to the exception of necessity appropriate for a democratic nation. There are also no laws explicitly mandating the adoption or practice of a particular personal belief.

The Law Council of Australia advised in 2000 that it has not identified ‘any laws imposing any specific restriction on the freedom of religion’ It concluded that ‘Generally speaking, Australians are not constrained in the exercise of religious freedom.’<sup>5</sup> This is still the case.

### ***Anti-Discrimination Legislation***

Anti-discrimination law across Australia allows discrimination on the ground of religion in certain cases.

By permitting discrimination for the purpose of, for example, not ‘offending the sensibilities’ of religious practitioners’ or of maintaining a religious ‘ethos’ allowing the balance to be skewed in favour of religion, government is often entangled with religion. The prioritising of the integrity of religious practice, ‘ethos’ or ‘sensibilities’ such as in ‘faith-based’ schools, hospitals and charities, rests on the conceptually flawed privileging of religious freedom itself. It overlooks the necessary dependence of religious freedom on non-discrimination. ‘Positive discrimination’ towards certain religious groups on the ground of upholding their religious ‘freedom’ should apply solely to compensate where religious freedom is otherwise necessarily compromised.<sup>5</sup>

Wojciech Sadurski explains this point.<sup>6</sup> Neutrality in relation to belief rights means the maintenance of ‘normality’. ‘Normality’ is described as a base-line set of circumstances determined by an impartial government as a normal state of affairs ‘by reference to which all departures from the baseline may be judged as non-neutral’.

In ‘normal’ circumstances, people are not prevented by the state from attending church or otherwise practicing their beliefs, and the State is not required to actively ensure everyone has access to their particular religious requirements. The state may deprive a person of the exercise of his or her beliefs through, e.g. limits to freedom in the military or prisons, and thus may be expected to compensate for that loss of (normal) freedom.<sup>7</sup> However, children are not deprived of the opportunity for having or practising religious belief by going to school, as they do not suffer a loss of normal freedom. Thus, the state should not be expected to compensate them by provision of religious instruction and observance in schools.<sup>8</sup> Based on the understanding that belief-based services should not be funded by the state, ‘compensation’ here does not *necessitate* state-funded facilities or services, but rather the liberty to access religious services where they can be independently funded and made available.

Those that argue, as did the Community and Family Rights Council, that Christians have come under increasing persecution from bodies such as ‘abortionists, porn merchants, sex liberationists, radical feminists, homo-sexuals (*sic*), alternative educationists, and left wing (*sic*) radicals’<sup>9</sup> ignore the fact that they themselves are not required to participate in such unwanted activity, and that others have the right to agitate for such activities. They are not being persecuted, as the right to participate in their own beliefs is not being questioned, and they should grant the same rights to others.

### ***Alleged persecution through provision of services***

We point to the example of those in the business of offering goods and services to the public who wish to refuse services for personal conscience reasons. We submit that all who act according to the law should be treated with equal consideration. We note the decision of the Northern Ireland Court of

<sup>5</sup> See, e.g., Eoin Daly, Tom Hickey, 2011, *Religious freedom and the ‘right to discriminate’ in the school admissions context: a neo-republican critique* Society of Legal Scholars, Blackwell Publishing, Oxford.

<sup>6</sup> Sadurski, Wojciech (1990) ‘Neutrality of law towards religion’ 12 *Sydney Law Review* 433.

<sup>7</sup> Ibid, 451.

<sup>8</sup> Ibid, 454.

<sup>9</sup> Joint Standing Committee on Foreign Affairs and Trade, *Conviction with Compassion* [https://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=jfadt/religion/relindex.htm](https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=jfadt/religion/relindex.htm), 5.13

Appeal which rejected the refusal of a baker to produce a cake with the slogan ‘Support Gay Marriage’.<sup>10</sup>

The court determined that the provisions prohibiting discrimination in the provision of services on the ground of religion are necessary in a democratic society and are a proportionate means of achieving the legitimate aim of protecting the right and freedom to access services. To do otherwise would be to allow religious belief to determine the law. The bakers can hold their genuine and deeply held religious beliefs and to manifest them, but this must be done in accordance with the law. That includes not manifesting their religious views in the commercial sphere if the manner of doing so is contrary to the rights of others.

The Court held that the bakers are not deprived of their right to manifest their religion in their private life, nor of their right to free speech. But when it comes to their treatment of fellow human beings, they should respect the right of all individuals to equal recognition before the law. If you provide a forum for the public to express views and beliefs, you should not discriminate in the messages you carry on the grounds of (legal) religious or other personal life-stance.

Bakers are perfectly at liberty to refuse to fulfil an order for the cake with the pro-same sex-marriage message, the court said. But if they are to be non-discriminatory, they should also refuse one with a pro-opposite-sex marriage message too. They should either bake cakes with any religious, political, or other such message, or refrain from any such message at all.

**Entanglement of the state with religious interests means that government activities exert an unwanted religious influence on the non-religious.**

Worldwide, no nation has a true separation of religion and state:

[I]t is estimated that of the world’s nations there are about 10 theocratic states that mandate, prohibit, or interfere with the practice of alternative beliefs. Over 40 states have a specific religion officially established by government with varying toleration of others and, where relevant, these generally require the monarch, head of state or government to be of a given religion. There are at least 113 states (nominally secular or otherwise) without an established religion or belief, with varying state accommodation of religion, such as Australia the US, France and Turkey). Some states show varying degrees of hostility to religion or belief, or subject particular beliefs to state control or suppression. State-belief relationships are hard to categorise, as they are volatile, changing over time, as witnessed by the recent Middle East political disturbances, so these figures are generalisations only.<sup>11</sup>

This is a misuse of the right to belief freedom. It ignores the universally declared position that the freedom to practise one’s beliefs does not apply when it encroaches on the rights of others, or when limits are considered necessary for public health, to secure due recognition and respect for the rights and freedoms of others and to meet the just requirements of morality, public order and the general welfare in a democratic society.<sup>12</sup>

### ***An ‘overlapping political consensus’ rather than theocracy***

The theory of John Rawls is offered as the best way for the equal opportunity to practise a religion or

<sup>10</sup> *Gareth Lee v Colin McArthur, Karen McArthur and Ashers Baking Company Limited* (24/10/16). See [http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2016/%5b2016%5d%20NICA%2039/j\\_j\\_MO\\_R10086Final.htm](http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2016/%5b2016%5d%20NICA%2039/j_j_MO_R10086Final.htm) .

<sup>11</sup> Wallace, Meg, *Freedom From Religion: Rethinking Article 18*, (2015) Cilento Publishing, Sydney, (2015), 113.

<sup>12</sup> Article 29 UDHR; Article 18 ICCPR.

belief by everyone in a pluralist society. This involves secular liberal democracy, where all beliefs are valued equally, and government and religion are separate. Government based on a common existential outlook is impracticable. Rather, equal human rights for all are maximised by society based on an overlapping *political* consensus through the process of liberal democracy exercising human rights and the rule of law.<sup>13</sup>

Belief freedoms are intended to ensure that no-one imposes their existential or prescriptive beliefs on others. It ensures both freedom *of*, and freedom *from*, 'religion or belief'. This can only happen through separation of religion or belief and the state.

**Government funding of, and entanglement with, religious institutions and practices compromises the separation of religion and state required in a secular liberal democracy.**

As stated above, in Australia, the separation of government and religion is compromised. We point to the still-relevant view of the Human Rights and Equal Opportunity Commission Report of 1988 that, though there is freedom to practice one's personal beliefs,

As a matter of history and convention, however, woven into the fabric of Australian life and culture is an underlying thread which creates an impression that, in substance, Australia's national religion is Christianity, albeit of a vaguely non-denominational nature. Many areas of civic life are affected. Exclusively evoking Christian symbolism on civic occasions potentially marginalises a significant number of Australians.<sup>14</sup>

The presumption that Article 18 rights give religion special status results in interweaving of government with religious institutions and practices in other ways. This approach includes the influence of religious interest groups on government policy and law-making, adoption of faith-based law, and the imposition of religious practices and teachings in non-religious environments (such as government proceedings and public schools), and pressure for the refusal of providing employment and general services based on religious belief. Some specific areas of religious-state entanglement are as follows:

***Tax exemptions and government funding***

Encroachment of religious beliefs on the non-religious results from tax exemptions and funding of religious and similar institutions and/or activities. State funding of purely charitable activities by religious bodies on a purely secular basis is of no concern, but government grants of substantial financial favours based simply on their pursuit of religious interests, is.

For example, it is claimed that tens and possibly hundreds of millions of dollars of taxpayers' money in government grants to religious organisations, perhaps the most infamous being the provision of funding and facilities for the recurrent international World Youth Day gatherings held by the Catholic Church in different countries. It is reported, that the Australian Commonwealth Government contributed \$55 million for the Catholic Church's week-long 'World Youth Day' Rally ('WYD') in 2008 as well as formally associating itself with the activity. The NSW Government may have chipped in an extra \$100 million (the Government would not reveal the true amount). The Commonwealth committed \$35 million towards security and visa costs, with an additional 'pledge of \$20 million to help relocate racehorses from Randwick'<sup>15</sup>. This was not considered a breach of Article

<sup>13</sup> See, e.g. Rawls, John (2003) *Justice as Fairness: a Restatement*, Cambridge, Belknap Press.

<sup>14</sup> Human Rights and Equal Opportunity Commission, *Article 18 Freedom of Religion and Belief* Commonwealth of Australia 1998 Section 4.3 p.92  
[https://www.humanrights.gov.au/sites/default/files/content/pdf/human\\_rights/religion/article\\_18\\_religious\\_freedom.pdf](https://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/religion/article_18_religious_freedom.pdf)

<sup>15</sup> Morris, Linda (2007) 'Taxpayers' \$95m bill for World Youth Day' *The Sydney Morning Herald*, 16/11/07) <http://www.smh.com.au/news/national/taxpayers-95m-bill-for-world-youthday/>.

18 ICCPR despite the resulting adverse cost to both taxpayers and the racing industry.<sup>16</sup>

Federal and State governments allow blanket exemption from taxation from all major forms of church income. The ‘advancement of religion’ is considered in itself a charitable purpose, automatically making the ‘advancement of religion’ (religion being based on belief in the supernatural) charities.<sup>17</sup>

The total cost of concessions to registered religious organisations in Australia was estimated to exceed \$31 billion in 2009, money that would have otherwise gone into consolidated revenue.<sup>18</sup> To what extent this figure includes non-religious activity is unknown. The exemption of religious institutions from the same financial reporting requirements that apply to other charitable organisations makes accuracy difficult. It also means they are not accountable for the extent and use of their wealth.

Governments have outsourced and funded many of their welfare responsibilities to Church-based agencies that may use their work as a ‘religious mission’, seeking to influence the recipients of their services. These welfare agencies are also often granted exemption from anti-discrimination legislation in hiring staff and conditions of work.

It is impossible to accurately estimate church wealth from its disparate sources (including donations, bequests, government funding, foregone taxes, property, artworks, buildings and income).<sup>19</sup> Governments demand varying degrees of financial accountability on the part of religious bodies, exempting them either partially or fully from reporting, so the extent of their wealth and how it is spent is not readily available. Some money purportedly acquired for specified charitable activities may be sent overseas e.g. to the Vatican for dispersal through secretive channels, or even to religious extremists fighting sectarian wars.<sup>20</sup>

### *Commercialisation of charity*

The ‘commercialisation’ of charitable activities by religious or other groups has led to an industry with an increasingly high management sector, with well-subsidised personnel and property, and a corresponding increase in political and social influence. This gives them a commercial edge over non-religious enterprises. It has been reported, for example, that in Australia: ‘The five big churches had revenue of more than \$21.7 billion in 1994’.<sup>21</sup> The Sydney Catholic Archdiocese has a net worth of \$1.24 billion in 2014.<sup>22</sup>

<sup>16</sup> Article 26 ICCPR (prohibition of discrimination on the ground of, inter alia, religion).

<sup>17</sup> Section 23(e), *Income Tax Assessment Act 1936*. The High Court has held that religion involves belief in the supernatural: *Church of the New Faith v. Commissioner of Pay-roll Tax* (Vic), (1983), 154 CLR 120. See also Australian Government Tax Office website, criteria for tax exemption.

<sup>18</sup> Perkins John and Gomez, Frank (2009) ‘Taxes and Subsidies: the Cost of “Advancing Religion”’, *Australian Humanist* No. 93 Autumn 6-8, see <http://home.alphalink.com.au/~jperkins/TaxesAndSubsidies.htm>.

<sup>19</sup> Ferguson, Adele (2005) ‘Charity Inc.’ *Business Review Weekly* (Sydney), 24-30 March, 45 The income from non-charity activity (including commercial properties and private enterprises such as hospitals and nursing homes), would constitute a substantial proportion of this income and thus of public revenue foregone in taxes.

<sup>20</sup> For example see Wallace, Max (2007) *The Purple Economy: Supernatural Charities, Tax and the State* Melbourne, Australian National Secular Association regarding the Vatican and wealth. Examples of charities accused of ties to terrorism by the US in 2007 can be found at [http://en.wikipedia.org/wiki/List\\_of\\_charities\\_accused\\_of\\_ties\\_to\\_terrorism](http://en.wikipedia.org/wiki/List_of_charities_accused_of_ties_to_terrorism).

<sup>21</sup> Ferguson, Adele ‘Charity Inc.’ *Business Review Weekly* (Sydney), 24-30 March, 45.

<sup>22</sup> Testimony by Cardinal George Pell to the Royal Commission on Institutional Child Abuse: the funds are ‘ultimately controlled by – owned by, if you like – the archbishop of the day’: Sydney Morning Herald, March 25, 2014.

### *Prayers in Parliament and religious sponsorship of government activities.*

Prayers are said in Parliament and other government proceeding, and the Parliamentary and Judicial year are commenced with church services at which judges and members of Parliament accept exhortations to apply their religious beliefs to their administration of government business. Ministers have officially associated themselves with religious activities of many denominations by supporting religious conferences and gatherings, and offering financial assistance for these and other activities.

### *Schools*

According to the *Sydney Morning Herald* in 2016, more than 150 private schools [most of which are religious] ‘are being over-funded by hundreds of millions of taxpayer dollars each year at the expense of other public schools.’<sup>23</sup> In addition is schools of funds from religious institutions accrued from tax exemptions. This results in a divisive and unequal education system.

The federal government has devoted up to \$700 million for programs providing religious chaplains in public schools, mainly by Christian organisations. Some State governments either fund or mandate religious instructions in schools. Taxpayer funding also goes to religious instruction in government schools. We submit that those who do not hold religious beliefs should not be paying for the propagation of religious belief.

All pupils should have a statutory right to education in a secular school environment, except for Queensland, without discrimination regarding personal belief. There should be no formal role for religious institutions in government schools, and schools should not be able to discriminate against staff on the basis of religion or belief, sexual orientation or any other protected characteristics, where their belief is not an inherent part of their work. Government policy should be aimed at a truly inclusive secular education system. No publicly funded school should be statutorily permitted to promote a particular religious position or seek to inculcate pupils into a particular faith.

Religion should not be prioritised over the teaching of non-religious worldviews, and secular philosophical approaches, and should be part of a broad range of religious and non-religious worldviews, possibly including basic philosophy. No students should be excluded from consideration in all aspects of the school day by segregation on the basis of belief.

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<sup>23</sup> *Sydney Morning Herald* October 1 2016 see [here](#).