

23 January 2018

To the Expert Panel,
Review of Religious Freedom in Australia,
Department of Premier and Cabinet,
PO Box 6500
Canberra ACT 2600,

**Submission by the Public Affairs Commission of the Anglican Church of Australia to
Expert Panel Review on Freedom of Religion in Australia**

Dear Members of the Panel,

Thank you for the opportunity to make this submission in relation to the Terms of Reference for the Expert Panel reviewing Religious Freedom in Australia announced on 14 December 2017. We understand the Terms of Reference are to:

- consider the intersections between the enjoyment of the freedom of religion and other human rights,
- have regard to any previous or ongoing reviews or inquiries that it considers relevant,
- consult as widely as it considers necessary.

Background

1. This submission is made by the Public Affairs Commission (PAC) of the Anglican Church of Australia (ACA). The PAC is a body set up, amongst other matters, to respond to aspects of public affairs as referred by the Primate, Standing Committee or General Synod or initiated by the PAC. The views expressed in this submission are only the views of the PAC and should not be taken to reflect the opinion of the ACA, the Primate, the Standing Committee or any of the Dioceses. We do, however, refer you in paragraphs 2 to 5 to the submissions of the Standing Committee and a resolution of the General Synod in relation to religious freedom matters. The General Synod is the ACA's "federal parliament" and main decision-making body, made up of lay and ordained representatives from the 23 Australian Anglican Dioceses and meets every 3 or 4 years. The Standing Committee handles the affairs of General Synod in between Synod meetings.
2. In 2008, the Standing Committee of the ACA made a submission in response to the Australian Human Rights Commission's Discussion Paper "Freedom of Religion and Belief in the 21st Century". A copy of the submission is attached (Attachment A). The submission supported the enactment of a Religious Freedom Act along the lines of the religious freedom provisions in the International Covenant on Civil and Political Rights (ICCPR). It also supported making it unlawful to discriminate on the grounds

of religion provided there were exemptions for bodies set up for religious purposes in the terms recommended in that submission.

3. In May 2009, the Standing Committee of the ACA made a submission to the National Human Rights Consultation supporting the protection of human rights as outlined in the ICCPR and the International Covenant on Economic, Cultural and Social Rights (ICECSR), including the right to religious freedom. A copy of this submission is attached (Attachment B).
4. On 1 July 2014, the following resolution was passed by the General Synod of the ACA:

Human Rights – moved by Bishop Robert Forsyth, seconded by Dr Karin Sowada
That the General Synod:

- (1) Affirms the importance of freedom of religion and its manifestation in the related freedoms of speech, association and conscience for a healthy and mature society; and
 - (2) Declaring its opinion that such freedoms are at risk of being undermined in Australian society due to a focus on other, sometimes competing, rights, calls on the Federal, State and Territory governments to take steps to ensure that the freedoms of religion, speech, association and conscience are protected, strengthened and promoted; and
 - (3) Calls on the Federal Government to continue its advocacy of such freedoms internationally through diplomatic channels and other appropriate instruments of global engagement; and
 - (4) Respectfully request the Primate to convey the above terms of this resolution to the Prime Minister, the Premiers of the States, the Chief Ministers of the Territories and their respective Attorneys General.
5. The submissions referred to above discuss some of the theological motivations and reasons for our support for human rights, including religious freedom. We have also seen the submission from the National Council of Churches in Australia which expands on these aspects. These will not need to be addressed again here.

Intersections between freedom of religion and other human rights

6. The submissions above briefly touched on the intersection of freedom of religion with other human rights in the context of the recommendations for defining religious freedom and the extent of the exemptions from anti-discrimination laws. The submission to the National Human Rights Consultation emphasised the importance and protection of all such human rights, including religious freedom, and challenged any “hierarchy of rights” which might value other rights above religious freedom. A similar concern is also reflected in the Synod Resolution referred to above.
7. There are often inappropriate pressures to reduce religious freedom to a private sphere or to matters of belief and conscience, ritual or internal religious organisation. Religious freedom as a recognised human right, however, includes the freedom to manifest and act out beliefs in the public sphere and in public discourse. Religious

vocation and practice is a way of life and thus extends to all aspects of life, including the political, social and the economic aspects. For some, especially Indigenous religions, it includes the need to protect and maintain sacred areas. In the case of an organisation set up for religious purposes, where the whole enterprise may be designed to advance the religious mission, issues of religious practice and vocation apply not only to the work of ministers of religion but also to lay members of staff. Religious freedom should not be artificially confined to a narrow concept.

8. On the other hand, religious freedom has never been absolute. Article 18(3) of the ICCPR allows for “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.” Freedom from discrimination (such as on the grounds of gender, sexuality, religion and the like) is also a fundamental human right. These human rights and freedoms should not be characterised as “competing rights” to religious freedom but as similar types of basic rights, all of which need to be protected as much as possible. In situations where they may conflict, the task may be to work out exemptions based on who is likely to be impacted most severely in each type of situation and to assess how needs can be accommodated in ways which minimise interferences with human rights. Distinctions may need to be drawn between an actual infringement of fundamental rights on the one hand and matters which may just cause some offence or upset on the other.
9. It is difficult to make specific recommendations given the generality of the terms of reference and the multiplicity of situations that could impact on religious freedom and where that may come into conflict with other rights. It is also important not to define religious freedom or draft legislation or exemptions based only on the needs and issues of religions familiar to most people. It would be vital to cover the needs for religious freedom for Aboriginal and Torres Strait Islander Peoples. We would welcome the opportunity to make more detailed submissions on particular proposals.
10. Further, while religious freedom is an important right that needs protection, the PAC notes that currently there is no such protection for many other human rights. There is much to be said for a coordinated legal approach to human rights protection rather than singling out religious freedom. As suggested in the ACA submission to the National Human Rights Consultation, the protection of the rights and dignity of all people, especially the most vulnerable and marginalised, is a theological imperative.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Carolyn Tan', written in a cursive style.

Dr Carolyn Tan,
Chairperson, on behalf of the Public Affairs Commission

Anglican Church of Australia
Standing Committee of the General Synod
'Freedom of Religion and Belief in the 21st Century' Submission

Introduction

1. This submission is made on behalf of the Standing Committee of the General Synod of the Anglican Church of Australia.
2. In responding to the Discussion Paper *Freedom of Religion and Belief in the 21st Century*, we have focussed our attention on the proposed *Religious Freedom Act (RFA)*. While we have not expressly addressed every question in the Discussion Paper, our comments on the RFA touch upon some of them. Before dealing with the RFA, we have set out five principles which we believe are fundamental to the consideration of freedom of religion and belief in Australia. While conscious that the current community discussion about a Charter of Rights will involve issues of freedom of religion and belief among many human rights, in this submission we have not addressed the intersection of freedom of religion and belief with other human rights.
3. In considering the RFA, we have separately considered the right to freedom of religion and belief, unlawful discrimination on the grounds of religion, and advocacy of religious hatred. Where appropriate we have referred to particular recommendations in the 1998 HREOC report, *Article 18: Freedom of Religion and Belief*.

Principles for freedom of religion and belief in Australia:

4. The following principles are fundamental to the consideration of freedom of religion and belief in Australia:
 - i. For many people, religion and belief is integral to personal and communal identity. Freedom to believe and to manifest belief is essential to personal and social wellbeing and has entailed freedoms of:
 - belief, conscience and religious practice
 - worship and assembly
 - political expression and social action
 - propagation of belief and practices within family and community, to people who hold other beliefs, and in public discourse.
 - ii. We affirm the right, as stated in ICCPR 25, of all persons (whether religious or not) to fully participate in public life and policy debates in Australia.

- iii. We uphold a distinction between the instruments of civil government at all levels, and organised religion and religious activity. At the same time, we affirm the many constructive partnerships that have been negotiated between the two in Australia (e.g. in education, health and aged care). These partnerships recognise that religious faith has had many demonstrable outworkings for the common good.
- iv. We value and want to keep the freedoms and rights Australians enjoy, which are delivered by Australian law, and have in turn been shaped and informed by Judeo-Christian thought. We recognise and affirm the cultural diversity that exists within Australia, and the need to respond thoughtfully to increasing religious diversity. But any policy initiatives arising from debate about freedom of religion and belief should not compromise these freedoms and rights.
- v. We look for a society where religious discourse is conducted in safety and security, and people are free to disagree without danger of social exclusion or harm to person or property. These conditions will entail the freedom to engage in robust debate and disagreement about religious beliefs and practices.

RFA: right to freedom of religion and belief

- 5. In the U.K. and Europe, the application in law of the equivalent of ICCPR 18 requires consideration of the following questions:
 - i. Is there a religious belief?
 - ii. Is there a manifestation of the belief?
 - iii. Is there any interference with the manifestation of belief?
 - iv. Is the interference justified?
- 6. We recognise that there are arguments supporting and opposing the enactment of ICCPR 18.

In support:

- i. The right to religious freedom is not recognised in Australian common law.¹
- ii. It will compel Commonwealth, State and Territory governments to consider the impact of policy and legislation upon the manifestation of religion and belief.
- iii. It will have a beneficial educative impact.

In opposition:

- iv. It may incite attempts to protect 'extreme' manifestations of religious belief.
- v. It could lead to judicial determination about what constitutes a 'religious belief' and a 'manifestation' of it, which could operate as a limitation upon religious freedom.

¹ *Grace Bible Church v Reedman* (1984) 36 SASR 376; (1984) 54 ALR 571.

7. The adoption of ICCPR 18 in its entirety will ensure that the benefits of its enactment are achieved, and the disadvantages will be minimised. On balance, we think that the proposed RFA should enact ICCPR 18 on the following basis:
 - i. The RFA should include ICCPR 18 entirely, including 18.3 and 18.4.
 - ii. The exceptions in ICCPR 18.3 should be strictly construed.
 - iii. The RFA should not follow the approach adopted in Victorian and ACT human rights legislation, which do not include ICCPR 18.4, nor specify the limitations in ICCPR 18.3. This will mean that courts, where appropriate, will be required to express a view on whether interference with the manifestation of belief is justified.
8. The right to religious freedom should not be construed only as applicable to manifestations that involve activity (e.g. assemblies or building places of worship), but should extend to the recognition and protection of places and objects of religious significance (e.g. Indigenous sacred spaces).

RFA: unlawful discrimination on the ground of religion

9. We support the RFA making it unlawful to discriminate, whether directly or indirectly, on the ground of religion in the area of employment provided there are appropriate exemptions. We support the first exemption proposed in *Article 18* (R4.1.1). However we consider that the second exemption (R4.1.2) is too narrow, as it will inhibit the legitimate expression of distinctions, exclusions and preferences on the ground of religion in the area of employment.
10. We consider that it should be unlawful to discriminate in employment on religious grounds if an organisation does not exist to serve religious purposes. This is the circumstance in which exemption R4.1.1 should apply:

'A distinction, exclusion or preference in respect of a particular job based on the inherent requirements of the job should not be unlawful. Preference in employment for a person holding a particular religious or other belief will not amount to discrimination if established to be a genuine occupational qualification.'
11. In many religious contexts (including congregations, schools, missionary organisations, and other charitable organisations), R.4.1.1 is not meaningful or relevant. In these organisations, there is no distinction between those positions where religious belief is a 'genuine occupational qualification', and other positions. The attempt to make such a distinction is not meaningful because:
 - i. These organisations may seek to maintain their distinctively religious mission, and to avoid loss of effectiveness, by employing people throughout the organisation who adhere to the religious purposes, and hold the religious beliefs, of the organisation.
 - ii. For Christian organisations, all action is done 'to the glory of God'. This makes it impossible to distinguish between specifically religious activity and other activities.

- iii. The concept of Christian vocation is not limited to clergy, nor to specific ministerial functions within the church, but includes the work of lay people in whatever capacity they may serve.

12. We reject R4.1.2 because:

- i. It is too complex.
- ii. It creates a distinction between those groups whose 'religious susceptibilities' are easily offended and those whose are not, discriminating against the latter.
- iii. In bodies established for religious purposes, not all conduct will stem from and be directly governed by ('conducted in accordance with,' R4.1.2) the doctrines, tenets beliefs or teachings of the religion or its creeds. Such organisations also look to other appropriate authorities, such as professional discipline, best practice and policy compliance.

13. We propose that the following exemption should apply to religious organisations:

A distinction, exclusion or preference in connection with employment, whether paid or voluntary, as a member of the staff of a body established for religious purposes (including humanitarian, educational, and other charitable institutions), being a distinction, exclusion or preference derived from the doctrines, tenets, beliefs or teachings of a particular religion or creed, should not be unlawful provided that it is made in good faith, is not arbitrary and is consistently applied.

This proposed exemption is also to be preferred because it reflects the **Religion Declaration Art. 6(b)**. This article protects the right to freedom of thought, conscience, religion and belief in the establishment and maintenance of charitable and humanitarian institutions.

14. The same exemptions should apply to at least the following other areas of public life:

- i. Club or society membership (e.g. membership of a university religious group, missionary society, or congregation);
- ii. The provision of goods and services (e.g. aged care services provided to a particular religious group; publishers supporting or promoting particular religious views; advertising space in publications servicing a religious community);
- iii. Education (e.g. seminary or theological college enrolments; educational institutions who want to give preference to students whose parents are members of that religion);
- iv. Accommodation and conference centres (e.g. those religious groups who wish to provide for members of that religion).

RFA: advocacy of religious hatred

15. We support the abolition of the common law offence of blasphemy, and the repeal of any laws creating the offence of blasphemy.
16. We support the withdrawal by the Commonwealth of its statement of interpretation relating to ICCPR 20.
17. We support the implementation within the RFA of ICCPR 20.2: advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence should be prohibited by law.
18. We strongly oppose the enactment of a law that follows the *Racial and Religious Tolerance Act (Vic) 2001*, which fails to follow the text of ICCPR 20.2, because of difficulties in its interpretation and application reflected in the differences of opinion between the members of the Court of Appeal of the Supreme Court of Victoria.²
19. We consider that the enactment of ICCPR 20.2 should make explicit that:
 - i. It is 'incitement to discrimination, hostility or violence' against persons, and not against beliefs or doctrines, which is proscribed: 'defamation of religion' per se is not within the prohibition.
 - ii. It is necessary to consider the impact upon the audience to whom the words or actions are directed.
 - iii. Injury to religious sensibilities is not within the prohibition.
 - iv. 'Vilification' is not a synonym for the text of ICCPR 20.2, and this term should not be used in the legislation or the supporting documentation (as appears in *Article 18 R5.3 and 5.4*).
20. In addition to the exemptions listed in *Article 18 R5.3*, we consider that acts done reasonably and in good faith for a religious purpose should also be exempt. The listed exemptions address the right to freedom of expression; a distinct exemption is needed to address the right to freedom of religion and belief.
21. We support both criminal and civil liability subject to the qualifications expressed below.
 - i. Criminal liability should require intent and knowledge of the likely consequences, and prosecutions should only be brought with the consent of the DPP. A person should not be convicted of a criminal offence without proof of intent and knowledge. Furthermore, the requirement of the consent of the DPP will prevent persons using the RFA to oppress others through private prosecutions.
 - ii. Civil remedies should not include damages for injury to religious sensibilities, since the protection of religious sensibilities is not covered by ICCPR 20.2 and should not be provided by the RFA.

² *Catch the Fire Ministries Inc. & Others v Islamic Council of Victoria Inc.* (2006) 15 VR 207; (2006) 235 ALR 750; (2006) 206 FLR 56.

iii. Civil remedies should not include any order to give an apology where it would conflict with a person's right to freedom of religion and belief.

22. After five years, as part of a wider review of the Act, there should be a review of these provisions. This review should particularly address the concerns we share with many in the wider community about possible negative consequences of providing civil remedies, including:

- i. Persons may misuse the legislation by pursuing complaints in order to denigrate or silence another religious viewpoint.
- ii. The legislation may inhibit open and free discussion of religious differences.
- iii. It may require courts to make judgments as to whether statements are a balanced presentation of a religion or a religious viewpoint, which courts are ill-equipped to undertake.

Conclusion

23. While we support the RFA, we wish to emphasise that this support is limited to legislation which gives effect to ICCPR 18.1-4, 20.2, & 26 as set out above.

24. Given the importance of this legislation, and its possible adverse impacts on the freedom and manifestations of religion and belief in Australia, we consider that there should be a comprehensive review of the entire Act after five years. This review should involve widespread consultation with the community, including religious groups.

5th December 2008



Garth Blake SC



Rev. Dr Andrew Cameron



Rev. Dr Mark Durie



Carolyn Tan

for and on behalf of the Standing Committee of the Anglican Church of Australia.



The Anglican Church of Australia

GENERAL SYNOD

HUMAN RIGHTS CONSULTATION

SUBMISSION OF THE GENERAL SYNOD STANDING COMMITTEE OF THE ANGLICAN CHURCH OF AUSTRALIA

INTRODUCTION

1. The Anglican Church of Australia (ACA) is organised into 23 dioceses and includes a diverse cross-section of Australian communities. The ACA makes a significant contribution to Australian society through education, welfare and aged services, advocacy for social justice and support for Indigenous Australians.
2. Australia's laws and institutions have developed out of a cultural tradition which has been strongly influenced by Judaeo-Christian values and world view. This influence reaches back to at least the Magna Carta in 1215. As recipients of this inheritance Australians enjoy significant individual and social freedoms, which are envied in many parts of the world.
3. Together with the majority of the community, Australian Anglicans believe that human rights are important and should be protected. Within the ACA there is a diversity of opinion around which human rights should be recognised and how they should be protected.

SCOPE OF THE SUBMISSION

4. The National Human Rights Consultation (NHRC) terms of reference refer to human rights in general terms. It is common for human rights to be described as first generation rights (which find expression in the International Covenant on Civil and Political Rights (ICCPR)), second generation rights (finding expression in the International Covenant on Economic Cultural and Social Rights (ICESCR) and third generation rights (which broadly encompass the right to self-determination and development). This submission focuses on first and second generation rights.
5. The third generation rights raise matters of importance for Australia. At present, there is little public awareness of their scope. Public education about these rights is an essential first step for an informed discussion within the Australian community as to their full implementation. We encourage the HRC to recommend to the Government to initiate a broad program of public education about these rights.
6. The Terms of Reference of the NHRC are very broad, and we are aware that the NHRC will be receiving submissions on a wide range of issues. Without derogating from the importance of the full range of human rights we, as representatives of a religious body, can best make a contribution by addressing the protection and promotion of freedom of religion in Australia and its interaction with other human rights.

AN ANGLICAN APPROACH TO HUMAN RIGHTS

7. Our thinking about human rights is informed by beliefs which are grounded in the Bible and our theological heritage.

I. *The image of God.* The belief that humanity is made in the image of God establishes the dignity and worth of every person. In the plurality of humanity there is a common identity which we all share. This image finds its truest manifestation in the person of Jesus Christ who lived in relation to God and others in the world. This reflects a relational and communal dimension to human beings made in the image of God. For example, the priority of loving one another is grounded in the love within God as Trinity.

II. *Accountability and the reality of sin.* Ultimately God determines what is good and evil. In the Biblical narrative humanity is described as 'good, but fallen'. The belief that human nature is flawed finds expression in the reality that people do wrong and cause harm to others. On our own we are incapable of properly discerning right from wrong:

'... the line separating good and evil passes not through states, nor between classes, nor between political parties either – but right through every human heart – and through all human hearts.'
(Solzhenitsyn, *The Gulag Archipelago*)

Self-interest, if unchecked, can be destructive and boundaries need to be set to limit this potential for harm. The remedy requires human accountability to God.

III. *Covenant and law.* In the Biblical narrative God's response to human sin is to establish a covenantal relationship with people.

The covenant of Moses includes a legal code which limits and guides human behaviour including responsibilities which people have to each other within the community. A well known example is the Ten Commandments which include prohibitions against murder, theft and false witness. In many cases rights can be derived from these responsibilities. For example, the law against theft implies a right to personal property. The law against murder implies the right to life.

In addition to the legal rules there are principles which govern the administration of justice. These include the equality of people before the law, impartiality and consistency in the application of the law.

The code acknowledges that particular classes of people are vulnerable and deserve special protection. These include widows, orphans and outsiders. The code also establishes principles of accountability such that no one is above the law. Even rulers and the powerful are to be held to account for their actions.

- IV. *Justice and mercy.* The Bible teaches that God's attributes of justice and mercy should be manifested in human affairs. This means that the administration of justice must be tempered with mercy. This reflects a value of compassion for people which endures even if they are found to be in the wrong. (Jonah). (Micah 6 v 8)
- V. *Freedom and responsibility.* One of the great themes of the Bible is freedom. Moses' call to Pharaoh was to let the people of Israel go free. In interaction with humanity God the creator allows all people freedom of choice in belief and action. Sometimes people choose to do wrong with terrible consequences for themselves and others. The Bible places a great emphasis on using our freedom to do good. Such choices not only cultivate good character and virtue but also benefit the community.
- VI. *Compassion and identification.* The instructions to Israel about how to relate to the vulnerable and outsiders teach a principle of identifying with the humanity of those who may be alien to one's own family and community. For example, widows and children were not to be taken advantage of, and foreigners resident in Israel had to be treated justly and kindly because the Israelites had known what it was like to be ill-treated as slaves in Egypt. Jesus' Golden Rule of 'do unto others as you would have them do unto you' was a continuation of this Old Testament tradition.
- VII. *Church and society.* In the Biblical narrative there is an emphasis on God's people having a responsibility to seek the wellbeing of the society in which they live. This responsibility exists irrespective of the political structure or religious identity of the state. Religion is never simply a private matter. For over 2000 years the church has been active in exercising this responsibility in society and this engagement has been integral to the development of our society.
- VIII. *Limits of the law.* The Christian world view expressed in the life and teachings of Jesus and the apostles is that law, while necessary and helpful, cannot alone bring about social harmony or protect human rights.
- IX. *Personal responsibility.* It is the responsibility of everyone to foster in themselves and others love and respect for all people. In this way, people will recognise their responsibility to others and thereby protect their human rights.

AN ANGLICAN APPROACH TO FREEDOM OF RELIGION.

8. The following principles are fundamental to the consideration of freedom of religion and belief in Australia:
 - I. For many people, religious belief and practice are integral to personal and communal identity. Freedom to believe and to manifest belief is essential to personal and social wellbeing and has entailed freedoms of:
 - belief, conscience and religious practice
 - worship and assembly
 - individual and corporate political expression and social action
 - propagation of belief and practices within family and community, to people who hold other beliefs, and in public discourse.
 - II. We affirm the right, as stated in Article 25 of the ICCPR, of all persons (whether religious or not) to fully participate in public life and policy debates in Australia.
 - III. We uphold the value and benefit of a distinction between the instruments of civil government at all levels, and organised religion and religious activity. At the same time, we affirm the many constructive partnerships that have been negotiated between the two in Australia (e.g. in education, health and aged care). These partnerships recognise that religious faith has had many demonstrable outworkings for the common good.
 - IV. We value and want to keep the freedoms and rights Australians enjoy, which are delivered by Australian law, and have in turn been shaped and informed by Judaeo-Christian thought. We recognise and affirm the cultural diversity that exists within Australia, and the need to respond thoughtfully to increasing religious diversity. But any policy initiatives arising from debate about freedom of religion and belief should not compromise these freedoms and rights.
 - V. We look for a society where religious discourse is conducted in safety and security where , without danger of ostracism or harm to person or property, people are free to proclaim their faith and to seek to persuade others to adopt it and people are free to disagree on matters of religion. These conditions will entail the freedom to engage in robust debate and disagreement about religious beliefs and practices.

RESPONSE TO THE TERMS OF REFERENCE

Which human rights (including corresponding responsibilities) should be protected and promoted?

9. We support the protection and promotion of the human rights in the ICCPR and the ICESCR. Many members of the ACA, as well as its religious bodies, are actively engaged in providing services which help to protect and promote these rights on a daily basis, as an expression of our beliefs and doctrines. We are aware that not all Australians enjoy these rights in equal measure. In supporting the ICESCR, we are aware that this can be only a matter of progressive realisation which, in part, will depend on available financial resources.

10. The right to freedom of religion, including the right to change one's religion, and freedom, either alone or in community with others and in public or private, to manifest one's religion in teaching, practice, worship and observance is recognised in Article 18 of the Universal Declaration of Human Rights.

11. We support the right to freedom of religion as set out in Article 18 of the ICCPR.
 - I. Article 18 (1) provides for the human right of freedom of religion and includes "freedom to have or to adopt a religion..., and freedom, either individually or in community with others, and in public or private, to manifest (one's) religion in worship, observance, practice and teaching".

 - II. Article 18 (2) provides that no-one should be subject to coercion, which would impair (their) freedom to have or to adopt a religion of choice.

 - III. Article 18 (3) provides that this freedom may be subject only to "such limitations as prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others".

 - IV. Article 18 (4) provides for the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.

12. The fact that Article 4 of the ICCPR permits no derogation from the right to religious freedom, even in a time of public emergency which threatens the life of the nation, demonstrates its fundamental importance.

13. The right to freedom of religion is elaborated in the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief*. Article 6 provides that the right to freedom of religion shall include the following freedoms:

- I. To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- II. To establish and maintain appropriate charitable or humanitarian institutions;
- III. To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- IV. To write, issue and disseminate relevant publications in these areas;
- V. To teach a religion or belief in places suitable for these purposes;
- VI. To solicit and receive voluntary financial and other contributions from individuals and institutions;
- VII. To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- VIII. To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- IX. To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

14. The right to religious freedom should not be construed only as applicable to manifestations that involve activity (e.g. assemblies or building places of worship), but should extend to the recognition and protection of places and objects of religious significance (e.g. Indigenous sacred spaces).

15. We acknowledge that there are circumstances in which a limitation may need to be placed on freedom to manifest religious belief. The scope of any limitation is adequately defined by, and should be confined to, the circumstances in Article 18 (3) of the ICCPR. However, these limitations have not been adhered to in the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). These two Acts contain a more general and wider scope for limitation of all human rights. This significantly weakens the protection for freedom of religion provided for by the ICCPR.

16. In relation to the issue of anti-incitement legislation on the grounds of religion, we support the wording of Article 20 (2) of the ICCPR, which provides that any "advocacy of ... religious hatred that constitutes incitement to discrimination, hostility or violence" shall be prohibited by law. There are a number of differences between Article 20 (2) and the provisions of the *Racial and Religious Tolerance Act 2001* (Vic) including the latter's much lower threshold for liability, namely, "conduct [irrespective of motive] that incites hatred against, serious contempt for, or revulsion or severe ridicule of" a person or class of persons. These differences also significantly weaken the protection for freedom of religion provided for by the ICCPR, as exemplified in the case of *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc*.

Are these human rights currently sufficiently protected and promoted?

17. Many ICCPR and ICESCR rights are well protected under Australian law – for example the right to property, the right to a fair trial, and the right to protection from discrimination (racial, sexual, disability and age), the right to social security and the right to choose a non-public school for one's children. Laws protecting these rights are the expression of a public consensus and in many cases have a long heritage through the common law.

18. In recent times there have been significant failures to adhere to the human rights norms. This has been reflected in the number of Australian complaints (17 out of 54) which have been upheld by the United Nations Human Rights Commission in respect of breaches of the ICCPR. Further, the indefinite detention of asylum seekers, including children, who have been seeking recognition as refugees under the Refugees Convention has been a fundamental denial of their human rights. The relatively recent removal of Indigenous children from their families, which has been documented in the *Bringing them Home* report, represents a sustained failure to safeguard human rights. These failures have arisen in part because of a lack of public consensus and political division around these issues.

19. The human rights of some groups of vulnerable persons in the Australian community are not adequately protected. Many examples could be given, including the abuse of children and the aged, and the neglect of prisoners and the mentally ill. While there are many protective laws, the incidence of abuse is at unacceptably high levels. Law alone is inadequate to protect the vulnerable. This demonstrates that it is necessary to address society's culture and attitudes and that public resources need to be allocated judiciously for the support of the human rights of the most vulnerable.

20. There are a wide variety of other human rights issues which are raising concerns in the community, including the rights of the unborn, access to reproductive technology, the rights of children conceived through artificial means, the ethics of medical research in a number of areas, the rights of the disabled, the rights of the terminally ill and those seeking to end their lives, the rights of particular categories of offenders who have completed their sentences, gender rights, rights around the adoption of children, and the limits of privacy.

21. An emerging issue is 'competition' between rights, and the need to 'balance' rights against each other and against competing public interests. Like others, we are deeply concerned about a number of cases where anti-discrimination laws have impacted upon the ability of churches and religious associations to conduct their activities in accordance with their beliefs. This difficulty has been compounded because religion has increasingly been characterised as a private matter which should give way to notions of public interest. In the emerging 'hierarchy of rights' there is a risk that the right to freedom of religion will be derogated from, contrary to Article 4 of the ICCPR.

22. The right to freedom of religion receives little protection in Australian law.

I. Section 116 of the Constitution has a narrow scope, being confined to the Commonwealth and dealing only with the establishment of religion, the imposition of religious observance, the prohibition of the free exercise of any religion and proscribing religious tests for any office or public trust for the Commonwealth.

II. This right is not recognised by the common law.

III. The Australian Human Rights Commission (AHRC) has power to conduct an inquiry into complaints involving a breach of the Religion Declaration, and to endeavour to effect a settlement of a dispute by conciliation, but not to impose any remedy.

How could Australia better protect and promote human rights?

23. We look for a society in which all people will respect and give effect to the human rights of others. The Australian Government has a particular role to facilitate and encourage a culture of understanding and support for human rights through education, communication, regulation and example. We recognise that the ACA has a parallel responsibility, particularly within its community.

24. We support the enactment of human rights legislation because this has the potential to have a beneficial effect on government policy and the legislation and administration which give effect to that policy. Legislators and administrators will be compelled by such legislation to consider the impact of their decisions on all Australians, especially the most vulnerable. Further, the existence of human rights legislation could encourage greater understanding of human rights in the community.

25. This legislation should give effect to the ICCPR and the ICESCR and have the following components:

- I. Scrutiny of all legislation for compliance with human rights prior to enactment with a statement of compatibility by the responsible minister and a parliamentary scrutiny committee and reasons given for any derogation from rights;
- II. All Australian Government public authorities should be bound to comply with human rights when developing and administering policy;
- III. Courts should be required to interpret legislation in a way that is compatible with human rights so far as it is possible to do so consistently with its legislative purpose and be empowered to make a finding that a law cannot be interpreted in a manner consistent with human rights which will be referred to Parliament for consideration;
- IV. The AHRC should be required to audit compliance by the Parliament and public bodies with human rights legislation.
- V. A person should be able to bring an action against a public authority for violation of their human rights and obtain relief except where the law requires that an act has been done, or a decision made, in a manner inconsistent with the right.

However, this support is subject to the legislation adequately dealing with the paragraphs 26 to 32 below.

26. Without careful planning accompanying the passing of human rights legislation there will be dangers in its introduction. In particular, unless people understand that they have responsibilities to others that correspond with rights, there is a risk that inappropriate individualism and intolerance may be promoted.

27. This legislation should conform to Articles 18 and 20 (2) of the ICCPR as the best means of protecting and promoting by law the right to freedom of religion.

28. We consider that this right of freedom of religion should include the right of a religious body to determine the requisite qualifications, including religious belief, for employees and volunteers who carry out its work, in accordance with its religious doctrines and practices.

In many religious bodies (including educational institutions, welfare agencies, aged care organisations, and other charitable organisations), there is no meaningful or relevant distinction between those positions where religious belief is a 'genuine occupational qualification', and other positions. The attempt to make such a distinction is not meaningful because:

- I. For Christian organisations, all action is done 'to the glory of God', and 'religious observance' extends to the whole of life. This makes it impossible to distinguish between specifically religious activity and other activities.
- II. The concept of Christian vocation is not limited to clergy, nor to specific ministerial functions within the church, but includes the work of lay people in whatever capacity they may serve.
- III. Many work places of religious bodies are organised as worshipping communities in which personnel are expected to take part in worship and devotional activities. This presupposes that they adhere to the religious teachings and practices of the body.
- IV. These bodies may seek to maintain their distinctively religious mission, and to maximise effectiveness, by employing people throughout the organisation who adhere to the religious purposes, and hold the religious beliefs, of the organisation.

29. We support the right of religious bodies to determine whether, and in what circumstances, they will provide particular services in accordance with their beliefs. Government should not coerce religious bodies to provide services or to provide services in a manner contrary to their religious beliefs. This would be a fundamental denial of freedom of religion.

30. The value given to the community by religious bodies is integrally connected to their religious identity. Any limitation on the right of bodies to freely manifest their religious identity will:

- I. Lead to a reduced 'prophetic role' in critiquing public policy and practices;
- II. Diminish the capacity of religious bodies to provide charitable services for the benefit of the community;
- III. Impair the quality of services provided to the public.

It is important for the harmony and wellbeing of Australian society that the benefits of constructive partnerships between government and religious bodies continue.

31. Many religious bodies might be thought to constitute a public authority because they undertake certain activities on behalf of the Australian Government and/or through public funding. The definition of a public authority in legislation should provide an exemption for religious bodies acting in conformity with their religious doctrines, beliefs or principles. Section 38 (4) and (5) of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* provide an appropriate model of such an exemption.

32. The enactment of Article 20 (2) of the ICCPR should make explicit that:

- I. It is 'advocacy of ... hatred that constitutes incitement to discrimination, hostility or violence' against persons, and not against beliefs or doctrines, which is proscribed: 'defamation of religion' per se is not within the prohibition.
- II. It is necessary to consider the impact upon the audience to whom the words or actions are directed.
- III. Injury to religious sensibilities is not within the prohibition.
- IV. 'Vilification' is not a synonym for the text of this Article, and this term should not be used in legislation or supporting documentation.
- V. There should be an exemption for acts done reasonably and in good faith for a religious purpose.

33. We support both criminal and civil liability subject to the qualifications expressed below.

- I. Criminal liability should require intent and knowledge of the likely consequences, and prosecutions should only be brought with the consent of the Director of Public Prosecutions. A person should not be convicted of a criminal offence without proof of intent and knowledge. Furthermore, the requirement of the consent of the DPP will prevent persons using the legislation to oppress others through private prosecutions.
- II. Civil remedies should not include damages for injury to religious sensibilities, since the protection of religious sensibilities is not covered by Article 20 (2).
- III. Civil remedies should not include any order to give an apology where it would conflict with a person's right to freedom of religion and belief.

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