

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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