



29 November 2019

Committee Secretary
Free and Equal Inquiry
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001

Lodged to website: <https://www.humanrights.gov.au/>

Dear Secretary

Submission Re Australian Human Rights Commission (AHRC) Free & Equal Issues Paper “An Australian Conversation on Human Rights” (the Issues Paper), the Discussion paper “A model for positive human rights reform in Australia” (the Models Paper) and the Discussion Paper “Priorities for federal discrimination law reform,” (the Priorities Paper).

Freedom for Faith is a christian legal think tank which is concerned to see religious freedom protected and promoted in Australia. It is led by people drawn from a range of denominational churches including the Australian Christian Churches, Australian Baptist Church Ministries, the Presbyterian Church of Australia, the Seventh Day Adventist Church in Australia, and the Anglican Diocese of Sydney. It has strong links with and works on a multi-faith basis across Australia. We are grateful to be a party to this important conversation in relation to the Issues Paper, the Models Paper and the Priorities Paper (together Free & Equal).

We respond to the Consultation Question (p20) as follows:

1. What human rights matter to you?

The work of FFF is to see the protection and promotion of religious freedom. But human rights cannot be seen separately or in isolation and need to be related to each other. In particular, freedom of religion cannot properly be understood or protected without taking into account freedom of conscience, speech and association.

2. How should human rights be protected in Australia?

We are best placed to answer this question by first narrowing the focus to our area of expertise - how freedom of belief is treated. The protection of this right is patchy, inconsistent, and under pressure across the country¹:

¹ Freedom for Faith ‘Protecting Diversity: Towards a better legal framework for religious freedom protection in Australia’ Submission to the Religious Freedom Review, January 2018, p5-6

There is almost no legal protection for freedom of religion in Australia beyond a provision in the Constitution which applies only to Commonwealth law, a provision in the Tasmanian Constitution, and exceptions and exemptions in anti-discrimination laws. There is also little protection for the inter-related civic freedoms of conscience, speech and association. Freedoms are protected only to the extent that Parliaments do not encroach upon those freedoms; but there is very little to stop Parliaments doing so, and no remedies in domestic Australian law that citizens have if laws impact upon them in ways that violate international human rights standards. The human rights charters in the ACT and Victoria are advisory only, and in any event do not comply with Article 18.3 of the International Covenant on Civil and Political Rights (ICCPR).

With the rapid secularisation of Australian society, and the growing and overt hostility to people of faith, the absence of protection for fundamental freedoms is a serious deficiency which threatens the cohesion of Australian society. Protecting human rights through defences and exemptions is something less than a complete way of implementing Australia's international human rights obligations.

The responsibility for compliance with Australia's international human rights obligations is a shared one, between the Commonwealth Government and the States and Territories; but ultimately it is the responsibility of the Commonwealth to ensure compliance. It can do much more to discharge its national responsibility for protecting religious freedom in Australia.

By way of contrast, there is extensive protection for some of the other human rights in particular through anti-discrimination and unfair dismissal laws and laws that restrict certain kinds of speech. Some of those rights necessarily encroach upon certain freedoms. One of the problems is that the 'freedom rights' tend to be protected only by defences and exemptions. So for example, it may be a defence to speech which offends somebody that it was made in good faith or for one of the purposes treated as being legitimate in the statute. A faith-based organisation may be able to rely on an exemption when it comes to discrimination on the grounds of gender, sexual orientation or marital status. Protecting human rights through defences and exemptions is something less than a complete way of implementing Australia's international human rights obligations.

We therefore argued for the enactment of a Religious Freedom Act. This proposal drew upon the recommendations made nearly twenty years ago by the Human Rights and Equal Opportunity Commission. The proposed federal law could helpfully provide a way of balancing rights and freedoms without having a Charter of Rights. The proposed legislation will be subject to clear limitations including reasons of national security, public safety, and the protection of children. The proposed religious freedom law does not confer rights; it only protects freedoms. It would not give a right to recognition of sharia law or any other such religious code. It is not possible to protect religious freedom sufficiently without at least addressing also the freedoms of speech, association and conscience which are intimately related to freedom of religion.

The Ruddock Report and Government Response did not accept the proposal to enact a Religious Freedom Act. Instead we have seen the development of a Religious Discrimination Bill (in Exposure draft at the time of writing) and the referral of exemptions to anti-discrimination laws to the ALRC inquiry. Part of the difficulty in providing this response to the AHRC is the work in progress before the Parliament and ALRC. It would be much simpler to consider the future of freedoms after we know what the current legislative reforms will bring.

3. What are the barriers to the protection of human rights in Australia?

Again, focusing on freedom of belief we would note the following barriers:

1. Anti-discrimination laws have expanded to include far more “protected attributes” than a few years ago. There is not a necessary conflict between religion and anti-discrimination laws. Christians were at the forefront of the civil rights movement in the United States and support anti-discrimination laws in general. However the protected attributes in many Australian jurisdictions now include those that are not inherent characteristics such as race or gender, or unchosen states, such as living with a disability. An example is ‘lawful sexual conduct’, which includes all kinds of lawful heterosexual conduct such as adultery which contravenes religious moral values. This has the potential to produce many more spheres of conflict between discrimination laws and the values of people of faith than a few years ago.
2. There is now a persistent campaign to remove exemptions in anti-discrimination law. Some tensions between religious beliefs and anti-discrimination norms have always had to be addressed, and currently they are dealt with by providing exemptions to otherwise generally applicable laws. This is the main way in which Australia currently complies with its international human rights obligations in the area of religious freedom. However, there are those who would remove permanent exemptions entirely, replacing them with temporary exemptions if and only if granted by a state bureaucrat. This makes fundamental human rights depend upon a secular administrator’s willingness to acknowledge them, and is a serious derogation from internationally accepted human rights norms.

1.

Many who argue for the removal of exemptions argue also for the removal of the protections in the law that those exemptions currently provide. This campaign to remove exemptions reflects a very much more expansive view of the State’s role in regulating community organisations than has ever been known in the past.

2. Underlying this campaign against exemptions are two beliefs. One is that all limitations on who is eligible to apply for particular jobs should be abolished or severely restricted in the name of one conceptualisation of ‘equality’, even if 99.9% of all the other jobs in the community are open to that person. This position involves taking a very restrictive approach to ‘genuine occupational requirements’. The second belief is that the only human rights that should be given any real significance are individual ones and not group rights. This can make adherents disregard the competing claims of groups which would justify a right of positive selection of staff in order to enhance the cohesion and identity of a religious or cultural organisation.

3. Freedom of belief is no longer a shared Australian value. While it seems clear that in the population as a whole, religious freedom continues to have broad support, it is not necessarily supported by certain human rights organisations and some advocacy groups. In particular, there is a new tendency to confine religious freedom to be nothing more than freedom of belief and worship (which is not under threat). If religious freedom impacts upon anyone else’s rights, on this view, religious freedom must almost always give way. Balancing rights tends to mean that in practice the right to religious freedom is crushed under the weight of the demands of ‘equality’- which is conceived narrowly. Some organisations also take an extraordinarily narrow view of freedom of conscience. Hostility to

freedom of religion is mostly manifested in the campaigns to remove exemptions from anti-discrimination laws.

3.

4. Freedom of Faith has serious concerns about the record of the Australian Human Rights Commission in this respect – concerns that are reinforced by the Discussion Paper to which we are now responding. We consider it has an imbalanced and unsympathetic view of freedom of religion to the extent that this freedom comes into tension with those rights that are of particular concern to those on the progressive side of politics.

4. There is increasing evidence of such hatred against people of faith across the secular western world. It is experienced by Christians of all denominations who hold to traditional beliefs and values on sexual ethics and family life. It is experienced in a different way by those of the Jewish faith, in terms of a resurgence of anti-semitism. It is experienced in a still different way by those in our Muslim communities arising out of fear and suspicion that members of those communities may be associated with terrorist activities. What we are increasingly seeing is complete intolerance of views and beliefs which dissent from what some people consider to be 'progressive' opinions. It is because of this level of hatred against people of faith, expressed covertly or overtly sometimes by people who hold positions of responsibility in the law, commerce, government, the education sector and elsewhere, that people of faith are now seeking greater protection in terms of anti-discrimination and anti-detriment laws.

4. How should the Government address the situation where there is a conflict between different people's rights?

Australia is a richly diverse multicultural society in which people hold a great range of beliefs and values about sexual conduct and family life. Governments need to be neutral between these different versions of the 'good life'. Diversity policies need to take account of the range of moral views and cultural values in a society in which more than a quarter of the population was born overseas. In relation to belief, some hold a deep faith that would be their prime marker of identity and source of individual and communal identity. Many hold no faith. Some may be hostile to faith and see the public manifestation of belief as a threat to their dignity. At the same time the government must be wary of seeing the community as hopelessly and inevitably polarised and segmented. It is not the case that the protection of the rights of one segment of society must be inevitably at the expense of another.

It seems that the tolerance and easy-going acceptance of other cultures and beliefs has diminished, and that Australian governments must address a relatively new-found hostility to religious beliefs. We consider that federal, state and territory parliaments all need to recommit to acknowledgement and acceptance of the real diversity of the Australian population. Diversity policies in the private sector must also recognise the range of differences within the one society which need to be equally respected, and policies to promote 'equality' must do so for all.

The issue of how to manage conflicting rights is a feature of any anti-discrimination legislation. It has arisen in the drafting of the Religious Discrimination Bill and will arise in the ALRC reference.

5. What should happen if someone's human rights are not respected?

It depends.

It is difficult to answer such a general question in the abstract and in the absence of further information.

6. What can the community do to protect human rights? How should the government support this?

Law sits downstream of culture. There is a role for both the community and the government in affirming the genuine diversity in Australian society and encouraging respect and tolerance in this context of difference.

In the context of freedom of belief, considerable work is done by different faith groups co-operating in areas of mutual concern. This may be the settlement of migrant communities or care for the poor. This tremendous building of social capital can incubate against intolerance and division. All faith groups are tremendous builders of social capital and function as intermediary organisations between the individual and the state, and operate in a space which is neither private nor fully public. The most significant thing a government can do here is not unduly regulate these faith based organisations and provide them with freedom to fulfil their mission.

7. How should individuals, businesses, community organisations and others be encouraged and supported to meet their responsibility to respect human rights?

Religious freedom needs to be seen not as a threat to human rights but as a vital human right. In the workplace, employees should be encouraged to bring their whole self to work - including their religious commitments. Likewise in community organisations, there should be recognition and toleration of differences. Civic pluralism means we do not have to shy away from our differences. Instead we can turn to one another and find ways to live together with hospitality and respect.

It will never be possible to create a utopian future where everybody thinks correctly and lives together easily. We must beware a cultural amnesia that forgets the terrible lessons of the 20th century and the litany of human rights abuse carried out in the name of progress. A healthy society is one in which there will be differences and disagreement within the culture on matters which people care about deeply - faith, family, sexual orientation, gender identity, race and so on. These disagreements of themselves are not necessarily unjust discrimination

8. What should the AHRC and the government do to educate people about human rights?

The AHRC first needs to turn its gaze inwards. It does not seem to have sufficient viewpoint diversity among the senior professional staff who give advice to the Commissioners, and in particular the legal advisors. It is therefore an unreliable advisor to Government and Parliament on human rights issues.

Reforms need to occur also at Commissioner level to promote more viewpoint diversity. Nowhere in Australia does any Commissioner have a specific brief to be concerned with freedom of religion and conscience, or discrimination against people of faith. We argued for the creation of a new Commissioner for Religious Freedom in the AHRC with the following roles:

- To comment upon draft legislation both federally, and in the States and Territories, that might have impacts upon legitimate religious freedom concerns.
- To advocate for changes to State, Territory or Federal laws that improperly encroach upon freedom to manifest religious belief.
- To engage with State, Territory and Federal education authorities if issues arise concerning the legitimate freedoms of religious schools to maintain their identity and ethos.
- To engage with State, Territory and Federal education authorities if issues arise concerning the rights of parents to raise their children in accordance with their religious and moral values (Article 18.4, ICCPR).
- To engage with State, Territory and Federal education authorities about issues concerning religious education programs in state schools.
- To meet annually with such religious leaders, of all faith communities, as wish to meet, in order to listen to their concerns about religious freedom issues.
- To have a voice in relation to the balances to be found between religious freedom and community safety issues, particularly when considering legislation, policies and practices that aim to address the threat of terrorism.
- To advise the Charities and Not-for-Profit Commission, if requested, in relation to issues that may arise concerning religious charities and organisations.
- To conduct research or hold public inquiries concerning issues where freedom of religion may be under threat.
- To intervene in significant court cases where religious freedom issues arise.
- To raise awareness in the community about issues concerning religious freedom through speeches, conference presentations, and commentary in the media.
- To support the protection of the right to religious freedom internationally, through liaison with the UN's Special Rapporteur on Freedom of Religion or Belief, the United States Commission on International Religious Freedom and other national, regional or international bodies concerned with human rights and freedoms.

9. What actions are needed to ensure that the government meets its obligation to fulfil human rights – for example in addressing longstanding inequalities in the community?

There is no one answer to this question, as situations will differ.

10. How should we measure progress in respecting, protecting and fulfilling human rights?

In relation to freedom of belief, much evidence given to inquiries, and relied upon for policy development has been anecdotal and untested. It would be helpful, where possible to see better collection and analysis of data to inform the AHRC.

11. How should we hold government to account for its actions in protecting human rights?

The government is subject to law, and accountable to the electorate.

The AHRC may exercise the kind of functions we set out in answer 8. The broader question is expressed in the Latin maxim, *quis custodiet custodies?* How can the AHRC be held more

accountable in providing expert advice on human rights issues which does not merely replicate the progressive views and misunderstandings of the day?

The Model Paper

DISCUSSION QUESTIONS

Please provide any comments on the options identified in this paper for better protecting human rights at the national level. For example:

- Do you consider the options proposed are the most important reforms that could be undertaken to better protect human rights?
- Do you have comments about how the options identified might work in practice?
- Are there other options not identified in the paper?

In our submission to the Ruddock Report considered whether the Commonwealth should seek to protect religious freedom within a broader context of a Charter of Rights of some kind but concluded that a Religious Freedom Act would be preferable:

A human rights charter?

There are undoubtedly advantages of having such a Charter even if it is merely advisory, as in Victoria and the ACT, since sometimes rights need to be balanced with other rights and compromises found. Having a Charter allows the courts to consider the different rights involved and to examine issues of proportionality.

However, Australia has only recently had this debate. The decision was taken by a federal Labor government not to proceed with the implementation of the recommendations of the Brennan Committee² for such a federal Human Rights Act as recently as 2010.³ The idea of a Charter of Rights also has little support on the conservative side of politics.

Since the Brennan Committee reported, the High Court has considered the constitutionality of Charters of Rights in *Momcilovic v The Queen*.⁴ While they are valid at state level, it appears from the judgments of French CJ, and Gummow, Hayne, Heydon and Bell JJ, that such a provision could not be introduced at the federal level, as it would represent a grant to the court of a non-judicial power contrary to Chapter III of the Constitution.⁵ While these comments were obiter, they represent carefully considered dicta.

It is, of course, entirely a matter for the Panel what it recommends to the federal

² National Human Rights Consultation Committee, *Report on the National Human Rights Consultation* (2009).

³ It did enact the establishment of a joint parliamentary committee by the Human Rights (Parliamentary Scrutiny) Act 2011.

⁴ (2011) 245 CLR 1.

⁵ Will Bateman and James Stellios, 'Chapter III of The Constitution, Federal Jurisdiction and Dialogue Charters Of Human Rights' (2012) 36 *Melbourne University Law Review* 1. See also Helen Irving, 'The Dilemmas in Dialogue: A Constitutional Analysis of the NHRC's Proposed Human Rights Act' (2010) 33 *University of New South Wales Law Journal* 60.

Government, or indeed to the governments of Australia collectively. The Panel has considerable expertise on the merits and feasibility of protecting religious freedom through a Charter of Rights approach. If every State and Territory were to enact such a Charter in similar terms, then there would be significant coverage for religious freedom at the level of state and territory laws. However, there would still be an issue about federal law unless the constitutional problems could somehow be overcome. It should be recognised that, in the light of the 1988 experience, it is extremely unlikely that a constitutionally entrenched Bill of Rights would be supported by the electorate in a referendum.

While leaving this matter to the Panel, and making no formal submission in this regard, we note three issues. First, given the strongly held views as a matter of principle on this issue, it cannot be expected that in response to the recommendations of this Review, all the States and Territories will enact charters of rights and freedoms in the foreseeable future. Secondly, were this to be the main recommendation of the Review Panel, there is a very real danger that the recommendation will not be well received by the federal government or by the governments of certain States. Nailing its colours to the mast of a human rights charter may therefore result in its major recommendation being rejected. Thirdly, the existing charters in the ACT and Victoria are not compliant with Article 18.3 of the ICCPR. The federal government would therefore not have fulfilled its responsibilities as a state party to the Covenant by supporting charters on a similar model to those in the ACT and Victoria, even if it were constitutionally possible for such a Charter to be enacted at the federal level.

In this Chapter, we propose another way of achieving a similar result, at least as far as state and territory law is concerned. This may leave some gap in terms of the protection of freedoms in federal law, but s.116 of the Constitution already provides some protection in relation to Commonwealth law, and the Australian Law Reform Commission, in the Freedoms Inquiry, found that in practice there were few, if any, encroachments on religious freedom by federal laws at the present time.⁶ The Parliamentary Joint Committee on Human Rights does provide another way in which attention can be given to the human rights' implications of Bills before the Commonwealth Parliament. Furthermore, there could be an interpretative provision requiring the courts to construe federal law in conformity with the relevant freedoms to the extent it is possible to do so.

A religious freedom Act

In 1999, the Human Rights and Equal Opportunity Commission recommended that the Commonwealth Parliament should enact a religious freedom Act which, among other

⁶ Australian Law Reform Commission, Report no 129, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (2016).

things, recognises and gives effect to the right to freedom of religion and belief.⁷

Its recommendations went on to spell out the content of that Act in some detail. It should “affirm the right of all religions and organised beliefs as defined to exist and to organise and determine their own affairs within the law and according to their tenets.”⁸ It should “cover the full range of rights and freedoms recognised in ICCPR article 18 and Religion Declaration articles 1, 5 and 6”.⁹ In accordance with Article 18.3 of the ICCPR it should permit only those limitations on the right to manifest a religion or belief which are prescribed by law and necessary to protect public safety, health or morals or the fundamental rights and freedoms of others.¹⁰

We trust this submission will be useful contribution to the AHRC conversation. We hope that review process helps us all to ‘live and let live’ more harmoniously, and to protect diversity within the Australian community.

Yours faithfully

Michael Kellahan
Executive Director
Freedom for Faith

⁷ Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief*, (1999), Recommendation 2.1, p.24.

⁸ Recommendation 2.2.

⁹ Recommendation 2.3.

¹⁰ Recommendation 2.4.