Joint Submission by Christian churches and organisations to the Legal Affairs and Community Safety Committee on the Human Rights Inquiry

April 2016

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Australian Christian Churches

Australian Christian Lobby

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Table of Contents

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1. Thank you for the opportunity to make a submission to the Human Rights Inquiry. It is the view of the undersigned joint submitters that Queensland should not enact a human rights act.

2. This submission will address each of the terms of reference in turn.

Preface

3. This submission is being lodged by Christian organisations that operate in Queensland. The championing of human dignity has long been a core concern of Christianity, and Christians have been at the forefront of human rights advocacy for centuries, particularly in Western culture.

4. Christians were instrumental in ending the slave trade, in winning civil rights for African Americans, and in the early trade union movement. Christian institutions were also behind the emergence of many benevolent activities which are now taken for granted in the provision of welfare and services – hospitals, hospices, aged care homes, orphanages, homeless shelters, schools, pre-schools, universities, food banks, community care, counselling and family assistance to name a few.

5. The theological basis for the Christian belief in human rights is rooted in a strong conviction of human dignity. This conviction finds its origin in the belief that men and women are created in a manner that is unique. This dignity is grounded in the fact that men and women are created as image-bearers of God (*imago dei*).

> *"So God created man in his own image, in the image of God he created him; male and female he created them. And God blessed them."* (Genesis 1:27-28a)

6. From this basis proceeds belief in the inherent value of people, their potential as human creatures for human flourishing, as well as the importance of protecting and valuing children among others who are vulnerable including the disabled, the aged, and the economically and socially disadvantaged. Christian advocacy was instrumental to the emancipation of children from labour and hardship following the industrial revolution.

7. Importantly, Christian teaching is heavily centred on the reciprocal duties which attach to human rights. That is, those things which we are obligated to do towards others in recognition of their *imago dei*. This is captured in the Golden Rule and the Greatest Commandment:

> *"So whatever you wish that others would do to you, do also to them, for this is the Law and the Prophets."* (Matthew 7:12)
>
> *"You shall love the Lord your God with all your heart and with all your soul and with all your mind. This is the great and first commandment. And a second is like it: You shall love your neighbour as yourself."* (Matthew 22:37-38)

8. In light of these beliefs it may therefore be considered counterintuitive for Christian organisations to be largely opposed to a human rights act. It is important to note that this opposition is not grounded in opposition to human rights. Rather, the opposition is grounded in the negative practical and philosophical consequences of attempting to protect or promote human rights according to this particular method.

9. It is the strong view of the undersigned submitters that a human rights act is a misguided initiative in the Queensland context because it is not necessary and because the negative practical and philosophical outcomes outweigh any potential benefits.

Need

Consider the effectiveness of current laws and mechanisms for protecting human rights in Queensland and possible improvements to these mechanisms.

10. In Australia there are effective and well-developed legal doctrines that protect fundamental rights and freedoms from incursion by legislation. In addition, a large range of specific rights and freedoms are already protected at common law. Australia also has a commendable record with respect to the democratic protection of fundamental rights and freedoms.

Common Law

11. Many fundamental rights and freedoms are protected at common law as necessary incidents of the system of representative democratic government.

12. Rights and freedoms have a long and distinguished heritage in common law, especially in key moments of Constitutional history such as the Magna Carta in 1215, the settlement of parliamentary supremacy following the Glorious Revolution of 1688 and the enactment of the *Bill of Rights Act 1688*.

13. English Historian AW Brian Simpson writes that, before the flood of international human rights conventions following the second world war, human rights in the UK were "so well protected as to be an example to the world… When there was neither war, nor insurrection, nor widespread problems of public order, few would deny that people in the United Kingdom enjoyed a relatively high level of personal and political freedom."[1] He also writes:

> *In the modern period, and subject to certain limitations which, for most persons were of not the least importance, individuals could worship as they pleased, hold whatever meetings they pleased, participate in political activities as they wished, enjoy a very extensive freedom of expression and communication, and be wholly unthreatened by the grosser forms of interference with personal liberty…"*[2]

14. The common law is a vibrant and rich source of human rights. French CJ has said that the rights and freedoms embodied in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) in significant measure incorporate rights and freedoms at common law.[3]

15. Many common law rights are expressed as freedoms or liberties due to the fundamental common law assumption that all things are permitted unless expressly prohibited by law.

[1] AW Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2004).
[2] Ibid.
[3] *Momcilovic v The Queen* (2011) 245 CLR 1, [51].

> *Under a legal system based on the common law, 'everybody is free to do anything subject only to the provisions of the law', so that one proceeds 'upon the assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it'.*[4]

16. The corollary of this principle is that no person or authority may interfere with the liberty of a person except by authority of law.[5]

17. The recognition of fundamental rights and freedoms within common law therefore has a rich history.

Common Law Doctrines of Legality and Consistency

18. The doctrines of legality and consistency with international law are principles of statutory interpretation. They protect fundamental rights and freedoms whilst carefully upholding the separation of powers between the legislature and the judiciary. They do not permit policy-making or legislative redrafting by courts, but do ensure that parliament must squarely confront any intention to override fundamental rights and freedoms, and therefore give account for it.

19. These doctrines operate without transferring policy-making authority into the hands of unelected judges.

Legality

> *"Unless the parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation."*[6]

20. The doctrine of legality provides that parliament cannot by the use of general words in legislation infringe fundamental rights and freedoms. Equally it ensures that where the wording of legislation is ambiguous in its application to a particular matter, the court will not give the law a meaning that would infringe fundamental rights and freedoms.

21. The doctrine of legality shares some qualities of the reading down provision from a statutory bill of rights at common law. It ensures that the task of statutory interpretation is not undertaken without reference to fundamental rights and freedoms and requires courts to ensure that rights and freedoms are not infringed by any law other than one clearly expressed to have the purpose of infringing a right or freedom – a purpose which must be clearly declared and therefore justified, debated and voted on through the democratic and legislative processes.

22. Where a reading down provision would refer to the particular rights and freedoms enumerated in the statutory bill of rights, the doctrine of legality draws the applicable rights and freedoms from the common law. No definitive list of those rights and freedoms has been drawn up at common law, but a broad range have been identified, including: freedom of association and community, freedom of movement, right of assembly, personal liberty, freedom of speech, freedom of

[4] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) quoting *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 283.
[5] *Entick v Carrington* (1765) 19 St Tr 1029.
[6] *Re Bolton; ex parte Bean* (1987) 162 CLR 514; *Coco v The Queen* (1994) 179 CLR 427, 437.

expression, equality of religion, right of re-entry of a citizen to Australia, trial by jury, *habeas corpus*, the right against self-incrimination, *mens rea* as an element of legislatively created crimes, procedural fairness, freedom from trespass of police officers on private property, open justice, non-retrospectivity of criminal law statutes and changes to rights and obligations generally, freedom from arbitrary arrest and search, freedom of individuals to trade as they wish, legal professional privilege, the criminal standard of proof and a wide range of others.[7]

23. Significantly, the doctrine of legality also applies to regulations and delegated legislation, placing an important check on the powers of the administrative arm of government.[8]

Consistency

> *"Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party."*[9]
>
> *"There is a common law principle that statutes should be interpreted and applied, so far as their language permits, so as not to be inconsistent with international law or convention to which Australia is a party."*[10]

24. Just as the doctrine of legality creates a presumption that legislation does not interfere with common law rights and freedoms, so the doctrine of consistency creates a presumption that legislation does not violate Australia's international obligations.

25. Parliament therefore cannot through the use of general language in legislation abrogate a right or freedom in applicable international law. Equally, where the wording of legislation contains ambiguity with respect to its application to a particular matter, courts will not prefer a meaning that infringes applicable international law. This includes international human rights instruments to which Australia is a party:

    - International Covenant on Civil and Political Rights;
    - International Covenant on Economic, Social and Cultural Rights;
    - Convention on the Elimination of all forms of Racial Discrimination;
    - Convention on the Elimination of all forms of Discrimination Against Women;
    - Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
    - Convention on the Rights of the Child; and
    - Convention on the Rights of Persons with Disabilities.

26. The doctrine of consistency operates similarly to the doctrine of legality, except that it sources its rights and freedoms from the seminal and widely adopted international treaties.

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[7] A wide-ranging list has been compiled from the relevant authorities by Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) at [5.46]; see also *Momcilovic v The Queen* (2011) 245 CLR 1, [444] (Heydon J); *Malika Holdings v Stretton* (2001) 204 CLR 290, [28] (McHugh J).
[8] Dan Meagher and Matthew Groves, 'The Common Law Principle of Legality and Secondary Legislation' (forthcoming, to be published in the *University of New South Wales Law Journal*).
[9] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287.
[10] *Momcilovic v The Queen* (2011) 245 CLR 1, [18] (French CJ).

27. In a way analogous to the doctrine of legality, parliament therefore has to squarely confront the democratic process with its intentions made clear, whenever enacting a law that would infringe human rights.

Democratic Protection of Human Rights

28. In Australia great emphasis is placed on the role of democratic process and the work of the legislature with respect to the protection of human rights. Not only is there no Commonwealth Bill or Charter of rights, but the common law doctrines discussed above have the effect of ultimately deferring the question of rights encroachments to parliamentary sovereignty, recognising that contested rights issues ultimately are questions of policy.

29. Some proponents of bills of rights are explicitly in favour of the reform due to distrust of the effectiveness of the democratic protection of human rights and freedoms through parliamentary sovereignty. The majoritarianism of democracy, some may argue, is geared towards protecting majority rights which are determined by majority interests at the expense of minority voices. Three objections to this view are:

    - In practice the majority is rarely so large that minorities are ignored;
    - The majority is in fact interested in the interests of the minority in certain key respects, especially if the concerns are valid; and
    - The minority is not always right – on the contrary irrational and fringe voices are minority voices which the majority helps to filter and moderate.

30. Concerning the bill of rights debate, former Minister for Foreign Affairs and New South Wales Premier, Bob Carr has said: "Parliaments are elected to make laws. In doing so, they make judgements about how the rights and interests of the public should be balanced. Views will differ in in given case about whether the judgement is correct. However, if the decision is unacceptable, the community can make its views known at regular elections. This is our political tradition. A bill of rights would pose a fundamental shift in that tradition, with the parliament abdicating its important policy-making functions to the judiciary. … A bill of rights is an admission of the failure of parliaments, governments and the people to behave in a reasonable, responsible and respectful manner. I do not believe we have failed."[11]

31. In 2007, Carolyn Evans and Simon Evans conducted empirical research into the attitudes of parliamentarians towards the protection of human rights in the legislative process.[12] They interviewed representatives in all jurisdictions and mostly, but not exclusively, chose those who had been involved on scrutiny of legislation committees. They found that parliamentarians were overwhelmingly aware of rights issues, believed they formed part of their daily work and understood that the balancing of rights issues was of high importance to constituents. They also found that parliamentarians had a diverse range of understandings of rights, noting:

[11] Bob Carr, *Only People – Not Bills – Protect Rights* (The Australian, 9 January 2001).

[12] See Carolyn Evans and Simon Evans, *Messages from the Front Line: Parliamentarians' Perspectives on Rights Protection* in Tom Campbell, K D Ewing and Adam Tomkins (Eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 329.

> *"This can be a healthy form of pluralism and allow for a more open debate about the relevance of rights in particular circumstances than the more constrained and legalistic arguments that tend to be made under bills of rights."*[13]

32. The authors further noted that parliamentarians believed that parliaments make a real contribution to the protection of human rights through scrutiny committees, parliamentary accountability and the various ways in which they could bring human rights issues to the attention of the parliament or the public.

33. In the Queensland context, some may counter these points by reference to concerns about the trampling of rights under the Newman Government – principally, restrictions on freedom of association through the "Bikie Laws". In practice, however, this is an example of the democratic protection of rights working well. Despite enjoying the largest majority in the state's history, the Newman government was voted out of office after just a single term. As a consequence, the present government is closely examining the bikie legislation.

34. The democratic process and the work of the legislature is a good, effective and accountable protector of human rights and freedoms.

[13] Ibid, 343.

Consequences

Consider the costs and benefits of adopting a HR Act (including financial, legal, social and otherwise).

Undermining Democracy

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35. A bill of rights reduces contested and often genuinely unclear questions of policy to vague abstractions of unpredictable application. A right to freedom of expression, for example, is something that gains broad support and, like other rights of the kind found in a particular charter or bill, reads well as a vague abstraction. But the point of application is less clear – what does this mean for racist speech? Holocaust revision? Offensive speech? The limits of sexual content in art? Regulation of the internet? More broadly there are innumerable and genuine contests over such nuanced issues as the entitlements of suspected terrorists, the appropriate limits of surveillance, the extent to which religion can be expressed in public life and so forth. Each of these questions is far more refined, representing issues of social policy, most of which are resolved in legislation or left open to civil society to deal with.

36. By way of example, widespread disagreement currently exists with respect to what constitutes vilification and hate-speech and the corollary of this issue: namely, the limits of free speech. The High Court of Australia is itself divided over the extent of freedom of speech in this regard evidenced by the 3-3 split in *Monis v The Queen*[14] over whether freedom of political communication can protect communication that "reasonable persons would regard as being, in all the circumstances, menacing, harassing or offensive." In addition, the threshold of "offend" and "insult" set by laws such as section 18C of the *Racial Discrimination Act 1975* (Cth) and section 17 of the *Anti-Discrimination Act 1998* (Tas) have been the subject of robust and important debate with the Australian Law Reform Commission recently recommending a review of section 18C and, in conjunction, of anti-vilification laws more generally.[15]

37. Other jurisdictions have experienced similar debates. Section 13 of the *Canadian Human Rights Act 1977* prohibited the transmission of "hate messages." It was repealed in 2014 after a government-commissioned report by academic Richard Moon recommended its removal and the limitation of hate speech to incitements to violence. Meanwhile the courts have demonstrated marked disagreement over their own approaches to hate speech and whether words that ridicule, belittle, or constitute extreme manifestations of detestation and vilification ought to be captured within the scope of unlawful hate speech. [16]

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[14] *Monis v The Queen; Droudis v The Queen* [2013] HCA 4.

[15] Australian Law Reform Commission Report 129, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws: Final Report* (December 2015) at 4.9 – 4.10.

[16] See *Saskatchewan Human Rights Commission v Whatcott* [2013] SCC 11; the history of this case at first instance before the Commission, the ruling of the trial judge and the Supreme Court appeal are an example of the contested nature of what constitutes hate speech and the limits of freedom of speech.

38. Not all disagreements relate to point of application issues, however. Some rights themselves are contested – a right to privacy? Healthcare? Should social and economic rights have the same status as civil and political rights? Once again, these are policy questions.

39. Jeremy Waldron has observed that in thirty years of modern study of human rights, there has been a proliferation of theories but no consensus.[17] The contested nature of human rights issues in a plural democratic society makes the maintenance of broad-based discussions for the ongoing development of human rights policy essential. The appropriate forum for these discussions and, in particular, the application of ideas about rights to particular legislative enactments, belongs with the parliament. It is particularly important to note that genuinely contested ideas such as these are the bread and butter of democratic policy-making and any decisions about them must be made by accountable bodies.

40. The separation of powers doctrine which is so foundational to our Constitutional system of democratic government requires that policy-making be vested in the body that is accountable to the people for its actions, and that is equipped with the mechanisms for this task, including committees, representation, and the forum of parliament itself. Courts are required to find meaning in legislation where the task is necessary to the dispute before them. To ask courts to reinterpret the meaning of legislation to suit vague and uncertain human rights abstractions which are resolved by judgement calls relating to contested social policies is to fundamentally reorient their role in a way that is undemocratic. It also undermines the courts' ability to apply fixed laws to uncertain cases, which is central to their responsibility under the separation of powers system.

41. Judges are not particularly qualified to conduct broad-ranging public policy investigations, neither is their forum conducive to this function. They are unelected, largely unaccountable and themselves represent an elite minority. Members of the legal profession already have opportunity to participate in the legislative process through specialist submissions to inquiries, the review functions of bodies like the Australian Law Reform Commission and participation in democracy at large.

42. Where decisions are made more remotely from the voting public, resentment becomes a problem and people feel disempowered. The rise of fringe political figures across the west is a timely reminder of the consequences of a disenfranchised electorate – from National Front in France to Donald Trump in the USA. Many fringe parties in Europe use concerns about the undemocratic nature of some decisions made in the European Union to raise their popularity.

43. It is also important to note that the vagueness of human rights instruments and the uncertainties around their application make it substantially more difficult for parliaments to legislate with certainty. Significantly, the uncertainty may not be related to a settled moral question, but rather a highly contentious one over which good people disagree. It is vital that parliament know beforehand the outcomes of policies as much as possible as these can be determinative of whether certain legislation is even implemented. In addition, it is vital that accountability for these policies is clearly traced back to the relevant body so that the electorate knows how to respond. Where the courts muddy the waters and alter outcomes the chain of accountability is more difficult for the electorate to understand.

[17] Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999), 225.

> *"At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decision s of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal"* (Abraham Lincoln, First Inaugural Address, 4 March 1861).

Undermining the Courts

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44. Where courts embark in broad policy-making exercises, judicial appointments become politicised and judges are increasingly viewed according to their real or perceived political opinions.

45. Former High Court Chief Justice Harry Gibbs has said:

> *"A bill of rights… would tend to have the result that judges would be appointed not so much for their legal ability as for their political or ideological attitudes. When a court is empowered to give a final decision on important matters of social policy there is a great temptation to appoint judges whose views on those questions of policy are views of which the executive government approves. The circumstances surrounding some judicial appointments in the United States show that it has often been impossible to resist this temptation. Thus one of the essentials of a free society – an independent judiciary – tends to be weakened when the judges are given what virtually amounts to political power."*

46. The former chief justice was referring "especially" to a constitutional bill of rights, but his comments were not limited to that model. Also, in practice, the same political and ideological attitudes become relevant to the application of a statutory document, as will be seen shortly in the examination of outcomes in other jurisdictions.

47. This would undoubtedly have the effect of undermining public trust in the judiciary and would create perceptions of ideological bias – phenomena which are refreshingly absent in Australia, where the judiciary enjoys enormous respect and neutrality.

Undermining Parliamentary Sovereignty

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48. When courts are empowered to make declarations concerning whether particular laws are or are not compatible with human rights, it is nearly impossible from a political or social point of view for parliaments to resist such rulings. Despite the reality that it is in fact a difference of opinion over a contested application of a vague rights abstraction, the terms of the legislation empower courts with moral authority.

49. It is probably at least partly for this reason that the UK parliament has not once resisted the pressure to repeal or rewrite laws that have been the subject of declarations of incompatibility under the *Human Rights Act 1998* (UK). Likewise, the Canadian parliament has never taken advantage of the "notwithstanding clause" available to it as a kind of over-ride trigger to protect legislation that may be believed by courts to infringe a right or freedom.

Fundamental Freedoms

50. As Christian groups we are particularly concerned with the maintenance fundamental freedoms, which are linked to human dignity. The coercive power of the state, when unduly limiting such rights as freedom of conscience, speech, association and expression amongst others erodes human dignity by denying human capacity to flourish.

51. In particular, freedom of thought, conscience and religion or belief (International Covenant on Civil and Political Rights, Article 18) lies at the foundation of freedom. The realm of a person's thought represents the most private and sacred aspect of their personhood and is the last bulwark against the power of the state. When the state enters into a person's conscience to determine what they may or may not think or believe by force of law, it steps outside of its mandate as a government of a free and democratic society.

52. Long considered the cornerstone of the western democratic tradition, fundamental freedoms are being eroded by human rights bodies and legislation. This is a major concern among religious groups relating to the legislation and litigation of human rights issues in general.

53. The reason for this erosion is partly because human rights mechanisms are being used for the very thing they were originally established to guard against. If one examines the seminal treaties on human rights such as the ICCPR or the Universal Declaration of Human Rights, for example, the overwhelming emphasis of those documents is on the freedom and liberty of citizens vis-a-vis the power of the state. Unfortunately, rights language and human rights mechanisms are increasingly being used to co-opt the coercive power of the state into social relationships between citizens. This is a powerful and popular way for special interest groups in particular to toy with social engineering at the expense of the liberty of others.

54. At the time of writing, Catholic Archbishop of Hobart Julian Porteous is before the Tasmanian Anti-Discrimination Commission for distributing a booklet to some Catholic schools titled "Don't Mess with Marriage." The booklet outlines the Catholic teaching on marriage and family and uses cautious and measured language. There is nothing overtly offensive about the document except that some people may disagree with the position of the Catholic church on the subject. A member of the Australian Greens has lodged a complaint with the Tasmanian Anti-Discrimination Commissioner and the matter has gone to mediation. Lawyers have been engaged and the Christian church across the nation has been shocked. If the complainant is not happy with the mediation process the matter will proceed to the Anti-Discrimination Tribunal from which there is a right of appeal to the Tasmanian Supreme Court.

55. Equal Opportunity and Anti-Discrimination commissions across the nation are empowered to bring the coercive power of the state into highly subjective and often morally unclear social disputes. The practical effect of this is to advance the social agenda of one particular ideological position among others. This use of state power can be initiated by activist groups to send a message that their opponents should be silent and not exercise fundamental rights like freedom of speech and belief lest they face legal consequences. Ironically, the legislation underlying these bodies is itself human rights legislation that purports to codify the human right to be free from discrimination at the hands of the government (for example, ICCPR Article 26).

56. The below signatories to this submission are aware of friends and colleagues who have been hauled before these bodies for exercising fundamental human rights in broadly reasonable ways – this includes the Queensland Anti-Discrimination Commission. The widespread concern of the church about this is not widely understood in the public eye, neither is it appreciated just how effective such activities have been at causing fear amongst religious people lest they suffer the same fate.

57. It is unsurprising, therefore, that many are sceptical about the way legislated human rights will be used to supress fundamental freedoms.

58. There are key examples of rights-type legislation being used by activists to make an example of people of faith. At present, one of the main rights legislated in Australian law is the right to non-discrimination, hence its prevalence in many of the cases.

    - Christian pastors Daniel Scott and Daniel Nalliah spoke at a seminar about Islam in 2002, aimed at educating the Christian church about Islamic issues. Scott is a former Muslim. Two Australian Muslims had been asked to attend the seminar by an employee of the Victorian Equal Opportunity Commission. They launched an action with the Commission under the *Racial and Religious Tolerance Act 2001* claiming that the pastors intended to vilify Muslims. In 2005 VCAT ruled in favour of the complainants. In 2006 the Supreme Court of Victoria overturned VCAT's decision on appeal. The legal proceedings drew out over years and the costs were enormous.

    - Christian Youth Camps is an organisation with a specifically Christian ethos. They own a campsite on Phillip Island in Victoria which the Cobaw Community Health organisation sought to book. The booking was declined on the basis that the activities being promoted at the camp were contrary to the Christian ethos of the campsite. Cobaw commenced proceedings in VCAT which found against the campsite. The ruling was upheld on appeal to the Victorian Court of Appeal.

    - "The Helpers" are a group of volunteers who offer counselling and support to women seeking abortions, principally in Melbourne. They understand that women are often under pressure and distressed when seeking an abortion and may prefer an alternative if they can see a way to achieve it. The Helpers have peacefully offered help for years outside clinics; they have never engaged in any violence, intimidation or harassment. Despite there being no evidence of any of these things, the Victorian government enacted legislation purporting to protect the right to privacy of women seeking abortions by legislating "buffer zones" around clinics in which it is illegal to communicate on the subject of abortion in a way that can be seen or heard. Over the past few years, through their presence near one Melbourne clinic alone, the Helpers have preserved the lives of more than 300 babies. Many of these lives have been preserved because the Helpers have offered financial assistance to mothers facing hardship, legal support to those suffering abuse, safe accommodation for those who need it, in home domestic support and babysitting for those who are alone. They remain in touch with many of the mothers who are grateful for the support. The work of the Helpers is now illegal on so-called human rights grounds. The first version of the legislation was introduced by pro-abortion and anti-Christian Sex Party MLC, Fiona Patten.

59. Christians are concerned by the way in which the language of rights are used mainly to advance a particular social or political view amongst others. The examples in Australia are scattered, but

becoming more regular – many don't find their way into court, but intimidate and cost money nonetheless. Far for from seeing an improved situation, culturally similar international jurisdictions that have bills of rights tend to have far more cases that bring the coercive power of the state into morally unclear social disputes. Organisations like The Christian Institute Legal Defence Fund, the Beckett Fund, and Alliance Defending Freedom International have been set up to protect the legal interests of Christians against rights activism on a full-time basis across Europe, in the UK, Canada and the USA.

60. Professor Rex Adhar of the University of Otago has noted:

> *"Social engineering is a demanding exercise for governments but especially so for special interest groups… A cure is at hand however. The broad generalities of modern rights laws can be invoked and interpreted to further one's cause. A bald assertion of one's interests is both crude and unnecessary. One's approach can, instead, be felicitously couched in the language of rights."*[18]

61. Samuel Gregg writes:

> *"The paradox that confronts us is that contemporary rights language seems increasingly predicated towards facilitating the use of political and legal power to sanctify certain ideological tendencies… as we have seen in more recent times, to attempt to restrict as fundamental a freedom as religious liberty to what occurs during church services."*[19]

62. On the subject of the drifting away from rights as freedoms that are possessed by citizens vis-à-vis the coercive power of the state, the Australian Capital Territory's Human Rights Act 2004 serves as a particular warning.

63. Part 5A of the Act was added by subsequent amendment, coming into effect from 1 January 2009. The new part not only extended the operation of the Act to cover the obligations of public authorities, but provided for an "opt-in" regime for private entities also. Alarmingly, the Act states that upon receiving an opt-in request, the Minister *must* make a declaration that the entity is subject to the obligations of the Act, but upon receiving an opt-out request, the Minister *may* make a declaration that the obligations of the Act no longer apply.[20]

64. The Explanatory Statement illuminates the matter more clearly:

> *"The private sector is already required to act lawfully in regard to occupational health and safety, equal opportunity and similar obligations. Encouraging broader, voluntary compliance with human rights standards is a natural progression in the process of ensuring the best possible outcomes for Canberrans.*
>
> *The provision will be unique to the ACT, however, it draws on the increasing international recognition that the private sector should be encouraged to respect and promote human rights."*[21] *[emphasis added]*

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[18] Rex Adhar, 'Adrift in a Sea of Rights' (*New Zealand Education Development Foundation*, 2001), 43.
[19] Samuel Gregg, 'Crisis of Human Rights' (*Policy*, Autumn 2001).
[20] *Human Rights Act 2004* (ACT), s 40D.
[21] *Explanatory Statement to the Human Rights Amendment Bill 2007*, 8.

65. Natural progression must be taken to mean that further encroachments of rights type language into social and other relationships can be expected.

66. The emerging agenda behind the expansion of the ACT Charter is clearly one to bring the coercive power of the state into the business and social relationships of society. This is not traditionally the domain of human rights law and seriously threatens the exercise of traditional rights and freedoms in the community.

A note on religious freedom and non-discrimination

67. Following the previous section, it is important to make some general statements about the value and importance of religious freedom as a fundamental and non-derrogable right, and its relationship with the right to non-discrimination and equality before the law.

68. Earlier human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) group religion, thought, conscience and belief together[22]. This locates freedom of religion amongst the most fundamental rights in society, at the core of the freedom of the human person.

69. High Court Chief Justice Anthony Mason and Justice Gerard Brennan phrased it this way:

> *Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society.*[23]

70. They went on to say:

> *What man feels constrained to do or to abstain from doing because of his faith in the supernatural is prima facie within the area of his legal immunity, for his freedom to believe would be impaired by restriction upon conduct to which he engages in giving effect to that belief. The canons of conduct which he accepts as valid for himself in order to give effect to his belief in the supernatural are no less a part of his religion than the belief itself.*[24]

71. Redlich J considered the function of religion as an inherent part of identity in *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors*[25]. He said:

> *The precepts and standards which a religious adherent accepts as binding in order to give effect to his or her beliefs are as much a part of their religion as the belief itself. The obligation of a person to give effect to religious principles in everyday life is derived from their overarching personal responsibility to act in obedience to the Divine's will as it is reflected in those principles.* ***Religious faith is a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity****. The person must, within the limits prescribed by the exemptions, be free to give effect to that faith.*[26]

72. That this is an accurate understanding of freedom of religion should be uncontroversial. Just as someone's beliefs - whether recognisably religious, humanistic, founded in some other ideology, or merely culturally imbibed – form an intrinsic part of their identity, so too does a person's religion. Beliefs inform what one thinks, from their deepest convictions to the way they

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[22] *International Covenant on Civil and Political Rights*, Article 18.
[23] *Church of the New Faith v Commissioner of Pay-Roll Tax* (Vic) (1983) 154 CLR 120, [6].
[24] Ibid, [4].
[25] [2014] VSCA 75.
[26] Ibid, [561].

progressively make sense of the wider world. But the full spectrum of Article 18 grants this group of freedoms, "either individually or in community with others and in public or private, to manifest… religion or belief in worship, observance, practice and teaching." The foundational right of freedom of thought, conscience and religion or belief therefore feeds into other fundamental freedoms. This broad protection necessarily requires freedom of association, which is a separate right under Article 22 of the ICCPR, in order to form religious communities, churches, parachurch groups, charities and other organisations. It also requires freedom of speech in order to express belief, share convictions and discussions of each person's truth claims in society at large. These activities are central to human flourishing.

73. Freedom of religion is therefore a most fundamental and important right. The respect which it is afforded is directly relevant to the extent to which any society is free in general as it underscores the extent to which the state is willing to reach within the realm of individual thought.

74. It is significant that, along with only a small number of other rights in the ICCPR, freedom of religion is a right from which no derogation is permitted even in a time of public emergency[27]. This underscores the fundamental importance of freedom of religion in a society that values human rights and fundamental freedoms.

75. This conception of freedom of religion is not widely reflected in current trends. Freedom of religion frequently loses out to other rights when conflicts occur and is relegated to lists of "exemptions" in various statutes.

76. The right to be free from discrimination is but one of many rights and freedoms enumerated under the *International Covenant on Civil and Political Rights* (ICCPR) and primarily relates to the need for all laws of the state to apply equally to all citizens. It is a protection against arbitrary law-making, or the inequitable treatment of persons through legislation.

77. Despite this, rights and freedoms have regrettably come to be viewed almost exclusively through a prism of non-discrimination in Australia – evidenced by the existence of widespread discrimination Acts across the commonwealth. There are four Commonwealth anti-discrimination Acts and either an anti-discrimination or equal opportunity act in most states and territories. Some of these include anti-vilification laws. This ballooning of a single right in legislation is fundamentally at odds with international law.

78. The prevalence of anti-discrimination laws has in part become problematic because they do not contain a sufficiently precise definition of what constitutes **unjust discrimination** as opposed to mere difference of treatment. Without such a definitional limit our domestic understanding of the right to non-discrimination threatens to become overly expansive at the expense of other rights and freedoms. Not all differences of treatment ought to be unlawful, particularly where the balancing of other rights is in issue.

79. Regarding the actual limits to discrimination, the United Nations Human Rights Committee specifically notes that the scope of the right to be free from discrimination is intended to be carefully defined. It is not necessarily intended to displace other rights and freedoms under the Covenant. The Committee's General Comment 18 states, at paragraph 13:

[27] *International Covenant on Civil and Political Rights*, Article 4(2).

> *Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the covenant.*

80. That is to say that non-discrimination's approximate limits lie at the point where differentiations of treatment occur in the reasonable and objective pursuit of other fundamental rights, including freedom of thought, conscience and religion or belief (Article 18).

81. There is a need to correct the imbalance in current anti-discrimination law to bring it closer to the ICCPR construction and ensure the ongoing protection of rights and freedoms in general.

82. Many are tempted to suggest that these issues are best resolved through the enactment of a comprehensive human rights instrument. The risks and problems associated with rights language in law already outlined, however, lead us firmly away from that conclusion.

83. Evidence from other jurisdictions and the points made earlier in this submission indicates that the enactment of more rights-type legislation which can be used to bring the power of the state into social relations on even wider grounds only serves to further exacerbate the concerns already outlined about the undermining of democracy and the transformation of rights instruments into social weapons rather than limitations on state power.

84. The enactment of more rights-type legislation (and a human rights act in particular) also creates new concerns around the role of the courts and the separation of powers, fundamental to our cherished system of government.

85. An alternative approach to resolve the issues around anti-discrimination and fundamental freedoms is therefore recommended.

86. The simplest solution is to ensure that "discrimination" under Commonwealth Anti-Discrimination Acts is defined in such a way as to be in accordance with its internationally prescribed definition.

87. **We recommend that Queensland anti-discrimination legislation be amended to add a general limitations clause that would ensure that the manifestation of a fundamental right or freedom, including religious freedom and other rights under the ICCPR, is not necessarily defined as discrimination.** This would also allow for the removal of exceptions for religion since such exceptions would no longer be necessary.

88. **We further recommend the adoption of the term "unjust discrimination" in Queensland laws that deal with discrimination, such as the *Anti-Discrimination Act 1991* (Qld), to describe unlawful differentiations of treatment.**

89. This approach has received support in the Australian Law Reform Commission's Freedom's Inquiry Final Report released in December 2015. Multiple organisations made submissions proposing this change, as did Professors Patrick Parkinson (University of Sydney) and Nicholas Aroney (University of Queensland). The ALRC concluded that:

> *Any concerns about freedom of religion should be considered in future initiatives directed towards the consolidation of Commonwealth anti-discrimination laws. In particular, further*

consideration should be given to whether freedom of religion should be protected through a general limitations clause rather than exemptions.[28]

90. The proposed drafting of this clause was included at paragraph 5.111 of the report and is also extracted in Annexure A of this submission.

[28] Australian Law Reform Commission Report 129, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws: Final Report* (December 2015) at 5.124.

Comparisons

Consider the operation and effectiveness of human rights legislation in Victoria, the Australian Capital Territory and by ordinary statute internationally.

91. A study of human rights acts in other jurisdictions reveals a number of concerns. Many of them have been largely ameliorated since the High Court's decision in *Momcilovic v The Queen* which rejected the more troubling aspects of the House of Lords' application of section 3 of the *Human Rights Act 1998* (UK) ("HRA"). Extracting these problems here, including their emergence in Victoria prior to *Momcilovic*, is nonetheless important to show the reality of the unpredictable consequences which can and still could flow from policy that purports to open "dialogue" between the legislature and the judiciary after the fashion of a statutory bill of rights.

92. Section 3 of the HRA requires courts to give effect to legislation in a way which is compatible with the human rights enumerated therein. Commonly referred to as a the "reading down provision", an analogue of this section is common to statutory bills of rights. This represents a fundamental shift in the law. Ordinarily, courts are required to interpret legislation so as to give the words their natural and ordinary meaning, and in line with the intention of parliament.

93. During parliamentary debates before the introduction of the HRA, Lord Cooke of Thondon in the House of Lords raised an objection common amongst those who oppose Human Rights Acts, observing that the role of courts with respect to statutory interpretation will fundamentally change: "Traditionally, the search has been for the true meaning; now it will be for a possible meaning that would prevent the making of a declaration of incompatibility." His Lordship went on to say, "The common law approach to statutory interpretation will never be the same again; moreover, this will prove a powerful Bill indeed."[29]

94. Judges have since said that, when applying the interpretation obligation in section 3, sometimes it will be "necessary to adopt an interpretation which linguistically may appear strained."[30] This may include techniques to "read down" express language and "read in" certain provisions.[31] A court may give a meaning to a statutory provision which it would not ordinarily bear[32], may imply words into a provision[33], or establish implied exceptions.[34]

95. The New Zealand Court of Appeal explained the nature of its decision making process under the *New Zealand Bill of Rights 1990*'s reading down provision in these terms:

> *"Of necessity value judgements will be involved… [these will be] a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all*

[29] United Kingdom, Parliamentary Debates, House of Lords, 3 November 1997, vol. 572, col. 1272-1273 (Lord Cooke of Thondon)
[30] *R v A* (No 2) [2001] UKHL 25.
[31] Ibid.
[32] *R v DPP ex Parte Kebilene* [1993] 3 WLR 972.
[33] *Lister v Forth Dry Dock & Engineering Co Ltd [1990] 1 AC 546* (House of Lords); *Pickstone v Freemans plc* [1989] 1 AC 66, 112D (House of Lords).
[34] *R v Offen, R v Gillard, R v McKeown, R v Okwuegbunam, R v Saunders (Stephen)* [2001] 1 WLR 514 (House of Lords); *R v Secretary of State for the Home Department ex Parte Simms* [2000] 2 AC 115; *R v Secretary of State for the Home Department ex Parte Pierson* [1998] AC 539, 573G-575D, 587C-590A.

the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise."[35]

96. This describes a quasi-legislative, policy-making exercise which points to the extent to which the courts' task of "finding meaning" is fundamentally reorientated, eroding the separation of powers.

97. Section 4 of the HRA empowers courts to make a declaration of a legislative provision's incompatibility with human rights. An analogue of this provision is also common to statutory bills of rights. Whilst the declaration does not suspend the operation of the law or strike it down, it does prompt the government and parliament to respond.

98. On the issue of parliamentary sovereignty, Professor James Allan notes that there has not been a single occasion on which the Courts have issued a declaration of incompatibility in the UK and the law has not been subsequently altered or amended by parliament. This, he argues, is on account of the near impossibility that a parliament would allow itself to appear to be "against human rights" – a simplistic but politically powerful perception[36]. Felicity McMahon further observes that declarations of incompatibility are often not issued, reflecting the extent to which judges have used the reading down provision to re-interpret statutes.[37]

99. Professor Allan states that declarations of incompatibility "…can convey the impression that the unelected judges had some authoritative, definitive (and to me, mysterious) ability to know and to declare precisely where to draw all highly contestable and disputed lines… [This is] grossly misleading in terms of a characterisation of what is in fact happening, which is that judges (or rather, a majority of judges) and the legislators (or rather, a majority of legislators) have disagreed over a highly contestable decision about where to draw some line on the basis of an indeterminate, abstract rights entitlement."[38]

100. In *Ghaidan v Godin-Mendoza*[39] Lord Steyn analysed every case to date in which a declaration of incompatibility had been considered in the UK. He concluded that under the HRA the interpretative obligation of section 3 was the principal remedial measure. His Lordship concluded, "A study of the case law reinforces the need to pose the question whether the law has taken a wrong turning."[40]

101. The power that UK courts have accrued to fundamentally reinterpret and effectively rewrite legislation by virtue of the HRA is now well established. This represents a shift in policy-making power to a small panel of unelected elites, thereby fundamentally eroding core principles of democracy, the democratic balancing of human rights concerns, and the separation of powers fundamental to our system of government.

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[35] *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9, 16.
[36] James Allan, 'You Don't Always Get What You Pay For: No Bill of Rights for Australia' (2010, *New Zealand Universities Law Review*, vol 24) 179, 184. See also Francesca Klug and Keir Starmer "Standing Back from the Human Rights Act: How Effective Is It Five Years On?" [2005] PL 715 at 721.
[37] 'The Human Rights Act 1998 (UK): An Impossible Compromise' in Tom Campbell, K D Ewing and Adam Tomkins (Eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 279.
[38] James Allan, 'The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism' (2006) *Melbourne University Law Review* 906, 914-915.
[39] [2004] UKHL 30.
[40] Ibid, 39.

> *"The operation of the HRA has shown that it is a severe blow to the sovereignty of Parliament. The interpretation obligation, rather than the power to issue a declaration of incompatibility, results in parliamentary intention and purpose being undermined and the object of legislation perverted. This seriously contorts the power of parliament to implement policy. An analysis of the case law surrounding the HRA shows that despite attempts to preserve parliamentary sovereignty by implementing a legislative model of human rights protection, when power is transferred to judges to review the acts of Parliament, to read down or away from the intention of Parliament, the harm to parliamentary sovereignty is unavoidable."*[41]

102. Prior to *Momcilovic*, there were similar troubling signs emerging with respect to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (CHRRA).

103. *DAS v Victorian Human Rights and Equal Opportunity Commission* [2009] VSC 381 concerned the interpretation of section 39 of the *Major Crime (Investigative Powers) Act 2004* which has the effect of limiting the common law protection against self-incrimination. That this was the plain meaning of the section was straightforwardly acknowledged by the Chief Justice in her reasons[42]. Ultimately, however, the Chief Justice ruled that the right to a fair trial under the charter precluded that effect from being given to section 39. Rather than issue a declaration of incompatibility, Her Honour relied on the reading down provision to reinterpret the legislation in a fashion that mirrors the problems described in the United Kingdom.

104. These points are made to illustrate the potential practical problems that emerge from reading down provisions and declarations of incompatibility. Although reading down provisions have been given more limited scope by the High Court in *Momcilovic*, the six separate judgements make it difficult to deduce precisely where the line is to be drawn. It also must be acknowledged that there is no guarantee, particularly in light of this slight uncertainty, how the law will develop in the future. It seems unlikely that the legislative provisions will be modified. *Momcilovic* was decided by a judiciary that is entrenched in the traditional separation of powers method – the enactment of more human rights acts may create a cultural shift.

105. French CJ appeared to be of the opinion that section 31(2) of the CHRRA added nothing new in principle to the common law doctrine of legality. If that opinion holds, then the enactment of a human rights act is a near pointless exercise. If a less restrictive approach is taken, however, then the possibilities for judicial policy making, an undemocratic concentration power, and the erosion of the separation of powers increase.

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[41] Above n 34, 285.

[42] *DAS v Victorian Human Rights and Equal Opportunity Commission* [2009] VSC 381, [56]

History

Consider previous and current reviews and inquiries (in Australia and internationally) on the issue of human rights legislation.

106. Australia has a long history of consultations, inquiries and votes into various bills or charters of rights models. Overwhelmingly, these processes have revealed strong opposition to such instruments.

107. Constitutional referenda have been held in 1944 and 1988. On both occasions the people voted overwhelmingly against a Constitutional Bill of Rights.

108. Since 1988 statutory bills of rights have become more central to the ongoing discussion. The statutory model received the most comprehensive attention following the establishment of the 2008 National Human Rights Consultation Committee (NHRCC) by then Attorney-General, Robert McClelland.

109. Despite the NHRCC receiving close to 40,000 submissions during the course of its national tour and consultation and recommending in its final report that a statutory bill of rights be enacted, unpopularity once again killed off the idea. As time passed, the publication of essays and books opposing charters of rights, and widespread opposition caused the government to drop the proposal.

110. In light of the history of this issue in Australia, there is no mandate or democratically driven reason why the Queensland government would pursue this policy.

Yours Sincerely,

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Lynne Donely
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Pastor John Hunt
Queensland State President, Australian Christian Churches

Wendy Francis
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Stephen O'Doherty
Chief Executive Officer, Christian Schools Australia

Reverend Ron Clark
Clerk, Presbyterian Church of Queensland

David Loder
General Superintendent, Queensland Baptists

Annexure A

A proposed general limitations clause for inclusion within the definitional sections of anti-discrimination legislation:

1. *A distinction, exclusion, restriction or condition does not constitute discrimination if:*
    a. *it is reasonably capable of being considered appropriate and adapted to achieve a legitimate objective; or*
    b. *it is made because of the inherent requirements of the particular position concerned or the overall ethos of the organisation; or*
    c. *it is not unlawful under any anti-discrimination law of any state or territory in the place where it occurs; or*
    d. *it is a special measure that is reasonably intended to help achieve substantive equality between a person with a protected attribute and other persons.*
    e. *The protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate objective within the meaning of subsection 2(a).*[43]

[43] Australian Law Reform Commission Report 129, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws: Final Report* (December 2015) at 5.111; citing P Parkinson and N Aroney, Submission to Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws*, 2011.