

The Research Director

Legal Affairs and Community Safety Committee

Parliament House

By email: lacsc@parliament.qld.gov.au

26 November 2018

Re: Queensland Parliament Human Rights Act Inquiry

Executive Summary

1. These submissions to the Queensland Parliament Human Rights Inquiry are made by the Australian Christian Legal Society Ltd, a body that unites State-based Christian lawyers' societies in Australia. In many senses religious freedom is the ultimate test of a society's willingness to recognise the liberty of the individual.
2. History, both within the West and within non-Western societies, has demonstrated that religion has the potential to challenge the State like no other claim on human life. The Australian Law Reform Commission's Freedoms Inquiry Final Report released on 02 March 2016 found, with reference to the encroachment of Commonwealth laws on freedom of religion, that there is 'a degree of community concern, as evidenced by the 2015 religious freedom roundtables convened by the Australian Human Rights Commission (AHRC).' As further outlined in these submissions, past human rights charter inquiries both in Australia and New Zealand attest to that level of concern.
3. The religious freedom rights of not only individuals but also of corporate entities should be protected in any proposed Charter. To fail to do so, would be to fail to give effect to human rights recognised under international law, with the consequent prospect that the Charter actually removes human rights in application. This is an unacceptable proposition for any Charter that purports to protect human rights. Any proposed Bill should not derogate from the standards implemented in international law.
4. In the Chair's Foreword to the 2017 Interim Report of the Australian Commonwealth Parliament Human Rights Sub-Committee Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the Status of the Human Right of Freedom of Religion or Belief Kevin Andrews writes:

the Victorian *Charter of Rights and Responsibilities* allows “reasonably necessary” limitations while the ACT *Human Rights Act* has the even lower threshold of “reasonable” limitations, compared to the ICCPR’s requirement that limitations be “necessary”. While religious exemptions within non-discrimination laws provide some protection, these place religious freedom in a vulnerable position with respect to the right to non-discrimination, and do not acknowledge the fundamental position that freedom of religion has in international human rights law.

5. The *Victorian Charter of Rights and Responsibilities Act 2006* (Vic) (the Victorian Charter) effectively weakens the *International Covenant on Civil and Political Rights* (ICCPR) guarantee of religious freedom by introducing the concept of ‘reasonable’ limitations, derogating from the standard of ‘necessary’ limitations found in Article 18(3) of the ICCPR. To adopt a model such as that implemented in the Victorian Charter is to effectively weaken the human rights protections offered under international law, which when applied in particular circumstances, may again amount to an effective withdrawal of the human rights of individuals or corporate entities. Again, any proposed Bill should not derogate from the standards implemented in international law.
6. The principle underpinning a ‘general limitations’ clause, as has been recently put forward for consideration by the AHRC, is that religious freedom rights are not unlawful to the extent that they must be balanced against other rights. They are equally valid and subsisting rights. An exemption regime is not an appropriate means to recognise these rights. To the extent that the Charter endeavours to balance religious freedom with other rights, the principle itself is one that should be reflected in its terms. A general limitations clause may be an appropriate means to provide that recognition.

Submissions

7. Having regard to the Terms of Reference for the Queensland Parliamentary Inquiry into a Human Rights Charter, the particular concern of these submissions is the right to religious freedom. We set aside the separate question of whether there should be a Charter implemented in Queensland. We do not take a position on this question in these submissions, and although the following submissions are concerned with the substance of a Charter, they are not to be understood to be made on the basis that there should be a Charter.
8. Our submissions are grouped under the following headings:

- a. The relevance of religious freedom.
- b. Religious freedom as a corporate right.
- c. Past academic treatment of religious institutions' concerns with Human Rights Charters.
- d. The findings of the 02 March 2016 Final Report of the Australian Law Reform Commission's Freedoms Inquiry as pertain to Religious Freedom.

The Relevance of Religious Freedom

9. It is arguable that 'the struggle for most of the principal civil liberties we have today originated in the struggle for various aspects of religious liberty'.¹ It is also arguable that the very idea of individual freedom and its protection in modern liberal democracies owes its origin to the defence of religion against encroachments by the state.² The right of individuals to formulate and articulate their beliefs, to act upon their consciences and to associate with fellow believers is fundamental to a free society.
10. In many senses religious freedom is the ultimate test of a society's willingness to recognise the liberty of the individual.³ History, both within the West and non-Western societies, has demonstrated that religion has the potential to challenge the State like no other claim on human life. Consider for example the role of the church in the formation of the Magna Carta, the role of Buddhist monks in assisting the transition from military dictatorship to fledgling democracy in Myanmar and the recent offer of sanctuary to asylum seekers facing return to Nauru by religious institutions (both Muslim and Christian).
11. Religious freedom also plays an important role in settler societies, such as Australia, where history shows that migrant communities reconnect with religious roots as a means to find community in a foreign land.
12. The Australian Law Reform Commission's Freedoms Inquiry Final Report released on 02 March 2016 found, with reference encroachment of Commonwealth laws on freedom of religion, that there is 'a degree of community concern, as evidenced by the 2015 religious freedom

¹ Jay Newman, *On Religious Freedom* (University of Ottawa Press, 1991) 100.

² Michael McConnell, 'Why Is Religious Freedom the "First Freedom"?' (2000) 21 *Cardozo Law Review* 1243.

³ See the exchange between Chief Justice Beverley McLachlin and Professor Jean Bethke Elshtain, 'Freedom of Religion and the Rule of Law: A Canadian Perspective' and 'Response', in Douglas Farrow (ed), *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal & Kingston: McGill-Queen's University Press, 2004).

roundtables convened by the Australian Human Rights Commission (AHRC).⁴ As further outlined below, past human rights charter inquiries both in Australia and New Zealand attest to that level of concern.

Religious Freedom as a Corporate Right

13. Religious freedom is also an associational right.⁵ It necessarily includes the right of religious associations and groups to exist, to define their own beliefs, to have legal personality, to govern their own internal affairs, and to manifest the religious convictions of their adherents both in public and in private, in worship, observance, practice and teaching.⁶ If religious freedom is restricted to an individual's right to believe, with no right to practice one's belief, then it does not amount to very much at all. If religious freedom includes an individual's right to believe and practice their religion, but does not include the right to associate with other religious believers in accordance with their shared convictions, then something that lies at the heart of religious faith and practice will be severely jeopardised. Religious freedom has an 'ineradicable collective or communal dimension'.⁷ As Professor Cole Durham has pointed out:

Protection of the right of religious communities to autonomy in structuring their religious affairs lies at the very core of protecting religious freedom. We often think of religious freedom as an individual right rooted in individual conscience, but in fact, religion virtually always has a communal dimension, and religious freedom can be negated as effectively by coercing or interfering with a religious group as by coercing one of its individual members.⁸

⁴ Australian Law Reform Commission 2016, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129), published on 02 March 2016, available at <https://www.alrc.gov.au/publications/freedoms-alrc129>, accessed 02 March 2016, paragraph 5.123.

⁵ Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010). The following section draws upon submissions made by Professor Nicholas Aroney and Mark Fowler to the Australian Human Rights Commission Religious Freedom Roundtable. These submissions have adapted those submissions, and this document is not to be taken to reflect the view of Professor Aroney.

⁶ International Covenant on Civil and Political Rights, Article 18. Opened for signature 16 December 1966, 999 UNTS 171, entered into force 23 March 1976. See Manfred Nowak, *CCPR Commentary* (Kehl am Rhein: Engel, 1993) 386–9, cited in Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford: Oxford University Press, 2010) 39.

⁷ Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford University Press, 2005) 325.

⁸ W. Cole Durham, 'The Right to Autonomy in Religious Affairs: A Comparative View' in Gerhard Robbers (ed), *Church Autonomy: A Comparative Survey* (Frankfurt am Main: Peter Lang, 2001) 1.

14. Religious liberty in a free society must include the right of individuals to form associations in which individuals chose to bind themselves to a set of religious values and convictions that are not necessarily 'liberal'.⁹ As Professor William Galston has observed:

It is not obvious as an empirical matter that civil society organisations within liberal democracies must be organised along liberal democratic lines... A liberal policy guided ... by a commitment to moral and political pluralism will be parsimonious in specifying binding public principles and cautious about employing such principles to intervene in the internal affairs of civil associations. It will rather pursue a policy of *maximum feasible accommodation*, limited only by the core requirements of individual security and civic unity. That there are costs to such a policy cannot reasonably be denied. It will permit internal associational practices (e.g. patriarchal gender relations) of which many disapprove. It will allow many associations to define their membership in ways that may be viewed as restraints on individual liberty ... Unless liberty – individual and associational – is to be narrowed dramatically, however, we must accept these costs.¹⁰

15. Furthermore as argued by former Chief Justice Gleeson, religious associational freedom continue to play an important role in contributing to the development of community bonds:

It is the general acceptance of values that sustains the law, and social behaviour; not private conscience. Whether the idea is expressed in terms of teaching, or communication, there has to be a method of getting from the level of individual belief to the level of community values. Religion is one method of bridging that gap. What are the alternatives? Apart from religion, what is it that forms and sustains the moral basis upon which our law depends? How are community values developed and maintained in a pluralist society? I do not suggest that it cannot be done; but it is not easy.¹¹

⁹ From a liberal point of view, what is most crucial in order to protect individuals is not the right to join a group, but the right to exit it: Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press, 2003) 97.

¹⁰ William Galston, 'Value Pluralism and Political Liberalism' (1996) 16(2) *Report from the Institute for Philosophy and Public Policy* 7, 7.

¹¹ Murray Gleeson, 'The Relevance of Religion' (2001) 75 *Australian Law Journal* 93, 95

16. The principle protection to religious freedom recognised under international human rights law is that found in Article 18(3) of the *International Covenant on Civil and Political Rights* (ICCPR), further detailed below. Importantly, it extends to both individuals and corporate entities.
17. Religious freedom rights of both corporate entities and individuals should be protected in any proposed Charter. To fail to do so, is to fail to give effect to human rights recognised under international law, with the consequent prospect that the Charter actually removes human rights in application. This is an unacceptable proposition for any Charter that purports to protect human rights. Any proposed Bill should not derogate from the standards implemented in international law.

Religious Institutions Concerns with Human Rights Charters

18. Proposals for Human Right Charters in New Zealand, in Australian States and the proposal considered by the Commonwealth 2009 Brennan Inquiry all brought forth deep reservations on the part of persons of faith, including Muslim, Jewish, Conservative religious (Evangelicals, Catholics and other religious groups), Sydney Anglican, Presbyterian, Baptist, Melbourne and Sydney Catholic dioceses and smaller Christian and other religious groups (Seventh Day Adventists, Mormons Latter Day Saints, Jehovah Witnesses). Various academic writers have attempted to analyse the bases for these concerns.¹² One objection of particular concern was raised by the Presbyterian Church of Australia and Anglican Church submissions to the 2009 Brennan Inquiry. They argued that the Charters in the ACT and Victoria do not give reflect the protections to religious freedom required under international human rights law. Article 18(3) of the *International Covenant on Civil and Political Rights* (ICCPR) provides:

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.¹³

19. As far as Victoria is concerned, they contrast this with s 7(2) of the *Victorian Charter of Rights and Responsibilities Act 2006* (Vic), which provides:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including —

¹² Parkinson, P. (2010). "Christian Concerns about an Australian Charter of Rights." *Australian Journal of Human Rights* 15(2): 83.83, Ahdar, 'How well is religious freedom protected under a Bill of Rights? Reflections from New Zealand' (2010) 29(2) *University of Queensland Law Journal*, 279.

¹³ *International Covenant on Civil and Political Rights* Article 18(3).

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

20. The Victorian Charter effectively weakens the ICCPR guarantee of religious freedom by introducing the concept of 'reasonable' limitations, derogating from the standard of 'necessary' limitations found in Art 18(3) of the ICCPR. The Victorian Charter fails also to reflect the subsequently enunciated United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1984),¹⁴ which define the conditions for permissible limitations and derogations enunciated in the ICCPR. The Principles provide that 'all limitation clauses shall be interpreted strictly and in favor of the rights at issue' and that 'Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:

- (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
- (b) responds to a pressing public or social need,
- (c) pursues a legitimate aim, and
- (d) is proportionate to that aim.'

21. Asserting the failure to comply with the ICCPR and the Siracusa Principles, the Presbyterian Church of Australia's submission argued that there is effectively no boundary to the grounds on which freedom of religion may be restricted under the Victorian Charter.

22. The Victorian Charter also omits the rights of parents to ensure the religious and moral education of their children (Article 18(4) ICCPR):

- 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

23. To adopt a model such as that implemented in the Victorian Charter is to effectively weaken the protections offered under international law, which when applied in particular circumstances, may amount to an effective withdrawal of the human rights of individuals or corporate entities. Again, this is an unacceptable proposition for any Charter that purports to

¹⁴ U.N. Doc. E/CN.4/1985/4, Annex (1985).

protect human rights. Any proposed Bill should not derogate from the standards implemented in international law.

Findings of the Australian Law Reform Commission's Freedoms Inquiry March 2016

24. Finally, as may be implied from the above discussion, the balancing of religious freedom human rights against other rights will be a necessary task of any proposed Charter. Lessons may therefore be drawn from equivalent 'balancing provisions' within existing Australian equal opportunity laws. The Australian Law Reform Commission's Freedoms Inquiry Final Report¹⁵ released last month provides a wholesale review of such laws which is based upon an extensive public submissions process. The Commission found that, in the context of Commonwealth laws, it 'remains possible ... that the removal or lessening of exemptions for religious organisations contained in Commonwealth anti-discrimination laws ... may have constitutional implications under s 116.'¹⁶ Section 116 enshrines the express Commonwealth Constitutional protection of religious freedom rights. Whilst various submissions to the Inquiry argued for the limiting or total removal of existing exemptions from the operation of anti-discrimination law granted to religious institutions, at paragraph 5.123 of the Final Report, the Inquiry impliedly refuted such submissions. It did this by linking a finding of no significant encroachment upon religious freedom to the ongoing presence of exemptions:

[T]here is no obvious evidence that Commonwealth anti-discrimination laws significantly encroach on freedom of religion in Australia, especially given the existing exemptions for religious organisations.

25. The AHRC found that 'concerns about freedom of religion should be considered in future initiatives directed towards the consolidation of Commonwealth anti-discrimination laws, or harmonisation of Commonwealth, state and territory 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.'¹⁷ These comments are relevant to the status of religious freedom within any proposed Queensland Charter.

¹⁵ Australian Law Reform Commission 2016, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (ALRC Report 129), published on 02 March 2016, available at <https://www.alrc.gov.au/publications/freedoms-alrc129>, accessed 02 March 2016.

¹⁶ *Ibid*, at paragraph 5.37.

¹⁷ *Ibid*, at paragraph 5.154.

26. The 'general limitations clause' approach is summarised by the Commission in the following statement:

A broader concern of stakeholders is that freedom of religion may be vulnerable to erosion by anti-discrimination law if religious practice or observance is respected only through exemptions to general prohibitions on discrimination. An alternative approach would involve the enactment of general limitations clauses, under which legislative definitions of discrimination would recognise religious practice or observance as lawful discrimination, where the conduct is a proportionate means of achieving legitimate religious objectives.

27. Whether such a clause would operate as an effective protection of religious freedom (including as a means to effect the applicable international instruments to which Australia is a signatory, including Article 18 of the *International Covenant on Civil and Political Rights*) will of course turn on its precise terms. The Inquiry's Final Report provides at paragraph 5.111 an example of a general limitations clause, as proposed by Professors Nicholas Aroney and Patrick Parkinson:

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
 - 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.
2. 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).

28. The principle underpinning such an approach is that religious freedom rights are not unlawful to the extent that they must be balanced against other rights. They are an equally valid and subsisting right. It is submitted that the principle itself is one that should be reflected in the terms of the Charter, to the extent that it endeavours to balance religious freedom with other rights. A general limitations clause may be an appropriate means to do so.

29. We thank you for the opportunity to make submissions to the Inquiry, and would be pleased to further elaborate upon the above matters in verbal submissions, where requested.

Yours sincerely

Mark Fowler

Chairperson

Australian Christian Legal Society Ltd

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