CHRISTIAN CONCERNS WITH THE CHARTER OF RIGHTS

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Abstract

In 2009, Australia has been having a debate on whether it should enact a statutory Charter of Rights of a kind similar to that in Britain, Canada and New Zealand. While there are arguments for and against this held by people from all sectors of society, some of the most organized opposition has come from churches and Christian organizations. The church groups opposed to a Charter are not at all against recognition of human rights – far from it. However they oppose a Charter. Paradoxically, most of the churches and organizations perceive religious freedom to be under threat from the growing antipathy among secular liberals towards exemptions under anti-discrimination legislation for faith-based organizations, and from the chilling effect upon freedom of speech arising from vague and poorly drafted 'anti-vilification' laws concerning religion. There are also concerns about the respect being given in Australia to freedom of conscience. A particular focus of Christian concerns is the right of faith-based schools to appoint staff committed to that faith.

Why then would churches not support a Charter of Rights to protect religious freedom? This paper explains the concerns of the churches opposed to a Charter. They argue that contemporary Charters of Rights may in fact not protect religion very well at all, that they fail to enact Article 18 of the ICCPR, that they give an enormous discretion to decision-makers to disregard human rights, that they may be used to support agendas hostile to religious freedom, and that governmental human rights organizations are rather selective about the human rights they choose to support. Christians who are opposed to a Charter of Rights or who have serious doubts about it would be less opposed to it if they thought that the legislators and policy-makers would take all human rights seriously, and faithfully protect freedom of religion and conscience in the manner required by Article 18 of the ICCPR and other human rights instruments.

Introduction

The issue of whether Australia should have a Charter of Rights, or some equivalent, is one on which opinions are sharply divided. Those divisions can be seen in all parts of the community. There is, nonetheless, one quite prominent sector of Australian society in which opposition to a Charter is rather more evident than support for it. That is in the Churches. The Australian Christian Lobby, a group with a significant level of support across the country, mostly from evangelical Christians, has run a strong campaign against having a Charter. Reservations about a Charter are to be found not only in submissions by churches and Christian organizations to the National Human Rights Consultation itself, ("the NHRC") but also in submissions to another inquiry, being conducted by the Australian Human Rights Commission, into Freedom of Religion and Belief in Australia ("the AHRC inquiry").

Submissions to the NHRC that are critical of a Charter, apart from the Australian Christian Lobby, include the Presbyterian Church of Australia, the Baptist Union of Australia, the Anglican Diocese of Sydney, the Life, Marriage and Family Centre of the Catholic Archdiocese of Sydney, and the Ambrose Centre for Religious Liberties (a body which has an advisory council that includes senior figures from a number of different faiths). In submissions to the AHRC inquiry, the NSW Council of Churches[1] and the Association of Christian Schools has also expressed reservations about a Charter.[2] In its submission to the NHRC, the Australian Catholic Bishops Conference decided not to take a stand either for or against a Charter of Rights. It considered that attention should first be given to the prior questions of what human rights should be protected and then to an examination of the extent to which protection of those rights could be improved. It suggested that[3]

> "seeking better coordination of existing protections and services should be considered prior to more substantial change. If such better coordination is unachievable or inadequate then more substantial change should be considered."

The General Synod Standing Committee of the Anglican Church of Australia came out in support of human rights legislation, but only if very strong provisions concerning freedom of religion were included, consistent with Article 18 of the ICCPR. The submission was critical of the level of protection for freedom of religion in the Victorian and ACT charters.[4] The

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1 AHRC submission p.3.

2 AHRC submission p.14.

3 NHRC submission p.20.

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

submission also noted that within the Anglican Church there is “a diversity of opinion around which human rights should be recognized and how they should be protected.”[5] The dissenting view is particularly evident in the submission of the Sydney Diocese (which has by far the largest active membership base of any diocese in Australia). It came out strongly against a Charter of Rights. By way of contrast, only the Uniting Church submission, and the submission of the Peace and Legislation Committee of the Religious Society of Friends, give unqualified support to an Australian Human Rights Act or Charter.[6]

Many of the same Church submissions that raise concerns about religious freedom argue very cogently against a Charter.

The church groups opposed to a Charter are not at all against recognition of human rights - far from it.[7] Most church submissions emphasised the Christian foundations for the recognition of human rights and the extensive involvement of Christians both in advocating for human rights and in giving practical effect to the promotion of those rights through humanitarian services. What many of these submissions oppose, or have doubts about, is various forms of a Charter of Rights whether constitutionally entrenched or not, that give judges a substantial role in determining public policy issues.

This paper examines the submissions of various groups that are opposed to a Charter of Rights, drawing both on submissions to the NHRC and to the AHRC inquiry and examines the reasons for concerns about a Charter.

The paradox: Christian concerns about freedom of religion

There is a paradox in these submissions. What emerges, in particular, from submissions to the AHRC inquiry, is that there is a widespread, if not universal, view across Christian denominations and organisations that religious freedom is under threat in Australia. This threat is seen to come in particular from the growing antipathy among secular liberals towards exemptions under anti-discrimination legislation for faith-based organizations, and from the chilling effect upon freedom of speech arising from vague and poorly drafted ‘anti-vilification’ laws concerning religion.[8] There are also concerns about the respect being given in Australia to

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significantly weakens the protection for freedom of religion provided for by the ICCPR.” NHRC submission, p.6.

5 NHRC submission p.1.

6 NHRC submission of the National Assembly, June 2009.

7 For example, the Australian Christian Lobby states: “ACL is committed to the promotion and protection of the fundamental human rights of all persons. It is a large part of our motivation.” NHRC submission, p. 1.

8 For an analysis by this author of the Victorian legislation on religious vilification, see P. Parkinson, “The Freedom to be Different: Religious Vilification, Anti-Discrimination Laws and Religious Minorities in Australia” (2007) 81 *Australian Law Journal* 954-966. See also R. Ahdar, ‘Religious Vilification: Confused Policy, Unsound Principle and Unfortunate Law’ (2007) 26 *Univ. of Queensland LJ* 293-316.

freedom of conscience.

One might think that organizations which perceive their fundamental human rights are under threat, rights guaranteed in very strong and clear terms by Article 18 of the Universal Declaration of Human Rights (the UDHR), Article 18 of the International Covenant on Civil and Political Rights (the ICCPR) and a number of other human rights' instruments, would be in favour of a Charter of Rights to provide some protection. Yet many of the same Church submissions that raise concerns about religious freedom argue very cogently against a Charter. Indeed it is noteworthy that this concern about religious freedom is expressed in almost every major church submission.

General arguments against a Charter

Some of the submissions opposed to a Charter of Rights reflected concerns expressed much more widely in the Australian community. The Australian Christian Lobby, for example, summarised its concerns as follows:

- A bill or charter of rights is simply not needed as rights can, and already are, protected in clear and precise legislation specific to the right in question;

- A bill or charter of rights does not of itself protect against the abuse of state power, or protect the interests of the vulnerable;

- A bill or charter of rights transfers power to make final determinations over issues of policy from elected parliaments to courts, leading to political and bureaucratic uncertainty and the weakening of judicial independence;

- A bill or charter of rights can too easily be used to provide leverage for unrepresentative activists to win contestable 'rights' that could never have been achieved through democratic processes; and,

- A charter or bill of rights effectively legislates selfishness, already too much a feature of modern society, propelling individual rights above rights held in community.

Many similar points are made by the Anglican Diocese of Sydney, the Presbyterian Church of Australia and the Baptist Union of Australia.

The indeterminacy of human rights' arguments

One of the concerns that Christian groups have expressed about the Charter centre on the way absolutist claims about the moral requirements of a Charter are used to mask and provide some

special authority for, the policy positions of people with particular agendas. Human rights are typically expressed in terms that suggest that the exercise of a right does not involve the diminution of the rights of anyone else. As the Presbyterian Church of Victoria submission noted:[9]

> "[I]t is absurd to speak of rights in the abstract, absolute way in which they are usually framed in human rights instruments, particularly when even those instruments themselves recognise that they are capable of legitimate abridgement."

There is little problem with human rights claims when there are no competing considerations. The difficult issues of public policy arise when different rights collide.

Sometimes, the exercise of human rights does not need to be qualified – or qualified to any significant extent – by respect for the rights and interests of others or the wellbeing of the community. The right of freedom of assembly, for example, does not diminish the right of anyone who does not wish to join the gathering. Of course, it may sometimes cause inconvenience – as when a planned protest march blocks off a few city streets for an hour or two – but that is a small price to pay for the freedoms that exist in a democratic society.

There is little problem with human rights claims when there are no competing considerations. The difficult issues of public policy arise when different rights collide. The mantra that rights are limited when they conflict with the rights and freedoms of others does not solve the problem in itself. When your right conflicts with my right, and my right conflicts with your right, it is no answer to say that each of our rights is limited by the rights of the other. That is to restate the problem, not to solve it. Which one will have to give way to the other? Which one will be given precedence? Politicians, lawyers, policy-makers and others often try to avoid the starkness of the choice by talking in soothing terms about the need to 'balance' different rights. Sometimes, to be sure, reasonable accommodations between rights can be found, but often the word 'balance' is code for a decision that allows one right or interest to trump another completely.

At the heart of Christian concerns about the development of a Charter is that the secular liberal interpretation of human rights charters will tend to relegate Article 18 to the lowest place in an implicit hierarchy of rights established not by international law but by the intellectual fashions of the day. These fashions are determined by the high priests and priestesses who have the responsibility for the interpretation of the secular texts. These include equal opportunity or human rights commissioners, judges, and other privileged members of the community of interpretation.

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[9] PCV submission to NHRC p.8.

Just as the scriptures have in the past been used by Christians to claim divine authority for rather earthly opinions on matters of social policy, so Christians see a similar danger in relation to the use of human rights discourse to claim absolutes for particular policy choices and to close off discussion of debatable issues by means of a legal adjudication on social issues. The Anglican Diocese of Sydney, for example, writes:[10]

> "[H]uman rights are essentially about moral claims and therefore the balancing of conflicting human rights (typically abstracted at a high level in charters) is essentially about making moral judgments. It is not at all clear why judges are in a better position to make such moral judgments than the populace in general and the Parliament in particular.
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> It is this tendency to see that which we most value in human life primarily in terms of legal standards which lies behind our concern about a rights charter. Rather than stimulating discussion over matters such as how competing moral claims in society should be appropriately balanced, a rights charter will prematurely foreclose political debate on such matters.
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> …If humans are to flourish and human rights are to be effectively protected and promoted, then our primary focus should be on maintaining the resolution of competing human rights in the political arena. We must avoid prematurely foreclosing this debate by transferring it from the political arena and into the judicial arena."

Similarly, the Australian Christian Lobby argues for the importance of policy issues remaining in the democratic arena:[11]

> "ACL's strongly held view is that human rights are best preserved by an open and democratic civil society where the direct representatives of the people are responsible for determining decisions of policy and social values. A bill or charter of rights, it is argued, moves authority for making such important decisions from the open and accountable forum of parliament to closed courts, distancing ordinary citizens from political life and deciding their shared values….
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> Staffed by legal, not moral authorities, a court is a closed forum unable and ill-equipped to canvas the full spectrum of issues and their consequences necessary for deciding sound public policy. It is designed to remedy legal disputes between two parties, automatically disqualifying the participation of citizens likely to be affected by policy decisions. Courts are unelected bodies of legal experts who need not be attuned to prevailing social standards or public perceptions. Members of the public have little avenue of recourse to overturn judicial policy determinations."

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[10] Anglican Diocese of Sydney submission to NHRC paras 28-30.

[11] NHRC submission, pp.6,8.

Debatable issues ought to remain debatable in a democratic society.

When it comes to balancing different rights, or choosing which one should take priority over the other and to what extent people who equally respect human rights in principle, may come to quite different conclusions. Balancing rights, freedoms and responsibilities is not particularly a legal task. The law speaks typically in binary language – of winning and losing, of entitlement and absence of entitlement, of lawfulness and unlawfulness.[12] The processes of politics are far better suited to working out the balances between conflicting rights and claims.

The Anglican Diocese of Sydney submission also points to the advantage of the political process in allowing discussions on important moral questions to continue to be discussed and debated. Through the political process, the compromises that are reached in one generation can be revisited in the next if those compromises prove unworkable or unsatisfactory. By way of contrast, decisions of courts that speak in the simplistic binary language of the law, declaring one thing to be lawful and another unlawful, foreclose further debate on the matter by cloaking a policy judgment in the absolute language of a declaration concerning 'human rights'.

Debatable issues ought to remain debatable in a democratic society.

The issue of anti-discrimination law

Central to Christian concerns about religious freedom in Australia is the potential impact of anti-discrimination law on religious freedom. These concerns do not arise from a discomfort with anti-discrimination provisions generally. Most grounds of discrimination in the laws of Australian jurisdictions would attract widespread support from a Christian perspective. However, Christianity involves adherence to a moral code. Christians insist on the importance of being able to discriminate between right and wrong, and to have freedom of conscience, when it comes to moral issues.[13]

Organisations opposed to a Charter of Rights are worried that in secular liberal interpretations of a Charter of Rights, anti-discrimination may become the human right that trumps all others. That concern is fuelled by the tendency in secular society to see human rights law as almost synonymous with non-discrimination, perhaps because anti-discrimination is the main work of governmental organizations that are given a watchdog role in relation to human rights.

The problem in particular, arises from a quite extreme but fashionable view of the requirement of non-discrimination in the workplace. There can be a dogmatism about such matters as powerful and rigid as any belief system of fundamentalist religious groups.

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[12] G Teubner, *Law as an Autopoietic System* (Oxford UP, 1993).
[13] PCA submission to NHRC para 23.

That fundamentalism inheres in two aspects. The first is a belief that all limitations on who is eligible to apply for particular jobs should be abolished or severely restricted, even if 99.9% of all the other jobs in the community were open to that person. This position involves taking a very restrictive approach to 'genuine occupational requirements' as a ground for exceptions to general anti-discrimination provisions.[14] The second fundamentalist aspect of the anti-discrimination movement arises from a belief that the only human rights are individual ones and not group rights. This can make adherents blind to the competing claims of groups which would justify a right of positive selection in order to enhance the cohesion and identity of the group.

Fundamentalism about non-discrimination

The view that any selection of a person for employment which takes account of characteristics other than merit is discriminatory reflects one particular understanding of what equality means.[15] This view is gaining ground in western countries. As Evans and Gaze note:[16]

> "[T]here is an increasingly powerful movement to subject religions to the full scope of discrimination laws, with some scholars now suggesting that even core religious practices (such as the ordination of clergy) can be regulated in the name of equality."

Not all proponents of this view are so extreme as to argue that government can regulate the ordination of clergy. Cass Sunstein, for example, argues that while there is no compelling argument for saying that religious institutions should be exempted from sex discrimination laws, at least some legislative restraint is justified.[17] He would protect religious autonomy when a law, whatever its nature and purpose, interferes with religious practices and is not supported by a legitimate and sufficiently strong justification. However even that view leaves plenty of scope for regulating religious practice. Interference with freedom of religion may be 'strongly justified' merely because it is 'necessary' in order to pursue an agenda that the secular liberal believes in. Principles that are plausibly objective are, on closer analysis, really just subjective value judgments.

The new fundamentalism about 'equality', which insists on a very narrow view of genuine occupational qualifications, has ramifications far beyond religious freedom. Should the gay bar be allowed to advertise for gay staff? Is the Thai restaurant guilty of discrimination if it insists on having Thai waiters or waitresses? Can the Prime Minister employ only the party faithful or Labor sympathizers as his advisers or secretarial staff? A narrow view of genuine occupational

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[14] For a discussion see R Ahdar and I Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford UP, 2005), Ch 10.

[15] For a critique of the use of equality rhetoric as devoid of meaning, see P Westen, 'The empty idea of equality'. (1982) 95 *Harvard Law Review*, 537-596.

[16] C Evans and B Gaze, 'Between Religious Freedom and Equality: Complexity and Context' (2008) 49 *Harvard International Law Journal Online* 40-49 at 41.

[17] C Sunstein, 'On the Tension between Sex Equality and Religious Freedom', in Satz, D. and Reich, R. (eds), *Toward a Humanist Justice: The Political Philosophy of Susan Moller Okin* (New York: Oxford UP, 2009) pp 129-139.

requirements threatens any assertion of group identity or the need for cohesiveness in the workplace. On a fundamentalist view of anti-discrimination law, even such modest claims to be able to appoint people who share the characteristics of the group should be subject to strict scrutiny.

The liberal attack on multiculturalism

This hostility towards exemptions to anti-discrimination law has been reinforced by another fundamentalist belief - that the only human rights are individual ones and not group rights. This reflects a profound change in liberal thought in western countries. Whereas once a commitment to multiculturalism was one of the hallmarks of progressive liberalism, now the emerging fashion of liberal thought is to see respect for other cultures as a roadblock in the way of advancing the freedom and dignity of people and the promotion of individual rights. Susan Moller Okin gave voice to these sentiments in her influential essay, "Is Multiculturalism Bad for Women?"[18] A similar analysis might also be adopted by gay and lesbian advocacy groups, for traditional societies, particularly those strongly influenced by moral values derived from a religious faith, tend not to be supportive of homosexual practice.

This changing attitude towards multiculturalism is, for example, expressed by American philosopher H.E. Baber, who puts the case succinctly:[19]

> "Liberals value individual freedom. Multiculturalism restricts individual freedom. That is the liberal case against multiculturalism."

Prof. Baber argues that liberals should discourage practices that promote cultural diversity and, instead, encourage assimilation. In a return to traditional American values espoused by conservatives, she argues for the promotion of a melting pot society in which only individual rights, and not the rights of groups, are recognized.[20]

This change in liberal thought is not confined to the United States. Tensions over multiculturalism have been particularly marked in European countries, such as France, affected by mass immigration from Muslim societies. The hostility to multiculturalism has gathered pace since 9/11, and the present climate in many Western nations is not at all hospitable to policies that permit or encourage a separate identity for Muslims.

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[18] This was first published in the *Boston Review* (vol 22, no 5, October-November 1997), and republished in Okin, S. et al, *Is Multiculturalism Bad for Women?* Edited by Cohen J, Howard M & Nussbaum M. (Princeton: Princeton UP, 1999). For another view, see W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Oxford University Press, 1995).

[19] HE Baber, *The Multicultural Mystique: The Liberal Case Against Diversity* (Amherst, NY: Prometheus Books, 2008), p. 17.

[20] Ibid, p.244.

The combination of fundamentalist attitudes towards discrimination with the new hostility by some liberals towards multiculturalism has led to a view of equality that has little or no place for rights of discrete minorities to maintain their identity as groups. This has particular implications for faith-based schools.

The issue of faith-based schools

From the earliest time in Australian history, churches have established schools. Many of the most well-known and prestigious private schools in Australia have such associations with churches. The Catholic Church also has a very well developed network of 'systemic' schools, both primary schools and high schools, in which fees are modest and which give to parents an alternative to the State school system within a reasonable distance of their home.

These Church-based schools vary in the extent to which they give importance to their Christian foundations.[21] Some of these faith-based schools, particularly some of the more prestigious, expensive and long-established private schools, no longer maintain a strong religious tradition beyond having a chaplain and religious services as part of school life. They do not insist upon adherence to the Christian faith as a condition for a teaching appointment. Other church-based schools endeavour to maintain a Christian ethos even if not all teaching staff are committed adherents to the faith.

However, there are other schools which have been established to provide an explicitly Christian environment for children and young people. These tend to be schools within the evangelical tradition of the Christian faith, and have a strong view of the authority of the Bible as central to life. Sometimes they are founded by one local church; more commonly, they are run by an independent association. These schools have flourished in recent years. Typically, these schools have an inclusive employment policy in the sense that Christians from any denominational background are welcome, but adherence to the fundamentals of the Christian faith – belief in the divinity of Jesus Christ, his atonement for sins and his bodily resurrection from the dead – are regarded as essential for employment. Some Christian schools require adherence to the Christian faith from all staff, not just teaching staff. This includes administrators and maintenance personnel. The reason for this is that they see the school as being a community of faith, and all staff interact with parents and children.

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21 Evans C, 'Religious schools, discrimination law and bills of rights'. Paper given at Conference on Cultural and Religious Freedom under a bill of rights, Canberra, August 2009.

The right of positive selection

The issue for Christian schools is not the right to 'discriminate'. That puts the issue in negative and pejorative terms. The core claim is a right of positive selection. The Australian Association of Christian Schools puts it this way:[22]

> "We also claim the right to employ only those persons who have a thorough understanding of and commitment to the school's Christian worldview and Statement of Faith and who, in their personal lives, are able and willing to model consistently a personal standard of conduct and lifestyle choices that aligns to the worldview and Statement of Faith of the school in which they have applied to teach/work."

In this, Christian schools and organizations only ask to be treated equally with gay bars, Thai restaurants and the staffing of ministerial offices. Recognition of minority group rights on an equal footing is another version of equality. A right of positive selection is rather different from discrimination. It is easy to see the problem if a restaurant advertised for staff of any nationality so long as they were not Thai. That would be discriminatory. However, it is quite different if a Thai restaurant advertises for Thai staff. Selection based in part on a characteristic which is relevant to the employment is hardly discriminatory. That is a common sense distinction, but common sense seems to be an increasingly rare commodity in an age of anti-discrimination fundamentalism.

A right of positive selection by minority groups in order to maintain a particular group identity, or because for other reasons that characteristic is relevant to their employment, is likely to have very little impact on the employment opportunity of others. For example, in a situation where demand for teachers exceeds supply, or is equivalent to supply, there is no overall impact whatsoever. In a situation where supply exceeds demand, the adverse effect is still likely to be minimal because the organisations that want to adopt specific faith-based criteria for selection are such a small part of the total employment pool in those fields. Those who take jobs in faith-based schools or organisations will also remove themselves from the pool of applicants for other positions in that field of work.

The right of positive selection in relation to faith-based schools is supported by the foundational international covenants and declarations on human rights. Article 18(4) of the ICCPR (1966) provides:

> "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."

In the interpretative documents such as the Human Rights Committee's General Comment 22, Article 18 (1993), it is abundantly clear that international human rights law protects the right to

[22] AACS submission to AHRC p.3.

run schools on a religious foundation. That is supported also, for example, by Article 5 of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. The Article 18(4) rights and similar international law provisions are abrogated if schools which are established for the purposes of providing a religious context for a child's education are deprived of the right to choose staff who adhere to the precepts of the faith and abide by the codes of conduct of that faith.

The secular liberal may accept that the Principal or the religious studies teacher should be an adherent of the faith, but cannot understand why the maths teacher, the office administrator or the gardener needs to be a believer - hence the move to restrict the scope of genuine occupational requirements in anti-discrimination legislation. For example, Evans and Gaze argue:[23]

> "The hiring of staff in religiously run hospitals, schools and other institutions may well be important to many religions, but it usually does not have the central place of activities such as the selection and training of clergy, the language and symbolism of ritual, and the determination of membership of the religious community. Such core religious activities have a greater claim for freedom from regulation (including from the imposition of non-discrimination laws) than activities that are more peripheral."

However, it is a *non-Christian* view of the Christian faith that supposes that religion can be confined to a particular set of beliefs taught in religious studies classes or in chapel. That is not how Christians understand their faith, as numerous submissions to the NHRC and AHRC made clear. Modelling Christianity within a faith community is as important as teaching Christianity within a classroom or from a pulpit. Indeed it may well be more important and have more impact on children's lives.

What is true of Christian schools is no doubt true of Jewish and Islamic schools as well. There are numerous Jewish schools in Australia with strong academic traditions and fine reputations. Islamic schools have come onto the Australian scene much more recently. Should Jewish or Islamic schools, any more than Christian schools, be compelled to employ people who may be qualified to teach English or history but who are entirely unsuitable to advance the religious mission of the school? Should such schools really be required to employ an avowed atheist or someone whose sexual ethics are inconsistent with the teachings of the faith? Does the religious primary school have to employ the otherwise qualified teacher who is openly living in a relationship outside marriage and who regards the religious teaching on sex outside marriage as outmoded and wrong? It may choose to do so, but should it be *forced* by law to act contrary to its beliefs?

Similar issues also arise for many faith-based charitable and humanitarian organizations. These organizations are not only faith-based, but faith-motivated. Around the world, they do an enormous amount in practical terms to promote the human rights, dignity and well-being of the

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[23] Above, n.16 at 47.

world's poor and disadvantaged. They don't just talk about human rights, as so many human rights advocates do from the comfort of their living rooms and offices. They dedicate their lives to the practical advancement of the poor and needy. Destroying the faith-based character of these organizations so that they no longer have a reason for existence may well diminish the human rights of those they serve.

This issue of the right of positive selection of staff to Christian schools and organizations is perhaps the strongest theme running through all the church submissions to the National Human Rights Consultation and to the AHRC's freedom of religion and belief inquiry, and has affected their submissions on the Charter of Rights. The Australian Catholic Bishops Conference, for example, wrote:[24]

> "Catholics will judge any proposed amendment to existing laws or any future human rights legislation by reference to the extent to which it will protect the right to religious freedom, not only for themselves but for all religions…
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> Does the law comprehensively protect the right of the Catholic Church, its institutions and agencies, such as parishes, schools, universities, hospitals, aged care facilities and welfare agencies, to employ their staff by reference to religious affiliation and commitment for such intrinsically religious purposes as religious instruction, formation and pastoral care, but more widely for the purpose of supporting and promoting the relevant entity's Catholic mission and identity?"

Anti-discrimination and multiculturalism

Far from being antithetical to multiculturalism, a right of positive selection is essential to it. Multiculturalism involves respecting the rights of minority communities to maintain their identity as groups, for example, through cultural and religious organizations. It involves acknowledgement of diversity and allowing some degree of separateness within the wider community. There has been a widespread acceptance that respect for different beliefs and cultures requires acceptance of faith-based schools in order to promote that diversity. Schools provide a context in which faith is taught and nurtured. They also support the Article 27 rights of ethnic minorities to promote identity and cohesion within the community. Faith-based schools are really very important to multiculturalism, for faith and culture are often closely intertwined, and a multicultural society needs to respect all faiths, as well as non-belief. Allowing faith-based schools as a way of giving expression to the Article 18(4) rights of parents also takes pressure of public schools in terms of providing religious education.[25]

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24 AHRC submission pp 5-6.

25 On teaching about religion in public schools, see Taylor, P *Freedom of Religion: UN and European Human Rights Law and Practice*, (Cambridge: Cambridge UP, 2005), pp 165-175; Evans , C, 'Religious education in public schools: an international human rights perspective'. (2008) 8 *Human Rights Law Review*, 449-473.

One way of crushing the diversity that faith-based schools provide is to insist on it. By requiring diversity in the employment of teaching staff within the faith-based school, its distinctive character as a faith-based school is undermined. To insist that faith-based schools employ people from a range of beliefs, including those who have no religious belief, is to prohibit and outlaw the very distinctiveness that these schools exist to promote. This reduces diversity in the provision of education. If, for example, such schools were prohibited from selecting staff on the basis of religion as a consequence of new laws prohibiting discrimination against people who have no religious faith, then the teaching staff would, over time, cease to reflect the values and beliefs of the religion in the name of which they are employed. If religious schools were forced to accept practicing homosexual teachers, or teachers whose heterosexual practices violate the moral teaching of the faith, then the influence of such moral teaching on children at these schools would be diminished. If Islamic schools were subject to all the prohibitions of anti-discrimination law, including a prohibition against discriminating on the grounds of religious belief (or the lack of it) then they would be required to cease being Islamic.

So why do many church organizations not want a Charter?

Christian concerns about the freedom to run faith-based schools and organizations might logically lead them to support a Charter of Rights, given the non-derogable nature of religious freedom in international human rights instruments. That would act as a constraint upon Parliament. The Australian Christian Lobby certainly supports more parliamentary scrutiny of legislation in terms of Australia's international human rights obligations. It recommends that the Senate Scrutiny of Bills Committee be strengthened to examine proposed and existing legislation in the light of international human rights instruments.[26] This maintains the primacy of elected representatives in protecting human rights. It also ensures the focus is on Australia's international human rights' commitments.

One of the problems, though, is that the two Charters currently in existence in Australia do not give effect to Australia's international human rights obligations, and this was a particular theme of church submissions.

Failures of jurisdictions with Charters to properly enact Article 18 of the ICCPR

The national Presbyterian and Anglican Church submissions, amongst others,[27] point out that the Charters in the ACT and Victoria do not give proper application to Article 18(3) of the ICCPR. That article provides:

[26] ACL submission to the NHRC, p.16.
[27] See also Anglican Diocese of Sydney submission to NHRC para 19.

‘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.’

The Presbyterian Church of Australia’s incisive critique of the Victorian *Charter of Rights and Responsibilities Act* 2006 justifies extended quotation.[28]

“Section 14: *Freedom of thought, conscience, religion and belief* of the Victorian *Charter* mirrors the positive guarantee of freedom of thought, conscience and religion found in the International Covenant on Civil and Political Rights (ICCPR), Article 18.

The problem immediately arises when Section 7 of the *Charter*: *Human Rights – what they are and when they may be limited* is taken into account. The limitation provisions in Section 7 bear little resemblance to ICCPR Article 18(3) in their practical and legal effect. Section 7(2) of the Charter 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—

(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.

The first point to be noted is that, contrary to ICCPR Article 18(3), there is no boundary to the grounds on which freedom of religion may be restricted in the *Charter*.

In the second place, the *Charter* introduces the concept of *reasonable* limitations. ICCPR, Article 18(3) makes no reference to reasonable limitations. The subsequently enunciated Siracusa Principles[29] define the conditions and grounds for permissible limitations and derogations enunciated in ICCPR in order to achieve an effective implementation of the rule of law.

Comparing Section 7(2) of the Victorian *Charter* with the Siracusa Principles clearly demonstrates Section 7(2) does not comply with Principle 1, Principle 3 (there is no mention of strict interpretation of limitations or the favouring of the right concerned in the *Charter*) or Principle 10 (the concept of ‘necessary’ is not explicitly present in the

[28] Submission to NHRC, paras 34-39.

[29] United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

Charter and there is no requirement that the limitation answer a pressing public or social need, pursue a legitimate aim, etc).

In contrast, therefore, to the rigour imposed by ICCPR, Article 18 interpreted according to the Siracusa principles, the *Charter* enables the state to restrict rights in a far greater range of circumstances than would be allowed by ICCPR, Article 18, especially when read in conjunction with the Siracusa principles, thus *effectively restricting* rights that are supposedly guaranteed under the *Charter*."

The Presbyterian Church of Australia also notes that while the *Charter of Rights and Responsibilities Act* requires other Victorian legislation to be interpreted as far as possible in a way compatible with 'human rights',[30] judges have an unfettered discretion whether or not to take any account of international law in carrying out that work of interpretation.[31] If international human rights law is not the body of law that should guide judges, what should inform and constrain their interpretations of what 'human rights' require? The legislation gives enormous discretion to whoever is the decision-maker about compatibility with the Charter. The Presbyterian Church submission notes that the ACT Charter offers a similar level of discretion.

Many enactments which might pass scrutiny under the vague terms of s.7(2) of the Charter of Rights and Responsibilities Act (2006) (Vic.) could well breach Australia's obligations under international human rights law.

The argument of the Presbyterian Church that the Victorian Charter, while purporting to gain its moral authority from international human rights law, in fact does not comply with that body of law, is compelling. Under the guise of implementation, it actually provides people of faith with far fewer rights that the ICCPR gives to them so far as the law of Victoria is concerned. Section 7 of the Victorian Act does not even state, as one might have expected, that rights can only be limited in order to protect the conflicting rights of another. No, the Act merely requires that the limits be reasonable and that they can be "*demonstrably justified in a free and democratic society based on human dignity, equality and freedom"* – whatever that means. It is somewhat similar to section 1 of the Canadian Charter of Rights and Freedoms, but there the comparison between the two Charters ends.

Under the Victorian Charter, as long as the limits can be justified by the decision-maker's view about what is reasonable according to the listed criteria, that is sufficient. It follows that many enactments which might pass scrutiny under the vague terms of s.7(2) of the Charter of Rights and Responsibilities Act could well breach Australia's obligations under international human rights law.

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[30] Section 32(1), *Charter of Rights and Responsibilities Act* 2006.

[31] Ibid, s.32(2).

The Charter has the pretence of law; but it really does not establish rules and principles. It confers very broad powers indeed on the decision makers to interpret Acts of the Victorian Parliament as far as possible in a manner consistent with their particular values and policy positions.

Article 18(3) of the ICCPR, and similar provisions in international human rights documents, require much more of the Victorian Parliament, precisely because the ICCPR places such a very high value on freedom of religion and belief. The replacement of the strong language of the ICCPR with the vague and anodyne statement that rights can be limited as long as those limitations are reasonably justified, means that the Act gives very limited protection to religious freedom and allows policy positions to be advanced that in reality place religious freedom near the bottom of the heap when it comes to balancing conflicting claims.

It is no doubt for this reason that the submission of the Standing Committee of the General Synod of the Anglican Church of Australia qualified its support for human rights legislation by insisting on guarantees for religious freedom that properly reflect the requirements of international human rights instruments.

Freedom of conscience and the Victorian Charter

Those who are sceptical about a Charter point out that they are no guarantee of protection for the vulnerable. They also point to the track record of such human rights legislation in other countries.[32]

A major issue referred to in many church submissions is the egregious failure of the Victorian Parliament to protect doctors' freedom of conscience in relation to abortion, despite the Charter in that State, and even though the human rights issues were presented to it very clearly and publicly. Section 8 of the Abortion Law Reform Act 2008 imposes upon doctors who have a conscientious objection to carrying out an abortion, a duty to refer the patient to another practitioner who does not have such a conscientious objection. The Victorian Parliament's Scrutiny of Acts and Regulations Committee drew the attention of the Parliament to the possible breach of the Charter provision on freedom of belief.

The provision encountered very strong and sustained opposition not only from Churches but also from the Australian Medical Association (AMA) in Victoria.[33] The AMA pointed out that it

[32] The Australian Christian Lobby, for example, points out that Zimbabwe has guarantees of human rights in its constitution.

[33] The history of this is fully retold in Frank Brennan, "The Place of the Religious Viewpoint in Shaping Law and Policy in a Pluralistic Democratic Society: a case study on rights and conscience". Paper given at Values and Public Policy Conference: Fairness, Diversity and Social Change, Centre for Public Policy, University of Melbourne, 26 February 2009.

already had a very clear and workable ethical code for dealing with conscientious objections to carrying out medical procedures, and that there was no need for a mandatory duty of referral. The AMA's ethical code had been supported by the Victorian Law Reform Commission as providing a reasonable balance between the rights of doctor and patient. Abortion is a procedure that needs no referral from a medical practitioner, unlike, for example, going to a specialist. Furthermore, access to information is hardly difficult. A woman need only go to the nearest public hospital or to contact a pregnancy advice service. Information is available everywhere through phone services, internet websites and other readily accessible sources of advice.

The requirement for mandatory referral thus seemed like an unnecessary and gratuitous attack on freedom of conscience. Yet the right to an abortion is not guaranteed in any of the foundational international human rights instruments such as the Universal Declaration or the ICCPR. Still less is there any internationally recognized human right to full information about accessing an abortion. The reality seems to be that freedom of conscience just didn't matter very much to the Victorian government, even though the same government introduced the *Charter of Rights and Responsibilities Act* 2006 to the Parliament.

Not surprisingly, the Australian Catholic Bishops Conference is very critical of this and uses this example to express doubts about the value of a Charter. It writes:[34]

> "Irrespective of any view on the worth or otherwise of overarching laws, in the nature of a Bill or Charter of Rights there is growing concern within the Catholic community over the restricted extent to which legislation works to protect religious freedom, including the religious rights of Catholics. This concern, and some would say scepticism, is based on the experiences of the Catholic Church in a number of countries and states where, for example, application of anti-discrimination legislation has resulted in the erosion of the Church's freedom to conduct its mission in accordance with its values.
>
> This scepticism has been deepened by the recent experiences of the total failure of the Victorian Charter of Rights and Freedoms adequately to protect the right of conscientious objection of Catholic doctors and other health professionals in the context of the compulsory referral for abortion.
>
> The growing trend to erode religious freedom has the potential to compromise the mission of the Church and inhibit the exercise of the religious freedom of its agencies."

It may be that the failure of the Government of Victoria to pay proper attention to issues of freedom of conscience would have been the same whether or not the State had a Charter. Indeed, the abortion issue could be put forward as an example of why a Charter might make a difference, at least if properly drafted to protect freedom of religion and conscience to the same extent

[34] ACBC submission to AHRC p.3.

required by international human rights instruments. After all, the Victorian Government ignored doctors' freedom of conscience in spite of the *Charter of Rights and Responsibilities Act* 2006, not because of it.[35] However. Church submissions opposing a Charter of Rights do not only argue that could be ineffectual in protecting freedom of religion and conscience. They also argue that it may operate as a negative.

Would a Charter further diminish freedom of religion?

Not only are sceptics concerned that a Charter may not make much difference in the face of core liberal agendas, but there is a concern expressed in a number of submissions that a Charter may add greater legitimacy to a culture in which freedom of religion and conscience is diminished in the name of protecting the rights of others. The Australian Christian Lobby, the Ambrose Centre for Religious Liberties in its submissions to both the NHRC and AHRC inquiries, and the Presbyterian Church of Victoria all provide examples from North America and Britain.

There is a concern expressed in a number of submissions that a Charter may add greater legitimacy to a culture in which freedom of religion and conscience is diminished in the name of protecting the rights of others.

A particular concern is the threat to religious freedom in Victoria which is seen as being linked to the Charter. A number of Christian organizations expressed deep concern about various options being considered to remove or limit exemptions from anti-discrimination laws which have previously been included in those enactments out of respect for freedom of religion and belief.[36] The Presbyterian Church of Australia submission to the NHRC states in bold that "the Charter is employed to produce a set of options that significantly reduce freedom of conscience, thought and religion."[37] It is indeed difficult to reconcile some of the options for reform proposed in the Victorian Parliament's options paper, so far as they pertain to religious freedom, with Australia's obligations under international human rights covenants.

Frank Brennan has sought to argue that a review of the exemptions under the anti-discrimination law was timely whether or not there was a Charter,[38] and therefore has nothing to do with the Charter debate. The review is wide-ranging and not at all confined to the exemptions that have been enacted to protect religious freedom. However, the review was originally established,

[35] A similar point is made by Fr Frank Brennan in his response to an article by Peter Costello. Letter to the Sydney Morning Herald, 31 July 2009, p.10.

[36] Scrutiny of Acts and Regulation Committee Scrutiny of Acts and Regulation Committee, *Exceptions and Exemptions to the Equal Opportunity Act 1995*, Parliament of Victoria, 2009 at http://www.parliament.vic.gov.au/sarc/EOA_exempt_except/default.htm#options_paper

[37] PCA submission to NHRC, para 32.

[38] Fr Frank Brennan. Letter to the Sydney Morning Herald, above n.35.

according to the Attorney-General, to ensure that the exceptions and exemptions "are compatible with the Charter".[39] As will be seen below, those who advocate for restrictions on religious freedom claim this is giving effect to the *Charter of Rights and Responsibilities Act*.[40]

Another concern is that government-funded human rights organizations dominated by people who believe human rights is synonymous with, rather than antithetical to, a secular liberal agenda will fund court cases to persuade judges to that point of view. That is particularly a concern if the domestic human rights charter gives little protection to religious freedom or the rights of ethnic minorities to maintain their culture and identity. In that regard, there is a real concern that certain of the bodies that are entrusted with the protection of human rights in Australian society seem to operate more from a secular liberal agenda than one which really reflects the requirements of international human rights law. Quis custodiet ipsos custodies?

The track record of human rights organizations in protecting human rights

How could organizations such as the Australian Human Rights Commission fail to protect human rights? Are they not the experts, and the evangelists for human rights? Perhaps; but a true watchdog for human rights has to do more than be concerned about the progressive agendas that are most fashionable at the time, or which are promoted by groups on one extreme of the political spectrum. It has to protect the human rights which conflict with a secular liberal agenda, rights which may stand in the way of fashionable social causes. In this regard, the submissions on the Charter show some reasonable grounds for concern.

The failure of human rights organizations in Victoria

The issue of a doctor's freedom of conscience in relation to referral for an abortion in Victoria, previously discussed, provides one example raised in several submissions. It wasn't just that in enacting this mandatory referral provision, the Victorian Parliament showed an utter disrespect for freedom of conscience. There have also been concerns raised about the way in which freedom of conscience was so readily dismissed by human rights organizations such as the Victorian Equal Opportunity and Human Rights Commission, and by human rights' lobby groups. Fr Frank Brennan's critique is scathing:[41]

> "In my opinion, this was the first real test of the Victorian Charter of Human Rights and Responsibilities and it failed spectacularly to protect a core non-derogable ICCPR human right which fell hostage to a broader social and political agenda for abortion law reform and a prevailing fad in bioethics which asserts that doctors should leave their

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39 Media Release, Office of the Attorney-General, Friday February 29th 2008, "Hull announces discrimination review".

40 It should be noted that some protection for faith-based organisations is provided in s.38(4) and (5) of the Victorian Act, however this only applies to decisions of public authorities.

41 Brennan, above n. 33, p.21.

consciences at the door…Groups such as Liberty Victoria provided no coherent answers. Academic experts on the Charter largely remained silent. The Equal Opportunity and Human Rights Commission simplistically dismissed freedom of conscience."

He concludes:[42]

"We need to do better if faith communities and minorities are to be assured that a Victorian style charter of rights is anything but a piece of legislative window dressing which rarely changes legislative or policy outcomes, being perceived as a device for the delivery of a soft left sectarian agenda – a device which will be discarded or misconstrued whenever the rights articulated do not comply with that agenda."

The Ambrose Centre for Religious Liberties wrote:[43]

"We submit that the outrageous decision in the relevant Victorian Act to exclude conscience is demonstrative of the belief that human rights have become a weapon to promote individualism and relativism."

The silence of human rights organizations on freedom of conscience in the abortion referral debate really is rather troubling. Since the violation of the Article 18 rights under the ICCPR was so flagrant, and the countervailing considerations about ensuring people have adequate information concerning abortion options is so easy to deal with, one might have thought that someone in the human rights establishment might have been motivated to defend doctors' freedom of conscience as the AMA did. But of course, abortion is seen as a fundamental liberal cause. In opposition to that, human rights appear to be dispensable.

The AHRC's questioning of freedom of political speech

The Australian Human Rights Commission's discussion paper on *Freedom of Religion and Belief in the 21st Century* has also raised significant alarm in Christian circles. One of the questions asked in the discussion paper is: "Is there a role for religious voices, alongside others in the policy debates of the nation?"[44] The question was framed neutrally, but given that at present, there are no restrictions on any voice being heard in the public square, and that includes religious voices, the most obvious implication of the question is that the Commission is considering whether it remains appropriate for religious voices to be heard in the public square. If not, then presumably the Commission would recommend ways to try to silence those voices within constitutional limits.

That the question should even have been asked at all caused consternation in Christian circles. The NSW Council of Churches, for example, indicated that it would be most interested to learn

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42 Ibid p. 23.
43 Ambrose Centre for Religious Liberties, submission to AHRC at 7.5.
44 Australian Human Rights Commission, Freedom of Religion and Belief in the 21st Century, p.9.

"which particular religious voices are to be silenced, and the reasons for such an attack on freedom of conscience, freedom of speech and freedom of religion".[45]

Articles 19 and 21 of the Universal Declaration on Human Rights, and Article 25 of the ICCPR could not be clearer in saying that everyone has a right to participate in the policy debates of the nation whatever their perspectives may be and whatever the influences that may have shaped those perspectives.

While it is no doubt possible that there is a benign explanation for this question, Christian concerns about this were heightened as a result of comments reportedly made by AHRC commissioner Tom Calma, at the time of the launch of the AHRC inquiry.[46] The ABC reported him as saying that there is a growing fundamentalist religious lobby, in areas such as same-sex relationships, stem-cell research and abortion, and argued that there was a need to 'strike a balance' between freedom of religion and not pushing those beliefs on the rest of society. It is of course, quite possible that Mr Calma was misunderstood. One can only hope so, for the clear implication of these reported remarks was that he thought the rights of people of faith to engage in public policy debates ought to be limited in some way, if they wanted to put forward views with which he disagreed.

Perhaps Mr Calma didn't mean this. He has certainly made it clear in subsequent public statements that the AHRC inquiry is an open one, asking legitimate and important questions without any preconceptions or agendas.[47] However, taken together with that very odd question in the discussion paper, a perception was created that the Commission does not think it is right for people of faith to be engaged in debates on public policy, adopting positions informed by their beliefs about when human life commences or about issues of sexual practice.

Such a view, if indeed it is held by the Commission, is deplorable. Even the suggestion of silencing certain voices in public life is utterly contrary to democratic principles and the most foundational requirements of international human rights law. Articles 19 and 21 of the Universal Declaration on Human Rights, and Article 25 of the ICCPR could not be clearer in saying that everyone has a right to participate in the policy debates of the nation whatever their perspectives may be and whatever the influences that may have shaped those perspectives. To suggest that it is illegitimate for people to bring forward ideas which are informed by religious convictions when it is alright for people to advocate positions based upon listening to the rantings of the worst "shock jocks" on talk-back radio, or based upon any other kind of influence, is extraordinary.

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[45] NSW Council of Churches, submission to AHRC, p. 7.

[46] http://www.abc.net.au/news/stories/2008/09/17/2366511.htm?section=justin (last accessed 1 August 09).

[47] http://www.onlineopinion.com.au/view.asp?article=8798&page=0 (last accessed 1 August 09).

There are certainly various versions of a secular liberal view that religious arguments should be excluded from the public square,[48] but there is a big difference between saying that the public square needs a common language - reason – and saying that certain voices should be prohibited from participating in public debate because of the positions for which they reason. The latter view cannot gain the slightest support from international human rights instruments. To suggest that the government should be involved in silencing some voices because those in power do not like what they have to say, or the values they bring to the debate in saying it, is the mark of a totalitarian worldview, not a democratic one.

A conference paper given a year later, reporting on some of the early findings of the religious freedom project raises further questions about the credibility of the AHRC in this area. Co-authored by Mr Calma and a senior official of the Commission, it began with the remarkable sentence:[49]

> "The compatibility of religious freedom with human rights is the subject of the most comprehensive study ever undertaken in Australia in this area."

No doubt this contrast between freedom of religion and human rights, as if religious freedom was not a human right, was unintended and unconscious; but it is revealing. The title of their paper certainly recognizes that religious freedom is a human right. However it asks whether religious freedom is "an inherent contradiction in a multicultural democracy or an 'achievable' human right". The contrast with the ICCPR could not be more marked. Freedom of religion is a non-derogable human right in international law, not an optional one. Furthermore, as Article 27 demonstrates, there is no contradiction between religious freedom and multiculturalism. One is an essential precondition to the other given the close connection between faith and ethnicity.

The question of credibility

These were not the only concerns raised in submissions about the track record of human rights organizations. As these submissions demonstrate, there is at least a perception that human rights commissions, both state and federal, are dominated by people of similar persuasions and values who take a very minimalist view of what respect for freedom of religion, belief and conscience entails. The Ambrose Centre for Religious Liberties, for example, wrote:[50]

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48 See the debate in R Audi & n Wolterstorff, *Religion in the Public Square: the Place of Religious Convictions in Political Debate* (Lanham, MD: Rowman and Littlefield, 1997).

49 T Calma and C Gershevitch, 'Freedom of religion and belief in a multicultural democracy: an inherent contradiction or an achievable human right?' Paper given at the Unity in Diversity Conference, Townsville, August 2009, available at http://www.humanrights.gov.au/about/media/papers/freedom_religion20090803.html (last accessed Sept. 3rd 2009).

50 NHRC submission, p. 6.

> "The fundamental human right of religion, belief, conscience, opinion and expression have been addressed by the protagonists for a Charter/Bill of Rights in the flimsiest of manners or not at all."

In similar vein, former Federal Treasurer Peter Costello, in a newspaper article, wrote: [51]

> "No one will tell you that the purpose of such a Commonwealth charter [of rights] will be to curtail religious conscience or practice. But it will work out the same way.
>
> Whatever the proponents say, the crusading lawyers will use any new federal charter against those institutions to which they are hostile. They will have sympathetic ears in the equal opportunity commissions. After all, experience in the human rights industry will be a qualification for appointment. The churches and Christian schools will be in the firing line."

Within a few days, Mr Costello was proved right. In evidence before a Parliamentary Committee, Mr Gorton, the Chair of Victoria's Equal Opportunity and Human Rights Commission, emphasizing the importance of reviewing exemptions from anti-discrimination law in light of the Charter, argued for restrictions on religious freedom. In relation to Christian schools he said:[52]

> "We do not see a need for a religious school to be able to discriminate in relation to the choice of a cleaner or for a religious school to discriminate in relation to the choice of a mathematics teacher who has no contact with the practice of the religion or the profession of faith in that school."

On the relationship between maths teaching and the Christian faith, Mr Gorton could not have been more wrong. From a Christian perspective, mathematics is God's language.[53] It has a central role in the debates about the scientific evidence for a Creator of the universe.[54]

Mr Gorton went on to imply that in his view Parliament should outlaw any discrimination against women even if it was based on fundamental religious beliefs[55] (presumably, for example, about female ordination). It appears that the Pope can be Catholic, but not necessarily male.

The Human Rights Law Resource Centre in Victoria also argued for reductions in religious freedom in the light of the Victorian Charter.[56] No-one, it seems, was too bothered by Thai restaurants, gay bars or the staffing of ministerial offices – just Christian schools.

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51 Costello, P 'Pursuing the churches over human rights is contradictory'.The Age, July 29th 2009 available at: http://www.theage.com.au/opinion/pursuing-the-churches-over-human-rights-is-contradictory-20090728-e02j.html?page=-1 (last accessed 1 August 09).

52 Scrutiny of Acts and Regulations Committee, Victorian Parliament, *Inquiry into exceptions and exemptions in the Equal Opportunity Act*, 4 August 2009, transcript p. 5 available at: http://www.parliament.vic.gov.au.

53 M Livio, *Is God a Mathematician?* (New York: Simon & Schuster, 2009).

54 Lennox, J. *God's Undertaker: Has Science Buried God?* (Oxford: Lion Hudson, 2007).

55 Above n.52, pp. 7-8.

Human rights organizations have no credibility if they only champion the causes that are intellectually fashionable, or to which leaders of the organization adhere. When I champion the human rights of my enemy, when I insist on the freedom of speech of someone with whom I profoundly disagree, when I respect the freedom of conscience of someone whose beliefs and values cannot allow her to do what I want her to do, when I demand the freedom for others that may have a prejudicial effect on my interests – then I demonstrate that I really do believe in human rights.

Human rights organizations and lobbyists in Australia do not necessarily stand up very well when measured against that test. It may well be of course, that some of their causes and interests are based on human rights as well and the question is how competing human rights should be balanced in a given context. Yet the true believer in human rights comes to that difficult policy issue understanding his or her biases and respectful of the need to compromise and balance conflicting rights as far as possible. Even when human rights conflict, it is just not good enough to despise and disregard one fundamental human right because it stands in the way of another human right one wants to advance.

Human rights organizations have no credibility if they only champion the causes that are intellectually fashionable.

It ought to be a matter of grave concern to such organizations if people in the mainstream of Australian society perceive them to lack credibility and to be driven by particular ideological agendas which are antithetical to some human rights. There can be little question that this perception has had a real and practical impact on submissions to the National Human Rights Consultation. There are many objections to having a judicially policed Charter of Rights which would remain important objections even if the human rights to be guaranteed far more faithfully reflected the requirements of international human rights norms. Nonetheless at least some objections may have dissipated if there was more confidence that watchdog bodies in Australia would be effective and dispassionate advocates for all human rights in a manner consistent with the priorities about what is fundamental and non-derogable, and what is less fundamental, so clearly established in the various basic Declarations and Covenants.

Human rights organizations such as the Australian Human Rights Commission therefore need to be more self-critical. It is quite possible, indeed likely, that some causes held dear by members and leaders of human rights organizations, are not causes which can be given primacy when in

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[56] See in particular the evidence of Rachael Ball, ibid at 6-7. She said that “there is a point at which religious belief can be restricted in order to promote equality” with reference to the operation of discrimination law (p.7).

conflict with other human rights, according to the priority of rights established in the foundational international human rights doctrines. The submission of the Life, Marriage and Family Centre of the Catholic Archdiocese of Sydney, for example, indicates how many causes advanced by progressive liberals today are not at all supported by the foundational human rights instruments. People may feel passionately that women should have an unfettered and unregulated right to abortion; but actually that is not a right protected in the foundational human rights documents such as the UDHR or ICCPR; people may feel passionately that all opposition or disapproval of homosexual orientation or practice should be vigorously stamped out; but actually, discrimination on the grounds of sexual orientation is not one of the specifically enumerated grounds of discrimination in the UDHR or the ICCPR, although both prohibit discrimination on 'any ground' before listing the specific examples.[57] That is not to say that it is unimportant; but when rights conflict, the foundational human rights documents do not have the same order of priorities as many of the philosopher-kings and queens of human rights today.

> When I champion the human rights of my enemy, when I insist on the freedom of speech of someone with whom I profoundly disagree, when I respect the freedom of conscience of someone whose beliefs and values cannot allow her to do what I want her to do, when I demand the freedom for others that may have a prejudicial effect on my interests – then I demonstrate that I really do believe in human rights.

The values of many liberals, even human rights commissioners, may conflict with the clear requirements of international human rights law. Recognising that is the beginning of a humble and self-critical acknowledgment that belonging to the international human rights community and faithfully protecting human rights may require me to sacrifice promoting my dearly held cause for the greater good of respecting the human rights of others with whom I disagree.

The perception that some human rights organizations, or individuals who represent them, place a low value on freedom of religion or conscience may or may not be an unfair one; but it is a widely held perception, and some fence-mending needs to be done. Human rights bodies may need to look at their own employment practices to see whether there is a sufficient diversity of opinion within them, and to ensure that they have people who can challenge the prevailing dogma in order to ensure better fidelity to human rights. One way of encouraging diversity and fidelity to human rights is to appoint champions for those rights which may not be all that popular within the Commission.

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[57] Article 26 of the ICCPR: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. See also UDHR Article 7, read in the light of Article 2.

Governmental human rights bodies play an important role. Human rights organizations need to be generally perceived as part of the solution to human rights concerns in Australia, not part of the problem.

The four freedoms

In the submissions to the NHRC and the AHRC, churches call for a renewed commitment to religious freedom in Australia – and a reversal of the trends to restrict religious freedom. Four freedoms are fundamental:

- Freedom to appoint people of faith to organizations run by faith communities
- Freedom to teach and uphold within faith communities a restrained and disciplined sexual ethic
- Freedom of conscience to discriminate between right and wrong
- Freedom to evangelise.

The first freedom gains most attention in the submissions. The second is however, related to the first. There is a great focus in western countries at the moment on issues about homosexual practice. Yesterday's orthodoxy on this area of sexual conduct is now today's heresy for many liberals. There are differences between churches on this issue and divisions within churches. Promoting human rights involves not only advancing the rights of people of homosexual orientation, but also respecting the moral positions of those who still adhere to yesterday's orthodoxy and feel compelled to do so by the teachings of their faith or the values instilled in them by their upbringing. There is much room for compromise and middle ground in respecting these different rights and positions. For the policy-maker, *respect* is the key.

> Freedom of conscience to discriminate between right and wrong is critical. Secular liberals need to respect the fact that not everyone shares their moral code.

However the attention given to this aspect of sexual conduct and expression should not distract us from the issues for churches in being able to uphold a Christian sexual ethic in relation to heterosexual behavior. Christians, and indeed other faiths, teach a discipline in relation to heterosexual expression that properly followed can best promote sexual, emotional and relational health. It is radical and counter-cultural these days. However, people of faith need the freedom to uphold those values in their schools and faith communities without being at risk of anti-discrimination lawsuits based on such grounds as marital status.

Freedom of conscience to discriminate between right and wrong is also critical. Secular liberals need to respect the fact that not everyone shares their moral code. Respect for diversity means

upholding the rights of faith-based groups to adhere to their teachings, at least within their own faith communities, and to be allowed freedom of conscience on issues that are fundamental to them within the broader society. Western societies have, for example, long respected the rights of genuine conscientious objectors not to be conscripted into the armed forces. There are not many issues on which freedom of conscience is essential, but there are a few, and a society which respects human rights must honour and protect the freedom of conscience of dissenters from the mainstream on moral issues.

Finally, there is freedom to evangelise – for all faiths. Religious conviction is not fixed and immutable. Many people who grow up without an active faith come to a strong religious conviction in their adult years. Others who grow up with a strong faith lose it. Others still convert to religions in which they have not been brought up at all. Freedom of speech on religious matters ought to be protected to the same extent as all other kinds of freedom of speech in Australian society. The law should not single out religion for special constraints on freedom of speech. The same laws ought to apply equally to discussions about politics or the football.

Of course, freedom of speech does not mean the freedom to vilify or to incite hatred. Christian objections to anti-vilification laws – objections which are very widely held - are not based upon any desire to defend people who stir up hatred; of course not. The problem is that some Australian laws in this area go far beyond application to people who stir up hatred. The poorly drafted law in Victoria, the *Racial and Religious Tolerance Act* 2001, which requires neither the intention to stir up hatred or ridicule, nor the effect of so doing, should stand as a model of how not to legislate.[58] It has caused terrible discord.

Legislation in this area needs to be carefully and narrowly drafted. Anti-vilification laws should not go beyond Article 20(2) of the ICCPR and should at the very least require an advocacy of hatred, and an intention to incite discrimination, hostility or violence before speech is regarded as unlawful, consistent with the ICCPR. Any other restrictions on freedom of speech should be non-discriminatory in the sense that the freedom of speech of people of faith should not be singled out for special restriction by legislatures. That would be in violation of Australia's international covenants. Indeed all legislation that restricts religious freedom should be carefully scrutinized. What is the compelling need to restrict religious freedom? Is this an intervention to solve a non-problem?[59] What impact will the legislation have to restrict the right to freedom of religion and conscience guaranteed by international conventions? Is the restriction on religious freedom the minimum necessary in order to protect public safety, order, health, or morals or the fundamental rights and freedoms of others? These are the questions adherence to international human rights norms compel us to ask. We should resist the impulse to legislate for the sake of it, or in order to

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[58] See n.8 above.

[59] Costello, above n.51: 'The human rights industry begins with grand promises and ends up intervening in non-problems'.

keep up with the Jones's of the international community. Freedom consists first of all in an absence of restraint.

Conclusion

Like all groups in society, there are differences of opinion amongst Christians, and indeed amongst church leaders, about the wisdom of having a Charter of Rights in Australia. There are valid arguments for and against the protection of human rights by means of establishing vague higher order and abstract standards which courts are meant to interpret and apply. People of great intellect, knowledge and goodwill, equally committed to the protection of human rights, can take quite different stands on such matters. It is no surprise therefore that Christians should also have differing views.

What is clear from the submissions is that at least some Christians who are opposed to a Charter of Rights or who have serious doubts about it would be less opposed to it if they thought that the legislators and policy-makers would take *all* human rights seriously, and faithfully protect freedom of religion and conscience in the manner required by Article 18 of the ICCPR and other human rights instruments. The suspicion that those advocating for a Charter don't take freedom of religion and conscience nearly seriously enough – a concern which has been fuelled by the track record of the human rights lobby and the drafting of the two Charters that already exist in Australia –has certainly played a significant part in enlivening opposition to a national Charter.

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The submissions of the Standing Committee of the General Synod of the Anglican Church of Australia and the Australian Catholic Bishops Conference are really bellwether submissions for Christian opinion. The Anglicans would support human rights legislation if it took religious freedom as seriously as international conventions do. It would also support anti-vilification laws which are very carefully drafted. The Australian Catholic Bishops endorse the order of questions raised by the National Human Rights Consultation. Asking what human rights should be protected is a first question. Asking how best to protect them is a secondary one.

Advocacy of human rights involves supporting the rights of those with whom one most profoundly disagrees. Human rights charters cannot just be a vehicle for the promotion of particular ideological agendas. When those who support a Charter demonstrate higher standards of fidelity to the cause of *all* human rights, then they will be better able to persuade at least some doubters to their cause.