SUBMISSION TO THE NSW STATE OPPOSITION: DISCUSSION PAPER ON RELIGIOUS FREEDOM

1. About Freedom 4 Faith

Freedom 4 Faith (F4F) is a recently incorporated association that was formed to educate the Christian church and members of the wider public on issues relating to freedom of religion and belief in Australia. The board of F4F is governed by leaders from the Anglican, Baptist, Presbyterian and Seventh-day Adventist Churches. The association's affiliate membership, which is open to any Church or faith-based organisation that shares the aims and objectives of the association, includes other Christian denominations such as the Apostolic Church and Australian Christian Churches. The members of F4F have a direct interest in religious freedom, which they consider to be one of the most fundamental human rights. F4F thanks the Shadow Attorney General and Shadow Minister for Roads and Ports, Citizenship and Communities for the opportunity to make a submission into this inquiry regarding how to better protect religious freedom in the State of NSW.

2. F4F welcomes the Opposition's interest in and support for religious freedom

There has been very little discussion about issues of religious freedom in NSW over the last ten years or so. The last major discussion F4F recalls related to proposed changes to the *Anti-Discrimination Act 1997* (NSW) in the late 1990s. These proposals had not been well thought-through and raised significant concerns in the Christian community. The former Premier, Bob Carr, and the Cabinet, acted decisively to put those concerns to rest.

F4F welcomes this new discussion paper with its positive approach to support religious freedom under the laws of NSW. F4F also appreciates the Opposition opening up a conversation about how to provide better protection for religious freedom in the State. F4F believes this is an area where there may well be bipartisan support for measures to promote and protect religious freedom, given the NSW Attorney-General's speech on the subject at the University of Sydney Law School in August 2011.

Religious freedom is, as the Opposition recognises in the Discussion Paper, a fundamental human right – the expression of which is bound up with the concept of human dignity as it enables people to live in accordance with deeply held views about what it means to be human. The right is safe-guarded by placing certain limits on government with regard to interference in the public and private exercise of religious freedom, and by ensuring that the government does not privilege one belief system over another.

Religious freedom can only operate in a society that embraces the principle of mutual tolerance and respect. Further, it goes hand-in-hand with freedom of conscience, speech and association, which serve as the means by which people can discuss and debate important questions about human existence.

F4F believes that a new focus on issues of religious freedom is timely for two reasons. First, the rise of secularism in Australia means that fewer and fewer Australians have first-hand experience with religious belief. Second, the increase in immigration of people who adhere to non-Christian religious beliefs means that issues concerning respect for culture and identity will become increasingly important over time.

F4F supports aims to promote religious freedom in a way that encourages mutual tolerance and respect so that Australians can live peaceably together.

3. International Covenant on Civil and Political Rights provides a comprehensive framework for understanding religious freedom

In responding to the proposals in the Discussion Paper, F4F's starting point is Article 18 of the International Covenant on Civil and Political Rights (ICCPR). Article 18 states:

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *Freedom to manifest one's religion or beliefs may be subject 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.*
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.*

Article 18 communicates the fact that freedom of religion is not just about respecting an individual's right to hold private beliefs behind closed doors, but also to live out those beliefs in the public sphere. It also recognises that freedom of religion extends beyond the individual and involves the protection of communities i.e. the right for believers to congregate in order to live out their shared beliefs together. This communal aspect of the right is commonly misunderstood due to the influences of individualism in our western culture. However, it is inherently connected with the freedom of association and the rights of cultural and religious minorities, which are protected by Articles 22 and 27 of the ICCPR.

Article 18(3) also provides helpful guidance on what constitutes an appropriate limitation on freedom of religion. The use of the word 'necessary' means that a restriction cannot be imposed beyond what is strictly necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others – and not beyond what is necessary. In other words, any restriction must be clearly

justified by 'real evidence and not assertion'.[1] The United Nations' Siracusa Principles provide further guidance on appropriate limitations of this right, and support a strict interpretation of limitation clauses.[2]

It is also noteworthy that Article 4 of the ICCPR lists Article 18 as a non-derogable right, which means it cannot be suspended under any circumstances, even a state emergency. In doing so, the ICCPR makes it abundantly clear that freedom of religion is a fundamental right that deserves the fullest protection.

3. Amending the State Constitution

Should NSW amend its Constitution to include a provision declaring the right of every citizen of the State to exercise freedom of religion?

F4F does not consider that the *Constitution Act 1902* (NSW) ("the Constitution") should be amended to include a provision protecting religious freedom.

In the first part of this submission, it was suggested that the right to religious freedom is a fundamental right, the protection of which is necessary to ensure a free and tolerant society. In light of this, it might seem at first glance appropriate to amend the Constitution in a way that affords its protection. The case for amendment might, in the eyes of some, be strengthened by the fact that the right to religious freedom is a negative right. That is to say, the inclusion of this right would not impose any positive duty on the NSW Government but rather a duty not to interfere with the rights of individuals and associations to go about living their faith. From that perspective, it might be argued that amending the Constitution to include an appropriately drafted provision on religious freedom would benefit NSW without placing undue expectations on the Government.

However, F4F is concerned that any constitutional amendment to protect religious freedom is likely to lead to pressure for a full Charter of Rights. The Constitution does not explicitly protect any human rights at present. It is therefore difficult to see how a constitutional amendment could be passed to protect one human right without demand for the protection of other rights.

F4F notes that the NSW State Opposition Discussion Paper on Religious Freedom does not propose to amend the Constitution in a way that confers 'any legal rights or entitlements' to religious freedom but rather that any amendment would be merely 'symbolic.'[3] However, even a symbolic amendment could still cause pressure to adopt a full Charter of Rights.

In the opinion of F4F, a constitutional Charter is undesirable as it would require the judiciary to make legal pronouncements on what will inevitably be controversial policy decisions. F4F believes that controversial policy decisions – like the limits on freedom of religion and freedom of speech and how

[1] Submission of the Victorian Ad Hoc Interfaith Committee to the Freedom of Religion and Belief in the 21st Century, p 3.

[2] 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).

[3] NSW State Opposition Discussion Paper on Religious Freedom, p 2-3.

competing rights should be appropriately balanced – are best left for the Parliament to decide through the formulation of carefully drafted legislation which responds to specific needs and circumstances. This way the Parliament would be held accountable at the next election for any laws it passes, including those that affect human rights.

F4F also believes that a Charter of Rights based on the model of the Victorian Act would also have some negative consequences for religious freedom.[4] This is because the Victorian Act represents little more than a declaration of general intent which can too easily be used to establish a de facto hierarchy of rights in which religious freedom is trumped by, rather than balanced with, other rights. There are also significant problems with interpreting how a Charter of Rights is supposed to operate, as the judgments of the High Court in *Momcilovic v The Queen* indicated.[5]

For these reasons, F4F believes that NSW should not amend its Constitution to include a provision declaring the right of every citizen of the State to exercise freedom of religion. However, if such an amendment were to be made, F4F would advocate for a clause that reflects the full wording of Article 18 of the ICCPR. As previously expressed, F4F believes that Article 18 properly identifies and articulates the nature of the right. This includes the freedom to both hold and manifest a belief, in private and in public, individually and in community. Freedom of private belief without the freedom to manifest one's belief publicly is not adequate. Even those who lived under the Soviet Union's communist regime were able to hold private religious beliefs.

F4F draws further attention to the Victorian Act as an example of how <u>not</u> to define religious freedom. While designed to reflect the wording of Article 18, the Victorian Charter has some important differences that should not go unnoticed. Firstly, section 14 protects 'freedom of thought conscience and *belief*' as opposed to 'freedom of thought conscience and *religion*', and in so doing takes the focus off religious groups. While freedom not to hold a religious belief is implicit in the idea of freedom of religion, F4F believes there is no reason to suppose that, in modern secular Australia, the absence of a religious belief requires the same protection. Secondly, the limitation clause in section 7(2) of the Victorian Act provides broad and vague grounds for ignoring the rights said to be protected in that Charter, and those grounds are much wider than provided in Article 18. While Article 18(3) calls for a limitation to be 'necessary', section 7(2) merely states that a limitation is to be 'reasonable.' In effect, section 7(2) can be used to justify almost any restriction on religious freedom.

4. Amending the *Anti-Discrimination Act 1977* (NSW)

Should NSW amend its Anti-Discrimination Act 1977 (NSW) to provide that discrimination on the basis of religion is unlawful? Should any additional exceptions or exemptions be established if religion is established as a basis upon which discrimination would be unlawful?

[4] *Charter of Human Rights and Responsibilities Act 2006* (Vic). See generally Parkinson P, 'Christian Concerns About an Australian Charter of Rights' (2010) 15 *Australian Journal of Human Rights* 83.
[5] (2011) 85 ALJR 957.

This is not a straightforward issue. A similar proposal was made in the late 1990s, and Churches raised concerns that the proposed legislation would have prohibited faith-based organisations – such as Christian schools - from advertising for and seeking to appoint staff who shared the religious beliefs and commitment of the organisation. This would have been devastating for religious freedom. It is important in a tolerant and multicultural society that parents should have a choice of schools at which to educate their children, including schools that reflect their faith and values. Article 18(4) of the ICCPR protects that right quite specifically. This has also been a foundational principle of Australian life since the colonies' earliest days as democratic and civil societies.

The right of faith-based organisations to recruit staff who share the beliefs and values of the organisation is important to all faith communities in NSW. It protects the religious identity of Islamic and Jewish schools and welfare organizations, as well as Christian ones. F4F would oppose any amendment to the *Anti-Discrimination Act 1997* (NSW) ("the Act") that might diminish this right. However, F4F also recognises that the inclusion of religion as a protected attribute under the Act would offer some protection for minority religious groups in multicultural Australia. This would also bring the Act into line with international human rights documents.[6]

F4F would support the inclusion of religion as a protected attribute if the following conditions were met:

1) *Religion is defined asymmetrically*

   F4F sees no need for the protection to be symmetrical. That is, F4F sees no reason to prohibit discrimination on the grounds of non-belief as well as belief. This is not because the rights of non-believers should be any less than the rights of believers. Rather it is because anti-discrimination law seeks to protect groups that have historically been subject to persistent, sustained and unjustifiable discrimination over time by the majority and who are still at risk of such discrimination. Only a minority of Australians continue to hold and actively live out a religious belief. The majority of Australians are either indifferent to matters of faith, agnostic or atheistic. There seems to be no risk of discrimination in Australia on the basis of non-belief.[7]

2) *Implementation of a general limitation clause*

   F4F thinks it is inappropriate for anti-discrimination law in NSW to address issues of religious freedom by means of exceptions or exemptions from otherwise inapplicable laws. As the Human Rights Committee of the United Nations has explained, conduct is not 'discriminatory' if it is for a purpose which is legitimate under the ICCPR.[8] That is, the right to be free from discrimination sits

[6] For example, see Article 2 and 26 of the ICCPR.

[7] Many people view religious schools as discriminating against those that do not adhere to a religious belief. However, this is an expression of freedom of association. The same would apply to humanist organisations or political parties whose membership is open to those adhering to the purposes of the association.

[8] The UN Human Rights Committee in General Comment 18, para 13 states that differentiation of treatment will not constitute discrimination, 'if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.

alongside other human rights such as freedom of religion, freedom of association and the rights of cultural and religious minorities, and the definition of 'discrimination' operates within that context.

F4F would like to see a definition along the following lines:

1. *Discrimination means any distinction, exclusion, preference, restriction or condition made or proposed to be made which has the purpose of disadvantaging a person with a protected attribute or which has, or is likely to have, the effect of disadvantaging a person with a protected attribute by comparison with a person who does not have the protected attribute, subject to the following subsections.*

2. *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.*

3. *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).*

4. *Without limiting the generality of subsection 2, a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of freedom of religion if it is made by a religious body, or by an organisation that either provides, or controls or administers an entity that provides, educational, health, counseling, aged care or other such services, and either:*
    a. *it is reasonably necessary in order to comply with religious doctrines, tenets, beliefs or teachings adhered to by the religious body or organisation; or*
    b. *it is reasonably necessary to avoid injury to the religious sensitivities of adherents of that religion or creed; or*
    c. *in the case of decisions concerning employment, it is reasonable in order to maintain the religious character of the body or organisation, or to fulfill its religious purpose.*

5. *Without limiting the generality of subsection 2, a distinction, exclusion, preference, restriction or condition should be considered appropriate and adapted to protect the right of ethnic minorities to enjoy their own culture, or to use their own language in community with the other members of their group, if it is made by an ethnic minority organisation or association intended to fulfill that purpose and has the effect of preferring a person who belongs to that ethnic minority over a person who does not belong to that ethnic minority.*

6. *…[the exercise of other protected human rights the exercise of which do not amount to discrimination against others, or the enumeration of other legitimate objectives that ought to be given specific legislative expression]* [9].

This definition explains what does and does not constitute discrimination without recourse to 'exceptions' or 'exemptions'. F4F believes that anti-discrimination legislation which is constructed on the basis of such 'exceptions' or 'exemptions' misleadingly presents religious freedom as a concession as opposed to a fundamental right. For this reason, F4F supports fundamental definitional change along the lines proposed.

5. Other comments

One of the difficulties in seeking to protect religious freedom is drafting laws that promote community cohesion rather than being a source of division and increased tension. While this goes beyond the ambit of the discussion paper, F4F considers it is worth referring to examples of how legislation can provoke conflict rather than reduce it.

In 2001, the Victorian parliament introduced legislation called the *Racial and Religious Tolerance Act* which proved to be controversial in its application. Section 8 of the Act states:

> *'A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.'*

In *Islamic Council of Victoria (ICV) v Catch the Fire Ministries (CFM),*[10] the ICV claimed that CFM and two pastors had vilified Muslims in a church publication and seminar they had given on the topic of Islam. At first instance, the Victorian Civil and Administrative Tribunal (VCAT) found against CFM and the pastors and ordered them to make a public apology in *the Age* and the *Herald Sun* acknowledging, amongst other things, that they had vilified "all Muslim people, their God, their prophet Mohammed and in general Muslim beliefs and practices". On appeal,[11] however, the Court found that the Tribunal had incorrectly interpreted and applied the Act and referred the matter back to VCAT to be reheard in light of the Court of Appeal's determination. The hearing never eventuated as the matter was settled through mediation. However, the proceedings had come at a great emotional and financial cost to the pastors and also had the effect of stifling reasonable public discussion on the topic of religion.[12]

Another example of how legislation can provoke unnecessary conflict comes direct from NSW. The case involved a same-sex couple, OW and OV, applying to become foster parents through Wesley Mission's

[9] This definition was proposed by Prof Patrick Parkinson AM, University of Sydney and Prof Nicholas Aroney, University of Queensland in their submission into the Consolidation of Commonwealth anti-discrimination laws (2011).
[10] [2004] VCAT 2510 (22 December 2004).
[11] [2006] VSCA 284.
[12] For further reading on the subject of religious hatred legislation, F4F recommends Parkinson, Patrick 'Religious anti-vilification, anti-discrimination laws and religious minorities in Australia: The freedom to be different' (2007) 81 ALJ 954.

foster program. Wesley Mission advised OW and OV that same-sex couples were not eligible to become foster parents under the Mission's guidelines. As a result of this, OW and OV lodged a complaint under the *Anti-Discrimination Act 1977* (NSW). At first instance,[13] the Administrative Decisions Tribunal held that Wesley Mission had wrongfully discriminated against the couple under the Act. The Tribunal further held that Wesley Mission could not rely on the religious exemption clause.[14] On appeal, however, the NSW Court of Appeal held that Wesley Mission could rely on the clause as a defense.[15] Section 56(d) of the Act states that the Act does not affect any act or practice of a body

> *'established to propagate religion that conforms to the doctrine of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.'*

The matter was referred back to the Tribunal for determination of the beliefs relevant to that organisation.

It should be noted that OW and OV were free to become foster parents in a number of different organisations. However, the case was run as a test case to challenge the right of Christian organisations to act in accordance with their conscience and beliefs in relation to this question. That is, the legislation provided a potential means of suppressing diversity and freedom of conscience in the provision of foster care, rather than promoting tolerance of different lifestyles, points of view and religious beliefs.

These two cases provide evidence of how legislation can be used as a vehicle to promote hostility and division as opposed to mutual tolerance and respect. F4F warns against creating or expanding legislation in a way that encourages litigation as the preferred method of dispute resolution.

6. Summary

F4F summarises its response to the discussion paper's proposals in the following three ways.

1) F4F does not support amending the NSW Constitution to include a provision on religious freedom as this may lead to pressure for a full Charter of Rights. If such a constitutional amendment was made, F4F would advocate for a clause that reflects the full wording of article 18 of the ICCPR.

2) F4F would not support any amendments to the *Anti-Discrimination Act 1977* (NSW) that may jeopordise the right of faith-based organisations to recruit staff who share the beliefs and values of the organisation. If this is respected, F4F would support an amendment to include religious belief as a protected attribute. F4F believes, however, that the definition of religious belief should not include atheism or lack of religious belief. This is because atheism is not the subject of persistent and ingrained discrimination in the Australian context and is unlikely to be the subject of discrimination.

[13] *OV and anor v QZ and anor (No 2)* [2008] NSWADT 115.
[14] Section 56 *Anti-Discrimination Act 1977* (NSW).
[15] *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 Dec 2010).

3) F4F believes a general clause which explains what is and is not discrimination is a more appropriate way of protecting freedom of religion than the current protection of religious freedom through exemptions and exceptions.

7. Further discussion

F4F is grateful for the opportunity to make this submission. The board and management of F4F would welcome the opportunity to meet with the Shadow Attorney General and the Shadow Minister for Roads and Ports, Citizenship and Communities to further discuss the contents of this submission.