



because Australians should be free to believe

## **Submission into the 2014 Australian Human Rights Commission 'Rights and Responsibilities' Discussion Paper**

### **Introduction**

Thank you for the opportunity to respond to the Human Rights Commission's Discussion Paper on Rights and Responsibilities.

Freedom 4 Faith ("F4F") is an organisation that was formed to educate the Christian church and wider public on issues relating to freedom of religion in Australia. F4F's leadership team includes senior Christian leaders from the Anglican, Baptist, Pentecostal, Presbyterian and Seventh-day Adventist traditions, as well as legal experts.

### **The way we exercise the right to freedom of religion**

Religious freedom is 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 consider, discuss and debate important questions about human existence. These "four freedoms" are essentially indivisible, and are each deserving of protection.

The International Covenant on Civil and Political Rights ("ICCPR") provides a comprehensive framework for understanding religious freedom, as it incorporates other fundamental freedoms. 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 – for example, by not participating in activities that contradict one's deeply held beliefs, including in the workplace. Article 18 also recognises that freedom of religion is not merely an individual right, but also a group right which enables people to manifest their religion 'in community with others.' The manifestation of religion does not merely involve acts of public worship – for example, going to church on Sundays - but also 'observance, practice and teaching', which include the running of schools, camps, hospitals, aged-care facilities and other such organisations.

The right to gather together with people who share in a common faith and creed is also protected by article 22 of the ICCPR which states: 'Everyone shall have the right to freedom of association with others'. Special protection is also afforded to religious minority groups, enabling them to preserve their own cultures, beliefs and traditions. Article 27 of the ICCPR specifically addresses this where it states:

*'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'*

Of course the right to manifest one's religion or belief is not absolute. If it were, violent or other antisocial acts committed in the name of religion would be justifiable. Article 18(3) provides helpful guidance on what constitutes an appropriate limitation on freedom of religion. Freedom of religion can only be limited in very restricted circumstances, namely where its expression threatens public safety, order, health or morals or the fundamental rights and freedoms of others. Any limitation on religious freedom must be strictly *necessary*, and therefore justified only in very serious cases, such as words or actions which intend to incite others to violence.

Article 18 is also instructive in the way it protects the right for parents to educate their children in accordance with their beliefs. Article 18(4) specifically protects the right of

parents 'to ensure the religious and moral education of their children in conformity with their own convictions.' In similar vein, Article 5(2) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (1981) provides that '[e]very child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents'.

While Article 18 does not refer explicitly to freedom of speech, speech nevertheless plays an important role in freedom of religion. It is often through speech – whether oral, written, or symbolic - that we come to adopt beliefs of our own in the first place, and having done so, we continue to use speech to test the truth or falsity of our religious claims, and to engage in dialogue with others.

### **Where restrictions on freedom of religious worship exist**

As explained above, there are numerous aspects of freedom of religion. Freedom of worship is just one of those aspects. The question of whether or not restrictions on freedom of worship exist depends on how the concept is defined. We note that Tim Wilson has sometimes used the term “freedom of worship” rather than “freedom of religion”, as if the two were synonymous.<sup>1</sup> With respect, this appears to limit religious liberty to the private, or even semi-private sphere of private or congregational worship, and it is precisely this reduction in the scope of freedom of religion that is of concern to Freedom 4 Faith and other religious liberty advocates around the world.

If freedom of religion only referred to the activities that take place within worship contexts – for example, the Sunday church service – then we are not aware of any restrictions here in Australia. Australians have long enjoyed the right to establish their own churches and centers of worship, and to conduct their own services according to their own liturgical practices and teachings – for example, the practice of male-only ordination and/or the teaching that the bread and wine used in Holy Communion transform into the body and blood of Christ. However there exist other restrictions on freedom of religion that occur outside formal worship contexts which will be discussed in the following section.

### **Whether we have felt restricted or prohibited from exercising our right to freedom of religion**

One of the difficulties in seeking to protect religious freedom and associated rights (“the four freedoms”) is drafting laws that promote community cohesion rather than being a source of division and increased tension. Over the last 12 years, however, Australian parliaments have implemented, or attempted to implement, legislation which undermines each of these four freedoms.

---

<sup>1</sup> For example, see Tim Wilson, ‘Allowing unpleasant views to be heard exposes them to ridicule they deserve’, *The Sydney Morning Herald*, 1 September 2014: <http://www.smh.com.au/comment/allowing-unpleasant-views-to-be-heard-exposes-them-to-ridicule-they-deserve-20140901-10art4.html>

*Anti-discrimination laws threaten freedom of religion and association*

Perhaps one of the most obvious threats to religious freedom in Australia comes from changes to anti-discrimination laws across the country. There is an active constituency arguing to reduce or eliminate 'religious exceptions / exemptions' that exist to safeguard legitimate expressions of religious freedom. This constituency seemingly has little understanding of, or respect or tolerance for, the rights of religious communities to maintain their identity.

For example, the *Sex Discrimination Amendment Act*, which was passed in the final days of the Labor government, was amended to remove exemptions for Commonwealth aged-care providers. As a result of this, it is no longer lawful for a Commonwealth-funded religious aged-care facility to preference a married couple over an unmarried couple – whether heterosexual or homosexual.

Of course the government has a duty to ensure that all people, irrespective of their sexuality, have access to aged-care facilities. The problem is that the previous government sought to achieve this end by prohibiting people who share in one faith, and share similar expressions of that faith, from choosing to live together in their old age. For some small religious aged care homes, the marital status or sexual orientation of a couple may be an issue, and the freedom of conscience of such organisations needs to be respected.

This was followed almost immediately by the *NSW Anti-Discrimination Amendment (Private Educational Authorities) Bill 2013*, which sought to prevent private educational institutions from being able to discriminate against their students on the basis of attributes relating to their sexuality or relationship status. We are not aware of any cases in recent years in which there has been discrimination against students on the basis of professed sexual orientation.<sup>2</sup> However faith based schools should have the right to create an education environment consistent with their doctrine and it is clear that such legislation creates a precedent that could see other exemptions for private educational institutions eroded.

Many private educational institutions are religious communities established with the object of professing, practicing and teaching a particular religious faith. This involves much more than including prayers at school or college assemblies, or mentioning God in the

---

<sup>2</sup> There was a case of a Catholic school Principal who refused to enroll the child of a lesbian couple but this was quickly overruled by the Bishop. This case was cited by the Public Interest Law Clearinghouse Victoria (PILCH), *Submission on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, (21 December 2012) 14 <<http://www.pilch.org.au/Assets/Files/PILCH%20-%20Submission%20on%20the%20Exposure%20Draft%20of%20the%20HRAD%20Bill%20%282%29.pdf>>. This submission (at 14) offered one example of an issue where a Catholic Primary School refused to enroll a child of a same sex couple. The submission omitted to note that the problem was resolved by the speedy and decisive intervention of the Bishop. See 'School Forced to Take Same-Sex Couple's Daughter' *The Age* (online), 14 December 2011 <http://www.theage.com.au/national/school-forced-to-take-samesex-couples-daughter-20111214-1ou92.html>.'

curriculum. Religious educational institutions are interested in the formation of the whole person, and often seek to establish a community that upholds the full teaching of the faith, including teachings on appropriate sexual behaviour.

Many religions, including orthodox Christian denominations, teach that sex is the celebration of a union between a man and a woman who have given themselves exclusively to one another in marriage. In fact almost every major Australian Christian denomination has a doctrinal statement to this effect. As a result of this, Christian educational institutions may expect their students to uphold particular standards in relation to sexual practice. This applies to heterosexual as much as to homosexual practices.

Another attempt to undermine religious freedom in NSW involved a same-sex couple, OW and OV, applying to become foster parents through Wesley Mission's 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,<sup>3</sup> 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.<sup>4</sup> On appeal, however, the NSW Court of Appeal held that Wesley Mission could rely on the clause as a defense.<sup>5</sup> 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, thus ultimately upholding the religious freedom of the organisation. It should be noted that OW and OV were free to become foster parents in a number of different organisations. The case was clearly run as a test case to challenge the right of Christian organisations to act in accordance with their beliefs in relation to this question. That is, the legislation provided a potential means of suppressing diversity in the provision of foster care, rather than promoting tolerance of different lifestyles, points of view and religious beliefs.

#### *Laws which undermine freedom of conscience*

Threats to religious freedom don't just stem from anti-discrimination measures. They are also imposed by legislation that limits freedom of conscience and speech, both of which go hand in hand with religious freedom.

---

<sup>3</sup> *OV and anor v QZ and anor (No 2)* [2008] NSWADT 115.

<sup>4</sup> Section 56 *Anti-Discrimination Act 1977* (NSW).

<sup>5</sup> *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 Dec 2010).

For example, the Victorian *Abortion Law Reform Act* (2008) requires medical practitioners who have a conscientious objection to abortion to provide a referral to another health professional who does not have such an objection. Doctors and nurses are compelled to assist in abortion where there is a threat to the life of the woman, again irrespective of any conscientious objection they may have to the procedure.

More recently, Tasmania passed the *Reproductive Health (Access to Terminations) Act 2013* which similarly limits the right of conscientious objection in relation to the issue of abortion by requiring medical practitioners who conscientiously object to abortion to provide their patients with a list of those who do not hold such an objection.

#### *Laws which undermine freedom of speech and assembly*

The Tasmanian *Reproductive Health (Access to Terminations) Act 2013* also limits freedom of speech and assembly by preventing members of the public from engaging in 'prohibited behaviour' within 150 metres of abortion clinics. The Act defines 'prohibited behaviour' to include engaging in 'a protest' that can be 'seen or heard' by a person accessing the clinic.

Abortion is an extremely sensitive issue, and no woman approaching an abortion facility should be harassed or threatened. However the difficulty is that the definition of 'prohibited behaviour' is so broad that it has the possibility of imposing a hefty fine, or even a prison sentence, on those who engage in even the most peaceful of protests. More importantly the issue of the sanctity of life has driven Christian activism on a range of issues from slavery to the death penalty and is a legitimate concern to be put in the public square by people of faith.

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)*,<sup>6</sup> 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".

---

<sup>6</sup> [2004] VCAT 2510 (22 December 2004).

On appeal,<sup>7</sup> 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.<sup>8</sup>

This case provides evidence of how legislation can be used as a vehicle to promote hostility and division as opposed to mutual tolerance and respect. We are wary of legislation which encourages litigation as the preferred method of dispute resolution.

Another case involved a medical practitioner from Queensland, Dr David van Gend, who was forced to attend a compulsory mediation arranged by Queensland's Anti-Discrimination Commission concerning an article he wrote on gay marriage for the Brisbane Courier-Mail. The Courier-Mail had invited Dr Karen Brooks and Dr van Gend to submit opinion pieces on the case for and the case against gay marriage. Dr van Gend wrote the following in his case against:

"If you hold the old-fashioned idea that a baby deserves both a mother and a father, (Queensland ALP President) Andrew Dettmer, calls your views 'abominable'.

"Yes, it is discrimination to prohibit the "marriage" of two men, but it is just and necessary discrimination, because the only alternative is the far worse act of discrimination against children brought artificially into the world by such men, compelled to live their whole lives without a mother. Now that approaches the abominable."

The case brought against Dr Van Gend was reported as follows:<sup>9</sup>

'A member of Gay Dads NSW filed a complaint under the Queensland Anti-Discrimination Act, forcing van Gend to mediation. The complaint was withdrawn but van Gend is still irate.

"I had to cancel a dozen patients to front up and it cost me thousands in legal advice," he says. "It cost him (the complainant) an email and a conference call."

The complaint was "utterly worthless (but) the problem of these laws is they cost innocent people lots of money and time".'

---

<sup>7</sup> [2006] VSCA 284.

<sup>8</sup> 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.

<sup>9</sup> <http://www.heraldsun.com.au/opinion/gays-must-curb-vile-vitriol/story-e6frfhqf-1226167514970>

This case illustrates the cost and inconvenience for a respondent even where a complaint is closed or withdrawn. It also shows how creating remedies against other people based upon nothing more than subjective 'offence' can be a weapon of warfare used by different advocacy groups. Of course people have strong views on subjects such as gay marriage. However in a healthy democracy that respects the human right of free speech, it ought to be possible to articulate the different arguments without being subject to civil litigation.

### **What could be done to enable you to exercise your right to freedom of religion**

What religious organisations really need by way of accommodation in anti-discrimination law is three things:

1. Accommodation which allows religious organisations to employ staff using criteria which derive from the mission and identity of the organisation;
2. The right to give preference in some kinds of service provision to those for whom the service was established; and
3. Freedom to uphold moral standards within faith communities.

In addition to the maintenance of the existing protections for religious freedom, which could readily be redrafted in more appropriate and modern terms, adherents of a religious faith also need better protection for their human rights in a new environment of hostility to religious faith. In particular, there is a need to extend the notion of reasonable accommodation to cover issues of conscience in the workplace. For instance this should take into account the reasonable availability of alternate services to those excluded from service.

Finally, religious organisations need the Australian Human Rights Commission to support the four freedoms with the same energy that they expend on supporting other human rights.

In the following section we propose four ways to ensure better protection of the four freedoms.

#### **1. Guarantees of freedom in relation to services funded by the federal Government**

We propose that the Government should introduce legislation to guarantee freedom of speech, religion, conscience and association in all services funded by the federal government. This legislation should:

- Guarantee by law that schools, welfare organisations and other bodies that receive funding from the federal government are able to maintain their religious identity, ethos and values in terms of staffing and delivery of services.
- By invoking the operation of section 109 of the Constitution, render inoperative any state or Territory laws that have the effect of restricting the freedom of

- organisations that receive funding from the federal government to maintain their religious identity, ethos and values in terms of staffing and delivery of services.
- Provide that, so far as it is possible to do so, the laws of the Commonwealth must be read and given effect in a way which is compatible with freedom of speech, religion, conscience and association and which promotes these four freedoms.
  - Require that universities and other tertiary institutions that receive Commonwealth funds must ensure that all staff and students are guaranteed rights to freedom of speech, religion, conscience and association in the life and work of the institution by university policy, with such policies, and any changes therein, to be reported to the Freedom Commissioner and the Department of Education.

## 2. Amendments to the Fair Work Act

We propose amending section 351(2) of the *Fair Work Act 2009* and adding a new subsection (4) as the following paragraph suggests. Please note that we have underlined the proposed amendments for ease of reference.

### ***Discrimination***

(1) *An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.*

*Note: This subsection is a civil remedy provision (see Part 4-1).*

(2) *However, subsection (1) does not apply to action that is:*

- a. not unlawful under any anti-discrimination law in force in the place where the action is taken; or*
- b. taken because of the inherent requirements of the particular position concerned; or*
- c. required by the doctrines, tenets, beliefs or teachings of a particular religion or creed; or*
- d. permitted under subsection (4).*

(3) *Each of the following is an **anti-discrimination law**:*

- aa. the Age Discrimination Act 2004;*
- ab. the Disability Discrimination Act 1992;*
- ac. the Racial Discrimination Act 1975;*
- ad. the Sex Discrimination Act 1984;*
- ae. the Australian Human Rights Commission Act 1986;*
- a. the Anti-Discrimination Act 1977 of New South Wales;*

- b. *the Equal Opportunity Act 2010 of Victoria;*
  - c. *the Anti-Discrimination Act 1991 of Queensland;*
  - d. *the Equal Opportunity Act 1984 of Western Australia;*
  - e. *the Equal Opportunity Act 1984 of South Australia;*
  - f. *the Anti-Discrimination Act 1998 of Tasmania;*
  - g. *the Discrimination Act 1991 of the Australian Capital Territory;*
  - h. *the Anti-Discrimination Act of the Northern Territory.*
- (4) Notwithstanding subsection (1) and any provision in an anti-discrimination law, or any other law of the Commonwealth, a State or a Territory, where an employer establishes, directs, controls or administers an entity that provides educational, health, counselling, aged care or other such services, and that is intended by the employer to be conducted in accordance with religious doctrines, tenets, beliefs or teaching, or for a religious purpose, the employer may:
- a. choose to appoint a person who adheres to particular religious doctrines, tenets, beliefs or teachings to a position likely to require interaction with those to whom the service is provided or with members of the public;
  - b. require an employee to abide by a code of conduct that is reasonably required of someone who adheres to those doctrines, tenets, beliefs or teachings;
  - c. take adverse action against an employee who no longer adheres to those doctrines, tenets, beliefs or teachings or breaches that code of conduct.

It may be helpful to ensure mirror provisions in specific federal anti-discrimination statutes.

### **3. Reasonable accommodation in the workplace for freedom of conscience**

The *Fair Work Act* should also impose upon employers a duty to make reasonable adjustment for an employee who has a conscientious objection to the performance of a particular duty or who, for religious reasons, seeks particular arrangements concerning dress code, rostering or otherwise, provided that the employer is able to accommodate such requirements of religion or conscience without discrimination in the provision of services in a manner which would be contrary to an anti-discrimination law and without unjustifiable hardship.

### **4. Redefinition of discrimination in the federal discrimination statutes**

F4F thinks it is inappropriate for anti-discrimination laws 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.<sup>10</sup> That is, the right to be free from discrimination sits 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.

For this reason, we propose redefining discrimination in accordance with the model drafted by Professor Patrick Parkinson and Professor Nicholas Aroney. Their definition, which defines both what is, and what is not, discrimination, is as follows:

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, counselling, 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*

---

<sup>10</sup> 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’.

- 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.*

*...[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].<sup>11</sup>*

## **Conclusion**

Religious freedom and associated rights (“the four freedoms”) are at risk of being undermined in Australian society due to a focus on other, sometimes competing rights. In light of this, there is a need to “re-balance” the rights agenda in view of recent developments, particularly the over-reach of the equality lobby. We now call the Australian Human Rights Commission to take steps to ensure that the freedoms of religion, speech, association and conscience are protected, strengthened and promoted. The value of protecting and promoting religious freedom is an essential and indivisible part of a broader program to safeguard fundamental freedoms for Australian society.

---

<sup>11</sup> 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).