27 September 2023

Department of Home Affairs

Submission to the Multicultural Framework Review

This submission is on behalf of, and co-signed by:

- Australian Baptist Ministries
- Australian Christian Churches
- Anglican Church Diocese of Sydney
- Presbyterian Church of Australia in NSW
- Seventh-day Adventist Church

The submission was coordinated by *Freedom for Faith,* a Christian legal think tank that exists to see religious freedom for all faiths protected and promoted in Australia and beyond. Freedom for Faith is led by people drawn from a range of denominational churches including the Anglican Church Diocese of Sydney, The Catholic Church, the Australian Christian Churches, Australian Baptist Churches, the Presbyterian Church of Australia, and the Seventh-day Adventist Church in Australia. It has strong links with, and works co-operatively with, a range of other faith groups in Australia.

We welcome the opportunity to make this submission and we give consent for this submission to be published. Our contact details are as follows.

Freedom for Faith

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Thank you for the opportunity to make a submission to this review.

As a peak body in this area, Freedom for Faith would welcome the opportunity to engage further with the Panel on religious freedom and religious discrimination issues in a multicultural society.

Executive Summary

Australia is a multicultural and multi-faith society which thirty years ago had a strong commitment to multiculturalism. Critical to the continuing success of any multicultural society is not only that people of all faiths be free from discrimination but also that, in their religious and cultural organisations at least, they are free to be different.

That commitment has diminished greatly in recent years, largely due to the emphasis of one version of equality which assumes that discrimination that excludes certain people from jobs or as members of a voluntary association is inherently harmful and ought to be unlawful. What this has meant is that there is increasing intolerance of freedom of religion and association, evidenced by opposition to exemptions in anti-discrimination law that have been placed there in the past to support these freedoms. Leaders of Australian multicultural policy must be vocal in supporting the right of communities to adhere to their own values, at least in their faith-based schools and organisations. If we fail to allow that freedom, we will become, increasingly an unhappy and highly conflicted, monocultural society.

Australia as a multicultural society

More than 25% of Australians were born overseas, and another 25% have at least one parent born overseas. In Sydney, as something of a magnet for migrants, the relevant proportions may well be much higher. There are suburbs in Sydney such as Fairfield that have more than 150 different ethnic groups in the one local government area, speaking a multitude of languages at home.

In the last three decades, relatively few new migrants have come from Europe or countries of the Anglophone world where religious adherence has declined in recent decades. Many migrants and refugees are devoutly religious and, even if they are not, most have come from cultures with quite conservative views about sex and family life.

The proportion of the population that holds to conservative values on sex and family life will only increase in the next three decades. This is not only because current migration patterns are very likely to continue, but because people from these cultures have much higher birth rates than secular Caucasian Australians.

Different applications of multiculturalism

Multiculturalism means different things to different people. We suggest that the claim to respect for the rights of minorities may take five different forms.

First, an acceptance of cultural diversity means that the freedom of particular groups to enjoy their culture or religion should not be restricted unless this is necessary to protect the fundamental human rights of others.1 The rights of minorities to be able to practise their religion and maintain their culture are protected by various conventions in international law. For example, Article 27 of the International Covenant on Civil and Political Rights (the **ICCPR**) provides that in states which have ethnic, religious or linguistic minorities, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, and to use their own language.

Freedom of religion is also a fundamental right, protected by Article 18 of the ICCPR. According to Article 4, it is one of the very few "non-derogable" rights that cannot be suspended, even in a time of national emergency which threatens the life of the nation. This demonstrates its fundamental importance according to international law. According to Article 18(3), states are only entitled to impose such limitations on the exercise of people's freedom to manifest their religion or beliefs as are **necessary** in the interests of public safety, order, health or morals, or for the protection of the fundamental rights and freedoms of others.2

An important aspect both of freedom of religion and multiculturalism is the right of religious minorities to run faith-based schools. In many such schools, an essential criterion for appointment to the staff is commitment to that faith. This can cause tensions in relation to anti-discrimination law if a very narrow view is taken concerning the exemptions that are appropriate.

The second dimension of multiculturalism which is expressed in international conventions and covenants is that governments should act to prevent discrimination based upon religion or ethnicity. Article 26 of the ICCPR prohibits discrimination on the grounds of race and national origin, as does the Convention on the Elimination of All Forms of Racial Discrimination. These international obligations are given effect in domestic law by legislation such as the Racial Discrimination Act 1975 (Cth). State antidiscrimination laws are also consistent with the aims of the international conventions.

The third dimension is that the legal system should be accessible to people irrespective of their cultural background and first language. If people from a non-English speaking background are

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[1] UN General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion) <https://www.refworld.org/docid/453883fb22.html>.

[2] Ibid.

to understand court cases in which they are involved, this means that they will need interpreter services as of right both in court and in the earlier stages of the legal process, such as interviews with police and legal representatives.

A fourth possible dimension of multiculturalism is that government officials and courts should take account of particular cultural factors in the application of the general laws of the land to individuals. Thus, in family law cases involving children of mixed race, account might be taken of such factors as the importance for the child's cultural development and sense of identity of maintaining links with her or his extended family. It is also necessary to take account of different understandings of family in different cultures. In criminal cases, officials or courts might take account of the cultural context in which the offence occurred in deciding whether to prosecute, whether to convict, or how to sentence. Specific exemptions, whether de facto or de jure, might be given to particular ethnic groups where the interference with their religious freedom outweighs any public benefit in applying the law to them.

A fifth potential dimension for multiculturalism is that the law should be sufficiently pluralistic to allow different communities to be governed by their own laws on matters where cultural values differ significantly between different groups. This fifth claim for multiculturalism is controversial. Sensitivity to cultural practices conflicts with the principle, which is a fundamental premise of western legal systems, that all members of society should be governed by the same laws. Apart from adherence to the fundamental precepts of the western legal tradition, there are other reasons for not allowing different communities to be governed by different legal norms. The recognition and enforcement of certain cultural norms and rules by the law of the country could, in certain instances, violate the principle that the government should protect the rights of vulnerable members of minority groups from practices which are regarded by the dominant culture as oppressive.

The rights of minority groups to cultural expression may conflict with other rights in international conventions to which Australia is a signatory, such as the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child. The protection of the rights of women and children may at times conflict with particular cultural practices that would otherwise have a claim to recognition. This has been a reason for a backlash against multiculturalism in recent years. The competing rights contained within these various international covenants and conventions create a difficult balancing operation for governments in a multicultural society. On the one hand, they must respect the cultural practices of minority groups within the society. On the other hand, they must protect "minorities within minorities", that is, the vulnerable members of ethnic minorities, from cultural practices that are oppressive.

In resolving these conflicts, governments have to steer between the twin dangers of cultural insensitivity and cultural relativism. There is scope for individual laws to be much more sensitive culturally than they are at present but, at the same time, there is a danger that culture will be used as an excuse for practices that should not be tolerated and which violate human rights.

The role of anti-discrimination laws in a multicultural society

How we 'live and let live' in such a multicultural society is a complex problem that requires wisdom, tolerance and compromise. The Interational Covenant on Civil and Political Rights (**ICCPR**) sets an international standard on the rights of freedom of religion, association and the rights of ethnic minorities. These must be given very careful attention with respect to reforming the Act. Religious communities and individuals do not only need to be protected from discrimination, which is the particular focus of the Act. There is also an equally, if not more important, need for religious communities to be protected from the negative effects of anti-discrimination laws. These laws should not interfere with the manifestation of fundamental freedoms in the public sphere, such as freedom of religion and association, except in extremely limited circumstances as discussed in UN General Comment No.22.1

The Review will need to grapple with the paradox of people of faith both needing protection from discrimination, as well as freedom to practice their religion in ways which might otherwise be prohibited by anti-discrimination laws.

This is typically achieved in two ways in drafting legislation. The first is in limiting the scope of application of anti-discrimination laws to appropriate fields which ought to be seen as sufficiently public and open to all, that the law should limit freedom of association or freedom of religious activity. The second is by providing 'exceptions' or 'exemptions' for religious activity that would be deemed unlawful discrimination but for the exception provided. The term 'exception' is unfortunate, as it fails to signify that it is in fact protecting a legitimate religious right that can be exercised by default and that has been qualified by the prohibition.

An example of the manifestation of religious beliefs in the public square that would involve unlawful discrimination but for the provision of exemptions in anti-discrimination law (section 56 of the Act) is the doctrine and practice involved in the Roman Catholic priesthood. The Church doctrine on this issue requires it to have exemptions from laws that would otherwise prohibit discrimination on both sex and marital status. Furthermore, it needs to be allowed to say that a person born as female does not meet the criteria for eligibility to the priesthood notwithstanding that the person now identifies as a male.

This is only one example of how anti-discrimination laws must balance different rights and religious freedoms. NSW law has been somewhat successful from a multicultural perspective to date, because the current law only encroaches to a limited degree on the autonomy of faith-based organisations such as Christian schools and welfare organisations to maintain their religious identity, ethos and values. By way of contrast, the State of Victoria is now in a position of continuing conflict with many of its faith communities, Christian, Jewish and Muslim, because it has amended its Equal Opportunity Act to wipe out, or otherwise severely restrict, most religious exemptions.

Laws which fail to allow for a healthy multiculturalism will exacerbate social tensions and create deep divisions. If the law strays too far from the cultural values of those who are governed by

it, including the values of religious and cultural minorities, the long-term effect will be to diminish respect for law and for government. Voluntary obedience to law will decline, and this has long-term implications for the society.

Exceptions and exemptions

Exceptions and exemptions are not ideal as a way of legislating for the protection of fundamental human rights. Rights that are said in the ICCPR to be "non-derogable" should not be protected in law only by way of exceptions to otherwise applicable rules.

A particular problem with this reliance on exemptions and exceptions in drafting legislation is that they have come under sustained attack from those who (wrongly) characterise them as a "licence to discriminate". Although there are some examples where the claims that religious believers make can be characterised in such terms, it is for the most part a gross distortion of the issue. People of faith want to be able to 'live and let live' with other members of the community, neither claiming privileges not open to the rest of society, nor accepting that their rights be subordinated to those of other members of the community.

The most important issue for Christians, and, we understand, for most other faith groups, is not the right to discriminate, but the freedom to select on the basis of religious belief and practice, and freedom to take adverse action against an employee if necessary, where issues of personal conduct are incompatible with the values of the employing organisation. That freedom to select should be expressed as a right, not an exception. It is a right which has been severely restricted in Victoria, and this negative trend is being extended to other states. It threatens the future of multiculturalism.

Employment rights

Of particular importance to Christian organisations, and no doubt those of other faiths, is the right to select, or to prefer, people who adhere to the faith and therefore are likely to be aligned with the mission and ethos of the organisation.

The ideas advanced by the Australian Law Reform Commission in its recent Consultation Paper on religious exemptions for faith-based schools have aroused enormous opposition across a broad cross-section of religious organisations and faith-based school groups. Indeed, it is difficult to think of any ALRC Consultation Paper which has been so poorly received by the stakeholders who were most affected by the proposed changes to the law. The thrust of the ALRC's paper seemed to be that it was the purpose of Christian schools to provide employment opportunities for non-Christian teachers, subject only to narrow exemptions. The authors of that paper did not seem to understand the reasons why so many parents who do not have an active religious faith choose Christian schools for their children, nor the importance to faith communities of the schools through which they seek to educate their children in a context of Christian living and practice.

We support the need for prohibitions on religious discrimination. They are necessary to protect people of all faiths. However, for the reasons given, it is important that the law is drafted carefully so as not to interfere with appropriate religious freedoms insofar as faith-based organisations are concerned. They need to be able to maintain their identity and ethos through the freedom to select staff appropriate to the mission of the organisation, or to give preference to the employment of such staff.

This approach gains support from the Human Rights and Equal Opportunity Commission report on religion and belief which commented in 1999 that "special provision for religious institutions is appropriate. It is reasonable for employees of these institutions to be expected to have a degree of commitment to and identification with the beliefs, values and teachings of the particular religion…Accommodating the distinct identity of religious organisations is an important element in any society which respects and values diversity in all its forms."[3]

Similarly, it is supported by the UN's Special Rapporteur on freedom of religion and belief. In 2014, Heiner Bielefeldt, the Special Rapporteur at that time, wrote an important report on religious freedom in the workplace. He argued that discrimination on the basis of religious belief in the workplace should be unlawful, but "religious institutions constitute a special case. As their raison d'être and corporate identity are religiously defined, employment policies of religious institutions may fall within the scope of freedom of religion or belief, which also includes a corporate dimension."[4]

Such legislative provisions confer what Hohfeld called a liberty right[5] for a faith-based organisation to select staff on the basis of religious belief should it choose to do so. This is an appropriate application of the rights of freedom of religion and association.

Gender identity and school students

Another issue which is likely to be of importance to all faith communities – but not just faith communities - is to clarify what legal obligations flow from the law prohibiting discrimination on the basis of gender identity for those people or organisations that cannot rely upon an exemption.

This is of particular importance in school communities, where a child, without or without support from both of his or her parents, wishes to be called by a new name and to be recognised as being of a gender different from his or her natal sex. As large numbers of children and teenagers, and particularly teenage girls, are now identifying as 'transgender' or 'non-binary', demands on schools to recognise their new identity have increased beyond what could ever

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[3] Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief*, (1999) p.109.

[4] Interim Report of the Special Rapporteur on Freedom of Religion or Belief, 5 August 2014 at [68].

[5] Wesley Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Essays (WW Cook, ed, Yale UP, 1923).

have been imagined when provisions were introduced into anti-discrimination laws to protect gender identity. For most of these children and teenagers, the novel gender identity is likely to be transient, as is other experimentation in adolescence; but medical experts around the world are now expressing concern about the 'affirmation' approach to this issue as it may concretise and lock in an otherwise quite temporary identity, causing long-term harm to the child.

Other children at school are also being impacted by the claims of some students to have a gender identity different to natal sex. For girls in particular, there are issues about having to share bathrooms and changing rooms with natal males, issues about sleeping accommodation at camps, and safety concerns when physically larger and stronger males want to participate in female-only sports.

Religious communities, as well as ethnic minorities,[6] have generally been consistent in holding to the scientific truth that, despite natural human variation and abnormalities such as disorders of sex development, there are just two sexes.[7] This accords with the teaching of the Abrahamic faiths. They have sought to hold onto this core truth while adopting a caring and pastoral approach to anyone in their congregations or communities who experiences gender incongruence.

For now, faith-based schools, whether Christian, Jewish or Islamic, provide something of a safe harbour from the extremes of gender ideology that are to be found in many state schools, especially (but not only) in Victoria. If the federal Parliament wipes out the religious exemptions entirely from faith-based schools, and does nothing to clarify and confirm the rights of those schools to separate boys and girls for purposes of toilets and changing rooms and, in the case of Muslims, for prayers, much conflict could arise.

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[6] For example, the Chinese-Australian population in New South Wales circulated a petition against the Safe Schools program in 2016, complaining that it promoted a particular ideology which was contrary to their culture and beliefs. It attracted over 17,000 signatures https://www.abc.net.au/news/2016-08-23/safe-schools-mp-lodges-petition-against-program-signed-by-17000/7777030 (last accessed, July 31st 2023).

[7] Congregation for Catholic Education, 'Male And Female He Created Them': Towards A Path Of Dialogue On The Question Of Gender Theory In Education (2019); Anglican Diocese of Sydney, Social Issues Committee, Gender Identity (2017).

Conclusion

This is an important review. Our perception is that there is a sizeable proportion of those engaged in the development and implementation of public policy who really don't believe in multiculturalism when recognition of religious and cultural minority rights would hinder the advance of favoured rights such as those of the LGBTQ+ communities. We are becoming increasingly monocultural, and increasingly intolerant of difference on social and moral issues, especially concerning sexuality, gender, family life and the protection of vulnerable human life, whether in the womb or in old age or impaired health.

Freedom for Faith and the signatories below look forward to further consultations with the Panel in due course.

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