

**Anglican Church of Australia**  
**Standing Committee of the General Synod**

**'Freedom of Religion and Belief in the 21<sup>st</sup> Century' Submission**

**Introduction**

1. This submission is made on behalf of the Standing Committee of the General Synod of the Anglican Church of Australia.
2. In responding to the Discussion Paper *Freedom of Religion and Belief in the 21<sup>st</sup> Century*, we have focussed our attention on the proposed *Religious Freedom Act* (RFA). While we have not expressly addressed every question in the Discussion Paper, our comments on the RFA touch upon some of them. Before dealing with the RFA, we have set out five principles which we believe are fundamental to the consideration of freedom of religion and belief in Australia. While conscious that the current community discussion about a Charter of Rights will involve issues of freedom of religion and belief among many human rights, in this submission we have not addressed the intersection of freedom of religion and belief with other human rights.
3. In considering the RFA, we have separately considered the right to freedom of religion and belief, unlawful discrimination on the grounds of religion, and advocacy of religious hatred. Where appropriate we have referred to particular recommendations in the 1998 HREOC report, *Article 18: Freedom of Religion and Belief*.

**Principles for freedom of religion and belief in Australia:**

4. The following principles are fundamental to the consideration of freedom of religion and belief in Australia:
  - i. For many people, religion and belief is integral to personal and communal identity. Freedom to believe and to manifest belief is essential to personal and social wellbeing and has entailed freedoms of:
    - belief, conscience and religious practice
    - worship and assembly
    - political expression and social action
    - propagation of belief and practices within family and community, to people who hold other beliefs, and in public discourse.
  - ii. We affirm the right, as stated in ICCPR 25, of all persons (whether religious or not) to fully participate in public life and policy debates in Australia.

- iii. We uphold a distinction between the instruments of civil government at all levels, and organised religion and religious activity. At the same time, we affirm the many constructive partnerships that have been negotiated between the two in Australia (e.g. in education, health and aged care). These partnerships recognise that religious faith has had many demonstrable outworkings for the common good.
- iv. We value and want to keep the freedoms and rights Australians enjoy, which are delivered by Australian law, and have in turn been shaped and informed by Judeo-Christian thought. We recognise and affirm the cultural diversity that exists within Australia, and the need to respond thoughtfully to increasing religious diversity. But any policy initiatives arising from debate about freedom of religion and belief should not compromise these freedoms and rights.
- v. We look for a society where religious discourse is conducted in safety and security, and people are free to disagree without danger of social exclusion or harm to person or property. These conditions will entail the freedom to engage in robust debate and disagreement about religious beliefs and practices.

#### **RFA: right to freedom of religion and belief**

5. In the U.K. and Europe, the application in law of the equivalent of ICCPR 18 requires consideration of the following questions:
  - i. Is there a religious belief?
  - ii. Is there are a manifestation of the belief?
  - iii. Is there any interference with the manifestation of belief?
  - iv. Is the interference justified?
6. We recognise that there are arguments supporting and opposing the enactment of ICCPR 18.

In support:

  - i. The right to religious freedom is not recognised in Australian common law.<sup>1</sup>
  - ii. It will compel Commonwealth, State and Territory governments to consider the impact of policy and legislation upon the manifestation of religion and belief.
  - iii. It will have a beneficial educative impact.

In opposition:

  - iv. It may incite attempts to protect 'extreme' manifestations of religious belief.
  - v. It could lead to judicial determination about what constitutes a 'religious belief' and a 'manifestation' of it, which could operate as a limitation upon religious freedom.

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<sup>1</sup> *Grace Bible Church v Reedman* (1984) 36 SASR 376; (1984) 54 ALR 571.

7. The adoption of ICCPR 18 in its entirety will ensure that the benefits of its enactment are achieved, and the disadvantages will be minimised. On balance, we think that the proposed RFA should enact ICCPR 18 on the following basis:
  - i. The RFA should include ICCPR 18 entirely, including 18.3 and 18.4.
  - ii. The exceptions in ICCPR 18.3 should be strictly construed.
  - iii. The RFA should not follow the approach adopted in Victorian and ACT human rights legislation, which do not include ICCPR 18.4, nor specify the limitations in ICCPR 18.3. This will mean that courts, where appropriate, will be required to express a view on whether interference with the manifestation of belief is justified.
8. The right to religious freedom should not be construed only as applicable to manifestations that involve activity (e.g. assemblies or building places of worship), but should extend to the recognition and protection of places and objects of religious significance (e.g. Indigenous sacred spaces).

#### **RFA: unlawful discrimination on the ground of religion**

9. We support the RFA making it unlawful to discriminate, whether directly or indirectly, on the ground of religion in the area of employment provided there are appropriate exemptions. We support the first exemption proposed in *Article 18* (R4.1.1). However we consider that the second exemption (R4.1.2) is too narrow, as it will inhibit the legitimate expression of distinctions, exclusions and preferences on the ground of religion in the area of employment.
10. We consider that it should be unlawful to discriminate in employment on religious grounds if an organisation does not exist to serve religious purposes. This is the circumstance in which exemption R4.1.1 should apply:

*'A distinction, exclusion or preference in respect of a particular job based on the inherent requirements of the job should not be unlawful. Preference in employment for a person holding a particular religious or other belief will not amount to discrimination if established to be a genuine occupational qualification.'*

11. In many religious contexts (including congregations, schools, missionary organisations, and other charitable organisations), R.4.1.1 is not meaningful or relevant. In these organisations, there is no distinction between those positions where religious belief is a 'genuine occupational qualification', and other positions. The attempt to make such a distinction is not meaningful because:
  - i. These organisations may seek to maintain their distinctively religious mission, and to avoid loss of effectiveness, by employing people throughout the organisation who adhere to the religious purposes, and hold the religious beliefs, of the organisation.
  - ii. For Christian organisations, all action is done 'to the glory of God'. This makes it impossible to distinguish between specifically religious activity and other activities.

- iii. The concept of Christian vocation is not limited to clergy, nor to specific ministerial functions within the church, but includes the work of lay people in whatever capacity they may serve.

12. We reject R4.1.2 because:

- i. It is too complex.
- ii. It creates a distinction between those groups whose 'religious susceptibilities' are easily offended and those whose are not, discriminating against the latter.
- iii. In bodies established for religious purposes, not all conduct will stem from and be directly governed by ('conducted in accordance with,' R4.1.2) the doctrines, tenets beliefs or teachings of the religion or its creeds. Such organisations also look to other appropriate authorities, such as professional discipline, best practice and policy compliance.

13. We propose that the following exemption should apply to religious organisations:

*A distinction, exclusion or preference in connection with employment, whether paid or voluntary, as a member of the staff of a body established for religious purposes (including humanitarian, educational, and other charitable institutions), being a distinction, exclusion or preference derived from the doctrines, tenets, beliefs or teachings of a particular religion or creed, should not be unlawful provided that it is made in good faith, is not arbitrary and is consistently applied.*

This proposed exemption is also to be preferred because it reflects the **Religion Declaration Art. 6(b)**. This article protects the right to freedom of thought, conscience, religion and belief in the establishment and maintenance of charitable and humanitarian institutions.

14. The same exemptions should apply to at least the following other areas of public life:

- i. Club or society membership (e.g. membership of a university religious group, missionary society, or congregation);
- ii. The provision of goods and services (e.g. aged care services provided to a particular religious group; publishers supporting or promoting particular religious views; advertising space in publications servicing a religious community);
- iii. Education (e.g. seminary or theological college enrolments; educational institutions who want to give preference to students whose parents are members of that religion);
- iv. Accommodation and conference centres (e.g. those religious groups who wish to provide for members of that religion).

## **RFA: advocacy of religious hatred**

15. We support the abolition of the common law offence of blasphemy, and the repeal of any laws creating the offence of blasphemy.
16. We support the withdrawal by the Commonwealth of its statement of interpretation relating to ICCPR 20.
17. We support the implementation within the RFA of ICCPR 20.2: advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence should be prohibited by law.
18. We strongly oppose the enactment of a law that follows the *Racial and Religious Tolerance Act (Vic) 2001*, which fails to follow the text of ICCPR 20.2, because of difficulties in its interpretation and application reflected in the differences of opinion between the members of the Court of Appeal of the Supreme Court of Victoria.<sup>2</sup>
19. We consider that the enactment of ICCPR 20.2 should make explicit that:
  - i. It is 'incitement to discrimination, hostility or violence' against persons, and not against beliefs or doctrines, which is proscribed: 'defamation of religion' per se is not within the prohibition.
  - ii. It is necessary to consider the impact upon the audience to whom the words or actions are directed.
  - iii. Injury to religious sensibilities is not within the prohibition.
  - iv. 'Vilification' is not a synonym for the text of ICCPR 20.2, and this term should not be used in the legislation or the supporting documentation (as appears in *Article 18* R5.3 and 5.4).
20. In addition to the exemptions listed in *Article 18* R5.3, we consider that acts done reasonably and in good faith for a religious purpose should also be exempt. The listed exemptions address the right to freedom of expression; a distinct exemption is needed to address the right to freedom of religion and belief.
21. We support both criminal and civil liability subject to the qualifications expressed below.
  - i. Criminal liability should require intent and knowledge of the likely consequences, and prosecutions should only be brought with the consent of the DPP. A person should not be convicted of a criminal offence without proof of intent and knowledge. Furthermore, the requirement of the consent of the DPP will prevent persons using the RFA to oppress others through private prosecutions.
  - ii. Civil remedies should not include damages for injury to religious sensibilities, since the protection of religious sensibilities is not covered by ICCPR 20.2 and should not be provided by the RFA.

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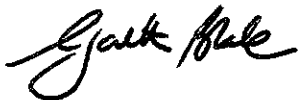
<sup>2</sup> *Catch the Fire Ministries Inc. & Others v Islamic Council of Victoria Inc.* (2006) 15 VR 207; (2006) 235 ALR 750; (2006) 206 FLR 56.

- iii. Civil remedies should not include any order to give an apology where it would conflict with a person's right to freedom of religion and belief.
22. After five years, as part of a wider review of the Act, there should be a review of these provisions. This review should particularly address the concerns we share with many in the wider community about possible negative consequences of providing civil remedies, including:
- i. Persons may misuse the legislation by pursuing complaints in order to denigrate or silence another religious viewpoint.
  - ii. The legislation may inhibit open and free discussion of religious differences.
  - iii. It may require courts to make judgments as to whether statements are a balanced presentation of a religion or a religious viewpoint, which courts are ill-equipped to undertake.

### Conclusion

23. While we support the RFA, we wish to emphasise that this support is limited to legislation which gives effect to ICCPR 18.1-4, 20.2, & 26 as set out above.
24. Given the importance of this legislation, and its possible adverse impacts on the freedom and manifestations of religion and belief in Australia, we consider that there should be a comprehensive review of the entire Act after five years. This review should involve widespread consultation with the community, including religious groups.

5<sup>th</sup> December 2008




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Carolyn Tan

for and on behalf of the Standing Committee of the Anglican Church of Australia.