



because Australians should be free to believe

Submission to the 2015 Review of the Victorian Charter of Human Rights and Responsibilities

Introduction

Thank you for the opportunity to take part in this review of the Victorian Charter of Human Rights and Responsibilities (“Charter”).

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 leaders from the Anglican, Baptist, Pentecostal, Presbyterian and Seventh-day Adventist traditions, as well as legal experts.

The main purpose of this submission is to outline the scope of the right to religious freedom so that it might be accurately reflected in the Charter. This submission is therefore structured in two parts. The first part outlines the nature and scope of the right to religious freedom; the second seeks to apply this understanding to the Charter so as to strengthen its level of protection.

Part 1: About Religious Freedom

Religious freedom is a fundamental human right recognised by international human rights documents, and one which is integral to our human dignity. 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.

The best articulation of religious freedom is, arguably, found in the International Covenant on Civil and Political Rights (“ICCPR”). Article 18 reads:

- 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 square, including in the workplace. It also recognises that religious freedom is not merely an individual right, but also a group right which enables people to manifest their religion 'in community with others.'

This involves more than the freedom to gather for public worship – for example, going to church on Sundays - but also 'observance, practice and teaching', including the running of schools, camps, hospitals, aged-care facilities and other religious organisations. In order to maintain their integrity and purpose, such groups ought to be able appoint people who will uphold the faith and ethos of the organisation, and also to teach and uphold moral standards within such communities.

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 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. According to Article 18(3), 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.¹ General Comment 22, which interprets Article 18, states:

‘In interpreting the scope of permissible limitation clauses, State parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2,3 and 26. Limitations imposed must be established by law and *must not be applied in a manner that would vitiate the rights guaranteed in article 18.*’
[emphasis added]

In other words, while at times it is necessary to balance rights in the case of a conflict, the application of the limitation cannot be such to destroy or impair the legal validity of Article 18. General Comment 22 also recognises the importance of respect for different moral codes where it states:

‘The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.’

In other words, a limitation to freedom of religion cannot be enlivened to impose a particular worldview, but must respect alternative moral perspectives that defer from the moral majority. Of course there are many legitimate examples of where freedom to manifest a belief must be limited, but to do so must go no further than ‘necessary’ to achieve the protective purpose, and should adopt the least restrictive means for achieving that purpose. Warren CJ has rightly said in relation to the Victorian Charter that the onus of justifying a limitation on a right rests with the party seeking to uphold it, and that the standard of proof is high.² Her Honour went on to indicate that the ‘more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justifiable’.³

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) 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

¹The United Nations’ Siracusa Principles, which provide further guidance as to what might constitute a lawful restriction on such rights, also support a strict interpretation of this limitation clause. See 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).

² Re an application under the Major Crime (Investigative Powers) Act 2004, [2009] VSC 381, at [147].

³ Ibid at [150] quoting R v Oakes [1986] 1 SCR 103 at 44.

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'.

F4F believes that the protection and promotion of freedom of religion is essential to Australia's multicultural society and that protecting freedom of religion is an indivisible part of safeguarding other fundamental freedoms.

Part 2: Religious Freedom and the Charter

In the following paragraphs we offer comments and suggestions regarding the terms of reference that relate to desirable amendments to improve the operation of the Charter and/or enhance its effectiveness.

Expand scope of religious freedom

The right to religious freedom is protected in the Charter, although only in a limited sense. Section 14 of the Charter is the relevant provision. It states:

- (1) *Every person has the right to freedom of thought, conscience and belief, including*
 - a. *The freedom to have or adopt a religion or belief of his or her own choice; and*
 - b. *The freedom to demonstrate his or her own religion or belief in worship, observance, practice or teaching, either individually or as part of a community, in public or in private.*
- (2) *A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice and teaching.*

While there are resemblances between section 14 and Article 18 of the ICCPR, the fact that it is not a direct implementation of Article 18 indicates that the Charter conceives of religious freedom in a different way. For example, section 14 protects 'freedom of thought, conscience and *belief*' as opposed to 'freedom of thought, conscience and *religion*'. In doing so, it arguably places the focus on individual belief rather than the collective belief of religious communities which, as we have discussed, is central to the concept of religious freedom.

Section 7(2) of the Victorian Charter 'Human Rights – What they are and when they may be limited' is also relevant. It states:

- (2) *A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –*
- a. the nature of the right; and*
 - b. the importance of the purpose of the limitation; and*
 - c. the nature and extent of the limitation; and*
 - d. the relationship between the limitation and its purpose; and*
 - e. any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*

The limitation clause in section 7(2) of the 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.

Further, the Charter’s general limitation clause differs from the approach in the ICCPR which, as Professor Patrick Parkinson explains, contains limitation clauses that ‘are specific to each right and are constrained within the Article which defines the scope of that right’.⁴ Professor Parkinson also highlights the fact that, in contrast to section 7(2), Article 18 is ‘one of the few rights in the covenant that cannot be derogated from, even in a time of emergency (Art 4(2))’.⁵

Recommendation: F4F recommends that section 14 of the Act be replaced with the full wording of Article 18 of the ICCPR, which we believe to be the proper articulation of religious freedom.

Section 48 of the Charter - Abortion

Section 48 of the Charter also has problematic implications for religious freedom. It reads:

Nothing in this Charter affects any law applicable to abortion or child destruction, whether before or after the commencement of Part 2.

Excluding the application of the Charter to abortion and child destruction is problematic as many people, including those within faith communities represented by F4F, believe that human rights should apply from the time of conception.

⁴ Patrick Parkinson, ‘Christian concerns about an Australian Charter of Rights’, (2010) 15 *Australian Journal of Human Rights*, 83 at 100.

⁵ *Ibid*, 101.

The problems concerning section 48 of the Charter were illustrated with the passage of the Victorian *Abortion Law Reform Act 2008* (“the Act”), which limits the right of conscientious objection in relation to abortion procedures. For example, section 8 of the Act ‘Obligations of registered health practitioner who has a conscientious objection’ says:

1. *If a woman requests a registered health practitioner to advise on a proposed abortion, or to perform, direct, authorise or supervise an abortion for that woman, and the practitioner has a conscientious objection to abortion, the practitioner must –*
 - a. *inform the woman that the practitioner has a conscientious objection to abortion; and*
 - b. *refer the woman to another registered health practitioner in the same regulated health profession who the practitioner knows does not have a conscientious objection to abortion.*

In other words, section 8 requires health practitioners who have a conscientious objection to abortion to provide a referral to another health practitioner who does not have such an objection. Providing a referral might seem like a reasonable requirement in the scheme of things. However, this is to overlook the fact that it forces medical practitioners to direct their patients to a service which they *do not recommend* for one reason or another. It essentially treats members of the profession as automatons that can't think for themselves when it comes to abortion, but must "just follow orders".

The inclusion of section 48 into the Charter means that the right to conscientious objection is completely removed when it relates to the issue of abortion and child destruction. We find it highly problematic that a fundamental human right such as conscientious objection would be excluded from consideration regarding any issue, not to mention a highly contentious issue such as abortion. In practical terms, the existence of the Charter did nothing to protect the right to freedom of conscience.

Recommendation: In light of the above discussion, F4F recommends that section 48 of the Charter be removed in its entirety.

Ensure the development of a human rights culture includes elaboration on the right to religious freedom

The Charter gives the Victorian Equal Opportunity and Human Rights Commission (“VEOHRC”) a number of specific powers and functions,⁶ including the provision of education about human rights and the Charter.⁷

⁶ See sections 40(1) and 41 of the Charter.

⁷ See sections 41(d) of the Charter.

F4F considers that the development of a human rights culture would be aided by the VEOHRC supporting the right to religious freedom and associated rights with the same energy that it expends on supporting other human rights.

Religious freedom consists, at a minimum, of the following five basic freedoms:

1. Freedom to manifest a religion through religious observance and practice;
2. Freedom to appoint people of faith to organisations run by faith communities;
3. Freedom to teach and uphold moral standards within faith communities;
4. Freedom of conscience to discriminate between right and wrong;
5. Freedom to teach and propagate religion.

The affirmation of these basic liberties, which are protected in international law and have long been recognised by the common law, is necessary in order to recognise and respect the importance of religion in the lives of so many Australians. It is also critical to having a successful and harmonious multicultural society. Multiculturalism, as it has been said, requires both majority and minority groups to adapt to one another.⁸ It requires a tolerance for different viewpoints and values on moral and social questions.

Protection for non-State entities to operate in accordance with their beliefs, even when they receive certain forms of government funding

One of the ways that the right to religious freedom and associated rights find expression is in the formation and running of religious organisations such as schools, camps, hospitals and aged-care facilities. Many such organisations are established with specific religious objects that may include professing, practicing and teaching a particular religious faith.

There is some anxiety within religious organisations about the ability for religious groups to safeguard their right to appoint people who they believe will teach and uphold moral standards of the faith, and thereby maintain the religious integrity of the organisation in question. This anxiety is very real in light of the expansion of anti-discrimination legislation across the Western world, which seeks to elevate the right to equality over and above the right to religious freedom, and also increasing pressure to treat religious bodies which receive government funding as branches of the government.

⁸ W Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, Oxford, 1995).

Dr Joel Harrison and Professor Patrick Parkinson shed light on the debate about whether or not religious bodies which receive government funding ought to be treated as public entities in a recently published article. They distinguished between 'situations where governments are purchasing services to be delivered through non-government agencies to the general community in a given locality, and situations where the government is providing funding support to a diverse range of bodies which are delivering services, giving the consumer some choice or reflecting the existing different communities.'⁹

F4F would oppose any amendment to extend the application of the Charter to religious organisations, including those that receive government funding that fits within the second category described by Harrison and Parkinson, whether through the definition of 'public authority', 'public nature', or otherwise.

Summary of recommendations

- Replace section 14 of the Charter with the full wording of Article 18 of the ICCPR;
- Remove section 48 in its entirety;
- Equip the VEOHRC to support the right to religious freedom and associated rights with the same energy they expend on supporting other human rights;
- Protect the ability of non-State entities to operate in accordance with their beliefs, even when they receive government funding;
- In addition to the above, we would support ongoing reviews of the Charter.

⁹ Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society', (2014) 40 *Monash University Law Review* 413.