Christian concerns about an Australian Charter of Rights

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In 2009, Australia had a debate on whether it should enact a statutory Charter of Rights of a kind similar to that in the United Kingdom, Canada and New Zealand. Some of the most organised opposition has come from churches and Christian organisations. The church groups opposed to a Charter are not at all against recognition of human rights — far from it. However, they oppose a Charter. Paradoxically, most of the churches and organisations perceive religious freedom to be under threat. Why then would churches not support a Charter of Rights? This article explains the concerns of the churches opposed to a Charter. They argue that contemporary Charters of Rights may, in fact, not protect religion very well at all; that they fail to enact the grounds for limitation contained in Art 18 of the International Covenant on Civil and Political Rights; that they may be used to support agendas hostile to religious freedom; and that governmental human rights organisations are rather selective about the human rights they choose to support. Organisations which have a statutory mandate to promote and protect human rights need to examine seriously the criticisms and concerns that have been expressed, if there is to be a national consensus about human rights in Australia that includes people of faith.

Introduction

At the end of September 2009, the *Report of the National Human Rights Consultation* was published (Brennan Committee 2009). As the consultations leading to this report indicated, the issue of whether Australia should have a Charter of Rights, or some equivalent, is one on which opinions are sharply divided. The extent of the divisions among Australians on this issue has led the government to indicate that it is not inclined to pursue the path of a Human Rights Act (Eyers 2010; Henderson, 2010).

The divisions about a Charter of Rights were seen in all parts of the community. There was significant opposition, for example, from leading figures in the Labor Party, such as former premier of New South Wales Bob Carr. There is, nonetheless, one quite prominent sector of Australian society in which opposition to a Charter has

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been rather more evident than support for it. That is in the churches. The Australian Christian Lobby, a group with a significant level of support across the country, mostly from evangelical Christians, ran a strong campaign against having a Charter.[1] Reservations about a Charter are to be found not only in submissions by churches and Christian organisations to the National Human Rights Consultation (NHRC) itself, but also in submissions to the Australian Human Rights Commission's (AHRC's) project on Freedom of Religion and Belief in Australia (the AHRC project).

The spectrum of views among churches

Submissions to the NHRC that are critical of a Charter include, apart from the Australian Christian Lobby, those from the Presbyterian Church of Australia; the Baptist Union of Australia; the Anglican Diocese of Sydney; the Life, Marriage and Family Centre of the Catholic Archdiocese of Sydney; and the Ambrose Centre for Religious Liberties (a body which has an advisory council that includes senior figures from a number of different faiths). In submissions to the AHRC inquiry, the NSW Council of Churches (AHRC 2009 submission, 3) and the Association of Christian Schools have also expressed reservations about a Charter (AHRC 2009 submission, 14). In its submission to the NHRC, the Australian Catholic Bishops Conference decided not to take a stand either for or against a Charter of Rights. It considered that attention should first be given to the prior questions of what human rights should be protected and then to an examination of the extent to which protection of those rights could be improved. The Catholic Bishops suggested that:

> … seeking better coordination of existing protections and services should be considered prior to more substantial change. If such better coordination is unachievable or inadequate then more substantial change should be considered. [NHRC 2009 submission, 20.]

While the Catholic Bishops collectively did not take a stand either way, Cardinal George Pell, the Church's most prominent leader, has been an outspoken critic of a Charter (see, for example, *CathNews* 2008). He was part of a delegation of top leaders from across the spectrum of churches who met with the Attorney-General and Shadow Attorney in October 2009 to express their opposition to a Human Rights Act (Berkovic 2009).[2]

The opposition among the churches is not universal. The General Synod Standing Committee of the Anglican Church of Australia came out in support of human

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1 See <www.acl.org.au>. In November 2009, the Australian Christian Lobby presented a petition to the government with 21,000 signatures. See <www.acl.org.au/pdfs/load_pdf_public.pdf?pdf_id=1452&from=national>.

2 The author accompanied this delegation.

rights legislation, but only if strong provisions concerning freedom of religion were included, consistent with Art 18 of the International Covenant on Civil and Political Rights (ICCPR). The submission was critical of the level of protection for freedom of religion in the Victorian and Australian Capital Territory Charters. The submission also noted that within the Anglican Church there is 'a diversity of opinion around which human rights should be recognized and how they should be protected' (NHRC 2009 submission, 1). The dissenting view is particularly evident in the submission of the Sydney Diocese (which has by far the largest active membership base of any diocese in Australia). It came out strongly against a Charter of Rights. By way of contrast, only the Uniting Church submission and the submission of the Peace and Legislation Committee of the Religious Society of Friends gave unqualified support to an Australian Human Rights Act or Charter.

The church groups opposed to a Charter are not at all against recognition of human rights — far from it.[3] Most church submissions emphasised the Christian foundations for the recognition of human rights and the extensive involvement of Christians, both in advocating for human rights and in giving practical effect to the promotion of those rights through humanitarian services. What many of these submissions oppose, or have doubts about, is the means of promoting human rights, not the end. The churches are not alone, of course, in questioning whether the only effective means to stiffen respect for human rights is through the law (Kinley 2007, 562–63).[4]

The paradox: Christian concerns about freedom of religion

What emerges, in particular, from submissions to the AHRC inquiry is that there is a widespread, if not universal, view across Christian denominations and organisations that religious freedom is under threat in Australia. This threat is seen to come in particular from the growing antipathy among secular liberals towards exemptions under anti-discrimination legislation for faith-based organisations, and from the chilling effect upon freedom of speech arising from vague and poorly drafted 'anti-vilification' laws concerning religion (Aroney 2006; Parkinson 2007; Ahdar 2007). There are also concerns about the respect being given in Australia to freedom of conscience.

One might think that organisations which perceive that their fundamental human rights are under threat — rights guaranteed in very strong and clear terms by

3 For example, the Australian Christian Lobby states: 'ACL is committed to the promotion and protection of the fundamental human rights of all persons. It is a large part of our motivation.' (NHRC 2009 submission, 1.)

4 Kinley cites rights skeptics such as Jim Allen, Tom Campbell, Marie-Benedicte Dembour, Keith Ewing, Mark Tushnet and Jeremy Waldron.

Art 18 of the Universal Declaration of Human Rights (UDHR), Art 18 of the ICCPR and a number of other human rights instruments — would be in favour of a Charter of Rights to provide some protection. Yet, many of the same church submissions that raise concerns about religious freedom argue very cogently against a Charter.

Understanding the churches' opposition

This article examines the submissions of various groups that are opposed to a Charter of Rights, drawing on submissions both to the NHRC and to the AHRC inquiry, and explains the reasons for concerns about a Charter from the perspective of one who has been actively involved with church leaders in the 'no' campaign. The views of church leaders are important, irrespective of what people may think about whether their concerns are justified, because they represent such a large body of educated and informed opinion in the Australian community and because of the influence that their views have had in the Charter debate. The concerns of the churches also raise important implications for the future of human rights discourse in Australia, since one of the primary issues for the churches is about the way in which freedom of religion and conscience has been seemingly disregarded by statutory bodies responsible for protecting human rights, and by other human rights advocates.

General arguments against a Charter

Some of the submissions opposed to a Charter of Rights reflected concerns expressed much more widely in the Australian community. The submission of the Australian Christian Lobby, for example, articulated the general case against a Charter of Rights, and chose not to focus only on the particular interests and concerns of the Christian community. Many similar points concerning the respective roles of Parliament and the courts in a democratic society were made by the Anglican Diocese of Sydney, the Presbyterian Church of Australia and the Baptist Union of Australia. The Anglican Diocese of Sydney, for example, argued that the courts were an inappropriate forum for the resolution of what were essentially competing moral claims.[5] It pointed to

5 The submission argued that:

> … human rights are essentially about moral claims and therefore the balancing of conflicting human rights (typically abstracted at a high level in charters) is essentially about making moral judgments. It is not at all clear why judges are in a better position to make such moral judgments than the populace in general and the Parliament in particular. … Rather than stimulating discussion over matters such as how competing moral claims in society should be appropriately balanced, a rights charter will prematurely foreclose political debate on such matters. [Anglican Diocese of Sydney in NHRC 2009 submission, [28]–[30]].

the advantage of the political process in allowing discussions on important moral questions to continue to be discussed and debated.[6] Through the political process, the compromises that are reached in one generation can be revisited in the next if those compromises prove unworkable or unsatisfactory.

This focus upon how to resolve competing claims of rights was central to Christian concerns about a Charter, particularly when claims to a right are made in absolute terms. As the Presbyterian Church of Victoria submission noted:

> … it is absurd to speak of rights in the abstract, absolute way in which they are usually framed in human rights instruments, particularly when even those instruments themselves recognise that they are capable of legitimate abridgement. [NHRC 2009 submission, 8.]

The problem is when absolutist claims about the moral requirements of a Charter are used to mask and provide some special authority for the policy positions of people with particular agendas. At the heart of Christian concerns about the development of a Charter is that secular liberal interpretations of human rights Charters will tend to relegate religious freedom to the lowest place in an implicit hierarchy of rights established not by international law, but by the intellectual fashions of the day.

The issue of anti-discrimination law

Central to Christian concerns about religious freedom in Australia is the potential impact of anti-discrimination law. These concerns do not arise from a discomfort with anti-discrimination provisions generally. Most grounds of discrimination in the laws of Australian jurisdictions would attract widespread support from a Christian perspective. However, Christianity involves adherence to a moral code. Christians insist on the importance of being able to discriminate between right and wrong, and to have freedom of conscience, when it comes to moral issues (Presbyterian Church of Australia in NHRC 2009 submission, [23]).

The problem, in particular, arises from an emerging, and almost absolutist, view of the requirement of non-discrimination in the workplace. There can be a dogmatism about such matters as powerful and as rigid as any belief system of fundamentalist religious groups.

That fundamentalism inheres in two aspects. The first is a belief that all limitations on a person being eligible to apply for a particular job should be abolished, or severely

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6 Similar points were made by the Australian Christian Lobby (NHRC 2009 submission, 6–8).

restricted, in the name of one conceptualisation of 'equality', even if 99.9 per cent of all the other jobs in the community are open to that person. This position involves taking a very restrictive approach to 'genuine occupational requirements' as a ground for exceptions to general anti-discrimination provisions (see Ahdar and Leigh 2005, ch 10). The second fundamentalist aspect of the anti-discrimination movement arises from a belief that the only human rights that should be given any real significance are individual ones, and not group rights. This can make adherents disregard the competing claims of groups which would justify a right of positive selection in order to enhance the cohesion and identity of the group.

Fundamentalism about non-discrimination

The view that any selection of a person for employment which takes account of characteristics other than qualifications is discriminatory reflects one particular understanding of what a commitment to equality requires.[7] This view is gaining ground in Western countries, and challenges the rights of faith communities to include and exclude based upon compatibility with the worldview and beliefs of that faith community. As Evans and Gaze (2008, 41) note:

> … there is an increasingly powerful movement to subject religions to the full scope of discrimination laws, with some scholars now suggesting that even core religious practices (such as the ordination of clergy) can be regulated in the name of equality.

This view was, for example, reflected in a statement of the Human Rights and Equal Opportunities Commission, as it was then known, questioning the exemption provided by s 37 of the *Sex Discrimination Act 1984* (Cth) and proposing a three-year sunset clause on its continued operation (HREOC 2008, 166). The Commission argued that 'the rights to religious freedom and to gender equality must be appropriately balanced in accordance with human rights principles', and that 'the permanent exemption does not provide support for women of faith who are promoting gender equality within their religious body'. The word 'balanced' is, of course, often code for an outcome in which one right is treated as entirely displacing another.

Not all proponents of this view are so extreme as to argue that government can regulate the ordination of clergy. Cass Sunstein (2009), for example, argues that while there is no compelling argument for saying that religious institutions should be exempted from sex discrimination laws, at least some legislative restraint is justified. He would protect religious autonomy when a law, whatever its nature and purpose,

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7 For a critique of the use of equality rhetoric as devoid of meaning, see Westen 1982.

interferes with religious practices and is not supported by a legitimate and sufficiently strong justification. However, even that view leaves plenty of scope for regulating religious practice, since it is ultimately a value judgment whether interference with freedom of religion is 'strongly justified'. Adherents to a cause — whether it be women's ordination, gay and lesbian equality, or another such movement — would no doubt be convinced that interference with religious freedom is strongly justified if it promotes that agenda. As Stanley Fish (1990, 1466) once put it, 'tolerance is exercised in an inverse proportion to there being anything at stake'.

Genuine occupational requirements

Religious freedom is particularly under attack from a very narrow approach to the idea of genuine occupational qualifications. This was, for example, seen in the United Kingdom with the Equality Bill 2009 (UK). Schedule 9, cl 2 of the Bill provides various exemptions to religious bodies. If 'the employment is for the purposes of an organised religion', the organisation is permitted to have:

- a requirement to be of a particular sex;
- a requirement not to be a transsexual person;
- a requirement not to be married or a civil partner;
- a requirement not to be married to, or the civil partner of, a person who has a living former spouse or civil partner;
- a requirement relating to circumstances in which a marriage or civil partnership came to an end; and
- a requirement related to sexual orientation.

The original version of the Bill stated that the exemption applies as long as the requirement is a proportionate means of complying with the doctrines of the religion or avoiding conflict with the strongly held religious convictions of a significant number of the religion's followers. Further, according to the original version of subpara (8), 'employment is for the purposes of an organised religion' only if it wholly or mainly involves:

- leading or assisting in the observation of liturgical or ritualistic practices of the religion; or
- promoting or explaining the doctrines of the religion (whether to followers of the religion or others).

As the Archbishop of York pointed out, even he would not be included within this definition, as the majority of his working week, like that of most clergy, was spent doing work other than preaching and conducting services (Sentamu 2009).

The government, which affirmed the Bill's compliance with the European Convention on Human Rights,[8] was quite clear about its intention to curtail religious freedom significantly if it clashed with the goal of equal access to employment opportunities. While clergy (at least those few who mainly work on Sundays) would be exempted, the Explanatory Memorandum stated that the otherwise prohibited requirement 'must be crucial to the post, and not merely one of several important factors' and that the exemption would be unlikely to apply in relation to a non-celibate gay or lesbian church youth worker unless he or she 'mainly' teaches Bible classes.[9] It followed that churches would not be allowed to insist that staff, other than those who mainly conduct services or teach the doctrines of the faith, exemplify Christian values in terms of family life and sexual practice (Boucher 2010). The issue is not only about homosexual practice. Christians — and other faiths — have traditionally taught a disciplined sexual ethic in relation to heterosexual conduct as well.

The government's provisions were defeated at committee stage in the House of Lords (Ormsby 2010), with amendments returning the law to the status quo as it had been since 2003.[10] However, the British Government's Bill indicates clearly how narrowly the scope of 'genuine occupational requirements' may be drawn when it comes to matters of faith and sexual morality. As was pointed out in the debate, there would be no similar attempt to force a rape crisis centre to have male staff.

This reach of government into the way in which churches run themselves reflects a major shift from what John Rawls called 'political liberalism' to the promotion of 'comprehensive liberalism' that addresses the non-political aspects of life as well (Rawls 1993, 11–13). Michael McConnell, a former academic lawyer and now a US federal judge, explains that in political liberalism:

> Elements of this liberal polity were state neutrality, tolerance and the guarantee of equality before the law. 'Neutrality' meant, fundamentally, that the government would not take sides in religious and philosophical differences among the people. … Tolerance meant something like 'live and let live'. [McConnell 2000, 1258–59.]

8 The requirement to certify this is contained in s 19(1)(a) of the *Human Rights Act 1998* (UK) and the certification is on the front page of the Bill.

9 Explanatory Notes to the Equality Bill, at 774–78. It appears also that the government was under pressure from the European Commission to narrow the religious exemptions (House of Lords 2009 and following).

10 See amendments moved in the House of Lords debate, above.

In contrast, he writes:

> Today there is a widespread sense not only that the government should be neutral, tolerant and egalitarian, but so should all of us, and so should our private associations. [McConnell 2000, 1259.]

The new version of liberalism involves a rejection of traditional ideas about the separation of church and state. Meyerson, for example, has offered an eloquent defence of the Rawlsian position concerning religion and the public square by emphasising that the principle of governmental neutrality that this entails preserves a large degree of autonomy for faith communities. She writes:

> … in placing religion largely beyond the state's reach, it confers maximum autonomy on churches to regulate their own affairs, free of liberal constraints if they wish. It also provides the strongest possible protection for religious freedom, a protection which it extends even to those who would deny it to others. [Meyerson 2008, 61.]

If only that were so. By way of contrast, the comprehensive liberalism evident in the British government's Equality Bill, reflecting also a view within the European bureaucracy (House of Lords 2009), offers to churches and other faith communities only the most minimal level of autonomy to regulate their own affairs, and only very limited freedom from 'liberal constraints'.

Comprehensive liberalism uses law as a tool to impose a particular notion of the good by coercion, denying people the freedom to act upon dissenting moral views and largely rejecting pluralism in relation to moral values. The issue is most acute in relation to sexual orientation, for here traditional Christian moral teaching collides, perhaps irreconcilably, with the equality agenda for gay and lesbian people (Feldblum 2006). Noted gay and lesbian rights scholar Carl Stychin (2009, 733) observes that what is happening is now a public policy reversal that mirrors the historic closeting of gay and lesbian people to the realm of the private. This is occurring through the utilisation of the public/private dichotomy:

> Ironically, supporters of sexuality equality at times fall back on the public–private, belief–conduct distinctions as the justification for curtailing religious freedom — relegating those of faith to the closet from which they themselves have emerged. In so doing, equality itself becomes a world view which monopolizes the public sphere …

This monopolisation of the public sphere, which includes the world of work outside very narrow confines, represents the essence of the threat to religious freedom, for it impacts not only upon the individual's freedom of conscience when living in the

general community — for example, when providing goods and services to the general public[11] — but also in the communal life of faith communities and organisations. Churches and other faith communities are now being denied the very autonomy to regulate their own affairs that, in its earlier manifestations, liberalism was anxious to protect.

The liberal retreat from support of multiculturalism

This hostility towards exemptions to anti-discrimination law has been reinforced by another tendency. Whereas once a commitment to multiculturalism was one of the hallmarks of progressive liberalism, now there is an emerging trend in liberal thought to see respect for other cultures as a roadblock in the way of advancing the freedom and dignity of people and the promotion of individual rights. Susan Moller Okin gave voice to these sentiments in her influential essay 'Is multiculturalism bad for women?' (Okin 1997, republished in Okin et al 1999).[12] A similar analysis might also be adopted by gay and lesbian advocacy groups, for traditional societies — particularly those strongly influenced by moral values derived from a religious faith — tend not to be supportive of homosexual practice.

This changing attitude towards multiculturalism is expressed, for example, by American philosopher H E Baber (2008, 17) who puts the case succinctly: 'Liberals value individual freedom. Multiculturalism restricts individual freedom. That is the liberal case against multiculturalism.'

Baber argues that liberals should discourage practices that promote cultural diversity and, instead, encourage assimilation. In a return to traditional American values espoused by conservatives, she argues for the promotion of a melting pot society in which only individual rights, and not the rights of groups, are recognised (Baber 2008, 244).

Such liberal views are not universal, of course. Government support for multiculturalism varies from one country to another, and promotion of cultural diversity retains UN endorsement (UNESCO, 2009) tensions over multiculturalism have been particularly marked in European countries, such as France, affected by mass immigration from Muslim societies (Bowen 2009). The hostility to multiculturalism has gathered pace

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11 See, for example, *Human Rights Commission v Eric Sides Motors Co Ltd,* 1981; *Re Christian Institute's Application for Judicial Review,* 2008; *London Borough of Islington v Ladele and Liberty,* 2009; *Members of the Board of the Wesley Mission Council v OV and OW (No 2),* 2009.

12 For another view, see Kymlicka 1995.

since 9/11, and the present climate in many Western nations is not at all hospitable to policies that permit or encourage a separate identity for Muslims (An-Na'im 2007; McGoldrick 2009).

The combination of an almost absolutist attitude towards non-discrimination with the retreat from support for multiculturalism has led to a view of equality that has little or no place for the rights of discrete minorities to maintain their identity as groups if that conflicts with equality agendas based upon any of the standard grounds for non-discrimination, including religious belief or the lack of it — that is, there is little recognition of the importance to faith-based communities of being able to maintain the boundaries of the group by religiously based rules of inclusion and exclusion. This has particular implications for faith-based schools and other religious organisations.

The issue of faith-based schools

From the earliest time in Australian history, churches have established schools. Many of the best known and prestigious private schools in Australia have such associations with churches. The Catholic Church also has a very well developed network of 'systemic' schools, both primary schools and high schools, in which fees are modest and which give parents an alternative to the state school system within a reasonable distance of their home.

These church-based schools vary in the extent to which they give importance to their Christian foundations (Evans C 2009). Some of these faith-based schools, particularly some of the more prestigious, expensive and long-established private schools, no longer maintain a strong religious tradition beyond having a chaplain and religious services as part of school life. They do not insist upon adherence to the Christian faith as a condition for a teaching appointment. Other church-based schools endeavour to maintain a Christian ethos, even if not all teaching staff are committed adherents to the faith.

However, there are other schools which have been established to provide an explicitly Christian environment for children and young people. These tend to be schools within the evangelical tradition of the Christian faith, and they have a strong view of the authority of the Bible as central to life. Sometimes they are founded by one local church; more commonly, they are run by an independent association. These schools have flourished in recent years. Typically, such schools have an inclusive employment policy in the sense that Christians from any denominational background are welcome, but adherence to the fundamentals of the Christian faith — belief in the divinity of Jesus Christ, his atonement for sins and his bodily resurrection from the dead — are

regarded as essential for employment. Some Christian schools require adherence to the Christian faith from all staff, not just teaching staff. This includes administrators and maintenance personnel. The reason for this is that they see the school as being a community of faith, and all staff interact with parents and children.

The right of positive selection

The issue for Christian schools is not the right to 'discriminate'. That puts the issue in negative and pejorative terms. The core claim is a right of positive selection. The Australian Association of Christian Schools puts it this way:

> We also claim the right to employ only those persons who have a thorough understanding of and commitment to the school's Christian worldview and Statement of Faith and who, in their personal lives, are able and willing to model consistently a personal standard of conduct and lifestyle choices that aligns to the worldview and Statement of Faith of the school in which they have applied to teach/work. [AHRC 2009 submission, 3.]

In this, Christian schools and organisations only ask to be treated equally with other employers that may have legitimate reasons for wanting to appoint only those with certain characteristics relevant to the identity of the organisation. It is quite understandable that gay bars might prefer to appoint only gay staff, that Thai restaurants might prefer to have Thai employees, and that government ministers would want to staff their offices with people sympathetic to the values of their political party. Recognition of minority group rights on an equal footing is another version of equality. A right of positive selection is rather different from discrimination. It is easy to see the problem if a restaurant advertised for staff of any nationality, so long as they were not Thai. That would be discriminatory. However, it is quite different if a Thai restaurant advertises for Thai staff. Selection based in part on a characteristic which is relevant to the employment is not discriminatory.

The right of positive selection in relation to faith-based schools is supported by the foundational international covenants and declarations on human rights. Article 18(4) of the ICCPR provides:

> 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.

In the interpretative documents, such as the Human Rights Committee's General Comment 22, Art 18 (1993), it is clear that international human rights law protects the right to run schools on a religious foundation. That is supported also, for example, by

Art 5 of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. The Art 18(4) rights and similar international law provisions are abrogated if schools which are established for the purposes of providing a religious context for a child's education are deprived of the right to choose staff who adhere to the precepts of the faith and abide by the codes of conduct of that faith. What is true of Christian schools is no doubt true of Jewish and Islamic schools as well.

Similar issues also arise for many faith-based charitable and humanitarian organisations. These organisations are not only faith-based, but faith-motivated. Around the world, they do an enormous amount in practical terms to promote the human rights, dignity and well-being of the world's poor and disadvantaged. Destroying the faith-based character of these organisations so that they no longer have a reason for existence may well diminish the human rights of those they serve.

This issue of the right of positive selection of staff to Christian schools and organisations is perhaps the strongest theme running through all the church submissions to the NHRC and to the AHRC's freedom of religion and belief inquiry, and has affected their submissions on the Charter of Rights. The Australian Catholic Bishops Conference, for example, wrote:

> Catholics will judge any proposed amendment to existing laws or any future human rights legislation by reference to the extent to which it will protect the right to religious freedom, not only for themselves but for all religions …
>
> Does the law comprehensively protect the right of the Catholic Church, its institutions and agencies, such as parishes, schools, universities, hospitals, aged care facilities and welfare agencies, to employ their staff by reference to religious affiliation and commitment for such intrinsically religious purposes as religious instruction, formation and pastoral care, but more widely for the purpose of supporting and promoting the relevant entity's Catholic mission and identity? [AHRC 2009 submission, 5–6.]

The concerns of churches about a right of positive selection have also been taken up by the Anglican Primate, Archbishop Phillip Aspinall, in a letter to the Prime Minister urging support for human rights legislation. He wrote:

> We believe that the right to freedom of religion should include the right of a religious body to determine the requisite qualifications, including religious belief, for employees and volunteers who carry out its work, in accordance with its religious doctrine and practices.

> We also support the right of religious bodies to determine whether, and in what circumstances, they will provide particular services in accordance with their beliefs. Governments should not coerce religious bodies to provide services contrary to their religious beliefs. This would be a fundamental denial of freedom of religion.
>
> We are concerned that any limitation on the right of religious bodies freely to manifest their identity may diminish the quality of services, reduce their important role as advocates and diminish their capacity to provide charitable services. [Aspinall 2009.]

Anti-discrimination and multiculturalism

Far from being antithetical to multiculturalism, a right of positive selection is essential to it. Multiculturalism involves respecting the rights of minority communities to maintain their identity as groups — for example, through cultural and religious organisations. It involves acknowledgement of diversity and allowing some degree of separateness within the wider community. There has been a widespread acceptance that respect for different beliefs and cultures requires acceptance of faith-based schools in order to promote that diversity. Schools provide a context in which faith is taught and nurtured. They also support the ICCPR Art 27 rights of ethnic minorities to promote identity and cohesion within the community. Faith-based schools are really very important to multiculturalism, for faith and culture are often closely intertwined, and a multicultural society needs to respect all faiths, as well as non-belief. Allowing faith-based schools as a way of giving expression to the Art 18(4) rights of parents also takes pressure off public schools in terms of providing religious education.[13]

One way of crushing the diversity that faith-based schools provide is to insist on it. By requiring diversity in the employment of teaching staff within the faith-based school, its distinctive character as a faith-based school is undermined.

Anti-discrimination law and the right of positive selection

One solution to the 'problem' of religious organisations is to narrow the meaning of 'manifesting' to a very narrow set of activities — conducting religious rituals or engaging in the teaching of religion. This is the narrow definition that lies behind the original version of the Equality Bill in the UK, for example. On this approach, equality legislation does not interfere with religious freedom because it does not impact upon 'core' religious activity, and that solves the problem when it comes to the staffing of religious schools. The secular liberal may accept that the religious studies teacher should be an adherent of the faith because that person is engaging in a 'religious' activity. However, on this view

13 On teaching about religion in public schools, see Taylor (2005, 165–75) and Evans C (2008).

there is no reason why the maths teacher, the office administrator or the gardener needs to be a believer. For example, Evans and Gaze argue (2008, 47):

> The hiring of staff in religiously run hospitals, schools and other institutions may well be important to many religions, but it usually does not have the central place of activities such as the selection and training of clergy, the language and symbolism of ritual, and the determination of membership of the religious community. Such core religious activities have a greater claim for freedom from regulation (including from the imposition of non-discrimination laws) than activities that are more peripheral.

However, it is a *non-Christian* view of the Christian faith that supposes that religion can be confined to a particular set of beliefs taught in religious studies classes or in chapel. That is not how Christians understand their faith, as numerous submissions to the NHRC and AHRC made clear. Modelling Christianity within a faith community is as important as teaching Christianity within a classroom or from a pulpit. Indeed it may well be more important and have more impact on people's lives.

A prominent gay and lesbian rights scholar, Chai Feldblum, who is now an equal opportunity commissioner in the Obama administration, acknowledges that the manifestation of religious belief cannot be confined to conducting services and teaching. She accepts that faith affects how people choose to live, and that anti-discrimination laws burden the liberty of people of faith to the extent that they prevent people from acting in accordance with their convictions. However, while acknowledging this impact, she considers that a right of positive selection for faith-based organisations that provide social services should be limited to leadership positions, on the basis that people in leadership ought to be able to articulate the beliefs and values of the enterprise. Even this rather modest proposal is offered hesitantly (Feldblum 2006, 122). A preference for people of faith would be prohibited on Feldblum's proposal. This falls well short of respecting the fact that some organisations providing education or health care see themselves as faith communities, rather than just educational or health care providers who happen to have had a religious foundation.

So why do many church organisations not want a Charter?

Christian concerns about the freedom to run faith-based schools and organisations might logically lead them to support a Charter of Rights, given the non-derogable nature of religious freedom in international human rights instruments. That would act as a constraint upon Parliament. The Australian Christian Lobby certainly supports more parliamentary scrutiny of legislation in terms of Australia's international human rights obligations. It recommends that the Senate Scrutiny of Bills Committee be strengthened to examine proposed and existing legislation in the

light of international human rights instruments (NHRC 2009 submission, 16). This maintains the primacy of elected representatives in protecting human rights. It also ensures the focus is on Australia's international human rights commitments.

One of the problems, though, as perceived by some churches, is that the two Charters currently in existence in Australia do not adequately give effect to Australia's international human rights obligations, and there is a lack of confidence, based on overseas experience, that a Charter will do much to protect the freedoms that churches want to preserve.

Failures of jurisdictions with Charters to properly enact Article 18 of the ICCPR

One of the major concerns of the churches is about the weak protection for religious freedom in the Victorian and ACT Charters. A number of submissions comment on this aspect of the *Charter of Rights and Responsibilities Act 2006* (Vic). The inadequate protection of freedom of religion is noted, for example, by the national Presbyterian (NHRC 2009 submission, [34]–[39]) and Anglican Church[14] submissions. They point out that the Charters in the ACT and Victoria do not give proper application to Art 18(3) of the ICCPR.[15] That Article provides:

> Freedom to manifest one's religion or beliefs may be subject only 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.

This may be compared with s 7(2) of the Victorian *Charter of Rights and Responsibilities Act 2006*, which provides:

> 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 —

14 For example, the General Synod Standing Committee of the Anglican Church of Australia, wrote:

> We acknowledge that there are circumstances in which a limitation may need to be placed on freedom to manifest religious belief. The scope of any limitation is adequately defined by, and should be confined to, the circumstances in Article 18(3) of the ICCPR. However, these limitations have not been adhered to in the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). These two Acts contain a more general and wider scope for limitation of all human rights. This significantly weakens the protection for freedom of religion provided for by the ICCPR. [NHRC 2009 submission, 6.]

15 For an overview of the Art 18 jurisprudence, see Radan (2005).

(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 Presbyterian Church of Australia submission offers a particularly incisive critique. It notes that the 'limitation provisions in Section 7 bear little resemblance to ICCPR Article 18(3) in their practical and legal effect' (NHRC submission, [34]–[39]). The submission goes on to note that there is no boundary to the grounds on which freedom of religion may be restricted. Furthermore, the Victorian Charter introduces the concept of *reasonable* limitations, which find no parallel in Art 18(3) of the ICCPR. The church also draws attention to the subsequently enunciated Siracusa Principles (1984), which define the conditions for permissible limitations and derogations enunciated in the ICCPR. It argues that s 7(2) of the Victorian Charter fails to comply with three of those principles.

The Presbyterian Church also notes that while the *Charter of Rights and Responsibilities Act* requires other Victorian legislation to be interpreted as far as possible in a way compatible with 'human rights' (s 32(1)), judges have an unfettered discretion whether or not to take any account of international law in carrying out that work of interpretation (s 32(2)). If international human rights law is not the body of law that should guide judges, what should inform and constrain their interpretations of what 'human rights' require? The Victorian Act, like the ACT legislation and similar provisions in other jurisdictions, gives enormous discretion to whoever is the decision maker about compatibility with the Charter.

The argument of the Presbyterian Church — that the Victorian Charter, while purporting to gain its moral authority from international human rights law, in fact does not comply with that body of law — deserves serious consideration. The Victorian Charter actually provides people of faith with far fewer rights than the ICCPR gives them, so far as the law of Victoria is concerned. Section 7 does not even state, as one might have expected consistent with Art 18(3), that rights can only be limited in specified circumstances. The Act merely requires that the limits be reasonable and that they can be 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. Similar criticisms could be levelled at the limitation provisions in certain other jurisdictions, notably that administered through the European Convention and those countries that adopt models which are similar to the European Convention, either through incorporation of Convention principles (such as the UK) or the adoption of a list of rights coupled

with a single omnibus limitation provision (the UK, Canada, the ACT, Victoria). This approach is in contrast to the ICCPR, in which limitation provisions are specific to each right and are contained within the Article which defines the scope of that right.

The practical and legal difference is perhaps illustrated by the stark contrast in outcomes resulting from decisions reached within four months of each other in 2004 by the European Court (under Art 9 of the European Convention) and the Human Rights Committee (under Art 18 of the ICCPR) on the single issue of religious dress. In *Sahin v Turkey*, 2004 the European Court supported restrictions at a secular university on women students wearing the hijab, because of the impact it would have on other women students who might feel pressure to conform. The decision of no violation was upheld by the Grand Chamber. In *Hudoyberganova v Uzbekistan*, 2004, a violation of Art 18 was found when deterrence against university students wearing headscarves took the form of an invitation to attend a different institution. The Human Rights Committee affirmed that the freedom to manifest religion encompasses the right to wear clothes in public in conformity with the individual's faith or religion. While there are many jurisprudential differences between the two systems of law, and the facts underlying the two cases were not identical, at the end of the day the manner of deployment of limitation provisions was decisive.

Section 7(2) has recently been interpreted by Warren CJ in *Re an application under the Major Crime (Investigative Powers) Act 2004*, 2009. Her Honour said that the onus of justifying a limitation rests with the party seeking to uphold it, and that the standard of proof is high. She went on to say, quoting Canadian Supreme Court authority (*R v Oakes*, 1986 at 42), that the evidence required to prove the elements contained in s 7 should be 'cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit' (at [147]). Her Honour also indicated 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' (at [150], quoting *R v Oakes*, 1986 at 44).

This goes some way towards indicating that, when subject to judicial scrutiny, at least, the requirements of s 7(2) will not lightly be satisfied. It remains the case nonetheless that those limitations are drafted in very much broader terms that can be justified by reference to Art 18 of the ICCPR and the Siracusa Principles. It follows that many enactments which might pass scrutiny under the terms of s 7(2) of the *Charter of Rights and Responsibilities Act* could well breach Australia's obligations under international human rights law.

Article 18(3) of the ICCPR, and similar provisions in international human rights documents, require much more of the Victorian Parliament, precisely because the

ICCPR places such a very high value on freedom of religion and belief. The ICCPR offers no justification for a hierarchy of human rights in which non-discrimination provisions are at the pinnacle and the rights to freedom of religion and conscience are on the bottom. Nor does it offer any justification for limiting fundamental human rights so long as those limitations are 'justified in a free and democratic society based on human dignity, equality and freedom' according to the values of the person appointed to make such a judgment. The ICCPR insists that human rights be given much greater protection than this. Article 18 is, indeed, one of the few rights in the covenant that cannot be derogated from, even in a time of public emergency which threatens the life of the nation (Art 4(2)).

It is no doubt for this reason that the submission of the Standing Committee of the General Synod of the Anglican Church of Australia qualified its support for human rights legislation by insisting on guarantees for religious freedom that properly reflect the requirements of international human rights instruments, an insistence recently reiterated by the Primate in a letter to the Prime Minister (Aspinall 2009).

Proper implementation of the ICCPR is also important because aspects of multiculturalism are so strongly endorsed by the ICCPR — not only Art 18, but also Art 27 on the preservation of ethnic and cultural identity.[16] Article 27 is, at least, replicated in s 19 of the Victorian Charter.

It is troubling that the report of the Brennan Committee also fails to address these concerns, despite the unanimous view of the churches — including those that supported a Human Rights Act — that Article 18 needed to be replicated properly in any Charter. The Committee recommended that freedom from coercion or restraint in relation to religion and belief should be non-derogable (Brennan Committee 2009, 367), but that freedom to manifest one's religion or beliefs should be subject to a limitation clause modelled upon the Victorian and ACT Charter provisions (Brennan Committee 2009, 372).

Proper enactment of the protections for religious freedom contained in the ICCPR would certainly assuage some Christian concerns. However, there is skepticism that even this would do much to protect religious freedom. The concern is that in a situation where the prevailing intellectual fashions of the day tend towards a disregard for religious freedom, a narrow interpretation may be given to what it

16 This provides:

> 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 their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

means to practise religion, confining it to private belief and worship. In Communist countries of the old Soviet bloc, that amount of respect for freedom of religion was also given.

Would a Charter protect freedom of religion and conscience?

A further argument which appears in a number of submissions is that Charters are no guarantee of protection for religious freedom.

The overseas experience

The Australian Christian Lobby, the Ambrose Centre for Religious Liberties in its submissions to the NHRC and AHRC inquiries, and the Presbyterian Church of Victoria all provide examples from North America and the United Kingdom of failures by courts applying human rights Charters to give adequate protection to religious belief and conscience.

In terms of anti-discrimination law, the position of Charters is largely untested. A Charter of Rights would only properly be tested if first a legislature in a country with such a Charter were to pass an anti-discrimination law that did not provide any exemptions on the grounds of religious belief. However, the signs are not promising that, in the contemporary secular environment, a Charter would provide much protection. New Zealand scholar Rex Ahdar points to the limited protection given to religious freedom by courts applying Charters of Rights, particularly in the United States (Ahdar 2009, 51–52).

The US jurisprudence on religious freedom exemplifies the problem particularly well. Human rights are meant to represent enduring values. The case law may well develop, and interpretation may adapt to changing circumstances, but one would not expect major shifts in the meaning attributed to values that have been entrenched precisely because they are supposed to be unchanging precepts for human liberty, equality and dignity. Yet the US case law on religious freedom demonstrates compellingly how malleable at least some human rights provisions are, and how much interpretations can alter in accordance with the prevailing intellectual ideas, beliefs or social values of the day.

This is well illustrated by Michael McConnell (2008). He shows how the interpretation of the establishment and free exercise clauses has shifted in different eras. The religion clauses have been the chameleon clauses of the US Constitution, their meaning changing quite dramatically in the light of changing values, concerns and perspectives in the period after World War Two. McConnell writes that:

> Arguably, the court's interpretation of these Clauses has changed more often, and more dramatically, than of any other provision of the Constitution. [McConnell 2008, 100.]

Of course, over that period of more than 60 years, there have been decisions supportive of religious freedom and others less supportive of it in competition with other values. Christians who oppose a Charter of Rights in Australia have not argued that freedom of religion clauses have never yielded positive decisions. They have. There is a concern, however, that protections for religious freedom, far from being a bulwark protecting people's liberties from the changing intellectual and political fashions of the day, have proved to be hostage to those fashions, as McConnell so clearly demonstrates.

There is a view, for that reason, that a Charter of Rights will offer little protection from the secularising tendencies, and comprehensive liberalism, that are currently in vogue. Harvard human rights scholar Mary Ann Glendon has observed this trend in the US jurisprudence:

> The current [US Supreme] Court majority has pressed forward with a six-decade-long trend of cabining religion in the private sphere while eroding protections of the associations and institutions where religious beliefs and practices are generated, regenerated, nurtured, and transmitted from one generation to the next. [Glendon 2004, 13.]

Similar trends may be observed in Canada. Leading Canadian scholar Margaret Ogilvie observes that the Canadian courts 'have "protected" religious freedom by the erasure of religion from public institutions, public spaces and the public law … Effectively, no religion now enjoys protection in Canada' (Ogilvie 2005, 160). This is not exactly a ringing endorsement of the benefits of a Charter of Rights.

There are certainly decisions of the European Court of Human Rights that offer some encouragement for freedom of religion (for example, *Kokkinakis v Greece*, 1993), as there are in the US and Canada. However, the decisions are somewhat mixed and the dominance of a narrow approach to freedom of religion is evident (Taylor 2005; Rivers 2007). Cases that raise issues of freedom both of religion and of expression have tended to be dealt with under the freedom of expression provisions, leaving unclear how the issues would have been analysed as a religious freedom problem (Evans M 2009). Most applications brought under Art 9 of the European Convention have failed (Hopkins and Yeginsu 2008). One of the causes is the doctrine of a 'margin of appreciation', which is frequently criticised for allowing excessive discretion to European state parties in restricting religious freedom in reliance on limitation provisions (see Evans C 2001). This itself obscures the essential gravamen of Strasbourg decisions. As Fenwick, Masterman and Phillipson (2007, 6) comment:

> Strasbourg's jurisprudence is often notably under theorized. The reasoning is frequently brief, and lacking in rigour. In particular, the effects of the doctrine of the margin of appreciation result in some decisions in an almost complete failure to examine in any meaningful way the proportionality of restrictions upon individual rights adopted by states. Great variation in the intensity of review may be discerned; indeed, no single account of proportionality can be derived from the Strasbourg jurisprudence. [Fenwick, Masterman and Phillipson 2007, 6.]

This, in turn, has serious ramifications for the UK Human Rights Act, which requires interpretation of European Convention rights and legislative compatibility with those rights. The interpretation of freedom of religion under the Human Rights Act imposes significant hurdles in the way of applicants, particularly in being able to demonstrate an interference with their right to manifest their religion (Hopkins and Yeginsu 2008). Julian Rivers comments on the jurisprudence of the Act, that 'there is a tendency to deal with clashes of ideology by denying the religious character of the impugned behaviour' (Rivers 2007, 37). One way, of course, to solve a dilemma is to pretend that it does not exist, but — as gay and lesbian rights scholars have acknowledged — this unreasonably limits religion to belief without conduct in a way that is difficult to defend as a coherent application of human rights principles (see Feldblum 2006; Stychin 2009; see also Koppelman 2006). It is also noteworthy that within 10 years of enacting the UK Human Rights Act, it has been a source of frustration to Tony Blair, whose government introduced it; the leader of the Opposition has promised to scrap, reform or replace it; and the popular press has campaigned for its repeal (Fenwick, Masterman and Phillipson 2007, 3–4).

Freedom of conscience and the Victorian Charter

But what about Australia? A major issue referred to in many church submissions is the failure of the Victorian Parliament to protect doctors' freedom of conscience in relation to abortion, despite the Charter in that state, and even though the human rights issues were presented to it very clearly and publicly. This was interpreted as an indication that in the current climate, a Charter of Rights will do little for freedom of conscience.

Section 8 of the *Abortion Law Reform Act 2008* (Vic) imposes upon doctors who have a conscientious objection to carrying out an abortion a duty to refer the patient to another practitioner who does not have such a conscientious objection. The Victorian Parliament's Scrutiny of Acts and Regulations Committee drew the attention of the Parliament to the possible breach of the Charter provision on freedom of belief, although abortion itself was excluded from coverage by the Charter (*Charter of Rights and Responsibilities Act*, s 48).

The provision encountered very strong and sustained opposition, not only from churches but also from the Australian Medical Association (AMA) in Victoria (Brennan 2009a). The AMA pointed out that it already had a very clear and workable ethical code for dealing with conscientious objections to carrying out medical procedures, and that there was no need for a mandatory duty of referral. The AMA's ethical code had been supported by the Victorian Law Reform Commission as providing a reasonable balance between the rights of doctor and patient. Abortion is a procedure that needs no referral from a medical practitioner — unlike, for example, going to a specialist. Furthermore, access to information is hardly difficult. A woman need only go to the nearest public hospital or to contact a pregnancy advice service. Information is available everywhere through phone services, internet websites and other readily accessible sources. The notion that the rights of women would in practical reality be prejudiced if a doctor did not have a duty of referral (Ball 2008) in this context seems surreal. Modern Victoria is not 19th-century Ireland.

The requirement for mandatory referral thus seemed like an unnecessary and gratuitous attack on freedom of conscience. Yet the right to an abortion is not guaranteed specifically in any of the foundational international human rights instruments, such as the UDHR or the ICCPR, although arguments have been put that it is supported by other provisions of international law (Zampas and Gher 2008). Still less is there any internationally recognised human right to full information about accessing an abortion.[17] It appears that the mere possibility, however remote, that a woman's access to a lawful abortion could be inhibited by a lack of referral information seems to have been sufficient to overcome the very real and tangible concerns about freedom of conscience for doctors. It provides an example of how even the non-derogable rights contained in the ICCPR seem in practice to give way when there is even the slightest concern that a derogable or even non-recognised 'right' could be impaired. Certainly, human rights are limited when they interfere with the rights of others, but that is a two-way street. If all other rights are regarded as inherently of higher value than the rights of freedom of religion and conscience, then there is a hierarchy of rights in practice that no talk of 'balancing' can mask.

Frank Brennan's critique of the human rights 'lobby' concerning this issue was scathing:

> In my opinion, this was the first real test of the Victorian Charter of Human Rights and Responsibilities and it failed spectacularly to protect a core non-derogable ICCPR human

17 There have been calls for such information to be provided: Committee on the Elimination of Discrimination Against Women, General Recommendation 24 on Women and Health, 20th session, 1999, as cited in Ball 2008.

> right which fell hostage to a broader social and political agenda for abortion law reform and a prevailing fad in bioethics which asserts that doctors should leave their consciences at the door … Groups such as Liberty Victoria provided no coherent answers. Academic experts on the Charter largely remained silent. The Equal Opportunity and Human Rights Commission simplistically dismissed freedom of conscience. [Brennan 2009a, 21.]

He concluded:

> We need to do better if faith communities and minorities are to be assured that a Victorian style Charter of rights is anything but a piece of legislative window dressing which rarely changes legislative or policy outcomes, being perceived as a device for the delivery of a soft left sectarian agenda – a device which will be discarded or misconstrued whenever the rights articulated do not comply with that agenda. [Brennan 2009a, 21; see also Ambrose Centre for Religious Liberties, AHRC 2009 submission, [7.5].]

It may be that the failure of the government of Victoria to pay proper attention to issues of freedom of conscience would have been the same whether or not the state had a Charter. Indeed, the abortion issue could be put forward as an example of why a Charter might make a difference, at least if properly drafted to protect freedom of religion and conscience to the same extent required by international human rights instruments. After all, the Victorian government ignored doctors' freedom of conscience in spite of the *Charter of Rights and Responsibilities Act*, not because of it. However, church submissions opposing a Charter of Rights do not only argue that it could be ineffectual in protecting freedom of religion and conscience. They also argue that it may operate as a negative.

Would a Charter further diminish freedom of religion?

The fundamental issue about the Charter of Rights is perhaps not whether it would be protective of religious freedom — since a 'neutral' outcome on this issue would be good enough — but whether it could actually do harm to religious freedom. There is a concern expressed in a number of submissions that a Charter may add greater legitimacy to a culture in which freedom of religion and conscience is diminished in the name of an equality agenda that involves the coercive imposition of a particular worldview on dissenters, and that in secular liberal interpretations of a Charter of Rights, anti-discrimination may become the human right that trumps all others. That concern is fuelled by the tendency in secular society to see human rights law as almost synonymous with non-discrimination, perhaps because anti-discrimination is the main work of governmental organisations that are given a watchdog role in relation to human rights.

This seems to have been the case in the UK, even before the Equality Bill was introduced. The 'human rights culture' promoted by the *Human Rights Act 1998* has led to a serious diminution of the human rights of those who hold dissident viewpoints grounded in their religious faith. Julian Rivers, now Professor of Jurisprudence at the University of Bristol, has summarised the precarious state of religious freedom in Britain:

> … a new moral establishment is developing, which is being imposed by law on dissenters. Those filling public offices are well advised to avoid challenging it, and even the most measured and reasoned public questioning of its truth can trigger formal investigations. This new orthodoxy masks itself in the language of equality, thus refusing to discuss its premises and refusing to articulate its conception of the good … Churches and religious associations find themselves boxed in by its obligations, benefiting only from narrowly drafted exceptions narrowly interpreted by an unsympathetic judiciary. [Rivers 2007, 52.]

Rivers's assessment of the British situation is not dissimilar to Ogilvie's assessment of the situation in Canada (Ogilvie 2005).

The issue of exemptions in Victoria

In the submissions to the NHRC, a particular issue was the threat to religious freedom in Victoria which was seen as being linked to the Charter.[18] A number of Christian organisations expressed deep concern about various options being considered to remove or limit exemptions from anti-discrimination laws which have previously been included in those enactments out of respect for freedom of religion and belief (Scrutiny of Acts and Regulations Committee 2009a). The Scrutiny of Acts and Regulations Committee Committee, which was pre-empted by an announcement from the Attorney-General as to the government's intentions (Fyfe, 2009), has since come down on the side of limited reforms which will operate to protect the core exemptions of faith-based groups (Scrutiny of Acts and Regulations Committee 2009b).[19]

The Presbyterian Church of Australia certainly linked its concerns about religious freedom in Victoria directly to the Charter. Its submission to the NHRC states in bold

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18 It should be noted that some protection for faith-based organisations is provided in s 38(4) and (5) of the Victorian Act; however, this only applies to decisions of public authorities.

19 The Committee recommended that the religious exceptions be narrowed so that they do not apply to allow discrimination on the basis of the attributes of race, impairment, physical features or age: see recommendations 48–50.

that 'the Charter is employed to produce a set of options that significantly reduce freedom of conscience, thought and religion' (NHRC 2009 submission, [32]).

Frank Brennan sought to argue that a review of the exemptions under the anti-discrimination law was timely, whether or not there was a Charter (Brennan 2009b), and therefore had nothing to do with the Charter debate. The review was wide-ranging and not at all confined to the exemptions that have been enacted to protect religious freedom. However, the review was originally established, according to the Attorney-General, to ensure that the exceptions and exemptions 'are compatible with the Charter' (Attorney-General 2008).

Another concern is that government-funded human rights organisations, dominated by people who believe human rights are synonymous with a secular liberal agenda, will fund court cases to persuade judges to that point of view. That is particularly a concern if the domestic human rights Charter gives little protection to religious freedom or the rights of ethnic minorities to maintain their culture and identity. In that regard, there is a real concern that certain of the bodies that are entrusted with the protection of human rights in Australian society seem to place very little importance on the human right of religious freedom. Quis custodiet ipsos custodies?

The track record of human rights organisations in protecting human rights

How could statutory human rights organisations fail to protect human rights? Is that not their mission? Perhaps, but a true watchdog for human rights has to do more than be concerned about pursuing the progressive agendas of the day. It has to protect unpopular human rights,[20] rights which conflict with a secular liberal worldview and which may need to be fairly and properly balanced with rights that represent cherished social causes. In this regard, the submissions on the Charter show some reasonable grounds for concern.

The issue of a doctor's freedom of conscience in relation to referral for an abortion in Victoria, previously discussed, provides one example raised in several submissions. Another issue was statements made by members of the AHRC concerning freedom of political speech.

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20 It may be that human rights organisations would argue that they stand up for many unpopular rights, such as the rights of refugees. However, such rights are usually popular among progressive university-educated law graduates and like-minded others who represent the social circle of the organisation's staff.

The AHRC's questioning of freedom of political speech

The AHRC's discussion paper on freedom of religion raised significant alarm among Christians. One of the questions asked in the discussion paper is: 'Is there a role for religious voices, alongside others in the policy debates of the nation?' (AHRC 2008, 9). The question was framed neutrally, but given that at present there are no restrictions on any voice being heard in the public square, and that includes religious voices, the most obvious implication of the question is that the Commission is considering whether it remains appropriate for religious voices to be heard in the public square. If not, then presumably the Commission would recommend ways to try to silence those voices within constitutional limits.

That the question should even have been asked at all caused consternation in Christian circles. The NSW Council of Churches, for example, indicated that it would be most interested to learn 'which particular religious voices are to be silenced, and the reasons for such an attack on freedom of conscience, freedom of speech and freedom of religion' (AHRC 2009 submission, p 7).

While it is no doubt possible that there is a benign explanation for this question, Christian concerns were heightened as a result of comments reportedly made by AHRC commissioner Tom Calma at the time of the launch of the AHRC inquiry (ABC News 2008). The ABC reported Calma as saying on radio that there is a growing fundamentalist religious lobby, in areas such as same-sex relationships, stem-cell research and abortion, and argued that there was a need to 'strike a balance' between freedom of religion and not pushing those beliefs on the rest of society. The clear implication of these reported remarks was that he thought the rights of people of faith to engage in public policy debates ought to be limited in some way, if they wanted to put forward views with which he disagreed.

Perhaps Calma didn't mean this. He has certainly claimed in subsequent public statements that the AHRC inquiry is an open one, asking legitimate and important questions without any preconceptions or agendas (Calma 2009). However, taken together with that very odd question in the discussion paper, a perception was created that the Commission does not think it is right for people of faith to be engaged in debates on public policy, adopting positions informed by their beliefs about when human life commences or about issues of sexual practice.

There are certainly various versions of a liberal view that religious arguments should be excluded from the public square (see, for example, the debate in Audi and Wolterstorff 1997; see also Meyerson 2008), but there is a big difference between saying that the public square needs a common language — reason — and saying that certain voices should be prohibited from participating in public debate because of the

positions for which they reason. Meyerson, for example, considers that arguments based solely on religious convictions should not be offered as reasons for changes to the law or public policy. However, she makes clear that her position is one about a voluntary approach to be adopted by people of faith. She does not suggest that legal effect should be given to it (Meyerson 2008, 44–45). Calma's comments, by way of contrast, appeared to indicate the need for some kind of legal constraint in the name of 'balancing' rights and interests.

Such a view, if indeed it is held by the Commission, is deplorable. Even the suggestion of silencing certain voices in public life is utterly contrary to democratic principles and the most foundational requirements of international human rights law.[21] Articles 19 and 21 of the UDHR and Arts 19 and 25 of the ICCPR could not be clearer in saying that everyone has a right to participate in the policy debates of the nation, whatever their perspectives may be and whatever the influences that may have shaped those perspectives. Bishops, talk-back radio hosts and human rights commissioners have equal rights to participate in public debate.

A conference paper given a year later, reporting on some of the early findings of the religious freedom project, raises further questions about the credibility of the AHRC in this area. Co-authored by Calma and a senior official of the Commission (Calma and Gershevitch 2009), the paper began with the remarkable sentence:

> The compatibility of religious freedom with human rights is the subject of the most comprehensive study ever undertaken in Australia in this area.

No doubt this contrast between freedom of religion and human rights, as if religious freedom was not a human right, was unintended and unconscious, but it is revealing. The title of their paper wasn't much better. The title, 'Freedom of religion and belief in a multicultural democracy: an inherent contradiction or an achievable human right?', certainly recognises that religious freedom is a human right. However, the implication within the question contained in that title is that perhaps freedom of religion cannot, or should not, survive in a multicultural democracy. The contrast with the ICCPR could not be more marked. Freedom of religion is a non-derogable human right in international law, not an optional one. Furthermore, as Art 27 demonstrates, there is

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21 Secularism is also enshrined in some national constitutions — albeit with a great variety of meanings (see Sajó 2008). In *Refah Partisi (The Welfare Party) v Turkey,* 2003, the European Court of Human Rights did uphold the right of the government of Turkey to dismantle a party which was established to promote Sharia law. Even this controversial decision cannot support an attack on individual freedom of speech.

no contradiction between religious freedom and multiculturalism. One is an essential precondition to the other, given the close connection between faith and ethnicity.

The question of credibility

These were not the only concerns raised in submissions about the track record of human rights organisations. As these submissions demonstrate, there is at least a perception that human rights commissions, both state and federal, are dominated by people of similar persuasions and values who take a very minimalist view of what respect for freedom of religion, belief and conscience entails. The Ambrose Centre for Religious Liberties, for example, wrote:

> The fundamental human right of religion, belief, conscience, opinion and expression have been addressed by the protagonists for a Charter/Bill of Rights in the flimsiest of manners or not at all. [NHRC 2009 submission, 6.]

In a similar vein, former Federal Treasurer Peter Costello, in a newspaper article, wrote:

> No one will tell you that the purpose of such a Commonwealth charter [of rights] will be to curtail religious conscience or practice. But it will work out the same way.
>
> Whatever the proponents say, the crusading lawyers will use any new federal charter against those institutions to which they are hostile. They will have sympathetic ears in the equal opportunity commissions. After all, experience in the human rights industry will be a qualification for appointment. The churches and Christian schools will be in the firing line. [Costello 2009.]

Within a few days, Costello was proved right. In evidence before a Parliamentary Committee, Michael Gorton, the Chair of Victoria's Equal Opportunity and Human Rights Commission, argued for severe restrictions on religious freedom. He did so, emphasising the importance of reviewing exemptions from anti-discrimination law in light of the Charter. In relation to faith-based schools, he said:

> We do not see a need for a religious school to be able to discriminate in relation to the choice of a cleaner or for a religious school to discriminate in relation to the choice of a mathematics teacher who has no contact with the practice of the religion or the profession of faith in that school. [Scrutiny of Acts and Regulations Committee 2009c.]

On the relationship between maths teaching and the Christian faith, Gorton could not have been more wrong. From a Christian perspective, mathematics is God's language

(Livio 2009). It has a central role in the debates about the scientific evidence for a creator of the universe (Lennox 2007).

Gorton went on to say:

> I think there are a number of faiths that have some fundamental beliefs that we would not accept as meeting the obligations of the Charter and the Act, because some of those fundamental beliefs are, at their core, discriminatory. There are some fundamental beliefs in some faiths that, for example, are absolutely discriminatory against women, that would be not acceptable in our pluralist, secular society. [Scrutiny of Acts and Regulations Committee 2009c.]

This appears to imply that, in his view, Parliament should outlaw any discrimination against women, even if it were based on fundamental religious beliefs (presumably, for example, about female ordination). On this view, there seem to be few limits on the extent to which even the core activities and practices of faith communities, based upon their most fundamental beliefs, are safe from government interference. The Pope can be Catholic, but not necessarily male.

It is surely little wonder, with such statements from leaders of human rights organisations that appear to give short shrift even to non-derogable rights under the ICCPR, that many churches were so deeply concerned about the enactment of a Charter of Rights. Such a Charter would give a lot of influence to these organisations, which could be used negatively to attack the human rights of people of faith.

Human rights organisations have no credibility if they only champion the causes that are intellectually fashionable, or to which leaders of the organisation adhere.[22] When I champion the human rights of my enemy, when I insist on the freedom of speech of someone with whom I profoundly disagree, when I respect the freedom of conscience of someone whose beliefs and values cannot allow her to do what I want her to do, when I demand the freedom for others that may have a prejudicial effect on my interests — then I demonstrate that I really do believe in human rights.

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22 It is quite possible, indeed likely, that some causes held dear by members and leaders of human rights organisations are not causes which can be given primacy when in conflict with other human rights, according to the priority of rights established in the foundational international human rights doctrines. This point is made in, for example, the submission to the NHRC of the Life, Marriage and Family Centre of the Catholic Archdiocese of Sydney (NHRC 2009).

Human rights organisations and lobbyists in Australia do not necessarily stand up very well when measured against that test. It ought to be a matter of grave concern to such organisations if people in the mainstream of Australian society perceive them to lack credibility and to be driven by particular ideological agendas which are antithetical to some human rights. There can be little question that this perception has had a real and practical impact on submissions to the NHRC. There are many objections to having a judicially policed Charter of Rights that would remain important objections even if the human rights to be guaranteed far more faithfully reflected the requirements of international human rights norms. Nonetheless, at least some objections may have dissipated if there was more confidence that watchdog bodies in Australia would be effective and dispassionate advocates for all human rights in a manner consistent with the priorities about what is fundamental and non-derogable, and what is less fundamental, so clearly established in the various basic human rights declarations and covenants.

There is value, therefore, in human rights organisations such as the AHRC reflecting carefully on the NHRC debates and the negative perceptions that have emerged about their own commitment to human rights. The perception that some human rights organisations, or individuals who represent them, place a low value on freedom of religion or conscience is widely held, and some fence-mending needs to be done. Human rights bodies may need to look at their own employment practices to see whether there is a sufficient diversity of opinion within them, and to ensure that they have people who can challenge the prevailing dogma within the organisation in order to ensure better fidelity to human rights. One way of encouraging diversity and fidelity to human rights is to appoint champions for those rights which may not be all that popular within the Commission.

It may also be advisable to separate equal opportunity and human rights commissions into two different bodies, one exercising functions in relation to anti-discrimination laws, and the other having a broader role as an advocacy body for human rights. This may reduce the extent to which 'human rights' are seen as entirely synonymous with non-discrimination.

Governmental human rights bodies play an important role. Human rights organisations need to be generally perceived as part of the solution to human rights concerns in Australia, not part of the problem.

Conclusion

Like all groups in society, there are differences of opinion among Christians, and indeed among church leaders, about the wisdom of having a Charter of Rights in

Australia. There are valid arguments for and against the protection of human rights by means of establishing vague higher order and abstract standards which courts are meant to interpret and apply. People of great intellect, knowledge and goodwill, equally committed to the protection of human rights, can take quite different stands on such matters. It is no surprise therefore that Christians should also have differing views.

What is clear from the submissions is that at least some Christians who are opposed to a Charter of Rights, or who have serious doubts about it, would be less opposed to it if they thought that the legislators and policy makers would take all human rights seriously, and faithfully protect freedom of religion and conscience in the manner required by Art 18 of the ICCPR and other human rights instruments. The suspicion that those advocating for a Charter don't take freedom of religion and conscience nearly seriously enough — a concern which has been fuelled by the track record of the human rights lobby and the drafting of the two Charters that already exist in Australia — has certainly played a significant part in enlivening opposition to a national Charter.

The submissions of the Standing Committee of the General Synod of the Anglican Church of Australia and the Australian Catholic Bishops Conference are really bellwether submissions for Christian opinion. The national body of the Anglican Church would support human rights legislation if it took religious freedom as seriously as do international conventions. It would also support anti-vilification laws which are very carefully drafted. The Australian Catholic Bishops endorse the order of questions raised by the NHRC. Asking what human rights should be protected is a first question. Asking how best to protect them is a secondary one.

Human rights charters cannot just be a vehicle for the promotion of particular ideological agendas. When those who support a Charter demonstrate higher standards of fidelity to the cause of all human rights, then they will be better able to persuade at least some doubters to their cause. ●

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