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Submission to Freedom of Religion and Belief Project

Anglican Church Diocese of Sydney

This submission is made on behalf of the Standing Committee of the Synod of the Anglican Church Diocese of Sydney.

We are glad that the AHRC is taking freedom of religion and belief seriously. We hope the researchers do justice to its enormous breadth, and we look forward to results that enable Australians to live well together, even when we differ greatly about the nature of religious truth. This submission responds to the discussion paper across six areas:

1. **Why Christians value freedom** (p. 2). We show why Christians value freedom; why Christian freedom usually takes the form of cooperation and community assistance; and how Christian allegiance is always finally to Jesus Christ, who stands above the state.

2. **Secularist assumptions** (p. 3). At some points the discussion paper has a bias towards assuming that secularism is the proper 'default' position for participation in public discussion. This bias has no warrant under ICCPR 25 and should be disavowed by the AHRC.

3. **Proscription of religious hate speech** (p. 6). Several difficulties with 'religious anti-vilification law' are raised. Its superiority over existing criminal law needs to be demonstrated. Four areas lacking clarity also need to be resolved before 'hate speech' can safely be proscribed: What constitutes 'incitement'? Can the 'vilification' of a person be distinguished from the criticism of their beliefs? What prevents anti-vilification law becoming de facto blasphemy law? Will such law disable the community in navigating conflict over religion? Any such law would need to be very carefully drafted to allay concern about these difficulties, and with a period of review set.

4. **Anti-discrimination exemptions** (p. 11). We argue for exemptions from discrimination law that match the broad mission of religious organisations, and which reflect the liberality of the Religion Declaration's art. 6.

5. **Charter of Rights** (p. 14). We express our support for the work of the AHRC in defending human rights in Australia. However we have reservations about whether a Charter of Rights is an appropriate means to achieve this end. Our concerns are briefly outlined.

6. **Wider issues** (p. 14). Five issues are canvassed that lie behind the Project, but can easily be forgotten: the social inadequacy of rights; the 'particularity' of religion; the importance of communal identity; the social limitations of statute law; the political status of U.N. law; and the risk of legal irrelevance.

1. Why Christians value freedom

This submission will generally respond to the discussion paper on its own terms. But religions need to be dealt with in their particularity and in recognition of their way of life. Therefore this section uses Christian logic to outline why freedom matters so much for us. One biblical text is a good starting point:

> For freedom Christ has set us free; stand firm therefore, and do not submit again to a yoke of slavery. [Galatians 5:1]

Jesus Christ introduced himself as a liberator. His first hearers were offended by this claim, because they did not believe they needed the 'liberation' he offered.[1] According to Jesus, every person is enslaved to desires and behaviours that drive us to hurt each other, and which destroy our relationship to God. He offers release from this 'sin' to become loved children of God. He insists that this news is the only truth that 'will set you free'.

Early Christians were mesmerised by this news of liberation. Christ, writes one, gives 'the glorious freedom of the children of God'[2] through the Holy Spirit.[3] This last point is significant: only the Holy Spirit can enact the kind of inner change that causes people to want to accept this news. It follows that people can only be *informed* of the news, never *coerced* into accepting it.

As Christians we have been freed from the link between our performance and our acceptability to God and freed to do what Jesus describes as 'loving' others—responding to them respectfully, and with caring affection.[4] The Bible's moral sections are a 'law of liberty'[5], a kind of 'roadmap' to loving well. This freedom with God and for others enables us to discern false 'freedoms'. For example, our freedom for pleasure is lost and barren on its own, and only finds its proper 'home' when we love others and are reconciled to God.

Christian freedom is not meant to take an anarchic or selfish form. Christians are as prone to weakness, failure and self-obsession as anyone else, and so we are charged to 'live as people who are free, not using your freedom as a cover-up for evil, but living as servants of God'[6]. We also become 'subject for the Lord's sake to every human institution'[7] as a corrective to our selfishness.

These two ideas—'being subject' and 'living free'—seem totally contradictory at first. But for Christians, a strange paradox follows. Human authorities often reflect Christ's rule, even if only roughly, and we can go along with that as 'subjects'. But

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1 John 8:31-36
2 Romans 8:31
3 Romans 8:2, 2 Corinthians 3:7
4 c.f. Galatians 5:13, cf Romans 6:18, 22
5 James 1:25, 2:12
6 1 Peter 2:16
7 1 Peter 2:13

when the authority stops resembling Christ, we can live free as the 'servants of God'. The Bible records moments when Christians suddenly stop cooperating with local authorities, as when two of Jesus apostles declare 'we must obey God rather than men'[8].

Of course everyone, Christians included, can nobly invoke freedom claims as a 'cover-up' for evil. This self-deception simply fails to love others and is another false 'freedom'. Hence Christians are generally very respectful of and cooperative toward government, knowing it to be one of God's methods of bringing peace and order to society.[9] However moments arise when Christians simply refuse to cooperate, because they owe an allegiance to someone greater.

This self-understanding is crucial to the current project. The researchers, the AHRC and the Government need to know that Christians carry a very real belief that Jesus Christ stands above us all. He has our primary allegiance, which we will not change for anyone. The wrong kind of governance drives Christians to express this allegiance either underground or in open defiance. There is no getting around this reality. At its best, the 'freedom of religion' is the social recognition of it.

Many Christians also believe that the theology outlined above shaped our democratic traditions.[10] No state authority can stand between a person and God. Each is free to know or to deny God, and to differentiate herself from society (the basis of freedom of thought). Each is free to find what God wants for them and to freely assemble with like-minded others (the basis of free assembly). Each is free to declare good news about Christ; to reason, debate and argue for the truth about God; and to contest claims that seem false (the basis of free speech). Each must respect the role of government as a reflection of Christ's rule over us all (the basis of the distinction between state governance and religious ministry).

The 'right' kind of governance, which respects these freedoms and demonstrably meets the needs of those whom society is failing, usually elicits our cooperation. Indeed we regard ourselves as (potentially) the best kind of 'friend' that a society and its government could have. We generally do not want to express our beliefs in some form of strict separatism (except when we feel we have no choice). We seek to care for the good of our neighbours and to cooperate with society where possible. We only want to challenge society when we think it is committed to folly or self-deception, and our more natural impulse is to participate when we can.

We hope that this short excursus into the Christian mind shows why freedom matters so much to us, that it is no threat to society, and that we will continue to live this freedom in primary allegiance to Jesus Christ.

2. Secularist assumptions

We accept that not all believe in a religion, and agree that freedom from any coercion to believe should be upheld. We also acknowledge a proper 'secular'

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8 Acts 5:29

9 cf Romans 13:1-7

10 For an important exposition of this view, see Oliver M.T. O'Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology*. Cambridge: Cambridge University Press, 1996, especially chapter 7.

realm. It consists in the social journey together of people with a variety of religious and non-religious views as they order their life together. (In fact the term 'secular' first appeared in early Christian discourse, to distinguish earthly life as we know it from heavenly life as we expect it.)

In the discussion that follows, the term 'secularist' is not intended pejoratively. We take it to refer to those who believe the only reality to be secular reality. But secularists can hold contestable 'conceits' just as religious people can, and all of these need to be challenged.

The AHRC discussion paper is marred by some secularist conceits, reflected in questions that seem to **assume secularism as the proper 'default' position for participation in public discussion**. On this view, religious believers have a burden of proof to demonstrate why they may participate, as religious persons, in public discourse and deliberation.

The error is reflected in Q 2.4 (p. 8). The phrasing of this question feigns even-handedness, but its first half is wrongly conceived:

> Do religious or faith-based groups have undue influence over government and/or does the government have undue influence over religious or faith based groups?

The ICCPR is primarily concerned to protect citizens against unwarranted incursions by the State. Hence the AHRC has clear warrant to consider whether government has 'undue influence over religious or faith based groups'[11]. But ICCPR 25 stipulates that:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [including 'religion'] and without unreasonable restrictions: (a) To take part in the conduct of public affairs [...and] (c) To have access, on general terms of equality, to public service...

It follows that there is **no warrant** upon which to posit an 'undue influence over government' by 'religious or faith-based groups', **for the ICCPR offers no basis from which to question involvement by religious citizens in public affairs**. As it stands, the question disingenuously inserts the idea that the only proper public engagement is non-religious engagement. This idea is also inserted into the phrasing of Q2.3 (p. 8):

> When considering the separation of religion and state, are there any issues that presently concern you?

Of course Australian law specifies no such 'separation of religion and state'. This term arises from U.S. discourse, and does not even appear in the U.S. First Amendment. The metaphor of a 'wall of separation' first appears in Jefferson's

[11] Such undue influences have been evident in the non-advocacy clauses used in government funding contracts of faith-based organisations. We are thankful that such provisions seem to have been neutralised under the Rudd Government.

1802 letter to the Danbury Baptist Association, and only comes into U.S. legal discourse through a 1947 Supreme Court judgment.

The metaphor of a 'separation' is one of several that may be used to describe a *distinction* between religious ministry and state governance, which we uphold and affirm. This distinction has long been evident in Australian custom and practise. It is a complex, nuanced distinction that cannot be reduced to mere 'separation'.

In fact historic interpretation of Australian Constitution s 116 has opened the way for **constructive partnerships** in Australia between state governance and religious ministry, as long as no favouritism is shown. In contrast the U.S. First Amendment has been construed as preventing any state assistance of religion, so generating the metaphor of 'separation'.

The notion of a 'separation', then, has no real place in Australian discussion, where the nature of constructive partnerships between government and religion has been navigated practically for the good of society, on a case-by-case and an issue-by-issue basis. Our different history on this matter cannot be undone, whatever aspirations secularists may have to the contrary.

The secularist conceit becomes breathtakingly overt when Q 5.8 asks:

> 'Is there a role for religious voices, alongside others in the policy debates of the nation?'

But what 'religious voices' are being referred to?

- According to ICCPR 25(a), the bishop or imam may make his contribution to the conduct of public affairs without any distinction made on the basis of his 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

- According to ICCPR 25(c), a Member of Parliament may engage in public service irrespective of her 'fundamentalist' Christianity, Islam or atheism.

In these and other cases, that their voice is 'religious' is quite irrelevant. Their policy arguments, and their performance of public service, will stand or fall before the public on their merits.

Unfortunately, the insertion of this question seriously undermines the credibility of the 'Freedom of Religion and Belief' Project. It should **immediately be withdrawn** as a term of reference, since it is **so obviously contrary** to the AHRC's statutory remit.

The secularist utopia, where religion influences no government policy, where religious voices are silenced, and where religion and state are truly separate, could really only be realised if all religious people were removed. Of course secularists do not propose such measures; but until they specify their concerns and solutions more precisely, no one can know how a 'separation' would be enacted.

The President of the American Academy of Religion, Jeffrey Stout, does not profess to a religious belief, but nonetheless attacked the loose rhetoric of secularism in his 2007 Presidential Address, 'The Folly of Secularism.'[12] He gives several examples of secularist rhetoric by U.S. academics and goes on to describe the average religious person's likely reaction:

> 'What are you going to make of the claim that atheists make better citizens than theists, or the fantasy of strangling the last king with the entrails of the last priest, or the notion that believers are essentially irrational and intolerant ... or the advice that you should, in all fairness, keep your religious convictions behind the church door while secularists pursue their long-term objectives?
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> 'It seems to me that you will treat such dicta as evidence that secularists are your avowed enemies, that they are plotting the eradication of your way of life, that they are less than wholeheartedly committed to democratic practices and the Bill of Rights. [540]
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> '[... Theocracy is] unlikely to grow unless believers who remain committed to democracy decide that they have to choose between theocracy and secularism. Secularist rhetoric gives them reason to think that they face that choice. It has the ironic effect of making theocracy more attractive to religious moderates. ...
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> 'It should be clear by now that I do not share the theological convictions of [various theologians]. But who among us surpasses them in the excellences of citizenship? Not I. Far be it from me to advise them to keep their religious convictions to themselves. Far be it from me to dream of a future in which they and others like them have passed from the scene.' [544]

The same arguments apply in the Australian context. Australians should be free not to believe in any religion, and to vigorously refute policy suggestions they consider to be wrong, and to challenge public service performances they think are poor.

But 'secular' life consists in the social journey together of people with a variety of religious and non-religious views. **There is no burden of proof upon religious people as to why they may participate.** To suggest that religious involvement in public life flouts some right or principle is naive at best and sinister at worst.

Such involvement by religious persons (among others) is protected by ICCPR 25. **The spirit of this protection should be strongly reflected in the ARHC's recommendations to Government.**

3. Proscription of religious 'hate speech'

From time to time, it is necessary to state and uphold the 'outer limit' of free expression.

12 Journal of the American Academy of Religion, September 2008, Vol. 76, No. 3, pp. 533–544.

We note HREOC/ARHC's longstanding advocacy of Federal religious anti-vilification legislation as a strategy to contain outbreaks such as the 2005 Cronulla riots. We suggest that the AHRC needs to re-evaluate and nuance some aspects of its previous proposals. There are good reasons to think that these have serious limitations, and do not adequately address social conditions in twenty-first century Australia.

The first discussion to be had is whether existing criminal law is competent to deal with outrages such as the riots, and whether further law is needed. We note in connection with the Cronulla riots that no charges have proceeded under the racial vilification provisions of the NSW Anti-Discrimination Act. This suggests, perhaps, that existing criminal law has performed adequately.

Nonetheless we understand that there are some people who believe there is a need for legal recourse on religious grounds which the AHRC believes they do not have. We recognise that the AHRC regards religious anti-vilification law as the most straightforward solution to meet this perceived need.

But we respectfully suggest that several difficulties and confusions surrounding religious anti-vilification law need to be resolved. Until some consensus emerges about these matters, such law will struggle to find community credibility. Nor will it be capable of guiding and shaping community attitudes when there is confusion about what community standard is being upheld.

The intention of this section is to outline these difficulties, in the hope that they can be resolved. They are best approached via the discussion paper Q2.2:

> Have new issues emerged since this report was published in 1998 relating to expression of faith?

The most obvious 'new issue' to emerge has been the difficult implementation of Victoria's *Racial and Religious Tolerance Act 2001* (RRTA) in the Victorian and Civil Affairs Tribunal (VCAT) judgment in 'Islamic Council of Victoria vs. Catch the Fire' (CTF). Four excellent reflections upon this case raise several difficulties with RRTA.[13] Informed by and borrowing from them, we may summarise the difficulties in terms of the following questions:

a. What constitutes 'incitement'? In the absence of an intention test, does 'incite' mean that the conduct *demonstrably* 'incited', or that the conduct *could have* 'incited'? If the latter, who is the audience that 'could have been' incited? This lack of definitional clarity was evident throughout CTF, and also exists in at least one other Australian jurisdiction.[14] As Parkinson observes, 'the law in Victoria seems to

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13 E.g. Garth Blake SC, "Promoting religious tolerance in a multifaith society: Religious vilification legislation in Australian and the UK," *Australian Law Journal* 81 (2007), 386-405; Hanifa Deen, *The Jihad Seminar* (Crawley, W.A.: University of Western Australia Press, 2008); Carolyn M. Evans, "Religious Freedom and Religious Hatred in Democratic Societies," in *Human Rights 2006: The Year in Review*, edited by Marius Smith, 155-168 (Melbourne: Monash University, 2007); Patrick Parkinson, 'Religious vilification, anti-discrimination laws and religious minorities in Australia: The freedom to be different.' *Australian Law Journal* 81 (2007), 954-966.

14 So Gail Mason observed of the NSW Act's provisions against racial vilification (at an AHRC-hosted seminar, 'Words that Wound', Sydney, 18 November 2008).

be that one can "incite" hatred without either the intention to do so or the effect of so doing.' (p. 957)

To the watching community, it seems that (i) judges do not agree on which audience may be 'incitable'; (ii) the nature and mode of the possible incitement is not adequately specified; and (iii) people can be caught up in this legal morass unintentionally. While anti-vilification law remains unclear at such a basic level, community apprehension about its capricious and arbitrary application seems quite reasonable. As Professor Parkinson observes, it can only have the effect of chilling discussion and creating rumours about the nature of the offence.

b. Can the 'vilification' of a person be distinguished from the criticism of their beliefs? In practice, this distinction quickly and regularly breaks down:

(i) It broke down in chapter 5 of HREOC's *Article 18* report. Section 5.2, 'Experiences of vilification and incitement to hatred', quotes from several submissions reporting some level of distress. The chapter goes on to assert that vilification law concerns hatred of persons, not criticism of views; that vilification clearly occurs; and that Australia should have laws against it. *Article 18's* recommendation to repeal blasphemy laws (which we endorse) also amounts to a permission to criticise religious views.

But of the cited instances of distress, over *twenty five* were occasioned by criticisms of a religion or of religious views, and *not* through vilification of persons per se. Yet HREOC's recommendations for religious anti-vilification law are based upon this data-set, with no effort made to analyse whether it would or should help in these instances of distress. Nor is there any reflection upon the interweaving of persons and views evident in almost all the cited submissions.

(ii) One of three appellant judges reviewing the VCAT ruling (Nettle JA) found that VCAT did not maintain a distinction between vilification of persons and criticism of their beliefs. Interestingly, another (Neave JA) doubted that such a distinction can be made when the religion of a socially marginalised person is criticised (Blake pp. 400-401).

(iii) Carolyn Evans points to a 'worrying' international trend toward 'a right to *respect* for religious feelings', where courts have 'simply asserted that such a right to respect for religious feelings existed' even while making the contradictory assertion that 'religions could not expect to be free from criticism' (pp. 162-63). In practice, no law can be imagined that protects a right to the respect of a religious feeling while also maintaining open discourse about religious truth claims.

(iv) A contentious concept, the 'defamation of religion' is emerging in U.N. circles. It asserts that criticism of a belief system equates to the incitement of religious hatred. One draft document states that when 'Islamophobia' 'is expressed in the form of defamation of religions [*sic*], it takes cover behind the freedom of expression' and that

> 'internationally binding normative standards need to be devised that can provide adequate guarantees against defamation of religions'[15].
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> 'Combating defamation of religions' is the title of U.N. General Assembly Draft Resolution A/C.3/63/L.22 (passed 85 to 50, with 42 abstentions),[16] where the term is undefined, yet is equated five times with 'incitement to religious hatred'. These references are only 'balanced' by one heavily qualified reference to the right to freedom of expression.
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> The legal problems presented by defining the 'defamation' of a group or of an idea are probably insurmountable. More importantly, the concept is deployed to assert that criticism of a religion incites hatred of its adherents.

A person cannot easily be distinguished from their beliefs, for what I believe has a lot to do with who I think I am. This 'interweaving' of a person with their beliefs makes the term 'vilification' unhelpful in a religious context. To attack my beliefs can often feel like an attack upon my identity. The 'vilification' of beliefs and the 'vilification' of persons become impossible to distinguish, and so religious vilification is inherently more complex than racial vilification.

They *seem* analogous when 'kill that Christian [bleep]' is as unacceptable, and as deserving of prohibition, as 'kill that white [bleep]'. But the similarity with racial vilification ends there, because **religion involves contestable claims about the cosmos and our place in it.** Many of these claims profoundly concern a person's identity, as much as any racial claim or epithet. A free society must be free to contest these claims, even when they impinge upon a person's felt identity quite strongly.

Therefore distinctions between vilifying people, criticising their views, and offending their self-identity, are not easily made or kept; and laws against racial vilification cannot easily translate into laws against religious vilification.

c. What prevents anti-vilification law becoming de facto blasphemy law?

Anglicans in Sydney want Australian society to be strong enough to sustain frank and robust contests of ideas, even when these impinge upon personal identity. For example, several recent aggressive publications by dogmatic atheists cut right to the heart of evangelical Christian identity. But we seek no legal redress against these authors; indeed, we revel in the opportunity to reply. It follows that we are in favour of *Article 18's* recommendations to repeal blasphemy laws.

Proponents of religious anti-vilification law claim that it can be drafted to exclude the criticism of religious views. But it will need to be drafted very carefully indeed, to prevent a process of operational 'creep' where it metamorphoses into de-facto blasphemy law. It could be coopted in attempts to protect religious adherents from

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15 Durban Review Conference Preparatory Committee (intersessional working group), "Compilation of paragraphs ... for use in the drafting process of the outcome document of the Durban Review Conference," 27 Oct. 2008. Hhttp://www2.ohchr.org/english/issues/racism/DurbanReview/docs/CRP.1_Compilation_of_proposals.docH (accessed 1/12/2008) art. 45 & 46.

16 *Journal of the United Nations* No. 2008/231, p. 17.

intellectual or moral challenge. More subtly, it could be coopted by ecumenical or interfaith groups to condemn assertions that one religion is superior to another. (For example, in a multifaith society many may regard the claim that 'only Jesus can save you' as a 'vilifying' form of multifaith 'blasphemy'.)

d. Will such law disable the community in navigating conflict over religion? An overreliance on law to arbitrate conflict does not enable a populace to navigate their differences civilly. Rather than encouraging skills in courteous and robust debate, disputing parties may too quickly invoke a third party to arbitrate their debate. By avoiding dealing with each other, law courts then become a new 'theatre of war' for old and long-running disputes. But the 'triangulation' of a third-party is often a poor way to navigate conflict. We recognise that mediation may have been a helpful aspect of some anti-vilification provisions, although mediations are hard to evaluate given their confidentiality. Even so, we prefer to see a society where adults maturely handle religious disagreement between themselves. We believe that well-handled conflict actually builds trust and strengthens civil society. But the wrong sort of religious anti-vilification law can too easily 'short-circuit' that process.

The Victorian attempt to use a racial vilification paradigm for religious vilification has only created confusion about what Victorians are being guided to do or to avoid in their religious discourse. As it stands, it may only have chilled religious discourse and created unhelpful rumours in the community about what constitutes an offence under the law (Parkinson, pp. 959-960). Communities cannot be guided by a law when its proponents, the Parliament and the judiciary remain unclear on what community standard is being defended.

We have observed four areas of difficulty. 'Incitement' is ambiguous; the precise nature of 'religious vilification' is ambiguous since people are so closely aligned to their views; the resemblance of these laws to blasphemy law is too close; and the community may have been disabled in handling conflict civilly.

These difficulties explain why Christians often resist such law.

If the Government decides to move down the path of proscribing religious hate speech, any such attempt will be unsafe unless the law is drafted only to proscribe those outermost limits where free expression has clearly become hate speech. Such a law should therefore –

- apply only to the incitement of violence or hostility against persons or property,
- be limited to creating a criminal offence requiring the requisite intention to incite, and
- require the consent of the Attorney-General for prosecutions.

As a further safeguard, there should be a distinct exemption for acts done reasonably and in good faith for a religious purpose. Provision should also be

made for the law to be reviewed a few years after it comes into effect, through a process of community consultation, for its social impact.

Such a law must not be used to protect 'religious feelings', or to protect against 'defamation of religion'. In a free society, religions must be capable of being challenged, and religious feelings may even be 'hurt'.

4. Anti-discrimination exemptions

Religious exemptions to anti-discrimination law are contested as they relate (mainly) to gender, sexuality, marital status, and pregnancy or potential pregnancy in relation to employment within, or service delivery by, centres of religious assembly and their related service organisations.

It is beyond the scope of this submission to consider the various religious exemptions in Federal, State and Territory anti-discrimination law. Rather, we will make some general comments about the AHRC's ongoing advocacy for the narrowing of exemptions.

A recent HREOC recommendation stated that religious exemptions 'should be removed, retained or replaced with a more narrowly tailored exemption' within three years, and that 'at a minimum, the exemption may be narrowed or alternatively ... could include a mechanism which would allow religious bodies ... to opt out of the exemption'[17]. These ideas seem to reflect the AHRC's general position on anti-discrimination law exemptions.

Unfortunately this position does not reflect the liberality given to religious freedom in the provisions of ICCPR 18 and art 6. of the Religion Declaration.

Religious organisations often pursue a broad mission with limited resources. Exemptions to anti-discrimination law should make the necessary allowances for the broadness of each organisation's mission and for the limitations on their resources. The expansiveness of a religious organisation's mission is reflected in the liberality of the Religion Declaration art. 6:

> [T]he right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:
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> (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
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> (b) To establish and maintain appropriate charitable or humanitarian institutions;
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> (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;

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17 HREOC *Submission to the Senate Legal And Constitutional Affairs Committee on the Inquiry Into The Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality,* 1 September 2008, pp. 173, 167.

(d) To write, issue and disseminate relevant publications in these areas;

(e) To teach a religion or belief in places suitable for these purposes;

(f) To solicit and receive voluntary financial and other contributions from individuals and institutions;

(g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;

(h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;

(i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

Every clause in art. 6 (with the provisions of ICCPR 18.1 and 18.4) sets out the broad mission of many religious people, and shows how it is regularly pursued in freely assembled communities of like-minded people. Each clause also has potentially extensive social ramifications. Exemptions should enable all the freedoms listed, allowing for the broadness of each organisation's mission and the communal nature of their enterprise.

Unfortunately, the trend, in recent times, appears to have been towards an unwarranted narrowing of exemptions.[18] The narrowing is unwarranted because it runs counter to the liberality of religious freedoms expressed in international instruments such as ICCPR 18 and art. 6 of the Religion Declaration.

It therefore concerns us when the Commission writes, for example, that a 'permanent exemption [for religious bodies within the *Sex Discrimination Act* 1984] does not provide support for women of faith who are promoting gender equality within their religious body'[19]. This partisan statement plainly advocates that the law should be used to pressure religious belief. Similarly, the proposal for a public register of organisations who 'opt out' of general exemptions is unnecessary, except to publicly pressure and shame those groups who do not opt out.

This attitude hinders the AHRC from assisting religious organisations and the community where it is most able to do so: in those areas where some judicious narrowing of an exemption threatens no religious belief, assists the organisation's relationship to the community, and produces no onerous overheads.

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18 For example the 2002 amendments to the *Anti-discrimination Act 1991 (Qld)* which narrowed exemptions for religious schools and hospitals. We are aware of a current review of the exemptions in the *Equal Opportunity Act 1995 (Vic)*. We are also aware of a decision of the NSW Administrative Decisions Tribunal in the matter of *OV & OW v QZ & The Uniting Church in Australia Property Trust* (NSW) (No 2) [2008] NSW ADT 115 which, in our opinion, renders virtually meaningless the exemption for religious bodies in s. 56(d) of the *Anti-discrimination Act 1977 (NSW)*. This decision is currently being appealed.

19 HREOC *Submission*, p. 166.

In this connection we note recommendation 4.1 (R4.1) in *Article 18*. It concerns the scope of exemptions in relation to employment. It upholds the inherent requirements of religious employment; it subjects employment preferences to tests of good faith and consistency; and it proposes that such preferences can be demonstrated against the religious beliefs of adherents. These aspects are promising, although the syntax of the R4.1 exemptions is too complex and risks creating onerous overheads for a resource-poor organisation, and undue state interference in the way each organisation pursues its mission or discerns its beliefs.

However if the implementation of these tests respected and upheld the liberality of ICCPR 18 and the Religion Declaration's art. 6, and if religious people were assured of the State's good faith in respecting their community's way of life, each community might be more open to negotiation about judicious changes to anti-discrimination exemptions.

We respectfully suggest, then, that the ARHC review its opposition to some religious practices. There is much to be gained, for example, by investigating the inner logic of each practice in the religion's own terms. In this way it will become evident that most religious organisations are not social blights that require close and ongoing management. They often have good reasons for much of what they do.

Nowhere is this need clearer than in matters relating to sexuality. A memorable passage in *Article 18* challenges the use of exemptions in relation to a lesbian person, and suggests that the church concerned exhibited mere 'prejudice' rather than a bona-fide 'religious susceptibility' (p. 112). This author has also strayed into a partisan judgment against the religion.

A similar attitude is evident in the loaded wording of a discussion paper question, where the language of 'exclusion' skews the matter in favour of individual aspirations at the expense of a religious community's mission:

> Q7.8: Should religious organisations (including religious schools, hospitals and other service delivery agencies) exclude people from employment because of their sexuality or their sex and gender identity?

A religious community upholding the good of sex within marriage sets out to reflect this good in many ways. It **does not** construe its mission expressly in terms of 'excluding' people. It simply includes and works with those who uphold celibate singleness and faithful marriage with them. All are free to participate on that basis or to go their separate way. (Likewise, religious people often have to accept that they do not really belong in some settings that espouse a different view of sex.)

The good faith of religious communities is evident in the absence of exemptions from race and disability discrimination. We are not aware of any religious groundswell that sought to secure such an exemption, for no substantive religious view required it. We could agree together on the good of these laws.

We invite the AHRC to commit more decisively to the freedoms enumerated in the Religion Declaration, and for Commission employees to engage religious practices with genuine curiosity and respect. Against that backdrop, the AHRC can go on to

show where current areas of exemption do not benefit either the religious organisation or the community, and a new negotiation can begin. But there are no easy short-cuts. If freedom of religious assembly is to be taken seriously, any proposal to narrow exemptions can only be evaluated specific to each jurisdiction, religious organisation, and claimant of discrimination.

5. Charter of Rights

The discussion paper asks if a legislated national Charter of Rights would add to our constitutionally guaranteed freedoms of religion and belief (Q2.5 p. 8).

We rejoice that Australia is a place where human rights are respected in both law and practice. We appreciate the AHRC's passion for the defence of human rights, and note with gratitude the Commission's record of listening carefully to the marginalised, and its longstanding advocacy for victims of abuse.

However we have reservations about whether a legislated national Charter of Rights would be an effective or even an appropriate way to protect human rights in general and freedoms of religion and belief in particular.

We intend to articulate more fully our reservations about a Charter of Rights in the context of the Federal Attorney-General's consultation process on the protection of human rights in Australia. However at the heart of our reservations lies a concern that, no matter how carefully drafted, a Charter of Rights will lead to a diminution of religious freedoms.

6. Wider questions

The discussion paper invites comments beyond the terms of its questions (p. 8). The Project does raise some wider questions that deserve consideration.

a. The social inadequacy of rights. At the launch of this Project, the Race Discrimination Commissioner described human rights as 'both a system of laws and a body of ethics'. This analysis is contestable. Rights are a form of moral discourse listing social goods worth defending, which it is generally agreed need then to be balanced. But human rights discourse does not necessarily deliver the moral or philosophical basis upon which to judge this balancing.

Also the language of rights can, if overused, skew a society's vision of itself away from a conception of the 'common good' based in mutual affection for one another. The maturation of rights discourse to include some reference to responsibilities is a welcome development. But Christians hope for more: a substantive vision of social relations characterised by what Jesus Christ called 'love', where our care for one another becomes the best protection of each other's rights.

Hence rights discourse is not really an entire 'system' or 'body' of thought. These comments are not meant to question the longing for justice behind the major U.N. human rights instruments, nor the AHRC's statutory mandate or its work to assist marginalised people. We simply ask the human rights community to be aware of the limitations of rights discourse in social life, and to be on guard against totalitarianism in its application.

b. The 'particularity' of religion. The enormous and ambitious breadth of the project may, ironically, obscure proper study of its core concept: religion. To take into consideration so many different beliefs and opinions presents a temptation to handle them all under the **generic** category 'religion and belief', rather than dealing with each as a uniquely **particular** way of life.

The discussion paper presumes that various disputes can be handled at the level of a 'meta-discussion' using abstracted categories such as 'religion', 'rights', 'the state', 'public', 'private' and so on. But there are no shortcuts: each dispute arises from the particularity of some religion or belief as it intersects with some specific issue. We ask the researchers not to overreach at these points, for there can be no substitute for 'fine-grained' discussion, and sometimes political and legal arbitration, at each of these flashpoints.

It is the historical weave of many such discussions and arbitrations, both within Australia and in Europe prior to settlement, which has delivered Australian society as we now have it. No 'silver bullet' recommendation or statute can put an end to this messy and ongoing historical patchwork.

c. The importance of communal identity. At some points, the discussion paper seems to present religion primarily as a matter for individual choice rather than as a communal affair.

But religious people often meet together in organised groups, and traditionally the 'freedom of religion' has also been a defence of the life and identity of these groups. This concern is reflected in ICCPR and the Religion Declaration when they mention the place of religious communities, their organisations, and the education of children.

But some discussion paper questions prejudge in favour of individual rights at the expense of the life of religious communities. This prejudice implies that religious communities and organisations are social problems to be managed, rather than social assets to be treasured as storehouses of 'social capital'. We respectfully ask those associated with the Project to self-critically challenge any such assumptions.

d. The social limitations of legislation. This issue is difficult to raise; but Australian society seems caught between two paradigms for the proper use of statute law.

- On one view, statue law is a major mechanism for social change. Law should lead and shape society rather than 'following' social values.

- A more 'minimalist' view holds that statute law prohibits excesses, but that a polity determines its social vision through families, education, religions, social policy discussions and other non-legal arenas.

This difference in political philosophy goes back thousands of years and cannot be pretended away. But it often lies unrecognised when new laws are proposed.

AHRC/HREOC has an impressive record in social cohesion initiatives that do not always require new law. A good example is the *Unlocking Doors* report of 2007,

which began meaningful engagement between local communities and police. The AHRC does well to commend these and other local initiatives, and to propose legislation with reticence since legislation is a comparatively blunt instrument for effecting social change.

e. The political status of U.N. law. Australians deserve ongoing political discussion about U.N. instruments, which are an important form of *moral* discourse to inform and challenge the local arrangements of sovereign States. But not every U.N. provision can or should reappear as a local statute.

f. The risk of legal irrelevance. Both the previous concerns raise the spectre of a body of law that becomes ineffective. Polities that make statutes too enthusiastically risk a 'tearaway effect', where too much law is too alien to the populace to have much effect. As Patrick Parkinson argues,

> 'Where ... governments impose standards of behaviour through law on a reluctant population, they risk more than they gain. Compliance is coerced rather than voluntary and the legislation undermines belief in a shared community of interest between governors and governed. ... Legislation defines legality and illegality, but legitimacy is something different. ... It is the legitimacy of law, and not its constitutional legality, which matters most for stable and harmonious societies'[20].

New laws can be a tempting shortcut for politicians. They are cheap to pass and can represent a 'policy fix' that looks good on the world stage, but which may have no substantive connection to actual conditions in society. We ask the AHRC to continue to be aware of this danger.

The 'Freedom of Religion and Belief in the 21st Century' Project promises to become an important contribution to Australian life. Christians will welcome it, if the Project:

- upholds the distinction between religious ministry and state governance;
- continues the strong Australian tradition of constructive partnerships between these two spheres;
- enables free, open and robust discourse about religious ideas in a culture of safety, security and respect;
- judiciously defends U.N. declared freedoms, respecting both individuals and free assemblies; and
- enables Christians to pursue their heartfelt longing: to introduce other Australians to the excellence of Jesus Christ.

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[20] Patrick Parkinson, 'Enforcing Tolerance: Religious Vilification Laws in Australia.' Paper delivered to the *Eleventh Annual International Law and Religion Symposium: Religion in the Public Sphere: Challenges and Opportunities*, Provo, Utah, October 2004, pp. 14-15.

We are thankful for the opportunity to contribute and wish the researchers well.

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For and on behalf of the Standing Committee of the Synod of the Anglican Church Diocese of Sydney

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