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TO

National Human Rights Consultation Secretariat
Attorney-General's Department
Central Office
Robert Garran Offices
National Circuit
BARTON

ACT 2600

The attached submission is presented to the Consultation by the Church and Nation Committee of the Presbyterian Church of Australia and on behalf of the federal denomination.

As noted in the submission, various state [constituent] churches have also contributed to the consultation.

Yours Sincerely,

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Convener/Honorary Secretary,

Presbyterian Church of Australia
Church and Nation Committee.

Presbyterian Church of Australia

Submission to the National Human Rights Consultation

Introduction

1. In making this submission we wish to point out that the Presbyterian Church has been in Australia since the earliest days of European settlement. The oldest church in Australia at Ebenezer on the Hawkesbury River, NSW celebrates its 200th anniversary this year, while over the past 50 years many of our congregations around the country have celebrated 150 years.
2. It is also worth pointing out that today the Presbyterian Church is multicultural in the best sense of having people not only of British origin but also large numbers of Dutch, Chinese, Japanese, Korean, Sudanese, Samoan, Sri Lankan, Indian, as well as Arabic speakers from the Middle East, all united by our common faith.
3. In this submission we do three things:
 - We comment on the terms of the inquiry in which we question the appropriateness of further developing a “rights” culture in Australia (paragraphs 5-12);
 - We enumerate our specific concerns about a charter of rights (paragraphs 13-29), with additional material presented on how the Victorian *Charter of Rights and Responsibilities Act 2006* fails to safeguard freedom of conscience, thought and religion (paragraphs 30-48);
 - We set out a positive expression of what we as a body of Christian believers believe would better protect the specific rights to freedom of conscience, thought and religion (paragraphs 49-54).
4. Aspects of this submission draw on submissions made by the constituent state churches of the Presbyterian Church of Australia.

The terms of the inquiry

5. The central questions posed by the National Human Rights Consultation (NHRC) harbour presuppositions which themselves need to be exposed and discussed. We are initially asked: which human rights (including corresponding responsibilities) should be protected and promoted; are these human rights currently sufficiently protected and promoted; and how could Australia better protect and promote human rights? The questions are posed in such a way as to make the ‘language of rights’ the terms in which the inquiry will be undertaken and submissions are to be made. At the outset, we express reservations about this way of proceeding. ***We are not convinced that the health of our community will be best served by framing the discussion as a conversation about rights, even when qualified by reference to corresponding responsibilities.***
6. Rights are the language of legal entitlements. When used in a moral context (which is not, we note, the context in which the NHRC is using the term), rights

are the language of moral entitlements. Our society, we acknowledge, is today dominated by the language of rights. We do not consider this to be an altogether healthy thing. Specific wrongs are all too often perpetrated against persons, and we would want to be among the first, wherever possible, to support and protect such persons against such abuse (and indeed to repent and make good any abuses for which we might, alas, be responsible). But at the same time, we hear a distressing cacophony of demands in our society for the satisfaction of individual wants, preferences and expectations, couched in the language of rights.

7. Whilst we readily acknowledge and gladly affirm that the concept of human dignity has its origin in the Judeo-Christian tradition of affirming the human race to be made in the image of God, thereby conferring worth and dignity upon every human being, we are not at all convinced that the promotion of the rights of the individual is beneficial to the life of our nation.
8. The Christian principle by which individuals relate to each other is the golden rule: “*whatever you wish that others would do to you, do also to them*” (Matthew 7:12). Rather than enforcing one’s rights, we should be prepared even to sacrifice our rights for the sake of others: “*if anyone strikes you on the right cheek, turn to him the other also.*” (Matthew 5:39). Thus the Apostle Paul gives the following direction:

“Let nothing be done through selfish ambition or conceit, but in lowliness of mind let each esteem others better than himself. Let each of you look out not only for his own interests, but also for the interests of others”. (Philippians 2:3-4).

As explained below, we affirm that looking out for the interests of others must most certainly include every appropriate effort to stand up for those who suffer specific injustices, especially at the hands of those more powerful than they. Consistent with this, however,

We also most strongly affirm that a culture of serving others and not ourselves, a culture of forgiveness and doing good, a culture of individual contribution for the good of the whole, is a far more appropriate basis for building our community than the individualistic rights-based culture that demands from others what we reckon to be our due.

9. It is perfectly reasonable to argue that the culture of human rights in its progressive unfolding over time has become a new secular religion. Rather than “loving God and neighbour” as first priority this new religion has as its basic premise, “love yourself first and foremost”. As the British philosopher Roger Scruton has written,¹

¹ Roger Scruton, *Gentle Regrets: Thoughts from a life* (Continuum, 2006), p 237f.

“[this obsession with human rights] tells us that we are the centre of the universe, that we are under no call to obedience, but that the world is ordered in accordance with our rights”.

Scruton continues:

“The result of this religion of rights is that people feel unendingly hard done by. Every disappointment is met with a lawsuit, in the hope of turning material loss to material gain. And whatever happens to us, we ourselves are never at fault. The triumph of sin thereby comes with our failure to perceive it.

But this world of rights and claims and litigation is a profoundly unhappy one, since it is a world in which no one accepts misfortune, and every reversal is a cause of bitterness, anger and blame. Misfortune becomes an injustice, and a ground for compensation. Hence our world is full of hatred – hatred for the other, who has got what is mine. Look at contemporary art, literature and music and you will find in much of it a singular joylessness, a revulsion towards human life. This revulsion is the inevitable reward of those who think only of what is owed to them, and not of what they owe.”

10. In contrast to this obsession with the self and its advancement, the Christian way is to see the world we live in, and indeed life itself, as the beautiful creation and gift of the good and loving God whom we worship. This in turn leads to gratitude and joy, and because of this gratitude we too begin to love and share freely with others.
11. So whilst we will now address at least some of the questions posed in the background documents to the National Human Rights Consultation, we do issue this important caveat: ***we consider that a rights-focused society would be an unhelpful one.*** Rather than promoting peace and harmony, a Human Rights Act would rather lead to greater focus on self, self-promotion and the individual, alas with the inevitable though unintended result of increased disharmony and social conflict.

Abstract rights and the politicisation of judges

12. Accepting, therefore, the need for us to make our submissions in the language of rights, we now proceed to a second point of great importance. Rights as articulated in charters or bills of rights are necessarily abstract propositions which are meant to play a part in practical deliberations about the content of the law, its application to specific circumstances and the determination of appropriate remedies. We acknowledge that the moral reasoning necessarily required by the making of legal determinations must rest upon general propositions about appropriate behaviour. However, many have pointed out that a charter of rights, expressed in abstract language, is necessarily going to be the subject of unpredictable interpretation and that to the extent that this task is given to judges, ***very significant decision-making power is transferred from elected representatives to a small group of unelected officials chosen for their mastery***

of the technicalities of the law, but not necessarily better equipped to make the open-ended judgments required by the application of a charter of rights.

13. In this connection, further, we point out that judges are highly respected in our community precisely because they perform their duties with integrity, impartiality and reliability in terms of well-established techniques of legal reasoning. However, if judges are given a role beyond this already significant role and are asked to pronounce upon the large social questions addressed by a charter of rights, then judges will find themselves mired in all manner of political controversies currently confined to the elected branches of government, and general societal respect for judges will consequently be undermined. ***Public respect for institutions like the courts is of profound importance in our society, and we express caution lest that respect be undermined by a charter of rights.***
14. We make these observations, not only to repeat and endorse a commonly made but very important line of criticism of charters of rights, but also to point out that if the language of rights must be adopted, and the question of a charter of rights is to be addressed, our focus ought to be on the specific judgments about particular cases that will have to be made under a charter of rights, whether these judgments are made by elected legislatures or unelected judicial committees. Indeed, if the language of rights is to be used, we consider it much more relevant, prudent and accurate to reserve the terms 'right' and 'duty' to the concrete, legitimate expectations of a specific person in a particular set of circumstances, all things considered. However, this is not what charters of rights do. Rather, they contain references to 'rights' expressed in the most abstract of terms, which are in turn subject to qualifications by limitation clauses which are themselves highly abstract in formulation. We certainly consider that, if a charter of rights is to be enacted, its content (in terms of the abstract rights which it actually contains or does not contain, and the language in which its qualification clauses are recorded) is a vital and important issue, which will have consequences either way. But we express concern and significant reservations about the idea that, provided the utmost care is taken, an appropriate charter of rights *can* be drafted, provided we get the wording right. It is our submission that what will matter most is not what the charter says, but how the charter is interpreted and applied, whether by the judiciary, the legislature or the government and its agencies. ***No matter how careful the drafting of a charter of rights, the words used are not always or even ordinarily going to control or dictate its application in contentious cases.***
15. Indeed, every charter right will imply a corresponding duty, and in imposing a corresponding duty, a charter of rights will imply a recalibration of the freedoms of others. Rights and duties are in this sense a zero-sum game: there will be winners and there will be losers. It is not at all evident to us that our society has, as a whole, drawn the lines in inappropriate places. Indeed, we express significant concern that a federal Charter of Rights will have seriously deleterious implications in relation to several issues of very great importance to us as a

denomination of Christians. *The Presbyterian Church of Australia is profoundly concerned that a charter of rights will open up these issues to determination in a manner that is far from just or appropriate in the circumstances of our society.*

16. Our submissions are made in order to draw attention to what we judge to be the most just and appropriate resolution of those issues, and we call on the National Human Rights Consultation and the Australian Government to ensure that no charter of rights which could possibly lead to outcomes contrary to these be enacted. We leave it to the judgement of the National Human Rights Consultation and the Australian Government whether the drafting of such a charter of rights is possible, but we express serious doubts about whether this could possibly be the case and we will strongly oppose any proposed charter which we consider makes such deleterious outcomes possible, let alone probable.
17. Before turning to those issues, let us finally make clear that our expressions of concern are not based upon any naive sense of satisfaction with the status quo or the current condition of our democratic institutions of government. Indeed, our society is currently plagued by widespread disillusionment and a sense of alienation among ordinary people from our institutions of government. But in our judgement, a charter of rights, which would transfer fundamental decision-making powers away from the elected branches and towards an unelected, select group of highly privileged individuals will not serve to address these pressing problems of disillusionment and alienation; rather, it will only exacerbate them. *Our vision of a healthy, properly operating democracy is, on the contrary, one in which people generally feel able to participate meaningfully in their own self-government.*
18. A charter of rights is generally embraced by those who believe that such a document will redress at least many of the ills perceived to be suffered by minority groups, whether of race, creed or colour. However, many such issues lie beyond the scope of a charter of rights unless the charter extends into the very doubtful field of economic and social rights. *We respectfully submit that such issues are best addressed within a vibrant democracy in which citizens feel able to participate meaningfully in public deliberation about such issues, and in which the results of those deliberations are given effect in duly enacted legislation and government policy.*
19. In this context, we find highly remarkable the recent suggestion by the President of the Australian Human Rights Commission that the Commission, rather than the courts, be given a watching brief and be empowered to make reports to Parliament about cases where legislation could not be interpreted in a manner compatible with charter rights. *Granting this power to an even less democratic, less visible and less publicly accountable body as the Human Rights Commission would only make matters even worse.*
20. We note the argument that Australia should have a Charter of Rights since most other countries possess one. However, both in the United Kingdom and Canada -- where such Charters have been adopted relatively recently -- the

increase in litigation and contradictory court judgments would appear to strengthen our contention that the adoption of such a Charter will potentially erode freedom and increase the level of instability and uncertainty in our country. We further observe that the fact that most countries having such a Charter in no way lessens the truth that most countries have less real freedom than we have enjoyed in Australia up to the present time.

Issue 1: The conscience of the medical practitioner

21. We draw attention to recent legislation in Victoria placing medical practitioners under a legal obligation to refer patients seeking abortions to suitably qualified medical practitioners able to provide what is euphemistically called abortion ‘services’. We note that this enactment came into being under the Victorian *Charter of Rights and Responsibilities Act 2006*, and we express concern lest a national charter of rights fail in the same way to protect the capacity of medical practitioners to act on their consciences in declining to make such references. A national charter might also provide grounds upon which individuals may claim that they have a right to be referred to a medical practitioner willing to provide such services and that medical practitioners have a duty to do so. *We submit in the strongest possible terms that a medical practitioner should be free to act on his or her conscience without pressure or interference of any kind to refer patients to a practitioner willing to provide medical ‘services’ which the first mentioned practitioner regards as inherently immoral.*

Issue 2: Abortion

22. We note that the Victorian Charter of Rights and Responsibilities also contains an explicit provision which seeks to ensure that the charter will not be used in any way to resolve the issue of whether and in what circumstances abortions are legally permissible. We wish to affirm in the most emphatic terms that we believe that in every relevant sense human life begins at conception and that it is the most grave of injustices to extinguish that life save in circumstances where that is an unavoidable and unintended secondary consequence of the application of procedures necessary to preserve a mother’s life or, in the case of multiple pregnancy, necessary to preserve the life of another child (or children) *in utero*. *We would resist in the strongest terms any provision in a federal charter of rights which made it possible to argue that any expressed right (such as a right to privacy) entailed a specific legal right to procure an abortion in circumstances other than those just mentioned. We also express concern lest a federal charter of rights be enacted in which the lives of the unborn are hypocritically excluded from protection.*

Issue 3: Exemptions from antidiscrimination laws

23. We are aware of enquiries currently being undertaken in Victoria which are revisiting the question of the existence and scope of current exemptions enjoyed

by religious institutions and religiously motivated organisations from the general application of antidiscrimination laws. As a denomination of Christians, the Presbyterian Church of Australia strongly affirms the truth that all human beings are made in the image of God and that God is no respecter of persons, whether of race, professed religion, gender and so on, but that his mercy in Christ is offered to all, no matter who they are and no matter what they may have done. At the same time, however, we affirm that moral discernment is intrinsic to the practice of living a just and upright life, and we note that all human beings who profess to act justly cannot avoid the responsibility of moral discernment. In previous generations, the words discernment and discrimination were used interchangeably, but in latter times the word discrimination has been singled out to refer to what are deemed to be inappropriate and unjust forms of distinction-drawn between persons or particular behaviours. We have no quibble with the mere fact that a gap has developed between the way in which the two words have come to be used. ***We acknowledge that in many circumstances discrimination is unjust and inappropriate, but we also affirm (as with the vast bulk of people) that moral discernment is an unavoidable responsibility we have before God and each other.***

24. We are conscious that the critical issue here lies in the boundaries between appropriate moral discernment and inappropriate prejudice and discrimination. And we are conscious that, as a denomination of Christians, our judgements about those boundary lines differ from those of at least some others. We note, in this context, that the boundary lines that have been drawn within the antidiscrimination laws of the Commonwealth and the States are the result of political decisions which reflect the views of elected representatives who do not necessarily share the views of our denomination. Nonetheless, as taught by apostolic authority, we submit to the laws of our nation and recognise that those laws will not always draw the lines that we would consider most just and appropriate in the circumstances in which we find ourselves as a nation.
25. In this context, we express profound concern lest the National Human Rights Consultation recommend a charter of rights or the adoption of policies which would alter the balance currently struck in Australia's antidiscrimination laws, particularly in the form of the exemptions currently enjoyed by religious institutions and religiously motivated organisations under relevant federal and state enactments. ***We submit in the strongest possible terms that the existing exemptions should continue to apply, and where necessary be extended so as to apply, to religious institutions and religiously motivated organisations, by which we mean to include primary and secondary schools, tertiary colleges and universities, welfare organisations and all manner of other associations which have been formed to perform (or which in the view of their members have become organisations which exist in order to perform) functions or provide a group environment which their members regard as legitimately religious in nature, ethos or purpose.*** We are aware of those who would wish to curtail our

freedoms in this respect and we call on the National Human Rights Consultation to uphold our freedoms in this regard.

Issue 4: Religious vilification laws

26. We also express extreme concern about the existence and scope of religious vilification laws in several of the Australian states. In the first place, we do not believe that laws prohibiting certain types of speech are a prudent or appropriate way to try to prevent social disharmony, particularly in religious matters. Religious beliefs and practices are subjects that need to be the subject of open communication. In saying this, we do not of course approve of the use of language which incites violence, hatred or discrimination (in the sense described above). But we observe that *religious vilification laws, by the very nature of the kinds of communications to which they apply, are more likely to exacerbate than to minimise the existence of religious conflict*. The notorious *Catch the Fire Ministries* case in Victoria illustrates this very clearly.
27. We therefore submit that while there is a place for laws which make communications which incite violence or other illegal behaviour themselves unlawful, we strongly question those who would suggest that the ordinarily criminal laws relating to offences of conspiracy and incitement to engage in illegal behaviour are somehow insufficient for this purpose. At the very most, if there are to be *religious vilification laws, they ought to be limited to communications which have the intent of inciting violence or other illegal acts*, and should have all of the careful qualifications and protections which ordinarily apply to the prosecution and conviction of persons accused of criminal offences.

Issue 5: Evangelism and proselytisation

28. We use the terms ‘evangelism’ and ‘proselytisation’ not because we intend to imply a distinction in meaning but because both terms are frequently used to refer to speech and other communicative acts which are motivated by the desire to inform people about or persuade people to adhere to particular religious beliefs, the performance of particular religious activities and the conduct of a certain way of life. *We strongly believe that people should be free, within the confines of the ordinary criminal and civil law, to hold religious beliefs and to act on those beliefs in various ways, including through evangelism and proselytisation*. However we express doubt about whether the enactment of a charter of rights containing an abstract right to religious freedom is the most appropriate way to ensure that this is the case, especially in the light of the need of a charter of rights to express in very abstract terms certain grounds upon which the expressed rights maybe justifiably qualified or limited. What we particularly wish to stress is our interest in religious freedom, including the freedom to engage in religious activities and the conduct of everyday life in terms of one’s religious beliefs and convictions. We also wish to emphasise that this must extend to communication, again within the confines of the ordinary civil and criminal law, of one’s beliefs

with others, with a view to providing information and persuading others to live and believe likewise. Religious freedom must not be understood as a freedom to be immune from the lawful efforts of those who would seek to convert us to their belief system and religious way of life. We have probably all experienced persons from some particular religious group knocking on our doors offering information and wishing to engage in conversation about their religious beliefs. We see no reason at all why this practice should be the subject of special legal regulation – apart, as we have said, from the application of the ordinary civil and criminal law.

29. In this context, we again express concern lest the enactment of an abstract charter of rights provide grounds upon which certain expressed rights (again, perhaps, the right to privacy, or indeed, a certain interpretation of the right to religious freedom) be interpreted to give individuals the legal right to be ‘free’ of the otherwise lawful evangelistic efforts of others. We do affirm that those who evangelise or proselytise should indeed act in respectful and non-overbearing manner, but we do not think that such conduct should become the subject of special legal regulation, either through specific statutes, government policies or indirectly through a charter of rights.

The failure of the Victorian *Charter of Rights and Responsibilities Act 2006* (the *Charter*) to safeguard Freedom of Conscience, Thought and Religion

30. We now present material of a cautionary nature to demonstrate the way in which the Victorian Charter fails to safeguard Freedom of Conscience, Thought and Religion.
31. The expansion of anti-discrimination measures has led to the threat of restriction of the right to freedom of conscience, thought and religion. This threat has been avoided in Australia either by exempting religion from the provisions of anti-discrimination legislation (e.g. NSW) or by including exception clauses in equal opportunity legislation (e.g. Victoria). However, these exceptions and exemptions are now under threat. Nowhere is this threat more real than in Victoria where the recently enacted *Charter of Rights and Responsibilities Act 2006* has demonstrated the ability to curtail the Freedom of Conscience, Thought and Religion for Victorians.
32. Already the Victorian *Charter* has failed in the review² by the Scrutiny of Acts and Regulation Committee (SARC) of the Abortion Law Reform Act 2008, as noted in paragraph 21 above, to prevent the inclusion of a grossly inadequate clause to protect doctors with a conscientious objection to abortion. And again, in the recently published SARC options paper, “Exceptions and Exemptions to the Equal Opportunity Act 1995”,³ **the *Charter* is employed to produce a set of options that significantly reduce freedom of conscience, thought and religion.**

² http://www.parliament.vic.gov.au/sarc/Alert_Digests_08/08alt11body.htm

³ http://www.parliament.vic.gov.au/sarc/EOA_exempt_except/default.htm#options_paper

33. The question, especially made relevant in the context of an enquiry into the possibility of a federal Human Rights Bill, is: how is it that the Victorian *Charter* has actually reduced the freedom of conscience, thought and religion in Victoria?
34. Section 14: *Freedom of thought, conscience, religion and belief* of the Victorian *Charter* mirrors the positive guarantee of freedom of thought, conscience and religion found in the International Covenant on Civil and Political Rights (ICCPR), Article 18.
35. The problem immediately arises when Section 7 of the *Charter: Human Rights – what they are and when they may be limited* is taken into account. The limitation provisions in Section 7 bear little resemblance to ICCPR Article 18(3) in their practical and legal effect. Section 7(2) of the *Charter* 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—*
- (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.*
36. The first point to be noted is that, contrary to ICCPR Article 18(3),⁴ there is no boundary to the grounds on which freedom of religion may be restricted in the *Charter*.
37. In the second place, the *Charter* introduces the concept of *reasonable* limitations. ICCPR, Article 18(3) makes no reference to reasonable limitations. The subsequently enunciated Siracusa Principles⁵ define the conditions and grounds for permissible limitations and derogations enunciated in ICCPR in order to achieve an effective implementation of the rule of law.
38. Comparing Section 7(2) of the Victorian *Charter* with the Siracusa Principles clearly demonstrates Section 7(2) does not comply with Principle 1, Principle 3 (there is no mention of strict interpretation of limitations or the favouring of the right concerned in the *Charter*) or Principle 10 (the concept of ‘necessary’ is not

⁴ Article 18(3) states: ‘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.’

⁵ United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

explicitly present in the *Charter* and there is no requirement that the limitation answer a pressing public or social need, pursue a legitimate aim, etc).

39. In contrast, therefore, to the rigour imposed by ICCPR, Article 18 interpreted according to the Siracusa principles, the *Charter* enables the state to restrict rights in a far greater range of circumstances than would be allowed by ICCPR, Article 18, especially when read in conjunction with the Siracusa principles, thus *effectively restricting* rights that are supposedly guaranteed under the *Charter*.
40. A further point of divergence from ICCPR, Article 18(3) read in the light of the Siracusa principles is that (and this is also true of the parallel ACT *Charter*) much is left to judicial discretion in the interpretation and application of the limitation provisions.
41. An example of wide judicial discretion conferred in the determination of fundamental rights is found in Section 32(1) of the Victorian *Charter*, which stipulates that

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.
42. Among the statutory provisions that are to be interpreted this way obviously is the *Charter* itself, and that includes its constituent guarantees. Section 32(2) does not require the international standard, ICCPR, Article 18 to be the yardstick for interpretation. Rather, the Charter merely provides that:

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

The result is that the extent to which international law, and especially ICCPR, Article 18, may be considered in interpreting a human right is left to the discretion of the judge and indeed may not be considered at all.
43. In fact no clear guidelines are offered as to those matters to be taken into account when determining the scope of a human right. It is simply inappropriate for judges effectively to award fundamental freedoms to the individual or take them away according to such an ill-defined principle of what “is compatible with human rights”. This is especially true of freedom of religion, which is the subject of Australia’s pre-existing international commitments. The Victorian Government in effect gives its judiciary the power to trump ICCPR, Article 18.
44. The broadly defined method of interpretation in the Victorian charter impacts not simply the guaranteed rights in the charter but, by virtue of Section 32, everything else in the Victorian statute book. The charter enables the Supreme Court to make a declaration of incompatibility with a State law if an issue arises in a court proceeding whether a law is consistent with a human right (Sections 33 of

the *Charter*)⁶. A declaration of incompatibility under the Victorian charter of *itself* may not immediately affect the rights or obligations of a party to the litigation which gives rise to the declaration. But the body of law developed by judges through their interpretation of human rights will be the law applicable throughout the jurisdiction.

45. Disputes which call for judicial interpretation will not only be those asserting the straightforward denial of a human right but inevitably will arise incidentally whenever it suits a party to invoke a human rights issue in pursuit of their claim (whether or not it is a human rights claim). Human rights thus enter the arena of private litigation to be used as a sword as well as a shield as demonstrated by the way in which the Victorian *Racial and Religious Tolerance Act 2001* was found to operate in practice, as illustrated by the facts surrounding the *Catch the Fire* case.
46. To the extent that human rights should be protected by legislation, rights claims should only be directed against the state – and not against private parties. As soon as human rights can be asserted by private parties, whether individuals or religious groups, they will be. The concern here is that a ***culture of rights assertion will be generated on religious grounds when instead tolerance should be the touchstone.***
47. It is submitted that the level of judicial discretion and basic uncertainty in the interpretation of fundamental human rights is unacceptable, and as such forms a significant part of our misgivings concerning charters of rights.

The best guarantee for freedom of conscience, thought and religion.

48. We are deeply conscious that freedom of religion and the protection of the human dignity of those who belong to religious communities is not to be taken for granted. Indeed, we have observed, as enumerated above, freedom of religion being threatened and even restricted in Australia in recent times, coupled with an attitude of hostility towards religious belief, morality and practice evident in some sections of Australian society.
49. What we desire is that all religious organisations, including faith based schools and other organisations with a faith based mission or purpose, have the freedom of positive selection, i.e., the right to advertise for and select staff, whether teaching, professional or otherwise, who will own the beliefs, values and codes of conduct of that faith based school, organisation or community. Such freedom equally benefit those desiring the services of such faith based institutions.
50. Equally, we desire a guarantee for freedom of conscience in the provision of goods and services . It should be unlawful to discriminate against a person or engage in disciplinary action if that person refuses to provide a service or to perform other work that violates his or her conscience, or is inconsistent with his

⁶ Provision is also made for the scrutiny of proposed State laws, all intended to conform State laws to the judicial interpretation of human rights under section 32. The potential reach of that judicial interpretation is unfathomable.

or her religious beliefs. The same freedom of conscience should extend to faith based organisations.

51. Whilst it is tempting for us to recommend the Commonwealth Government's use of its external affairs power to make a law in favour of freedom of religion which strictly complies with ICCPR Articles 18(1), 18(2), 18(3), 18(4), 20, 25 and 27 (with the limitations of Article 18(3) defined according to the Siracusa Principles), we are loath to do so on account of our well justified concern (witness the Victorian *Charter*) that any domestic legislation will amplify the limitation provisions in such a way that restricts freedom of religion. We also remain concerned that even if such a domestic law should strictly comply with the UN framework, judicial creep will remain a real concern.
52. The alternative which we favour is for the Federal Government to amend the Human Rights and Equal Opportunity Commission Act 1986, to do two things. Firstly, it should include exemption provisions for individuals who rely on a religious belief or conscience to avoid performing an impugned service; and, secondly, remove any doubt as to the rights of religious institutions to recruit and/or appoint individuals who are fully committed to the teachings and doctrine of the institution.
53. By acting in such a manner, public recognition is given to the notion that religious persons and the values that they represent are welcome in the public debate as a valid and equal contribution in the shaping of our Australian cultural values. Religious beliefs and conscience are no mere passing fancy, they are lifelong commitments passed from one generation to the next.