



New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

RELIGIOUS FREEDOM REVIEW

14 February 2018

Contact: Dr Martin Bibby

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The Council for Civil Liberties (NSWCCL) thanks the Expert Panel for its invitation to make a submission to the Religious Freedom Review. We are grateful to the Expert Panel for the extension of time to 14 February 2018.

This submission is in the way of a statement of the NSWCCL's general views on the issue and areas we think are in need of attention. We regard it as a preliminary submission to your inquiry.

We had hoped to address issues that had been floated superficially during the recent marriage equality debates. However, we wish to engage with the substance of other views, not media reports of them. Unfortunately no submissions are currently available on the Review's website. We urge the Expert Panel to make these available as soon as possible to assist the general understanding of the range of views in the community and to facilitate informed and constructive discussion in this hugely important area.

There are four areas in which rights might be better dealt with in Australian law: freedom of speech, (for and against religions), freedom to practise, freedom from discrimination and protection against hate speech and incitement to violence.

I Human rights and Australia's obligations: International law.

Human rights are basic standards of treatment that must be recognised and respected if people are to live as persons, and to live lives fit for persons. They are based on the belief that all human beings have worth and dignity in view of their personhood. The foundation of that worth lies in the fact that they are rational, autonomous decision makers, most importantly, that they are beings that choose the basic values by which they will live, and make decisions based on those values.¹

It is here that the importance of protecting religion lies.

Australia is committed to respect and protect those rights by its adoption of numerous international treaties, especially the International Covenant on Civil and Political Rights (the *Covenant*) and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (the *Declaration*).

Relevant articles of the Covenant, the Declaration and the International Labour Organisation Discrimination (Employment and Occupation) Convention 1958 (ILO 111) are extracted in the Appendix.

II Australian Law—a summary.

¹ This is what makes us different from animals, what makes us subject to moral evaluation.

Given the external affairs power in placitum xxix of section 51, these provisions give all the power necessary to protect religious rights. But Australia has yet to fully incorporate those rights into domestic law.

Section 116 of the Australian constitution reads:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

This protection from Commonwealth laws imposing or prohibiting religious observance does not apply to state laws. It does inhibit Federal courts from interfering in religious matters.²

But whereas the Racial Discrimination Act 1975 prohibits racial hatred, defined as a public act/s likely to offend, insult, humiliate or intimidate on the basis of race, protection against religious hatred is more limited.

Under paragraph 11(1)9f) and section 20 of Australian Human Rights Commission Act, the Human Rights Commission (the Commission) can receive complaints concerning any human right listed in various international instruments including the Covenant and the Declaration.³ However, unlike the situation with complaints concerning sex, race or age discrimination, if the President of the Commission fails to achieve conciliation, persons complaining about discrimination on religious grounds do not have the option of going to the Federal Court or the Federal Magistrates Service.

With the exception of New South Wales, the states and territories have legislation dealing with discrimination on religious grounds. What is protected, however, varies a bit between the jurisdictions. Victoria has broader protections in its Charter of Human Rights and Responsibilities (sections 14 and 15), as does the Australian Capital Territory in Human Rights Act 2004 (sections 14 and 16).

The essential issue facing the Expert Panel is whether the power of the Commission to investigate complaints and attempt conciliation, combined with the states and territories anti-discrimination laws and the constitutional provisions are enough to protect human rights concerning religion.

III Four areas in which rights might be better dealt with in Australian law

A Freedom of thought and conscience—promulgating or rejecting a religion.

² See for instance Idelsohn & Idelsohn [2017] FamCA 398 (11 May 2017)

³ This expands the more limited powers provided in section 11.

Apart from the powers of the Commission, there is no protection for religious belief or speech incorporated into federal law; the constitutional provisions above protect religious observance only.

It is important that people are free to promulgate religious views, and to criticise them. This is true, first, for the well-known reasons given by John Stuart Mill in his essay *On Liberty*: in essence, that the truth is more likely to be found where there is free debate (“the marketplace of ideas”), and that the likelihood is that restrictions on speech will be likely to hide the truth and maintain false beliefs.

It is also true, because where religious beliefs are morally intolerable, the first line of defence is criticism.⁴

The right to assert religious propositions is also a right *not* to assert them. Children, for instance, should not be required (as they were in New South Wales schools for many years) to declare that they love God. Witnesses at court have for some time now been able to make a declaration rather than take an oath, and that is as it should be.

The wedding cake.

During the recent survey on same sex marriage, the issue was raised as to whether pastry cooks who reject the morality of same-sex marriage should be given exemption from anti-discrimination laws concerning sexual orientation, and permitted to refuse to bake cakes for celebrating a same-sex marriage.

Making a cake is not participating in the marriage ceremony. The cooks and decorators are not forced to act directly contrary to their religions. It might be argued, however, that it involves participating in a celebration of the recent marriage; making a statement about it. The decision of a judge of the Superior Court of California has just been reported to that effect.

"A wedding cake is not just a cake in a Free Speech analysis," wrote Superior Court Judge David Lampe in a decision this week. "It is an artistic expression by the person making it that is to be used traditionally as a centrepiece in the celebration of a marriage. There could not be a greater form of expressive conduct."

Sydney Morning Herald, Feb 8, 2018.

There are very few cases world-wide of this kind. CCL does not support the creation of an exemption from anti-discrimination law to cover them, on the ground of the general principle that hard cases make bad law. Instead, we propose that such cases be dealt with

⁴ It should be possible to ask, for example, what kind of god would require all the members of a nation to be killed, or homosexuals or witches, or would consign people to eternal torment. It should be possible to question interpretations of religious texts and to dispute the texts themselves.

by allowing persons to seek an exemption from anti-discrimination law from the Commission.

B Vilification.

Although verbal attacks on people because of their religions are different from racial attacks, in that people cannot change their physical attributes but can change their beliefs if they can be convinced they are mistaken, for those who believe in a religion, the values it incorporates are of the utmost importance in their choices. They are not easily abandoned.⁵

But, as the worst atrocities of the past and present have shown, religious intolerance easily becomes violent, and atrocities such as mass murders and wars follow. Moreover, religious intolerance easily becomes racial intolerance as well. There is reason for protecting people from hatred, while also protecting the right to the peaceable expression of opinion. There is reason to protect from incitement to violence, from vilification and from defamation. That is to say, the rights involved must be balanced.⁶

State and territory prohibitions on vilification have their own separate sets of exemptions to the laws that prohibit vilification. These exemptions are consistent across the states and territories. The three exemptions are:

- the conduct was a fair report of a public act
- the conduct would be covered by the defence of absolute privilege in a proceeding for defamation
- the conduct was done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest.

It is desirable if it is achievable that the laws in each state and territory be made the same, with New South Wales adding protection from discrimination on religious grounds and religious vilification in the same manner that other states do.

C Manifesting a religion—worship, observance, practice and teaching.

The Covenant is rightly cautious about the freedom to practise a religion. There is a spectrum of religious practice, from the human sacrifices of early Mesoamerica to the peaceful prayer of today's mainstream religions. (Along the way lie religious wars, psychological abuse, religious endorsement of rape in marriage, the subjection of women and rejection of divorce.) Like the Covenant, the Declaration also provides that 'religion or

⁵ In the past, and, regrettably, recently, many people have died rather than recant their religious principles and beliefs.

⁶ It is, regrettably, necessary to point out that balancing is not an arbitrary matter, nor a mere seat of the pants judgement. It requires careful argument.

belief 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—there is a need for balancing here.

On the other hand, an explicit law could strengthen the hands of those who wish to maintain a tolerant and inclusive society against those whose notion of Christianity is one of exclusivity, who believe that error has no rights.

It will be difficult to frame a law which permits, for instance, circumcision but prohibits other physical harm; which limits psychological harm while allowing preachers to warn of the perils of hell, and which precludes people from claiming that they are psychologically harmed by the mere assertion and practise of religious beliefs they do not accept. That is a further reason for including any law protecting the right to practise in a context in which the right is to be balanced with others.

It is desirable that there be protection in state and federal law of the freedom to practise a religion, provided the practice does not cause serious physical or psychological harm—preferably within a bill of rights.

D Discrimination.

People can be prevented from practising their religion by other means than legal restrictions. They may be refused permission to erect buildings suitable for worship; tradespeople may refuse their services in building them. They may be refused permission to practise in existing buildings. These kinds of matters are at present dealt with by the state and territory anti-discrimination laws.

This is the one area where religious adherence is widely protected in Australia.

Religious adherence is protected from discrimination under the Fair Work Act (Cmth.) 2009. The Commission is enabled to deal with complaints—though the option to take a case to the courts is not provided.

Discrimination in employment, education, access to premises, provision of goods, services or facilities, accommodation, clubs, and requests for information on the basis of *religious conviction* is prohibited in the ACT under the Discrimination Act 1991. *Religious belief or activity* are protected in the Northern Territory, Queensland and Tasmanian Anti-Discrimination Acts (1996, 1991 and 1998 respectively), as they are under the Victorian Equal Opportunity Act 2010, and the Western Australian Equal Opportunity Act 1984. *Religious affiliation* is also protected in Tasmania. *Religious appearance or dress* is protected in South Australia under the Equal Opportunity Act 1984, while *vilification on religious grounds* is prohibited in Victoria under the Racial and Religious Tolerance Act 2001. There are variations in what is covered, but all jurisdictions except New South Wales protect

from discrimination in employment, education, membership of clubs and the provision of services.

Continued protection from discrimination is of very high importance. If we are to have a society in which people feel they belong, it must be one in which their most fundamental beliefs and values are respected and accepted. If young people in particular are excluded from full participation, they will be ripe for extremist recruitment.

IV The relation between freedom of religion and other rights.

Passing legislation to protect the rights to religious (and anti-religious) speech, belief, adherence and practice without reference to other rights would be a mistake. Rights should inform our choices and limit their legality as a group, because they can come into conflict. We have already noted above a possible conflict between the right to free speech and the right not to be discriminated against. To privilege religious rights over others would provide the likelihood of serious abuses. It would also privilege religious rights over others, at least as important or more so.

The best way to achieve balance is to include them all in a single, comprehensive bill of rights entrenched within the Australian Constitution.

V The functions of a bill of rights.

A bill of rights is a statement of universal standards, standards against which the polity and practice of any society should be judged. It should serve to protect our fundamental rights and liberties, and those subordinate rights that follow from them, against intrusion by any of the three branches of government. It should codify our rights and freedoms in an accessible and comprehensive manner. It should ensure that our existing laws conform to those rights and liberties.⁷

On our preferred model, a constitutionally entrenched Charter of Rights and Freedoms enables the courts to find that a bill that has passed through the parliamentary process is incompatible with those rights, and to strike the legislation down. The supremacy of parliament is maintained, because the parliament can then pass the legislation again, explicitly overriding the bill of rights.

There are a number of benefits of this arrangement:

- It slows down hasty legislation, allowing more time for mature consideration and for comment both by legislators and the public;
- it provides an accessible and comprehensive set of rights against which proposed legislation is judged;
- the prestige of the judges gives weight to the judgements that they make, putting pressure on the legislators to further justify their intrusions on rights;

⁷ It might also provide a basis for judging the legitimacy of values presented as “Australian”.

the process or over-ruling the Bill of Rights is very public, meaning that lawmakers are reluctant to pursue rights intrusions; the legal acumen of the judges complements the practical knowledge of the politicians.

Australia is the only democratic country in the Western world that does not have a national bill of rights. Two Australian jurisdictions, Victoria and the ACT, each have one. It is time we had a national one.

However, if the Expert Panel is moved to recommend the adoption of legislation to protect religious freedom in a separate act of parliament, it is important that freedom of speech and belief, for and against religious beliefs, are protected as well as religious practice, that anti-discrimination legislation is maintained, and that while religious officials are not required to perform activities that are contrary to their beliefs, other exemptions are left to the Human Rights Commission to determine.

The forms below provide models.

VI Relevant sections of Australian bills of rights.

The Victorian Charter of Human Rights and Responsibilities

Section 14 Freedom of thought, conscience, religion and belief

(1) Every person has the right to freedom of thought, conscience, religion and belief, including—

(a) the freedom to have or to adopt a religion or belief of his or her choice; and

(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Section 15 Freedom of expression:

(1) Every person has the right to hold an opinion without interference.

(2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—

(a) orally; or

(b) in writing; or

(c) in print; or

(d) by way of art; or

(e) in another medium chosen by him or her.

(3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—

(a) to respect the rights and reputation of other persons: or

(b) for the protection of national security, public order, public health or public morality.

The ACT Human Rights Act 2004

Section 14 Freedom of thought, conscience, religion and belief:

(1) Everyone has the right to freedom of thought, conscience and religion. This right includes—

(a) the freedom to have or to adopt a religion or belief of his or her choice; and

(b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.

(2) No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Section 16 Freedom of expression

(1) Everyone has the right to hold opinions without interference.

(2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

VII Balancing principles.

This standard or a similar account of balancing should be applied to rights within a bill of rights, to determine their implications where the rights conflict.

i. Better reasons can be given for acting on the overriding norm than on the infringed norm.

ii. The moral objective justifying the infringement must have a realistic prospect of achievement.

iii. The infringement is necessary in that no morally preferable alternative actions can be substituted.

iv. The infringement must be the least possible infringement, commensurate with achieving

the primary good of the action.

v. The agent must seek to minimize any negative effects of the infringement.

vi. The agent must act impartially in regard to all affected parties; that is, the agent's decision must not be influenced by morally irrelevant information about any party.⁸

VIII Recommendations

Recommendation 1: The Expert Panel should recommend the incorporation of rights to speak about and practice religion within a bill of rights.

In such a bill, rights of free speech should include the right not to speak, and to speak against a religion, and should be explicitly balanced against prohibitions on incitement to violence and hate speech and defamation. The right to practise religion should be balanced by protections against significant physical and serious psychological harm.

The bill of rights might begin as an ordinary act of parliament, but the intention would be that, like the Canadian process, it would eventually be entrenched in the Constitution. Such a bill should enable the courts to find that a bill that has passed through the parliamentary process is incompatible with those rights, and to strike the legislation down. The supremacy of parliament should be maintained, in that the parliament should be able to then pass the legislation again, explicitly overriding the bill of rights.

Recommendation 2: If the Expert Panel declines to support a full bill of rights, it should:

a. recommend protecting religious and anti-religious speech and practice along the same lines, with explicit reference to other rights, so that balancing can suit the application of the laws to situations;

b. recommend that state, territory and federal laws on discrimination on religious grounds be made the same in each jurisdiction;

c. recommend that conflicts between the anti-discrimination and free speech laws (such as wedding cake cases) be determined on a case by case basis by the Human Rights Commission;

d. recommend the protection in state and federal law of the freedom to practise a religion, provided the practise does not cause serious physical or psychological harm;

e. recommend that laws protecting against vilification on religious grounds be enacted, parallel to the laws on racial vilification, with the same exceptions.

⁸ Tom L Beauchamp and James F. Childres, Principles of Biomedical Ethics, fifth edition, New York, OUP 2001.

This submission was prepared by Dr Martin Bibby on behalf of the New South Wales Council for Civil Liberties. We hope it is of assistance to the Expert Panel.

Yours sincerely,

A handwritten signature in cursive script that reads "Therese Cochrane".

Therese Cochrane
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APPENDIX

The relevant provisions of the **International Covenant on Civil and Political Rights (the Covenant)** read:

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject 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.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20 (2):

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 26, in part:

the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as...religion, political or other opinion....

And article 27:

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.

The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, relevantly noting inter alia

that the disregard and infringement of human rights and fundamental freedoms, in particular of the right to freedom of thought, conscience, religion or whatever belief, have brought, directly or indirectly, wars and great suffering to mankind, especially where they serve as a means of foreign interference in the internal affairs of other States and amount to kindling hatred between peoples and nations

and that

religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed,

provides that:

Article 1

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

3. Freedom to manifest one's religion or belief 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.

Article 2

1. No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief.
2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

Article 3

Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.

Article 4

1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.
2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter.

Article 5

1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up.
2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle.
3. The child shall be protected from any form of discrimination on the ground of religion or belief. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, respect for freedom of religion or belief of others, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.
4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle.
5. Practices of a religion or belief in which a child is brought up must not be injurious to his physical or mental health or to his full development, taking into account article 1, paragraph 3, of the present Declaration.

Article 6

In accordance with article 1 of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia , the following freedoms:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (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;
- (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.

Article 7

The rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice.

Article 8

Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.

Australia also has obligations under the **International Labour Organisation Discrimination (Employment and Occupation) Convention 1958 (ILO 111)**. It reads, in part:

1. (1)

For the purpose of this Convention the term *discrimination* includes-

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

1. (2)

based on the inherent requirements thereof shall not be deemed to be discrimination.

1. (3) For the purpose of this Convention the terms **employment** and **occupation** include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.

Article 2

2. Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

3. [in part] Each Member for which this Convention is in force undertakes, by methods appropriate to national conditions and practice--
(a) to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy;
(b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy.