

35/08 Human Rights Framework for Australia

(A supplementary note.)

1. On 19 October 2009, the Synod received a report from the Standing Committee about the Standing Committee's response to Synod resolution 35/08. A copy of this report can be found at pages [138 to 160] of the Standing Committee's Report to Synod.
2. As indicated in that report, the Standing Committee appointed an ad hoc committee comprising Bishop Robert Forsyth, Dr Karin Sowada, Mr Robert Tong and Mr Robert Wicks to undertake consultation with the Federal Government in relation to the question of human rights by –
 - (a) expressing our support for the protection of human rights,
 - (b) expressing our opposition to a Charter of Rights, and
 - (c) undertaking such other education and lobbying activities on behalf of the Standing Committee as may be appropriate.
3. As part of the committee's on-going activities, Mr Robert Wicks attended a meeting, convened by Jim Wallace of the Australian Christian Lobby, of denominational representatives and other stakeholders in Sydney on 12 October 2009. The purpose of the meeting was twofold, namely –
 - (a) to discuss generally the report of the National Human Rights Consultation Committee (NHRC) which was provided to the Attorney-General on 30 September 2009, and
 - (b) to consider a proposed national agenda for religious freedom in response to the NHRC report and related matters including the Australian Human Rights Commission's *Freedom of Religion and Belief Project*.
4. A copy of a paper by Professor Parkinson on a National Agenda for Religious Freedom is attached. The paper was finalised following input from those who attended the meeting.
5. In summary, the paper sets out the basic religious freedoms that should be protected by the Federal Government regardless of the way in which it chooses to protect human rights and, in particular, regardless of whether it seeks to introduce a Federal Human Rights Act.

6. The paper has been prepared with the initial aim of having a broad range of Christian and other religious groups express their support for the principles concerning religious freedom set out in the paper. The longer term aim is to seek assurances from both the Federal Government and the Opposition about the protection of religious freedom in Australia based on these principles.

For and on behalf of the Committee

ROBERT WICKS
Diocesan Secretary

26 October 2009

Attachment

A National Agenda for Religious Freedom

EXECUTIVE SUMMARY

People of faith have numerous concerns about threats to religious freedom in Australia, both at state and federal levels, deriving from an attitude of hostility towards religious belief, morals and practice among some in the Australian population. Freedom of religion is a fundamental human right. It is guaranteed by the International Covenant on Civil and Political Rights and other international instruments in the clearest and strongest terms.

Religious freedom can be further defined by the following five basic freedoms. These freedoms are:

- Freedom to manifest a religion through religious observance and practice
- Freedom to appoint people of faith to organizations run by faith communities
- Freedom to teach and uphold moral standards within faith communities
- Freedom of conscience to discriminate between right and wrong
- Freedom to teach and evangelise.

The federal Government should protect religious freedom by:

1. Establishing a national policy on religious freedom consistent with the principles outlined in this paper.
2. Taking whatever action is appropriate, including legislation, to ensure that these freedoms are protected in Australian society at both federal and state levels.
3. Establishing a means of monitoring compliance with government policy.
4. If the Government decides to enact a Human Rights Act, ensuring that religious freedom, as articulated in this paper, is properly protected in accordance with the requirements of the United Nations' declarations and covenants, in particular the ICCPR.

Introduction

Australia is now a multicultural society in which only a minority of people are actively involved in religious worship and practice of any kind.

The changes in the nature of Australian society necessitate a new examination of how the country should fulfil its international obligation to protect religious freedom in the context of a multicultural society. Freedoms that were once taken for granted in Australian life can be taken for granted no longer. Indeed, people of faith have numerous concerns about threats to religious freedom in Australia, both at state and federal levels, resulting from an attitude of hostility towards religious belief, morals and practice by some elements in the growing secular community. There are also issues about potential conflicts between freedom of religion and other valid principles of modern society such as freedom from discrimination.

The purpose of this paper is to propose some principles that ought to inform the Government's approach to issues of religious freedom and that are derived from internationally recognized standards of human rights law. The paper suggests how different rights should be integrated in a society that takes seriously the principle of religious freedom. It examines five particular freedoms that are implicit in freedom of religion and ought to be protected in Australian law. Finally, it proposes practical steps that the federal Government could take to protect those freedoms. All religions in Australia would benefit from the protection of religious freedom.

Article 18 of the International Covenant on Civil and Political Rights: scope of religious freedom and its limitations

Article 18 of the ICCPR provides:

- “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.”

Whilst referring also to freedom of conscience and thought, the focus of Article 18 is on protecting the human rights of people who hold religious beliefs. This recognises the importance of religious belief to adherents, the close linkage between religion and identity, and the importance of religion in the life of societies. Freedom of religion is one of the very few non-derogable human rights in international law. Article 4(2) of the ICCPR provides that governments may not dispense with it even in a time of national emergency which threatens the life of the nation. The meaning of Article 18 is further explained in the Human Rights Committee's General Comment 22, and in the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights.

Religious belief and practice

Article 18 goes far beyond freedom of belief and worship. The rights protected by that article also include the right of a person to manifest his religion or belief in "observance, practice and teaching". This is because religion does not only involve belief in the supernatural. As the High Court of Australia noted in *The Church of the New Faith v The Commissioner of Pay-roll Tax (Victoria)* (1983) 154 CLR 120, religion also impacts upon, and makes demands upon, the way we should live in the world.

There are many areas in which the major religions are united when it comes to those codes of conduct. Perhaps the greatest common ground is in relation to marriage and the family. The major monotheistic religions also share similar beliefs about the wrongfulness of sex before or outside marriage, and, for the most part, in relation to homosexual practice.

Religious belief is usually expressed communally; so part of religious freedom is the right and ability to congregate in groups in places such as churches, synagogues and mosques, in order to worship, to pray and to learn together. The communal expression of religious faith is protected not only by Article 18 but by 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."

A law which protects religious freedom must therefore protect the rights of religious people to congregate and to organise as a group. Beliefs and other faith-based criteria inevitably define the group by categories of inclusion and exclusion. The right to congregate, to organise as a group and to put group values into practice is not only protected by Article 18 but also by Article 19 (freedom of expression) and Article 22 (freedom of association).

Restrictions on religious freedom

The test that the ICCPR places on restrictions on religious freedom is a very strict one. It requires that restrictions may only be imposed on outward manifestation of religion or belief and that any such restriction be *necessary*. Being 'necessary' is something quite different from being merely 'desirable' or 'a good idea'. It ought to be demonstrated (and by real evidence, not merely assertion) that without this restraint on religious freedom, damage would be caused to public safety, order, health, or morals or there would be a violation of the *fundamental* rights and freedoms of others. No other limitation provision in the ICCPR is qualified with the term 'fundamental'. Those 'rights and freedoms of others' that are to limit the manifestation of religion must not only be those recognized by the ICCPR but they must be 'fundamental'.

Article 18 of the ICCPR therefore requires the Australian Government to ensure that there is an extremely generous zone of protection associated with religious belief, worship, observance, practice and teaching. This recognizes the very important part that religious belief should be allowed to play in the lives of a large number of Australians, and the nature of freedom of religion as one of the most fundamental human rights.

Laws that have the intention or effect of restricting religious freedom must not only have that legitimate aim but should also be carefully drafted so as to go no further than 'necessary' to achieve the protective purpose, and should adopt the least restrictive means for achieving that purpose.

Five fundamental freedoms

Freedom of religion and conscience, as upheld in the ICCPR and other international instruments, can be defined at least by the following five basic freedoms which ought to exist in any society that honestly respects freedom of religion. All of these freedoms (and more could be included) have been respected in Australia until recently, but they are under challenge from an extreme and dogmatic secularism which demonstrates little respect for religious faith and which sometimes actively opposes it. These freedoms are:

- Freedom to manifest a religion through religious observance and practice
- Freedom to appoint people of faith to organizations run by faith communities
- Freedom to teach and uphold moral standards within faith communities
- Freedom of conscience to discriminate between right and wrong

- Freedom to teach and evangelise

Freedom to manifest a religion through religious observance and practice

Article 18 guarantees the freedom to have or adopt a religion or belief of a person's choice and to manifest that religion. Manifesting a religion means more than practising it in private. Even in public it goes far beyond meeting for worship. For some faiths, it also involves forms of dress or symbols that are significant to an adherent for religious reasons. Manifesting a religion may also involve observing certain days as holy, when no work should be done. For the Orthodox Jew or the Seventh Day Adventist, Saturday is a special day of that kind. In other faiths, other days are special.

Respecting freedom of religion means accommodating these faith-based observances, as far as possible. That may not be easy to do in relation to school uniforms, workplace uniforms or business attire; but usually, reasonable accommodations can be found with little effort, just as employers and others are often required to accommodate working mothers or people with disabilities. Similar accommodations can and should be made, for example, in terms of rostering, for those who have religious objections to working on certain days.

Freedom to appoint people of faith to organizations run by faith communities

Religious freedom includes the right to form religious organisations and to operate these according to religious values. The right to do so is protected by Article 18. Many such organisations already exist. Faith communities run schools, hospitals and welfare organisations, as well as places of worship. However, the operation of anti-discrimination laws in some jurisdictions may interfere with that freedom. Religious communities do not need general exemption from anti-discrimination laws. They do, however, need the freedom of positive selection – that is, the right to advertise for and select staff (whether professional staff or otherwise) who will honour the beliefs, values and codes of conduct of the faith-based community. They also need to be able to make adherence to certain beliefs and codes of conduct a condition for continuing employment. This is consistent with the ICCPR's concept of discrimination - that not every differentiation of treatment constitutes discrimination if the criteria for such differentiation are reasonable and objective, and if the aim is to achieve a purpose which is legitimate under the ICCPR.

The right of positive selection is an issue for many faith-based organisations, including religious schools. Such schools have long been a part of religious expression. Indeed, across the western world, many of the oldest and most esteemed schools and universities have had a religious foundation. Many private schools in Australia continue

to emphasise the importance of that religious foundation as part of the *raison d'être* of the school.

In Australia, there are not only schools established on the basis of the Christian faith but also Jewish and Moslem schools and schools associated with other faiths. Article 18(4) of the ICCPR specifically protects the right of parents "to ensure the religious and moral education of their children in conformity with their own convictions." In similar vein, Article 5(2) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (1981) provides that: "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". Permitting faith-based schools and being able to teach scripture in schools are means of giving effect to these human rights. It is a surprising feature of the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the Human Rights Act 2004 (ACT) that neither gives any acknowledgment to Article 18(4).

These faith-based schools vary in the extent to which they give importance to their religious foundations. Some of them do not insist upon adherence to the religious faith of the school as a condition for a teaching appointment. However, there are other schools which have been established to provide an explicitly religious environment for children and young people. Central to the notion of such a faith-based school is that there is much more to a religious education than merely having lessons on the beliefs and doctrines of the faith – that is available in public schools as well. The faith-based school is a religious community and the faith provides a context and a focal point for the children's education. In a religious school, through the teaching and example of staff members who adhere to the religion, the codes of conduct that follow from the religious beliefs are taught and practised. The pastoral care provided by the school is also an expression of the faith and moral values of the staff.

Because faith-based schools are religious communities, they need to have the right at least to employ staff (in both teaching and non-teaching roles) who adhere to the faith, whether or not all such schools would wish to exercise that right. They also need to be able to insist on adherence to the codes of conduct that they reasonably believe are required by the faith.

Similar issues arise for many faith-based charitable and humanitarian organizations, including hospitals and social welfare organizations. Many of these organizations are not only faith-based, but faith-motivated. Around the world, they do an enormous amount in practical terms to promote the human rights, dignity and well-being of the world's poor and disadvantaged. Their staff members dedicate their lives to the practical advancement of the poor and needy. Destroying the faith-based character of these organizations so that

they no longer have a reason for existence may well diminish the human rights of those they serve.

For these reasons, all religious organizations, or organizations that have a faith-based mission or purpose, should have the right of positive selection in the employment of staff.

Freedom to teach and uphold moral standards within faith communities

In the great monotheistic religions at least, believers are not only instructed in how to worship but also in moral norms. These moral standards have long been the basis for shared community values in Australia; but in recent decades, there has been a sharp divergence between community standards and the moral teaching of most religions. This is particularly so in the areas of abortion, euthanasia, human sexuality and family life.

There is a great focus in western countries at the moment on issues about homosexual practice. There are differences between religious groups on this issue. Promoting human rights involves, for example, not only advancing the rights of people of homosexual orientation (especially to be free from discrimination), but also respecting the rights of those who adopt moral positions on sexual practices (both homosexual and heterosexual), based on the teachings of their faith. While the issue of homosexual practice has been in the forefront of public consciousness in recent years, it should not be forgotten that people of faith teach a disciplined sexual ethic in relation to heterosexual behaviour as well.

There is a need to respect the different rights and positions taken on all sides of the issue on human sexuality. Whatever the values in the broader community, religious freedom requires that people of faith be able to uphold their values in their faith communities, including religious schools, without this constituting unlawful discrimination.

One application of the right to uphold moral standards within faith-based communities is that it has to be within the power of the leadership of that community to place boundaries around acceptance of people to share in the membership and privileges of that religious group. For example, a Church needs the freedom to refuse to baptise a person, or the infant child of someone, who does not adhere to the teachings of the faith, since baptism is a marker of acceptance into membership of the Church. Similarly, a Church needs to be able to refuse communion to someone who does not accept the teachings of the Church concerned. There are no doubt similar parallels in other faiths where religious leaders need to say who is, and is not, entitled to share in the membership and privileges of the religious community.

Freedom of conscience to discriminate between right and wrong

Freedom of conscience, in distinguishing between right and wrong according to religiously based moral codes, is also critical to freedom

of religion. It is not legitimate for the state to interfere, or allow interference by others, with this freedom in any manner whatsoever. It goes to the heart of the freedom to choose in favour of a particular belief system and be free from coercion in such matters. There are not many issues on which freedom of conscience is essential, but there are a few, and a society which respects human rights must honour and protect the freedom of conscience of dissenters from the mainstream on moral and ethical issues.

One application of this is that it should be unlawful to discriminate against a person or to engage in disciplinary action if that person refuses to provide a service or to perform other work that reasonably violates his or her conscience, or is inconsistent with his or her religious beliefs. Most civilized nations have accommodated conscientious objection to military service. However, in Australia many doctors face adverse consequences for refusing to make referrals for abortions against their conscience.

Freedom of conscience extends to religious organizations, including those receiving Government funding. This means that generally such organisations ought to be able to refuse a service on the basis of conscience, unless the service is not reasonably available through other providers for whom there are no inhibitions of conscience. If religious organisations were to be unreasonably exposed to legal action for exercising their freedom of conscience, this would increase the likelihood that such organisations, which are major providers of social services in Australia, would withdraw from the provision of certain social services.

Freedom to teach and evangelise

Freedom to teach is guaranteed by Article 18 of the ICCPR. Allowing scripture classes in state schools is one positive way in which governments give positive support to this right.

Freedom to teach includes the freedom to make truth claims in the free market of ideas. Religions of the world make claims to know and teach absolute truth about man's nature and place in the universe. Believing in the truth of one's religion necessarily means that on some matters, one believes others to be mistaken to the extent that their beliefs are inconsistent. While different religions have much in common, and much that unites them, there are points of difference on which they cannot agree. It follows that teaching about the faith may involve pointing out areas of difference with other religions and declaring them to be wrong in relation to those matters.

That does not mean at all that religions are intolerant. One can say that another is mistaken while defending to the utmost his or her right to believe, practise and profess those beliefs. One can also respect the integrity of those who hold to beliefs with which one disagrees. Disagreement, even vigorous debate, is a normal part of life in any free

society and is one of the markers of its vitality and capacity for growth and change. People disagree about politics, sport, the arts, the economy, the environment and a myriad of other things. Sometimes people are offended by the views of others. Disagreement is not a problem for a society, and disagreement on religious matters ought to be no exception. Disagreements only become a problem for a community when they threaten public safety or order. This is a very rare circumstance in Australia, and laws should not inhibit religious freedom because of the merest possibility that there could be some risk to public safety or order from a person's vigorous reactions to the expression of an opposing viewpoint. Restrictions on religious freedom have to be 'necessary', according to the ICCPR. The liberty to make rival truth claims in the free market of ideas is what makes for a free society.

Laws that prohibit vilification or incitement to hatred can justifiably be imposed in tightly defined circumstances; however, they should be very carefully drafted to ensure that they do not have a chilling effect on freedom of speech in religious or moral matters even where the exercise of that freedom causes offence to others who have conflicting beliefs or moral values. Anti-vilification laws should not go beyond Article 20(2) of the ICCPR and should at the very least require an advocacy of hatred that constitutes incitement to discrimination, hostility or violence before speech is regarded as unlawful, consistent with the ICCPR. It should not be possible to litigate such claims privately (since this only fuels intolerance); it should be a criminal public order offence requiring proof of intent to incite, possibly requiring the Attorney-General's consent for prosecution. Freedom of speech of people of faith should not be singled out for special restriction by legislatures.

Freedom of religion involves freedom to evangelise. Religious expression, for many faiths, involves communicating about the faith. Indeed, it may be part of what it means to practise one's religion. Religious conviction is not fixed and immutable. Many people who grow up without an active faith come to a strong religious conviction in their adult years. Others who grow up with a strong faith lose it. Others still convert to a religion in which they have not been brought up at all. Freedom of speech on religious matters ought to be protected to a higher standard than other kinds of freedom of speech in Australian society. This is required by the ICCPR, since evangelism falls within Article 18, and is therefore accorded a higher standard of protection than freedom of expression under Article 19, which may be restricted in a broader range of circumstances.

Four practical steps

How could the Federal Government advance the National Agenda for Religious Freedom? We propose four practical steps.

1. Establish a national policy on religious freedom consistent with the principles outlined in this paper.
2. Take whatever action is appropriate, including legislation, to ensure that these freedoms are protected in Australian society at both federal and state levels.
3. Establish a means of monitoring compliance with Government policy.
4. If the Government decides to enact a Human Rights Act, ensure that religious freedom, as articulated in this paper, is properly protected in accordance with the requirements of international human rights law, in particular the ICCPR.

1. *A national policy on religious freedom*

The Government has never had a national policy on religious freedom before, perhaps because it has never needed one. Given the pressures on religious freedom across the country, there is now a need for the federal Government to articulate clearly in terms of domestic policy how it will adhere to one of the most fundamental rights enshrined in the UN Declaration on Human Rights and the ICCPR.

A formal statement of policy has the benefit of acting as a guide to government departments and can be used as one benchmark against which to evaluate the benefits and detriments associated with particular legislation or governmental initiatives. A model for this was the way in which the National Agenda for a Multicultural Australia, promulgated in 1989, guided federal Government policy in the Hawke-Keating governments.

A bipartisan policy on religious freedom is not essential; but it would help to ease tensions within the Australian community on these issues, and prevent perceived threats to religious freedom causing unnecessary anxiety among law-abiding citizens.

2. *Taking appropriate action to ensure these freedoms are protected*

There are various ways in which a national agenda on religious freedom could be implemented. It could, for example, be implemented through specific legislation such as clarifying the effect of employment laws in relation to appointment of staff to faith-based organisations; it could inform conditions for government funding of faith-based organisations in circumstances where the organisation is not being funded to deliver a service on behalf of the Commonwealth of Australia exclusively. It could form part of the content of statements of Australian values to be used in schools and in other educational settings.

While these are important actions to take at the federal level, many of the most significant debates about religious freedom occur at the State level – as has been evidenced most recently by the debate concerning exemptions from the operation of anti-discrimination provisions in Victoria. There has been a tendency in recent years for non-discrimination to be overused as a tool to address all human rights issues. Principles of non-discrimination are not to be used absolutely, but are to be used proportionately. Anti-discrimination laws are fundamentally meant to support human rights, not undermine them.

The federal Government, under its external affairs power and with the responsibility to provide national leadership in giving effect to Australia's international human rights obligations, could helpfully intervene in this area without taking over any role from the States and Territories. It could do this, for example, by enacting a federal law that affects the operation of laws in the States and Territories only to the extent that, intentionally or otherwise, those laws impinge on one of the five constituent freedoms of religion which the nation ought to recognise and protect. That would require state legislation to be read down in such a way that it is not interpreted as interfering with a fundamental religious freedom.

3. *Establish a means of monitoring compliance*

It is not enough just to have a policy; there has to be monitoring of that policy to ensure that it is not merely a window-dressing document. The United Nations has recognised the international importance of religious freedom by establishing a Special Rapporteur to monitor consistency with the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief.

In the domestic Australian context, a parliamentary committee, a unit within the Department of Prime Minister and Cabinet, a designated office-holder within the Australian Human Rights Commission or a Standing Committee of federal and state Government ministers (such as the Standing Committee of Attorneys-General) could be the means by which compliance with government policy on religious freedom is monitored on a regular basis. An annual report to Parliament by the Attorney-General or other designated government minister is another means of reporting on compliance.

4. *Ensure religious freedom is protected in any Human Rights Act*

The issue of whether Australia should have a Human Rights Act to give effect to its commitment to human rights remains controversial. Whatever decision the Government makes on this issue, if there is to be something like a Human Rights Act, then it ought to provide proper protections for religious freedom, and religious organisations should be properly consulted in the drafting of any such Bill.

One of the surprising features of the National Human Rights Consultation Report is its failure to recommend that any such legislation should give proper effect to Article 18 of the ICCPR. All of Article 18 is made non-derogable by Article 4(2) of the ICCPR, not merely the right to freedom from coercion in relation to religious belief. Certainly, Article 18(3) of the ICCPR provides that freedom to manifest one's religion or beliefs may be subject to limitations that are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. However, Article 18(3) is a much narrower basis for limitation of freedom of religion than is proposed by the Committee, which based its proposed limitation provision on the Victorian legislation.

The submissions to the National Human Rights Consultation from the major churches expressed significant concern about the failure to properly implement Article 18 of the ICCPR in the Victorian Charter of Human Rights and Responsibilities Act 2006. Even those church bodies which were in favour of a Charter of Rights, such as the Standing Committee of the Anglican General Synod (with qualifications) and the National Assembly of the Uniting Church, specifically indicated that the religious freedom provisions should give effect to Article 18. Whatever decision the Government makes on a Human Rights Act, the opposition which already exists among many Churches to a Human Rights Act would only increase unless such an Act adheres closely to the requirements of the United Nations declarations and covenants in protecting freedom of religion.

Conclusion

The ICCPR requires that religion should, in some respects at least, be given a privileged and protected status in the law. Australian law should give effect to the specific protections contained in the ICCPR for religious belief, worship, observance, practice and teaching. That involves giving full recognition to Article 18, supported by other ICCPR obligations such as Article 2(1) and Article 27. To do so is to recognize and respect the importance of religion in the lives of many Australians.

Prof. Patrick Parkinson AM

October 2009