

HUMAN RIGHTS FROM A RELIGIOUS VIEWPOINT  
(with particular reference to religious liberty)

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## I. Introduction

This paper takes up the story of the involvement of religious groups in the struggle for international recognition of human rights and fundamental freedoms from the end of the second World War. I realise that my adoption of this starting point means that I do not deal with one of the most shameful events in history. I refer to the silence of the world community, including the great religions, to rally to the victims of the holocaust. Beyond referring to it in this way I leave it alone simply because I do not have readily available the material that would enable me to deal with it adequately. I suppose one can seek to explain it in terms of the exigencies of war and the inhumanity that war breeds.

But the dreadful silence through those fateful years is all the more extraordinary when one recalls President Roosevelt's "Four Freedoms" speech delivered on 6 January 1941. This speech supplied significant inspiration to those who worked to establish the United Nations Organisation and to articulate its goals. I recall the key part of that speech:

"We look forward to a world founded on four essential human freedoms. The first is freedom of speech and expression - everywhere in the world. The second is freedom of every person to worship God in his own way - everywhere in the world. The third is freedom from want - which, translated into world terms, means economic understandings which will secure to every nation a healthy, peaceful life for its inhabitants - everywhere in the world. The fourth is freedom from fear - which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbour - anywhere in the world."

## II. United Nations Charter

The Charter of the United Nations was adopted at a conference in San Francisco in 1945. A draft of the Charter had been formulated at an earlier conference in Dumbarton Oaks. The draft was deficient in its expression of a concern for human rights. Intensive lobbying took place, during the San Francisco conference, by a widely representative group led by Dr O. Frederick Nolde, Director of the Churches' Commission on International Affairs (CCIA) and Judge Joseph Proskauer of the American Jewish Committee.

Their efforts succeeded. The preamble to the Charter expresses determination to "re-affirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small". Article 1, Section 3 recites that one of the chief purposes of the organisation shall be "to achieve international co-operation ... in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion". Furthermore, Article 68 of the Charter was enlarged to require the Economic and Social Council to establish a permanent Commission on Human Rights to promote respect for, and observance of, human rights and fundamental freedoms. This was a vital achievement.

There can be no doubt that an international religious influence played a determining part in achieving these more extensive provisions. But notwithstanding the achievements of the Charter - particularly in outlawing discrimination by reason of race, sex, language or religion and in the creation of the Commission - it left unanswered two important questions. There was no definition of human rights and freedoms and there was no description of the means by which the objectives of the Charter were to be pursued. The Human Rights Commission was the body which became responsible for proposing answers to these questions.

### III. The Universal Declaration

The meeting of the General Assembly in Paris from September to December 1948 became the target date for submission of a document to be known as the Universal Declaration of Human Rights. Its adoption on 10 December 1948 was preceded by sustained diplomatic activity by churches and other groups around the world. Both as a consultant to the Commission and in contacts with Assembly delegates, Dr Nolde was indefatigable in representing the concerns of religious groups. As the drafting progressed, he constantly emphasised the principle that governments could not grant human rights, but could only recognise the human rights which human beings, by virtue of their being and destiny, already possessed. The principle is enshrined in the first preamble to the Declaration, which reads "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ..."

It was timely that the first Assembly of the World Council of Churches should be held in Amsterdam in August, 1948. The coming General Assembly of the UN was very much on the agenda. The member churches were urged to support every endeavour to secure within an international bill of rights adequate safeguards for freedom of religion and conscience, for freedom from arbitrary arrest, "as well as all those other rights which the true freedom of man (sic) requires" - including the fuller realisation of human freedom through social legislation. In another resolution, the Assembly expressed the opinion that a mere declaration, although valuable as setting a common standard of achievement for all peoples and all nations, was nevertheless inadequate. An enforceable international bill of rights was essential.

A good deal of the debate in the General Assembly focussed on the freedom of religion clause. In particular, there was a concerted move to delete from the draft a reference to "freedom to change one's religion or belief", Dr Nolde and others regarded the retention of this phrase as essential to the fuller understanding

of freedom of religion and strenuously argued the case. Perhaps the turning point came in the final debate when the Pakistani delegate, Muhammad Zafrulla Khan (later Sir Zafrulla Khan, a member of the International Court of Justice) defended on the basis of the Koran, the right to change one's religion or belief. He said, in part:

"Islam is a missionary religion. It claims the right and the freedom to persuade any man (sic) to change his faith and accept Islam. Surely and obviously, it must equally yield to other faiths the free right of conversion. There cannot be any doubts on that point ... We therefore have the greatest pleasure in declaring from the rostrum that we shall support this article as it stands, without any kind of limitation upon its operation whatever."

The clause was adopted without amendment and now reads as Article 18 in the Declaration:

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

#### 1. Place of religious freedom among human rights

There were of course widely divergent philosophical positions underlying the consensus achieved in the adoption of the Universal Declaration. The remark is often repeated of one of the delegates involved in the drafting of the Declaration: "We agree on the rights, on condition that no-one asks us why".

It is possible, from some perspectives, to see religious freedom as simply an implication of a number of other civil and political rights, rather than having a distinctive place of its own. In particular, religious freedom might be seen as a special case of

freedom of opinion, thought and conscience, with which it appears in the Civil and Political Covenant.

(a) A matter of individual opinion?

There is a powerful strand in United States constitutional thinking, in particular, from Jefferson onwards which sees religion as an essentially private matter for each individual, with which the State therefore should not interfere.

This can be seen as an affirmation of the importance of religion in individual life. Equally, however, it can be seen as basing defence of religious freedom on a complete indifference to religion as irrelevant to social and political life.

There are number of strengths to what I might describe as an individualist understanding of religious freedom: in particular its emphasis on freedom of conscience and its disapproval of the State attempting to dictate belief.

The individualist understanding of human rights in relation to religion also emphasises tolerance of a variety of beliefs. I take this as important from the perspective of believers as well as from the secular perspective: not because our beliefs are not significant and might as readily be different; rather because of an essential recognition firstly of the humanity of adherents of a different faith, and secondly that our human perspectives are necessarily limited, our judgments may be fallible and our different beliefs may reflect the same truth. It is important, then, that we defend the freedom not only of adherents our own religion, but of all.

It should also be emphasised that religious freedom depends intimately on enjoyment throughout society of freedom of thought and conscience, and rights such as freedom of expression and association. A recognition of this partly explains a concern often - though regrettably not always - shown by the churches to defend human rights beyond freedom of religion itself.

(b) A social and political right

There are, however, a number of limitations to the individualist approach, some of which have already been touched on in my historical remarks.

It is limiting to approach religion solely as an opinion or idea. Freedom of religion is not only freedom to believe, but freedom to act on those beliefs, subject of course to limits necessary to protect the rights and freedoms of others.

A related point is the inadequacy of approaching religion as an entirely private or individual matter. All religions involve collective and communal aspects as an essential part of their practice.

I think there is an increasing recognition that the church as a human community must necessarily defend human rights in general, and not only those rights which it requires itself for some minimum level of existence. While it cannot be said that the Christian churches have always lived up to this principle, I think that it is exemplified by the involvement in United Nations activities which I have discussed and in a number of more recent developments which I will discuss shortly.

IV. The 1966 Covenants

It was generally recognised that the adoption of the Universal Declaration, encouraging landmark though it was, would fail to achieve its object without further definition of specific human rights and some machinery for enforcement. Consequently, the UN General Assembly meeting in Paris in November 1951 requested the Human Rights Commission to draft two Covenants - one on civil and political rights and the other on economic, social and cultural rights.

The inclusion in the draft clause on freedom of religion of the phrase referring to the freedom to change one's religion or belief was the subject of controversy at the meeting of the Commission in April 1952. The delegate from Egypt proposed an amendment to ensure that the freedom to change should be exercised "without influence affecting the free will". The CCIA, while recognising Egypt's legitimate concern to exclude any coercion, perceived that an amendment in those terms might seriously affect the scope of the freedom to change. Dr Nolde again entered the fray, consulting widely and persuasively. Unanimity was achieved on an amendment, proposed again by the Egyptian delegate, firstly to make the clause read "this right includes freedom to maintain or to change his religion or belief" and secondly to add a new paragraph expressly excluding coercion.

The CCIA continued to monitor closely the Commission's work on the Covenants. Progress was slow, both because of the Cold War and because there was a reluctance in some quarters to acknowledge that human rights were other than of domestic concern. It was 1966 before the Covenants were adopted by the General Assembly and opened for signature and ratification.

#### 1. Freedom of religion in the Civil and Political Covenant

Article 18 in its final form reads as follows:

"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 [sic] 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 subjected 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 their children in conformity with their own convictions.

It is not my purpose here to make an exhaustive legal analysis of Article 18. But I want to note that freedom of religion as recognised in the Universal Declaration and in the Civil and Political Covenant clearly is not restricted to a purely individual and private matter. Article 18 of the Covenant states that it includes 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". It also expressly requires respect for the liberty of parents or guardians "to ensure the religious and moral education of their children in conformity with their own convictions". It is true that while freedom of belief is recognised in absolute terms, practice may be subject to limitations under the law. However, it is clear that any limitations require strict justification by reference to the criteria provided.

Apart from Article 18 itself, a number of other provisions of the Covenant should also be referred to.

## 2. Non-discrimination

The Covenant (Article 2) requires protection from discrimination on grounds of religion in the enjoyment of other civil and political rights. That is, it is not consistent with the Covenant to permit the practice of a religion but to subject its adherents, or allow them to be subjected, to discriminatory treatment or restrictions.

### 3. Right of minorities to practise their religion

Among the rights recognised for minorities in Article 27, the right to practice their religion, as well as enjoy their own culture and use their own language, in community with other members of their group is specifically recognised.

Article 27 states that minorities "shall not be denied" these rights. This has been criticised as providing only a negative obligation on the State, and failing to require positive measures where these are required to assist in ensuring the survival of minority cultures. As a practical matter, it might be better if this provision were framed differently. As a matter of law, I am not sure that a purely negative obligation is the correct interpretation. Parties to the Covenant are bound under article 2 not only to "respect" the rights recognised, but also to "ensure" these rights, which suggests more positive measures are included when required.

#### (a) Freedom of religion and Aboriginal land rights

There have been suggestions from time to time that the right to freedom of religion provides support for Aboriginal land rights in Australia. Despite the clear importance of relationships with the land in Aboriginal culture and traditional religious beliefs, these suggestions might have been regarded as a fairly ambitious reading of the rights concerned. But this approach gains some support from recent jurisprudence of the United Nations Human Rights Committee interpreting the cultural rights recognised in Article 27 of the Covenant. The Committee has held that an economic activity could be an essential part of the culture of a people within the meaning of ICCPR Article 27, and that in such a case the right to engage in this activity is protected by the Covenant. <sup>1</sup>

#### 4. Enforcement and monitoring

The Civil and Political Rights Covenant provided for an international Human Rights Committee to receive reports regularly from States Parties and to report to the General Assembly. The Covenant also annexed an Optional Protocol which provided the opportunity for countries to submit to the jurisdiction of the Committee in hearing complaints from individuals of alleged breaches of the Covenant. Furthermore, Article 41 established a machinery whereby the Committee could receive complaints from one State Party that another State Party was not fulfilling its obligations under the Covenant. However, the jurisdiction of the Committee under this Article arises only between States who signify their adherence to the Article.

Australia has yet to adhere to the Optional Protocol or make a declaration under Article 41, although these steps have been under consideration for several years. It may be hoped that a decision is not too far distant.

#### V. Other human rights instruments

There have been many other human rights instruments adopted by the United Nations since the Universal Declaration, which relate more or less directly to freedom of religion. They include the following:

- the 1951 Convention on the Status of Refugees;
- the 1959 Declaration of the Rights of the Child;
- the 1960 Convention on Eliminating Discrimination in Education;
- the 1965 Convention on the Elimination of all forms of Racial Discrimination;
- the 1971 Declaration on the Rights of Disabled Persons;
- the 1975 Declaration of the Rights of Mentally Retarded Persons; and

- the 1979 Convention on the Elimination of All Forms of Discrimination Against Women.

### 1. Convention on the Rights of the Child

The latest major United Nations human rights instrument is the 1989 Convention on the Rights of the Child. The Convention restates the right of the child to freedom of thought, religion and conscience, but adds little more detail. (It needs to be emphasised that the Convention expressly requires respect for the rights and duties of parents or guardians to provide direction and guidance in this respect.)

The Convention also (Article 30) restates the right for children who belong to ethnic, religious or linguistic minorities or who are indigenous to practice their religion, as well as enjoy their own culture and use their own language, in community with other members of their group. Again, the provision states that the child "shall not be denied" this right. Again, however, I would argue that there is a positive obligation by virtue of the basic obligation to "respect and ensure" (Article 2) and the further obligation to "undertake all appropriate legislative, administrative and other measures" for the implementation of the rights recognised in the Convention.

### VI. The 1981 Declaration

The recognition of religious freedom provided in the Civil and Political Covenant, and referred to in a number of other instruments, is very important. But it must be said that the content of the right could have been developed in greater detail. That it was not was partly due to the need to accommodate the variety of approaches to which I have already referred.

There have been some moves toward more detailed development, although these have been relatively limited and slow. In 1963, the United Nations General Assembly proclaimed the Declaration on Elimination of Racial Discrimination, and resolved to develop a

parallel Declaration on religious intolerance or discrimination.

In 1965, further and speedy action in the area of racial discrimination saw a stronger and more detailed Convention on Elimination of All Forms of Racial Discrimination adopted. It has had more support from the international community than any other United Nations human rights Convention. It now has over 130 parties.

The adoption of a Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief took another 16 years, until 1981. [The text of this Declaration is annexed to this paper.]

The Preamble to the Declaration recognises that religious intolerance and discrimination have brought great suffering to humanity and have been major causes of threats to international peace and security.

It also contains a positive recognition of the place of religion in the life of the believer and affirms the essential place of religious freedom among human rights.

The Articles of the Declaration commence by essentially restating the terms of the Civil and Political Covenant. This might seem redundant, but not all nations have bound themselves to comply with the Covenant, so that there is some value in restating its terms in a document aspiring to more universal acceptance.

#### 1. Measures against discrimination

The Declaration states that "No-one shall be subjected to discrimination by any State, institution, group of persons, or person on grounds of religion or belief". Obviously, this desirable state will not come about simply by proclaiming it as a goal. The Declaration therefore goes on to specify that all states shall take effective measures to prevent and eliminate this

form of discrimination, and in particular to take any legislative steps necessary to prohibit such discrimination.

## 2. Measures against intolerance

The Declaration also specifies that governments are to take all appropriate measures to combat religious intolerance. In this it recognises that such intolerance is not simply a matter of private attitude or prejudice that might, perhaps, be properly left in the private sphere. Article 2 of the Declaration stresses the direct link - for which, of course, there is only too much historical evidence - between religious intolerance (as well as discrimination) and the impairment of the enjoyment or exercise of human rights and fundamental freedoms. I will return to this theme in a moment.

## 3. Responsibility of individuals and groups

It is interesting that the Declaration does not put the responsibility solely on states, but also refers to institutions, groups and individuals. Among those institutions and groups, religious institutions themselves are I think called on to take a firm stand against discrimination against others on the basis of religion or belief.

In Australia, the Christian churches now occupy a less extensively and exclusively privileged position than was once occupied by the Anglican Church in particular. There is not, in this sense, any longer an "established church" in Australia. Nonetheless, the Christian churches occupy a position within the mainstream of political and social life which is not shared by some other faiths at present.

That imposes a special obligation to speak when, as in recent weeks, conscience and religion dictate (for many of us) a view contrary to that adopted by our leaders. There are also obligations on the Christian churches to stand in solidarity with

other religious communities when they are the targets of intolerance or discrimination.

#### 4. Implementation and monitoring

Unlike a Convention, the 1981 Declaration does not of itself create any binding legal obligations. It does not provide any mechanisms for its own implementation or monitoring.

As something of a compromise, the United Nations has appointed a "Special Rapporteur" to study the implementation of the Declaration, to seek information from nations on their laws and practice and report on any problems encountered. This provides a monitoring mechanism, although at a fairly minimal level of resourcing and without any direct obligation on nations to submit reports, much less to submit to any stronger form of scrutiny of how well the rights proclaimed are protected in law or respected in practice.

The Special Rapporteur has also reported on issues relating to the development of a Convention. This, however, is not given a high priority in the U.N. system at present, in part due to a desire not to re-open issues such as the right to change one's religion.

#### VII. The World Council of Churches

The CCIA has continued to be active as a non-governmental organisation working closely with the Human Rights Commission. I am not aware of the work of any other NGOs representative of other faiths in sufficient detail to discuss them here, and I leave that for others. While the CCIA has been an ardent advocate of human rights in the Human Rights Commission and the UN General Assembly, the WCC has actively sought to raise the profile of human rights in the consciousness of its member churches, which now total 311 churches in almost every country in the world.

### 1. Human rights and human beings

The theological underpinning to its concern is derived from the Christian estimate of a human being. Made in the image of God, human beings are created equal in dignity and worth in God's sight, regardless of difference in colour, race, nationality, culture and sex. This conception of the worth of human beings was demonstrated in and is fortified by the act of history wherein God was in Christ reconciling the world to himself. In the words of John's Gospel: "I am come that they may have life and have it more abundantly".

### 2. Freedom and community

The key to this life, the key to the dignity of the human being is freedom. Freedom, not virtue, God's truth and love are given in freedom and call for a free response. This freedom is the genesis of religious liberty and all other human rights. They are the birthright of every human being, and in no sense can be claimed as the exclusive preserve of Christians. Furthermore, although the tendency in western capitalistic countries has been to emphasise the human rights and freedoms of individuals, Christian doctrine provides ample incentive for the pursuit of economic, social and cultural rights. Christian faith in a Trinitarian God identifies community relationships as being at the heart of God's purpose for the world. Human beings are made for community and their destiny and dignity are fulfilled in relationship with other human beings.

### 3. Evolution of the WCC

At its inception 42 years ago, the WCC was largely a fellowship of churches from Europe and North America. It is not therefore surprising that the early conceptions of human rights within the organisation reflected the liberal laissez-faire tradition with its emphasis on individual liberty and freedom from governmental interference. Over the succeeding decades, however, the composition of the WCC has been progressively enlarged until it

now reflects the whole range of political theories and realities throughout the world. This process has had its effect on the ecumenical understanding of the content and the context of human rights.

The Third Assembly of the WCC, meeting in New Delhi in 1961 saw the membership enlarged to admit a number of orthodox churches from eastern Europe, including the Russian Orthodox Church. The influx of new members from a socialist background confirmed the widening understanding of human rights to include economic, social and cultural rights. But the development did not stop there. The decade of the sixties saw the emergence of the third world as a force to be reckoned with in the ecumenical life of the churches.

The representatives of churches in newly-independent countries brought with them vivid memories of oppressive or paternalistic colonial regimes and an appreciation of the legacy of unjust structures that remained. The Assemblies of 1968 and 1975 were the occasion for some tempestuous debates as delegates from these churches (largely from the South) demanded that the parent churches acknowledge their complicity in the maintenance of the unjust structures that had oppressed them. The result was a heightened awareness of the need for a sustained witness to the fundamental importance of just structures and the search for a just and peaceful world.

These concerns were considered during the Nairobi Assembly in 1975 in the section entitled "Structures of Injustice and Struggles for Liberation". The choice of such a theme was significant for three reasons: first, it recognises that human rights cannot be dealt with effectively in isolation from the larger issues which lead to violations; secondly, it makes clear that the violation of individual rights takes place in the context of society and within social structures and that the struggle for such human rights is basically a struggle for the liberation of the entire community; thirdly, the perception that human rights are not merely humanitarian concerns, but have a clear political context and political implications.

There are two other reasons which helped to make the Nairobi Assembly a milestone in the ecumenical understanding of human rights. The first is that the question of religious liberty was seen to be inseparable from other fundamental human rights. The former primacy of religious liberty as the concern of the churches gave way to a more integral approach to human rights. The second reason is that, for the first time in ecumenical history, the churches arrived at a consensus regarding the content of human rights. Patient wrestling with widely divergent attitudes and perspectives produced a workable acceptance of the following six headings:

1. The right to basic guarantees of life;
2. the rights to self-determination and to cultural identity, and the rights of minorities;
3. the right to participate in decision-making within the community;
4. the right to dissent;
5. the right to personal dignity;
6. the right to religious freedom.

The Sixth Assembly of the WCC was held in Vancouver in 1983. The Assembly re-affirmed its wide-ranging responsibility in the field of human rights, saying:

"The making and breaking of human life anywhere and for whatever reason is the legitimate and necessary concern of Christ's church; on that score the churches as they work together through their World Council have never had any doubts."

Sadly there has been more evidence of breaking than of making human rights in the world in the succeeding years of the eighties. Encouragement can be gathered from the emergence of a measure of democracy and religious liberty in the countries of central and eastern Europe, from the apparently successful transition to independence in Namibia and from the return to civilian rule in

some of the countries in South America. The CCIA and the churches have been closely involved in the developments both in Europe and in Namibia. The CCIA has also played an important role in facilitating communication between north and south Korea, thereby enhancing the prospect of reunification of that unhappy country. But other areas of the world, predominantly in countries of the third world but also in more affluent countries where there are significant indigenous populations, the picture presented is a gloomy one.

In many countries, the suffering of individuals from a violation of their human rights, dreadful though it is, is obscured by the massive dislocation of governmental services by the growth of militarism and the international debt crisis. The failure of the world community to make any progress towards a new international economic order condemns many of the poorer countries of the south to utter helplessness in the face of urgent social demands. By and large, indigenous peoples still wait for recognition of their right to land and a measure of self-determination in the conduct of their affairs: Several countries in Central America exhibit a breakdown of law and order resulting from massive repression of civilian populations and dramatic violations of human rights: extrajudicial killings, disappearances, torture, harassment and the persecution of any groups, including churches, who call attention to the disorder.

In all these situations, the churches acknowledge a call to a suffering solidarity with the poor and the oppressed, coupled with such advocacy on their behalf as is possible in the circumstances. At the same time, the CCIA continues its skilled advocacy in the councils of the United Nations and provides guidance and the assurance of pastoral support to the churches in the field.

#### VIII. Religious freedom in Australia

I want now to turn to the protection of the rights recognised in the international human rights instruments in Australian law and practice.

Australia is a party to the Civil and Political Covenant, and supported the adoption of the 1981 Declaration. But in our legal system, international commitments of this kind have very little direct effect in Australia without further legislative action.

## 1. Freedom of religion in the Australian Constitution

There is some recognition of freedom of religion in the Australian Constitution (section 116). This is in fact one of the few explicit human rights provisions in the Australian Constitution, which has been described with some justice as concerned with allocating powers between branches and levels of government rather than with relations between citizen and State including human rights.

### (a) The Federal level

Section 116 prohibits the Federal Government from "establishing" any religion; from imposing any religious observance, or any religious test for public office; and from interfering with the free exercise of any religion.

The range of "religion" covered by this section, it is now clear, is very wide. In 1985 the High Court held<sup>2</sup> that "religion" was not confined to the Christian religion, nor to theistic religions, nor to the major religions of the world, but encompassed any belief in a "supreme Person, or thing, or principle", accompanied by the acceptance of canons of conduct to give effect to that belief. On this test the Court concluded that "Scientology" was a religion as claimed by its adherents.

There are a number of limitations, however, to the protection offered by section 116. Keith Mason QC, Solicitor-General for New South Wales, has described the section as "something of a dead letter"<sup>3</sup>. It applies only against the Commonwealth Government, not against State or local governments or other bodies or individuals. It is also not clear what level of protection the

section would provide when most needed. It has been interpreted by the High Court as permitting fairly severe restrictions in some circumstances.

In Krygger v Williams<sup>4</sup> the Court held that section 116 did not protect any right to conscientious objection on religious grounds to military service.

In the wartime case of Adelaide Company of Jehovahs Witnesses v The Commonwealth<sup>5</sup> the Court had to consider regulations which permitted the dissolution of the religious body concerned because the executive government considered some of its doctrines to be prejudicial to the prosecution of the war. The court held that such regulations did not contravene section 116.

A number of important points were made in this case:

- Section 116 refers to the free exercise of religion, not only to freedom of belief.
- Chief Justice Latham made the point that "The religion of the majority of the people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities, and, in particular, of unpopular minorities".
- Freedom of religion must be viewed in conjunction with other rights and does not mean the right to do any act no matter how harmful to the rest of the community.

This last proposition is undoubtedly correct. The problem with the case perhaps was that the Court essentially left the executive government, in wartime at least, to determine for itself what actions were prejudicial to the community and were therefore not protected within the freedom of religion.

(b) The position at State level

At the State level, the position has been clearly stated by the Supreme Court of South Australia<sup>6</sup>: There is no guarantee of a

fundamental right to religious freedom contained in the common law, and even if there were such a right, it could be overridden by legislation.

(c) Proposals for amendment

Amongst proposals for amendment of the Australian Constitution put to referendum in 1988 was a proposal which sought to extend section 116 to apply to State governments. There were no doubt varying reasons for the defeat of that proposal. Much of the campaign against it, as with the Bill of Rights previously, was not particularly rational or closely related to the actual proposals. There was also the problem that the people were asked to vote on several different proposals in the same question. But the nature of the proposal itself could at least genuinely be seen as involving problems.

(d) "Establishment" and separation of Church and State

Section 116 refers to government not "establishing any religion". This phrase is borrowed from the United States Constitution, where in turn it originated in opposition to the position in Britain where one "established" church existed by law, and adherents even of other Christian churches were at times subject to various legal disabilities.

In United States constitutional doctrine this has been interpreted to extend beyond neutrality between different religions, and between religious and non-religious purposes or groups, well towards a requirement of complete separation of church and state. This has led to conclusions such as those in the "school prayer cases" prohibiting even voluntary prayer in public schools, and to even more absurd results.

The tension between the "non-establishment" principle and the principle of religious freedom, each recognised in United States and Australian constitutional law, has been remarked on before.<sup>7</sup> I think it is clear that the separation of religion and state may,

if taken to extremes, actually interfere with the substance of religious freedom.

The more extreme aspects of United States doctrine have not to date found favour with Australian courts as interpretations of section 116. In particular the High Court has indicated that "establishment of any religion" should be regarded as prohibiting establishment of a single State religion rather than requiring a wall between the State and all religions, so that for example Federal assistance to religiously based non-government schools is permitted.<sup>8</sup>

Nonetheless, reflections on the US experience motivated concern by a number of church leaders regarding the proposals to extend guarantees of religious freedom in Australian Constitution.

It is important to note that this concern relates to particular constitutional language which does not derive from or reflect the terms of the ICCPR. It is not an argument against further legal protection of freedom of religion as such.

## 2. A need for legal protection?

The result however is that in Australia there is no general constitutionally or legally protected right to freedom of religion.

But, as with most human rights in Australia, lack of specific legal provision is accompanied by a reasonably high level of observance - at least for the majority of the community.

The problem, as pointed out by Chief Justice Latham, is the protection of the rights of minorities or vulnerable groups.

(a) Racial discrimination legislation and religious discrimination

The Federal Racial Discrimination Act gives legal protection against racial discrimination in a wide range of specified areas of life, as well as a general provision dealing with racial discrimination affecting the enjoyment of human rights. Racial discrimination is defined as discrimination based on race, colour, national or ethnic origin. Religion is not included per se in these grounds - or in the Convention on which the Act is based.

Religious discrimination is included in the Victorian and Western Australian anti-discrimination legislation, but not in the New South Wales or South Australian legislation.

Religious discrimination is included in its own right in the Commission's separate jurisdiction dealing with employment discrimination; but this is more limited than the Racial Discrimination Act in the powers and remedies available, as well being restricted to employment issues.

State and Federal anti-discrimination authorities have recognised that discrimination against members of Islamic communities is often bound up with racial discrimination and in these cases can be dealt with under racial discrimination legislation accordingly.

(b) Racial and religious harassment

But the legislation does not cover all cases. There are no specific provisions covering racial harassment. While some instances - such as in employment - are clearly unlawful under the Racial Discrimination Act, other instances are less clearly covered.

In Australia at present this is particularly topical. There is strong evidence of harassment and violence, on mixed racial and religious grounds, against Australians who are members of Arabic

and/or Islamic communities, and indications that this has increased in association with the Gulf crisis.

These attacks directly involve interference with one or more civil and political rights - whether the right to security of the person, or the right to privacy, or freedom from unlawful attacks on honour and reputation.

But they are also, often quite calculatedly, an assault on the ability of the targets to exercise their human rights more generally: their freedom of movement; their freedom of speech; their right to the equal protection of the law and their right to practice their religion.

This harassment and violence has been the subject of a number of submissions to the national Inquiry on Racist Violence chaired by my colleague the Race Discrimination Commissioner. She is presently finalising the report of the Inquiry, and I do not wish to preempt the findings and recommendations to be made. But it is open to question whether all such actions are adequately addressed by the existing legal system.

Much racial or religious harassment is covered by the existing criminal law. But here there are issues of effective enforcement and remedies. There is also a need for wider responses than those based purely within the legal system.

(c) Religious intolerance and racial vilification

It is clear that religious intolerance, as defined in the 1981 Declaration, is being promoted by some persons in the Australian community, in particular using the pretext of the Gulf conflict.

Free expression, without doubt, is fundamental among human rights. Many other rights, not least freedom of religion, suffer by its suppression. But it is equally fundamental that no right encompasses the right to destroy the rights of others.

Incitement of the violation of human rights on the basis of race or religion is not in my view within the protection of the right to free expression. Free expression did not include, or should not have included, the right to promote the Nazi terror. It does not include the right to promote violence and discrimination against Muslim or Arab Australians now.

Yet Arab or Muslim Australians have been unable to raise questions on the wisdom and morality of participation in the hostilities in the Gulf without facing calls from ignorant and prejudiced commentators for deportation, internment, censorship or other discriminatory restrictions on human rights.

Statements from Islamic Australians calling for peace in the Gulf are portrayed, even by purportedly responsible journalists, as evidence of "divided loyalties", when the same statements from Christian leaders among others are accepted as legitimate dissent.

There is a duty on all of the Australian community, and its leaders, to rally to the defence of the human rights, and in particular the religious freedom, of those under attack. I think it is also necessary for governments to look seriously at the legislative and other responses to the promotion of intolerance and discrimination which the 1981 Declaration calls for.

There is no specific provision in Federal legislation outlawing advocacy of racial hatred, despite the requirements in this respect of Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination.

In New South Wales and in Western Australia there is legislation dealing with racial vilification. Vilification of a religious minority is not specifically included, but as with harassment, vilification directed at Islamic communities may also involve unlawful racial discrimination in some cases.

(d) Blasphemy and criticism of religion

Criticism or even ridicule of a religion itself is I think a conceptually different case from vilification of its adherents or promotion of intolerance against them, although the two may coincide. However genuine the offence which may be caused, I find it difficult to see a violation of human rights in the criticism of religion in itself. The human rights issues to be considered in relation to any legislation against such criticism are rather whether it impermissibly restricts the rights to freedom of expression and freedom of religion itself.

In Australia the law of blasphemy still exists on the books, even if it is long since it was invoked in practice. However, the offence only applies to attacks on Christianity. The New South Wales Anti-Discrimination Board in 1984 identified this as discriminatory, and recommended that in New South Wales the offence of blasphemy should either be abolished, or else widened to protect other religious beliefs. That recommendation has not been reflected in any specific legislative proposals from Government. Keith Mason QC, a prominent Anglican as well as being Solicitor-General for New South Wales, supported in the paper to which I have already referred the total abolition of blasphemy offences rather than their extension. On the other hand, some in Australia's Islamic communities would see some legal protection for their religion itself as part of protection for these communities from vilification.

IX. Religious freedom and religious intolerance

There is room for difference of views on what the role of the law should be in this area. What is very clear is the responsibility of religious leaders and believers not to allow their faith to be used to promote intolerance towards others. Particularly for scholars and those who shape religious doctrine, there are responsibilities to humanity and to the faith itself. Ultimately, abuse limits the freedom of faith to discern the truth and express that truth in the world.

- 1 Kitok v. Sweden, U.N.Doc A/43/40 p.229; Bernard Ominayak and the Lubicon Lake Band v. Canada, Views adopted 26 March 1990, cited in Jakob Moller, "Recent Jurisprudence of the Human Rights Committee", paper presented to Workshop on the Optional Protocol to the International Covenant on Civil and Political Rights, Ottawa, June 17-20 1990.
- 2 Church of the New Faith v Commissioner of Payroll Tax (Vic.) (1985) 154 CLR 120.
- 3 Constancy and Change: Moral and Religious Values in the Australian Legal System, 1990, p.118.
- 4 (1912) 15 C.L.R. 366.
- 5 (1943) 67 C.L.R. 116.
- 6 Grace Bible Church v Reedman (1984) 54 A.L.R. 571.
- 7 W. Sadurski, "On legal definitions of religion", (1989) 63 Australian Law Journal 834.
- 8 Attorney-General for Victoria; ex rel Black v The Commonwealth (1981) 146 C.L.R. 559.