

# **Free to Believe?**

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## **The Right to Freedom of Religion and Belief in Australia**

**Human Rights Commissioner  
Discussion Paper No. 1**

February 1997

*Human Rights and Equal Opportunity Commission*

## ACKNOWLEDGMENTS

This discussion paper was researched by Richard Bennett, Eva Veileborg Hald, Jon Porter and Shahyar Roushan of the Human Rights Policy Unit at the Human Rights and Equal Opportunity Commission. Additional material was provided by Saku Akmeemana of the Race Discrimination Unit and Cath Duff of the Aboriginal and Torres Strait Islander Social Justice Unit. Some sections of the discussion paper are based on 'Leap of Faith: Religious Freedom in Australia' which was written by Andrew Naylor and Chris Sidoti in 1994.<sup>1</sup>

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ISSN 1328-312x

Human Rights and Equal Opportunity Commission, Sydney, 1997.

Design by Liam Gash  
Printed by SOS Printing

## **PREFACE**

In many respects Australia is a reasonably fair and accepting society. The principle of a 'fair go' is widely accepted throughout the community that is seen to be one of the more successful multicultural societies.

However, if we Australians look a little more closely at ourselves we find things could be fairer than they are; we could be more accepting than we are; and the economic, social and cultural life this country has to offer could be more equitable and inclusive than it currently is.

The values of fairness, acceptance and equality have largely defined the character of the Australian people. They find expression in different ways for different purposes. In fact, these fundamental Australian values also find expression in international human rights instruments. One of these instruments is the *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (the Declaration), the most comprehensive international statement of the right to freedom of religion.

This paper explores Australia's compliance with the provisions of the Declaration. To have religions or beliefs ridiculed and to be victimised because of them, especially in an increasingly secular society and world, is as divisive and destructive as other forms of discriminatory and intolerant behaviour.

This discussion paper has five chapters.

**Chapter 1 Religious Diversity in Australia** provides a snapshot of the religious makeup of Australian society.

**Chapter 2 Religious Freedom and the Australian Legal System** discusses the extent to which the right to freedom of religion is protected and promoted in Australia under existing law.

**Chapter 3 Religious Freedom and International Human Rights Law** looks at how protection of the right to freedom of religion has developed in international human rights law.

**Chapter 4 — *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*— Explained** provides an analysis and explanation of the provisions of the Declaration.

**Chapter 5 Issues for Discussion** contains some questions seeking comment on Australia's compliance with the Declaration and on Australians' experiences of freedom of religion and belief.

The paper also contains in the Appendix the full text of the *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*

I invite any comment on the issues raised in this paper. Based on submissions received by the Commission, I then anticipate submitting a report to the federal Attorney-General to advise what actions need to be taken by Australia to comply with the provisions of the Declaration.

If you would like to make any comments on any of the issues in this paper please write to:

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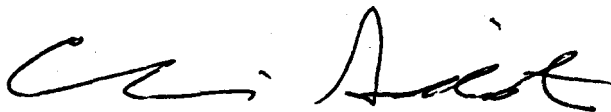
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**Closing date: 30 June 1997**

Unless a submission is marked confidential, it will be made available to any person or organisation on request. If you want your submission, or any part of it, to be treated as confidential, please indicate this clearly. A request for a submission marked 'confidential' will be determined in accordance with the *Freedom of Information Act 1982* (Cth).

The Human Rights and Equal Opportunity Commission (the Commission) will include in its final report a list of submissions received in response to this paper. It may also refer to those submissions in the text of the report and other Commission publications. If you do not want your submission or any part of it to be used in any one of these ways please indicate this clearly.



Chris Sidoti

**Human Rights Commissioner**

18 February 1997

**CONTENTS**

**Chapter 1 -**

**Religious diversity in Australia** ..... 7

    Introduction ..... 7

    The religions of Australia ..... 7

        Today's Australia ..... 7

        A predominantly Christian society ... .. 9

        ... with significant religious minorities ... 9

**Chapter 2 -**

**Religious freedom and the Australian legal system**..... 11

    Introduction ..... 11

    Defining 'religion' ..... 11

    The Australian Constitution ..... 11

    Federal law..... 13

    State and Territory law ..... 16

    International law ..... 17

**Chapter 3 -**

**Religious freedom and international human rights law** ..... 18

    Introduction ..... 18

    United Nations ..... 18

    International human rights instruments..... 18

        Universal Declaration of *Human Rights* ..... 18

*International Covenant on Civil and Political Rights* and other international instruments..... 19

    The Declaration on *the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*..... 19

**Chapter 4 -**

***UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 - explained*** ..... 21

    Introduction ..... 21

    The Declaration ..... 21

        Preamble ..... 21

        Article 1 — Freedom of thought, conscience and religion ..... 22

        Articles 2 and 3 — Intolerance and discrimination based on the grounds of religion and belief..... 22

        Articles 4 and 7 — Obligations placed on States..... 22

        Article 5 — Freedom to impart religion or belief to one's children .. 23

        Article 6 — Religion and belief in practice ..... 23

        Article 8 — Reaffirmation of relevant provisions contained in other human rights instruments..... 23

**Chapter 5 -**

**Issues for discussion**..... 24

    Introduction ..... 24

    1. Discrimination in employment ..... 25

    2. Discrimination in other areas of public life ..... 26

    3. Planning and environment laws ..... 26

    4. Violence, intimidation and harassment ..... 27

    5. Indigenous beliefs ..... 27

    6. Legislation ..... 28

    7. Other matters..... 28

Footnotes..... 29

Glossary ..... 32

Bibliography ..... 33

**Appendix -**

***Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*** ..... 35



## CHAPTER 1

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# *Religious diversity in Australia*

### INTRODUCTION

Australia is a nation of 18 million people drawn from all parts of the world. When European settlement began in 1788 the continent was occupied and owned by the Aboriginal and Torres Strait Islander peoples. Since 1788 immigrants have come to Australia in very large numbers, first from Britain and Ireland and then from other parts of Europe. European immigration was particularly high from 1945 to 1970. Immigration from Asia first became significant during the gold rush years in the 1850s and 1860s. Further immigration from Asia was prevented by the White Australia Policy, an explicit national policy adopted late in the last century and confirmed and entrenched when the Australian colonies federated in 1901. This policy was rejected in the 1960s and 1970s and Asian immigration has been significant since then, although still less than immigration from other parts of the world.

The original Australians had and maintain their own highly sophisticated indigenous beliefs and practices. The various immigrant groups have brought to Australia their religions, customs and cultures. Today's Australia is therefore a multi-racial, multi-cultural and multi-religious society.

### THE RELIGIONS OF AUSTRALIA

#### **Today's Australia**

Australians claim predominantly to be Christians. In the 1991 national population census 74% of the population described themselves as Christian or as members of a Christian denomination.<sup>1</sup> Until the 1980s Anglicans constituted the largest Christian denomination in Australia. The 1986 census had indicated that Catholics had become the largest religious group. In the 1991 census 27.3% of the population described themselves as Catholic and 23.9% as Anglican. 22.8% of the Australian population identified with Christian

denominations other than the Anglican and Catholic Churches. The largest group is the Uniting Church (8.2%), a union of the Congregationalist, Methodist and Presbyterian churches founded in 1977. The 1991 census also included identification with Presbyterian congregations (4.3%) which chose not to participate in the Uniting Church, Baptist (1.7%), Brethren (0.1%), Churches of Christ (0.5%), Jehovah Witness (0.4%), Latter Day Saints/Mormons (0.2%), Lutheran (1.5%), Orthodox (2.8%), Pentecostal (0.9%), Salvation Army (0.4%), Seventh Day Adventist (0.3%) and other Christian denominations (1.2%) not specified.

Although the great majority of Australians describe themselves as Christian there are significant religious minorities. Islam is now the second largest religion in Australia. In the 1991 census 0.9% of the population described themselves as Muslim.

Large numbers of immigrants from Asia, especially from Vietnam, Cambodia and China, have made Buddhism the third largest religion, with 0.8% of the population.

Judaism came to Australia with the first European settlers. In 1991, 0.4% of the population described their religion as Judaism.

Another religion with significant numbers is Hinduism. Hindus constitute 0.3% of the population.

Many Aboriginal and Torres Strait Islander people maintain their traditional beliefs and practices. Even those who have adopted other religions continue a close association with traditional customs and attach great significance to places and sites of cultural and religious importance to their communities.

12.9% of the population described themselves as having no religion.

**DISTRIBUTION OF MAJOR RELIGIONS IN AUSTRALIA**

<b>Religion</b>	<b>1981</b>		<b>1986</b>		<b>1991</b>	
	(000)	%	(000)	%	(000)	%
<i>Christian</i>						
Catholic <sup>a</sup>	3,786.5	26.0	4,064.4	26.1	4,606.7	27.3
Anglican	3,810.5	26.1	3,723.4	23.9	4,018.8	23.9
Uniting	712.6	4.9	1,182.3	7.6	1,387.7	8.2
Methodist <sup>b</sup>	490.9	3.4	-	-	n.a	n.a
Presbyterian	637.8	4.4	560.0	3.6	732.0	4.3
Orthodox	421.3	2.9	427.4	2.7	474.9	2.8
Baptist	190.3	1.3	196.8	1.3	279.8	1.7
Lutheran	199.8	1.4	208.3	1.3	250.9	1.5
Pentecostal	72.1	0.5	107.0	0.7	150.6	0.9
Churches of Christ	89.4	0.6	88.5	0.6	78.3	0.5
Jehovah's Witness	51.8	0.4	66.5	0.4	74.7	0.4
Salvation Army	71.6	0.5	77.8	0.5	72.3	0.4
Seventh Day Adventist	47.4	0.3	48.0	0.3	48.4	0.3
Latter Day Saints/Mormons	32.4	0.2	35.5	0.2	38.4	0.2
Brethren	21.5	0.1	23.2	0.1	24.1	0.1
Oriental Christian	-	-	10.4	0.1	23.3	0.1
Congregational	23.0	0.2	16.6	0.1	6.3	0.0
Other Protestant	2,207	1.5	199.4	1.3	n.a	n.a
Other Christian	2,53.8	1.7	346.4	2.2	199.2	1.2
<b>Total Christian</b>	11, 133.3	76.4	11, 381.9	73.0	12, 466.4	74.0
<i>Non-Christian</i>						
Muslim	76.8	0.5	109.5	0.7	147.5	0.9
Buddhist	35.1	0.2	80.4	0.5	139.8	0.8
Jewish	62.1	0.4	69.1	0.4	74.2	0.4
Hindu <sup>c</sup>	-	-	21.5	0.1	43.6	0.3
Other non-Christian	23.6	0.2	35.7	0.2	40.0	0.2
<b>Total non-Christian</b>	1,97.6	1.4	316.2	2.0	445.0	2.6
<i>Other</i>						
Non-theistic	n.a	n.a	4.9	0.0	n.a	n.a
Inadequately described	73.5	0.5	58.0	0.4	49.8	0.3
No religion (so described)	1,576.7	10.8	1977.5	12.7	2176.6	12.9
<b>Not stated</b>	1,595.2	10.9	1,863.6	11.9	1,712.3	10.2
<b>Total other</b>	3,245.4	22.3	3,904.0	25.0	3,938.7	23.4
<b>TOTAL</b>	14,576.3	100.0	15,602.2	100.0	16,850.2	100.0

- a. Roman Catholics and Catholic (non-Roman)
- b. The Uniting Church was formed in 1977 from the Methodist, Congregational and part of the Presbyterian churches.
- c. People who responded Methodist in 1986 were coded to Uniting.
- d. Included in Other Christian in 1981.
- e. Included in Other non-Christian in 1981.

Source: ABS 1988a, p.19; ABS 1991 Census.



## A predominantly Christian society ...

Christianity was brought to Australia by the earliest European settlers who came to establish penal colonies. The guards and their families were predominantly Anglican Christians. Many of the prisoners were English and from Anglican and non-conformist Christian groups. Other prisoners were from Ireland, then occupied by Britain, and were predominantly Catholic Christians. Orthodox Christianity came later to Australia but grew significantly in the two decades after the Second World War with immigration, particularly from Greece.

The first *Catholics* to reside in Australia arrived with the First Fleet. They were mostly Irish convicts. One-tenth of all convicts transported to Australia were Catholic. The first priests did not arrive in the colony until 1800. The arrival in 1820 of two chaplains, appointed by the British Government, is however regarded as the formal establishment of the Catholic clergy in Australia. The first Vicar-General arrived in Australia in 1833. The following year Australia's first Bishop was consecrated. In 1842 approval was granted by Rome for the establishment of dioceses in Sydney, Hobart and Adelaide. By 1847 separate dioceses were also established in Western Australia and Melbourne. Irish clergy dominated Australian Catholic life until fairly recently. The prevalence of Irish clergy determined the character of the Catholic Church in Australia despite early attempts to base the Church on the English model. Irish clergy eventually were outnumbered by Australian-born clergy in the 1930s. The 1950s were a boom time for Australian Catholics: numbers grew rapidly, many parishes were established in the new suburbs of the major cities and the numbers of priests, sisters and brothers expanded. During the 1960s and 1970s not only did Australian society undergo enormous change so too did the Australian Catholic Church. Contributing factors include adjustment to changes introduced by the Second Vatican Council and the influx of post-war non-English speaking Catholic immigrants from Italy, Poland, Malta, the Netherlands, Germany, Croatia, Hungary and other places.<sup>3</sup>

The majority of those who disembarked from the First Fleet at Sydney Cove were at least nominally *Anglican*. The period 1788-1823 was essentially a period of chaplaincy to a convict settlement. This period ended with the appointment of the

first Anglican Archdeacon of New South Wales in 1823. The Archdeacon had wide powers over both clergy and church officers and control of education policy and administration. In 1836 the office of Bishop of Australia was constituted. By the 1850s separate dioceses had been established in each of the colonies. In 1872 the first General Synod of Australian dioceses agreed upon a constitution of church government which lasted until 1961. Under this constitution every diocese in Australia remained part of the Church of England. A new constitution was passed at the 1955 General Synod and came into force on 1 January 1962. The new constitution established the Church of England in Australia as an autonomous church in communion with the Church of England but guaranteed the independence of the dioceses. In 1981 the Church of England in Australia officially terminated all legal ties with the Church of England established in England and adopted the name of the Anglican Church of Australia.<sup>4</sup>

Other Christian denominations, all of which have made significant contributions to the social fabric of Australian life, include the *Uniting Church and its Methodist, Presbyterian and Congregational constituents, Baptist, Brethren, Churches of Christ, Jehovah Witness, Latter Day Saints/Mormons, Lutheran, Orthodox, Pentecostal, Presbyterian, Salvation Army and Seventh Day Adventist* denominations.

## ... with significant religious minorities

*Islam* was first brought to Australia by Asian traders who visited the north west coast of the continent over 130 years ago. From 1911 until 1951 the rate of growth of Muslims in Australia was very slow and based largely on natural increase. The Muslim community only really became visible with the arrival of Turkish and Lebanese Muslims in the 1960s and 1970s.<sup>5</sup> In the last twenty years the Australian Muslim community has grown substantially and now includes a wide array of linguistic, national and ethnic origins from the different parts of the Arab world, Pakistan, Afghanistan, India, Indonesia, Malaysia, Bangladesh, Fiji, Albania, the former Yugoslavia, Greece, South Africa and elsewhere. The majority of Muslims now settled in Australia are Sunni but other Muslim traditions include the various Shi'a sects.<sup>6</sup>

The first *Buddhists* in Australia were Chinese miners who came during the gold rush in the 1850s. The number of Buddhists in Australia has fluctuated greatly over the years. Recent immigration from Asia has resulted in the proliferation of Buddhist communities representing all major schools of Buddhism. Several ethnic groups have established Buddhist societies in Australia. For example, settlers of Vietnamese, Burmese, Thai, Sri Lankan, Malaysian, Cambodian, Laotian and Tibetan origin have all established Buddhist organisations in Australia.<sup>7</sup> During the 1980s Buddhism experienced more rapid growth than any other religious group.<sup>1</sup> The influence of Buddhism in Australia however is not entirely derived from Asian immigration. Groups of Western Buddhists were formed in Australia as early as 1925.<sup>9</sup>

*The Jewish people* are one of the oldest non-Anglo-Celtic groups to have settled in Australia.<sup>10</sup> A number of Jewish people arrived on the First Fleet. The first Jewish free settlers however arrived in 1809 and the earliest synagogue was founded in 1828-30 in Sydney. All the early synagogues in Australia were Anglo-Orthodox, that is, associated with the British United Synagogue headed by the British Chief Rabbi. There are now a significant number of synagogues in Australia spanning most religious traditions within contemporary Judaism from Strict Orthodoxy to Progressive Judaism. The Jewish people can be defined in religious, ethnic and cultural terms. Many Jews would not consider themselves to be religious at all."

The *Hindu* and *Sikh* traditions both have their origins in South Asia. Hindu and Sikh settlement in Australia goes back to the early years of the 19th century but many early immigrants returned to South Asia. Since 1970 the abolition of the White Australia Policy led to increased immigration from the South Asian region particularly from India, Sri Lanka, Fiji and Malaysia. Consequently, the Hindu and Sikh communities in Australia have now grown to become significant religious groups."

Current census categories do not identify those with specific *Aboriginal and Torres Strait Islander* beliefs. Indigenous beliefs and customs inform many traditional cultural and community practices that cannot be compared with the membership of other religious organisations. Aboriginal and Torres Strait Islander peoples may have dual associations. Some may belong to a Christian church while also maintaining the rites and customs of their own community.<sup>13</sup> For many Indigenous Australians the land holds special spiritual significance. This significance is lost on a largely euro-centric society that regards land as personal property to be bought, sold, inherited or possessed by force. Aboriginal and Torres Strait Islander peoples traditionally do not recognise individual land ownership. They recognise that a local descent group has an inalienable right to possession of a certain area and to significant sites of spiritual importance with corresponding obligations. Sacred sites may contain natural features that have ancestral or mythological significance or are used as burial grounds or for other important ceremonies.'

## CHAPTER 2

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# ***Religious freedom and the Australian legal system***

### **INTRODUCTION**

The Australian legal system purports to treat Australia's many different religious communities equally. There is no established or State sponsored religion or church and religious law is not imposed by civil authority. This section of the paper discusses the extent to which the right to freedom of religion is protected and promoted in Australia by examining four relevant sources of law

- the Australian Constitution
- Australian federal laws
- Australian State and Territory laws
- international law.

### **DEFINING 'RELIGION'**

The High Court considered the threshold issue of defining 'religion' in *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)*.<sup>15</sup> The Court was asked to decide whether the Church of Scientology was a 'religious or public benevolent institution' for the purposes of the *Pay-Roll Tax Act 1971 (Vic)*.<sup>16</sup> If so, it would be exempt from pay-roll tax on wages paid or payable to its employees. The Court held that the beliefs, practices and observances of the Church of Scientology did, in fact, constitute a religion in Victoria. The judges proposed a number of different tests for the definition of 'religion' under the Act but no definition secured majority support. The narrowest test was proposed by Acting Chief Justice Mason and Justice Brennan and required two elements

- belief in a supernatural Being, Thing or Principle
- the acceptance of canons of conduct to give effect to that belief (though canons of conduct which offend against the ordinary laws are outside the areas of any immunity, privilege or right conferred on the grounds of religion).

Justices Wilson and Deane found no single characteristic that could be a formalised legal

criterion for a particular system of beliefs and practices that constitutes a religion. In their view all that can be done is to formulate indicia or guiding principles by reference to which the question is to be decided. They identified five indicia

- a particular collection of ideas and/or practices involving belief in the supernatural
- ideas that relate to the nature and place of humanity in the universe and the relation of humanity to things supernatural
- ideas accepted by adherents requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance
- adherents constituting an identifiable group or identifiable groups regardless of however loosely knit and varying in beliefs and practices these adherents may be
- adherents themselves seeing the collection of ideas and/or practices as constituting a religion.

Justice Murphy also did not propound a definitive 'test' but rejected the first criterion of Chief Justice Mason and Justice Brennan as no longer essential to a definition of religion. Justice Murphy held, in part, that any organisation which claims to be a religious organisation and which offers a way to find meaning and purpose in life is a religious organisation.

### **THE AUSTRALIAN CONSTITUTION**

#### **Introduction**

The Australian Constitution was negotiated and settled by white, Christian, European men. It was proclaimed under 'Almighty God'. The majority

of these Founding Fathers did not see any general need to enshrine a Bill of Rights in the Constitution. They thought that the common law inherited from England and the parliamentary system provided sufficient protection. They also thought that the constitutional protection of rights could undermine Australia's policy of racial exclusion. Australia therefore has no Bill of Rights. It is one of the few remaining countries that does not seek to protect human rights constitutionally. The right to freedom of religion, however, is one right that has some measure of constitutional protection.

## The scope of s.116

Section 116 of the Australian Constitution provides

(T)he 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.<sup>17</sup>

The section restricts only the legislative powers of the Commonwealth. It does not apply to the States. It is not a positive guarantee of freedom of religion and, apart from the exclusion of a religious test, it does not apply to executive and judicial powers and activities. It therefore offers only very limited protection. While preventing the Commonwealth from establishing a religion, section 116 does not preclude, for example, federal legislation prohibiting discrimination on the ground of religion.

There have been a number of constitutional cases before the High Court of Australia concerning the establishment and free exercise provisions of the section. The religious observance and public office provisions have not yet been judicially considered.

### Establishing a religion - the narrow view

The meaning of the establishment provision was considered by the High Court in *Attorney-General (Victoria); Ex rel Black v The Commonwealth*.<sup>18</sup> The Council for the Defence of Government Schools challenged a federal government decision to provide funding to private schools.

The Council argued that the decision breached the establishment clause of s.116.<sup>19</sup> In its view the clause prohibited the Commonwealth from making any law which tended to support, aid or recognise a religion. It urged on the Court an interpretation similar to the US Supreme Court's interpretation of the US Constitution's First Amendment. It said that religious freedom can only be achieved by prohibiting all government involvement with religion.

A majority of the High Court rejected the argument, finding that a law which provides for financial aid to the educational activities of church schools is not a law for establishing a religion, even though the law might indirectly assist the practice of religion. Preferring to consider 'establishment' in terms of the establishment of the Church of England in England, the majority adopted a much narrower interpretation than that of the US Court. It held that a religion is 'established' where the church becomes identifiable with the civil authority as a national institution. Any law which purports to give effect to this purpose by constituting or recognising a particular religion (or part of a religion or church) as a national religion will contravene s.116 and therefore be invalid.

The majority also said that s.116 could and should be interpreted without recourse to US law, principally because of the difference in wording between the First Amendment and s.116. Section 116 uses the words *for* establishing any religion'; the First Amendment uses the words '*respecting* an establishment of religion'. The majority saw this difference as crucial to the interpretation of the section. To breach s.116 the whole purpose of the law must be to establish a religion. If the law simply *relates* to the establishment of a religion without being *for* the establishment as its primary purpose, then it is valid.<sup>20</sup>

### Establishing a religion - the wide view

One High Court judge, Justice Murphy, disagreed with the narrow approach taken by the majority. He looked at the way in which the US Constitution had been interpreted. He saw s.116 as not simply limiting the legislative power of the Commonwealth but as fundamentally guaranteeing the right of every Australian to freedom of and from religion. In his view, the provision should not be read down so as only to invalidate discriminatory

or preferential laws. He considered that even non-preferential sponsoring or aiding religion is tantamount to establishing religion and is therefore prohibited." Justice Murphy said that the Court's majority interpreted s.116 'as if it were a clause in a tenancy agreement rather than a great constitutional guarantee of freedom of and from religion' 22

## Free exercise of religion

The High Court considered the meaning of the free exercise provision of s.116 in *Adelaide Company of Jehovah's Witnesses v Commonwealth*.<sup>23</sup> The case arose out of a World War II declaration, under the *National Security (Subversive Organisations) Regulations*, that the Jehovah's Witnesses (the Witnesses) were prejudicing the defence of the Commonwealth and the efficient prosecution of Australia's war efforts. The Witnesses' place of worship was seized by the Commonwealth, preventing them using the premises. The Witnesses argued that the Regulations and the declaration breached s.116.

The High Court held that s.116 did not preclude laws prohibiting the advocacy of doctrines or principles which although advocated in pursuance of religious convictions were prejudicial to the war. The High Court held that the freedom to exercise one's religion is therefore not absolute. An individual's freedom to exercise and act upon religious beliefs is constrained by the right of other members of society to protection against 'unsocial actions or actions subversive of the community itself'.<sup>24</sup> The High Court did not clearly specify what these words encompass. It referred to the decision of the US Supreme Court in *Reynolds v United States* in which it was held that 'Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties and subversive of good order'.<sup>25</sup>

## A broader interpretation of s.116?

Although in *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)*<sup>26</sup> Acting Chief Justice Mason and Justice Brennan adopted a fairly narrow definition of religion, their comments on the way in which s.116 should be interpreted indicates a possible change in thinking on the High Court.<sup>27</sup> They said

(T)he guarantees in s.116 of the constitution would lose their character as a bastion of freedom if religion were so defined as to exclude from its ambit minority religion out of the mainstream of religious thought."

Their language is couched in terms of fundamental guarantees, not restrictions on the powers of legislatures as in the *DOGS* case and *the Jehovah's Witnesses* case. A more rights based approach would be consistent with a greater awareness of human rights generally shown by the High Court in several recent cases.<sup>29</sup> At present, however, s.116 does not offer the guarantees of fundamental rights to freedom of religion that it might.

## FEDERAL LAW

### Introduction

The Australian Constitution gives the Commonwealth power to make laws with respect to 'external affairs'.<sup>30</sup> This head of power enables the Commonwealth to make laws to implement bona fide international treaties ratified or acceded to by Australia and other international human rights instruments, provided that the law gives effect to the terms of the instrument in a reasonably appropriate or proportional way.<sup>31</sup>

Australia has ratified a number of international treaties in the area of human rights. The Commonwealth has subsequently enacted a number of laws to help give effect to its obligations arising from these treaties. These Commonwealth laws include the *Human Rights and Equal Opportunity Commission Act 1986* and the *Racial Discrimination Act 1975*.

### **Human Rights and Equal Opportunity Commission Act 1986 (Cth)**

The *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act) establishes the Human Rights and Equal Opportunity Commission (the Commission) and the office of the Human Rights Commissioner. The Commission is an independent federal body and has a variety of functions and powers relating to the protection and promotion of human rights for all people in Australia.

## Meaning of 'human rights'

For the purposes of the functions and powers of the Commission under the HREOC Act, 'human rights' is defined as the rights and freedoms contained in the following international instruments

- *International Covenant on Civil and Political Rights*
- International Labour Organisation *Discrimination (Employment and Occupation) Convention 111*
- *Convention on the Rights of the Child*
- *Declaration of the Rights of the Child*
- *Declaration on the Rights of Disabled Persons*
- *Declaration on the Rights of Mentally Retarded Persons*
- *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*

The *International Covenant on Civil and Political Rights* (ICCPR) was adopted by the United Nations General Assembly in 1966. Australia ratified the ICCPR on 13 August 1980. The ICCPR provides for the right to freedom of religion and belief, the right to equality without discrimination on the basis of religion and belief and the right to live free from religious hatred.

The International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958* (ILO 111) prohibits discrimination on the ground of religion in employment and occupation. Discrimination on the ground of religion means any distinction, exclusion or preference made on the basis of religion that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. There is an exception for any distinction, exclusion or preference made in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith to avoid injury to the religious susceptibilities of adherents of that religion or that creed.<sup>32</sup>

The *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (the Declaration) is the most comprehensive international statement of the right to freedom of religion and belief. It was adopted unanimously by the 37th Session of the United

Nations General Assembly in November 1981. Australia supported the adoption of the Declaration. On 8 February 1993, following consultations with the State and Territory governments, the Declaration was declared to be a 'relevant international instrument' for the purposes of the HREOC Act. The Attorney-General's declaration became effective on 24 February 1993.

An account of the development and history of the Declaration is contained in Chapter 3. That is followed by an explanation of the provisions of the Declaration in Chapter 4. The full text of the Declaration is contained in the Appendix.

## Functions and powers of the Commission

The Commission has specific legislative functions and responsibilities for the promotion of human rights and the elimination of discrimination under the HREOC Act. In particular, the Commission has functions to

- promote the understanding, acceptance and public discussion of human rights and equal opportunity in employment and occupation — s.11(1)(g) and s.31(c)
- inquire into the acts or practices of the Commonwealth that may be inconsistent with or contrary to any human right and all acts and practices that constitute discrimination in employment and occupation — s.11(1)(f) and s.31(b)
- advise on laws that should be made by the Parliament or action that should be taken by the Commonwealth on matters relating to human rights and equality of opportunity and treatment in employment and occupation — s.11(1)(j) and s.31(e)
- advise on what action, in the opinion of the Commission, needs to be taken by Australia to comply with the provisions of the international instruments appended to or declared under the HREOC Act — s.11(1)(k).

The Commission has a duty to ensure that its functions have regard for

the indivisibility and universality of human rights; and the principle that every person is free and equal in dignity and rights; and with the greatest possible benefit to the people of Australia.<sup>33</sup>

The Commission also has the power to intervene in court proceedings which involve human rights issues. Powers of intervention enable the Commission to bring a human rights perspective to court cases which may not otherwise be presented. Where consideration of human rights issues are relevant to existing legal cases and there is some possibility that they may not be adequately considered without the Commission's presence, the Commission applies for leave to intervene direct to the court holding proceedings.<sup>34</sup>

The HREOC Act does not guarantee rights and it does not prohibit discrimination as it does not provide enforceable remedies. The only sanction contained in the HREOC Act is that the Human Rights Commissioner may submit a report to the federal Attorney-General for tabling in parliament.

### **Racial Discrimination Act 1975 (Cth)**

The *Racial Discrimination Act 1975* (the RDA) provides some limited protection against discrimination on the basis of religion. If a religious group can also be classified as an 'ethnic' group, the RDA may cover direct<sup>35</sup> and indirect discrimination<sup>36</sup> and vilification under the racial hatred provisions of the Act.<sup>37</sup> Even if a religious group cannot be classified in that way, the RDA arguably covers discrimination on the basis of religion in certain circumstances as indirect race discrimination.

### **Discrimination and vilification on the basis of ethnic origin**

The term 'ethnic origin' has been interpreted broadly by courts in a number of jurisdictions. In *King-Ansell v Police*, the New Zealand Court of Appeal held that Jews in New Zealand formed a group with common ethnic origins within the meaning of the *Race Relations Act 1971*.<sup>38</sup> In *Mandla v Dowell Lee*, the House of Lords held that Sikh people had a common ethnic origin.<sup>39</sup> According to Lord Fraser, for a group to constitute an 'ethnic group' for the purpose of the legislation in question, it had to regard itself and be regarded by others as a distinct community by virtue of certain characteristics, two of which were essential.<sup>40</sup>

The NSW Equal Opportunity Tribunal followed the New Zealand and English decisions in *Phillips v Aboriginal Legal Service* and held that a Jewish person was a member of a 'race' for the purposes of the *Anti-Discrimination Act 1977* (NSW).<sup>41</sup> In *Commission for Racial Equality v Dutton*<sup>42</sup>, the English Court of Appeal also relied on *Mandla* to hold that gypsies were a racial group within the definition of the *Race Relations Act 1976* (UK) with common geographical origin, distinct customs and a common dialect. By way of contrast, Muslims and Rastafarians have not received the protection of racial discrimination laws in England.<sup>43</sup>

While Jewish and Sikh people are likely to be classified as ethnic groups for the purposes of the RDA, it is a matter of conjecture whether Muslims comprise such a group. The English Employment Appeal Tribunal held in *Nyazi v Rymans Ltd* that, following the principles enunciated by the House of Lords in *Mandla v Dowell Lee*, Muslims are a group defined mainly by religion and thus do not fall within the *Race Relations Act 1976*.<sup>44</sup> Although Muslims profess a common religion, a common cultural, historical and other background, and have a common literature in the Holy Quran, the Tribunal held that other characteristics of an ethnic group are lacking and there are Muslims in many countries and of many colours and languages. The common denominator was said to be religion and a religious culture. However an Australian court could rely on the Attorney-General's second reading speech<sup>45</sup> and explanatory memorandum during the passage of the *Racial Hatred Act 1995*,<sup>46</sup> pursuant to section 15AB of the *Acts Interpretation Act*, such that the broad definition of 'ethnic' could include Jews, Sikhs and Muslims.

### **Indirect race discrimination**

Indirect discrimination occurs when a practice or policy treats everyone in the same manner but in effect disadvantages a higher proportion of people from particular racial or ethnic groups and it is not reasonable in the circumstances. The indirect race discrimination provisions of the RDA can prevent discrimination on the basis of religion in certain circumstances because the discriminatory act or practice may affect certain races disproportionately.

### **Example**

An Australian woman of Iraqi origin is refused employment because she is wearing the hijab.

- a. If Muslims were held to constitute an ethnic group under the RDA, this may constitute direct discrimination on the basis of her ethnic origin.
- b. Even if Muslims were not held to be an ethnic group in Australia, it could arguably form indirect discrimination on the basis of race. There is a term, condition or requirement with which she cannot comply, which is unreasonable and which affects persons of Iraqi origin to a greater extent than persons of many other racial and national origins in Australia. This condition has the effect of nullifying or impairing her right to work and to just and favourable conditions of work.

## **STATE AND TERRITORY LAW**

### **Introduction**

Section 116 of the Commonwealth Constitution does not affect the legislative powers of the States.<sup>47</sup> The States therefore are not prevented from establishing a religion or from imposing any religious observance or prohibiting the free exercise of any religion, except Tasmania which is the only State to provide for religious freedom in its constitution.<sup>48</sup> They may, if they see fit, establish a state church or religion, oppress other religious beliefs and require a religious test as a qualification for any public office.

Although the international instruments appended to and declared under the HREOC Act form part of Australian federal law, the law specifically provides that the Act does not bind the States (except in respect of the operation of ILO 111 which extends to the States and Territories, the private sector, non government organisations and individuals).

### **Anti-discrimination laws**

The States of Victoria, Queensland and Western Australia and both the self-governing Territories have passed legislation extending some protection to freedom of religion." These laws are not rights-based. They do not guarantee freedom of religion.

Rather, they are based on prohibiting discrimination. Each of the Acts makes it unlawful to discriminate against another person on the basis of lawful religious beliefs and practices or the absence of lawful religious beliefs and practices. None of the Acts contains a definition of religion or religious belief. The Northern Territory Act provides specifically that religious belief and activity includes Aboriginal spiritual belief and activity.<sup>50</sup>

In New South Wales the *Anti-Discrimination Act 1977* (NSW) prohibits discrimination on many grounds but not on the ground of religion. The definition of 'race' in the New South Wales Act includes ethno-religious background." Consequently, in NSW there is some measure of protection against discrimination for some religious groups but not others. In South Australia and Tasmania there is no provision in each of these State's anti-discrimination laws for the prohibition of discrimination on the ground of religion.

### **Direct and indirect discrimination prohibited**

The anti-discrimination laws of the States and Territories that cover religious belief prohibit both direct and indirect discrimination. Direct discrimination occurs when someone treats a person with a particular religious belief less favourably than he or she would treat another person without that religious belief. Indirect discrimination occurs when a person is unable to comply with rules or requirements which, whether or not they have any discriminatory intention, in fact discriminate unreasonably against the person on the basis of religious belief or practice."

### **Areas of coverage**

The Acts prohibit direct and indirect discrimination on the grounds of religious belief and religious activity in the following areas

- employment and work (including partnerships, professional trade or business organisations, qualifying bodies and employment agencies)
- education
- provision of goods and services
- accommodation
- club membership.



The Victorian Act also prohibits members of local government councils from discriminating against other members on the basis of, among other things, their religious practices or beliefs. The Queensland Act probably has the widest coverage and applies to superannuation, insurance and the administration of State laws and programs in addition to other areas.

### Reasonable accommodation

Many of the State and Territory Acts recognise that there may have to be some accommodation of the special needs of individuals unless it is unreasonable to do so.<sup>53</sup> These provisions arise principally in relation to disability but they are also significant for religion.

Religious belief can place obligations on a person in relation to worship, diet, dress and other customs. If there were no allowance for these, for example, in a workplace, there would be widespread discrimination. The ACT Act provides specifically that it is unlawful to discriminate by refusing an employee permission to perform during working hours a religious practice

- that is of a kind recognised as necessary or desirable by persons of the same religious conviction as the employee
- the performance of which is reasonable having regard to the circumstance of employment
- that does not subject the employer to unreasonable detriment.<sup>54</sup>

The Western Australian Act has a similar provision.<sup>55</sup> The other Acts deal with special needs in a negative way, by providing that it is not discriminatory to fail to provide for a special need if it is unreasonable to do so.

### Exceptions

There are a number of exceptions in each Act which permit discrimination on the grounds of religious beliefs and activities. Most of these exceptions are for the benefit of religious organisations. For example, it is not unlawful for a religious school to discriminate between applicants for employment on the basis of their religious convictions, or absence of religious convictions, in order to avoid injury to the religious susceptibilities of the adherents of that religion.<sup>58</sup>

Religious organisations also have broader exemptions from other provisions of State and Territory anti-discrimination legislation if the discrimination is on the basis of religion and is to avoid injury to the susceptibilities of adherents of that religion. Religious organisations may lawfully refuse, for example, to ordain women, refuse to employ persons living in de facto relationships or refuse to permit homosexuals to use their accommodation services.

The exemption for ordinations is accepted on the basis of the separation of church and state but there is significant opposition to exemptions in relation to, for example, employment and services.<sup>57</sup>

### INTERNATIONAL LAW

Australia acceded to the First Optional Protocol to the ICCPR with effect from 25 December 1991. This permits the Human Rights Committee, established in 1977 under the auspices of the United Nations, to receive and consider communications from individuals alleging violations by Australia of rights contained in the ICCPR.

There have been several communications to the Committee concerning Australia but none relates to Articles of the ICCPR concerning religious freedom. Nonetheless accession to the Optional Protocol provides an avenue for complaint based upon the right enunciated in the ICCPR. It is a more broadly based right to religious freedom than Australian domestic law provides. Accession may also have an impact on the recognition of implied rights in the Australian Constitution. The High Court has referred already to Australia's obligations under the ICCPR and the effect of the First Optional Protocol in developing domestic Australian law.<sup>58</sup>

The scope of the protection of freedom of religion and belief in international law is discussed in the next chapter.

## CHAPTER 3

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# *Religious freedom and international human rights law*

### INTRODUCTION

A report to the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1959 stated

... world-wide interest in ensuring the right to freedom of thought, conscience and religion stems from the realisation that this right is of primary importance. In the past, its denial has led not only to untold misery, but also to persecutions directed against entire groups of people ... [T]oday, notwithstanding changes in the climate of opinion, equality of treatment is not ensured for all religions and beliefs, or for their followers, in certain areas of the world.<sup>59</sup>

This chapter of the paper discusses the extent to which the protection of the right to freedom of religion and belief has developed in international human rights law. [Attention is](#) given to the role of the United Nations and the development of relevant international human rights instruments.

### UNITED NATIONS

Ever since its inception, the United Nations has strived to encourage States to promote and respect human rights and protect fundamental freedoms for all people without distinction as to race, sex, language or religion.<sup>60</sup>

Article 1, paragraph 3 of the United Nations Charter, adopted in 1945, provides that the chief purpose of the organisation is

to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, *and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion* (emphasis added).

The United Nations Charter firmly establishes religious discrimination as an impermissible ground of differentiation. The Charter, however, does not contain detailed guarantees of freedom of religion. By employing the familiar formula of 'human rights and fundamental freedoms for all' the Charter only provides general norms in prohibiting discrimination.<sup>61</sup>

### INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

#### *Universal Declaration of Human Rights*

In 1948 three years after the adoption of the UN Charter the United Nations General Assembly adopted the *Universal Declaration of Human Rights* (UDHR), the foundation stone upon which modern international human rights law has been built.<sup>62</sup>

On the adoption of the UDHR, the president of the United Nations General Assembly, Dr H V Evatt of Australia, stated

[T]he adoption of the Declaration is a step forward in a great evolutionary process ... the first occasion on which the organised community of nations has made a declaration of human rights and fundamental freedoms. That document is backed by the authority of the body of opinion of the United Nations as a whole and millions of people, men, women, and children all over the world who would turn to it for help guidance and inspiration.<sup>o</sup>

The adoption of the UDHR was preceded by sustained diplomatic activity by churches and other groups around the world representing the concerns of religious groups and their endeavour to secure adequate safeguards for freedom of religion and conscience. Consequently, the need to protect religious freedom is featured more than once in the UDHR. The preamble to the UDHR,

for instance, states that

... disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and *belief* and freedom from fear and want has been proclaimed as the highest aspiration of the common people (emphasis added).

Article 2 states

Everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, *religion*, political or other opinion, national or social origin, property, birth or other status (emphasis added).

More specifically, Article 18 provides

Everyone has the right to freedom of thought, conscience and religion; this right includes the right 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.

The UDHR, therefore, provides for the right to freedom of religion and belief and the right to freedom from discrimination on the ground of religion and belief.

### ***International Covenant on Civil and Political Rights and other international instruments***

The right to freedom of religion and belief has also been proclaimed in the *International Covenant on Civil and Political Rights* (ICCPR). The ICCPR was adopted by the United Nations General Assembly in 1966. Australia ratified the ICCPR on 13 August 1980.

Article 18.1 of the ICCPR states that 'everyone shall have the right to freedom of thought, conscience and religion ...'. Article 18.2 prohibits coercion which would impair one's freedom to have or adopt a religion or belief of his or her choice. Paragraph 3 provides that freedom to manifest one's religion and belief may be subjected 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. Paragraph 4 provides for freedom to impart religion and belief to one's children.

Article 20 of the ICCPR also provides for the prohibition by law of any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence.

Article 27 protects the right of minority groups to profess and practice their own religion.

Article 4 of the ICCPR prohibits any derogation of the right to freedom of religion by state parties.

The *International Covenant on Economic, Social and Cultural Rights*, the *UNESCO Convention against Discrimination in Education*, International Labour Organisation *Discrimination (Employment and Occupation) Convention* and the *Convention of the Rights of the Child* also contain clauses which seek to counter religious discrimination and intolerance."

### ***The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief***

In 1956 UN bodies took the first step to deal specifically with discrimination and intolerance in the matter of religious rights and practices. The Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed Mr Arcot Krishnaswami as a special rapporteur to study the problem of religious discrimination and to present a program of action with a view to eradicating this discrimination. In 1960 Mr Krishnaswami presented his final report, later characterised as a 'landmark in the efforts of the United Nations to eradicate prejudice and discrimination based on religion or belief'.<sup>65</sup>

The report found a discernible trend towards greater religious tolerance. It formed the basis of the Sub-Commission's draft principles on religious freedom and non-discrimination which were ultimately expected to be embodied in a United Nations declaration or at least in a recommendation to member states.<sup>66</sup>

The study coincided with an outbreak of acts of religious intolerance and discrimination in several countries.<sup>67</sup> These alarmed the international community and had the effect of elevating the problem to a more urgent level. The widespread reaction of many governments, organisations and individuals to these incidents prompted the UN to take a firm stand in resisting discriminatory and intolerant practices.

Between 1960 and 1962 UN bodies adopted a series of resolutions categorically denouncing all manifestations and practices of racial, religious and national hatred.<sup>68</sup> In 1962 a draft declaration and a draft convention on the elimination of all forms of religious intolerance was initiated by the United Nations General Assembly. The Commission on Human Rights conducted a preliminary debate in 1963 and instructed the Sub-Commission to prepare a draft declaration. The Sub-Commission completed a preliminary draft declaration in 1964 and a preliminary draft convention in 1965. In 1972 the General Assembly decided to give priority to the declaration and the Commission on Human Rights began to formulate a single declaration in effect indefinitely postponing a binding treaty. ° The Declaration was completed and adopted in March 1981 at the thirty seventh session of the Commission on Human Rights following intensive lobbying and pressure by religious and human rights non-governmental organisations.<sup>70</sup>

The declaration was finally adopted and proclaimed by the General Assembly, by unanimous vote, in December 1981. It had taken the UN 19 years to adopt the Declaration. The length of the process reflects not only the political struggles in the UN but also the sensitive nature of the issue and the potential controversy inherent in the subject matter itself.<sup>71</sup> It has been noted that 'against the historical backdrop of civil strife, international warfare and ideological conflict fuelled by religion, the Declaration stands as a milestone in the progressive development of human rights norms'.<sup>72</sup>

Chapter 4 of this discussion paper provides an explanation of the Declaration. The full text of the Declaration is contained in the Appendix.

## CHAPTER 4

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# ***UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 explained***

### INTRODUCTION

The lengthy process of drafting and adopting the *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981* (the Declaration) indicates the sensitivity and complexity of the issue of religious freedom. Twenty years passed between the first proposal for a declaration to proclaim freedom of religion and belief and its final acceptance.

An explanation of the Declaration is provided in this chapter. The full text of the Declaration can be found in the Appendix.

### THE DECLARATION

#### **Preamble**

The preamble of the Declaration reaffirms the basic principle that all people are born free and equal in dignity and rights — a principle previously recognised in the *Universal Declaration on Human Rights* (UDHR) and the two International Covenants adopted on the basis of that declaration, the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

The preamble also has regard for the significance and centrality of personal conceptions of life. It recognises that each person has a fundamental right to believe in and to practise whatever religion she or he chooses or not to believe in any religion based on the principle of equality and non-discrimination.

The preamble reaffirms that universal respect for and observance of the right to freedom of thought, conscience and belief, as with all rights and freedoms, safeguards human integrity, freedom and equality and contributes to the attainment of social justice and world peace.

What constitutes a religion is a threshold issue in determining what freedom of religion and belief means. Defining 'religion' is not easy. Despite several attempts in the process of drafting the Declaration no real definition emerged.

Comments provided by the Human Rights Committee of the United Nations are instructive and can be used as an interpretative guide.<sup>73</sup> When considering Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR), the Human Rights Committee has stated

Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms belief and religion are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.<sup>74</sup>

'Religion' and 'belief' in the Declaration should have meanings at least as broad as they have in the ICCPR which is a binding treaty and of higher status in international law.

The right to freedom of thought, conscience and religion therefore entails the right to hold any thoughts or convictions — 'religion' constituting one form of belief while 'thought' and 'conscience' may encompass a wide range of beliefs not necessarily based on religious precepts.

## Article 1 - Freedom of thought, conscience and religion

According to Article 1 of the Declaration each person has the absolute right to believe whatever she or he chooses to believe free from any kind of undue influence and coercion. Article 1 also recognises that the right to freedom of thought, conscience and religion includes the freedom to act on those beliefs through worship, observance, practice and teaching, either alone or with other like minded peoples in private or in public.

The Declaration concedes that the right to act on one's religion or belief is subject to certain restrictions. Article 1.3 states that the right to manifest one's religion or belief is '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'.<sup>75</sup>

The distinction between the right to hold certain beliefs as opposed to the right to act on those beliefs rests upon what has been called the action-belief dichotomy. This dichotomy means that the 'legislator is deprived of all power over *belief* but is free to regulate *action* that is inimical to State-determined priorities or social policy'.<sup>76</sup>

The Human Rights Committee, however, has commented on the scope of the State's power to impose restrictions on the manifestation of religion and belief. It has stated

(L)imitations may be applied only for those purposes for which they are prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.<sup>77</sup>

The scope of the State's power to place limits on the manifestation of religion and belief must therefore be interpreted narrowly and consistently with the right to religion and belief as a whole and all other fundamental rights and freedoms.

## Articles 2 and 3- Intolerance and discrimination based on the grounds of religion and belief

Article 2 prohibits any act or practice of intolerance or discrimination on the grounds of religion or belief by any person in any capacity whatsoever.

For the purposes of the Declaration an intolerant or discriminatory act or practice 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 2.2 of the Declaration is modelled on the definition of racial discrimination contained in Article 1 of the *International Convention on the Elimination of Racial Discrimination* (CERD). Like CERD, the Declaration prohibits unintentional as well as intentional acts of discrimination. Protection is also afforded to acts and practices that have discriminatory effects as well as purposes. Unlike CERD, however, the prohibition of religious discrimination is not limited to 'public life'; it also includes the private sphere.

Article 3 proclaims discrimination on the grounds of religion and belief as an affront to human dignity and a violation of fundamental rights and freedoms.

## Articles 4 and 7- Obligations placed on States

Articles 4 and 7 place obligations on States to take positive measures to counter intolerance and discrimination on the grounds of religion and belief.

Article 4 provides that all States shall take effective measures to

- prevent and eliminate religious discrimination in all fields of public life
- make all efforts to enact or rescind legislation to prohibit such discrimination
- take all appropriate measures to combat intolerance on the grounds of religion or belief.

Article 7 calls for national legislative action to ensure that the rights and freedoms contained in the Declaration are protected by law and available in practice to all people.

### **Article 5 - Freedom to impart religion or belief to one's children**

Article 5 of the Declaration recognises the rights of parents or legal guardians to impart their religion or belief to their children.

The Article guarantees that parents or legal guardians have the right to organise family life in accordance with their own religion or beliefs and that children have a right of access to a religious education that is consistent with the wishes of their parents. This includes freedom from religious education if the parents or legal guardians so desire bearing in mind the best interests of the child concerned.

Article 5.3 prohibits discrimination directed towards children on the basis of religion or belief and imposes the general requirement that all children 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'.

If a child is not in the care of her of his parents or legal guardians, in matters dealing with religion and belief consideration is to be given to the expressed wishes of the child again bearing in mind the best interests of the child.

Article 5.5 stipulates that practices stemming from religion or belief must not be injurious to the physical or mental health of any child taking into account the limitations outlined in Article 1.3.

Similar provisions relating to the rights of parents or legal guardians to impart their religion or belief to their children are contained in the *UN Convention on the Rights of the Child* (CROC).<sup>78</sup>

### **Article 6 - Religion and belief in practice**

Article 6 provides a list of minimum freedoms, subject to the limitations contained in Article 1.3, that guarantee in practice the right to freedom of

thought, conscience and religion. They are

- freedom to worship or assemble and maintain appropriate places for these purposes
- freedom to establish and maintain appropriate charitable or humanitarian institutions
- freedom to acquire and use religious artefacts that relate to the customs and rites of a particular religion or belief
- freedom to write, issue and disseminate religious publications
- freedom to teach religion and belief
- freedom to solicit and receive voluntary financial support
- freedom to train and appoint appropriate leaders in accordance with the requirements and standards of that particular religion or belief
- freedom to observe religious holidays and other obligations
- freedom to communicate nationally and internationally on religious matters.

The phrasing of Article 6 clearly indicates that the list of freedoms is not exhaustive. For example, the list of freedoms could also include

- freedom to teach and learn the sacred language of a particular religion or belief
- freedom to maintain sacred and religious sites
- freedom to make pilgrimages to sacred and religious sites
- the right to a burial ceremony in accordance with the religion or beliefs of the person concerned!

### **Article 8- Reaffirmation of relevant provisions contained in other human rights instruments**

Article 8 reaffirms statements made pertaining to religious freedom contained in other international human rights instruments, the UDHR and the ICCPR.

The effect of Article 8 is to incorporate provisions made explicit in these international human rights instruments such as freedom to change one's religion or belief as provided for in Article 18 of the UDHR or freedom to adopt a religion or belief of one's choice as provided for in Article 18 of the ICCPR. It also ensures that any question of interpretation of the Declaration is resolved by reference to the standards contained in the UDHR and the ICCPR.

## CHAPTER 5

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# Issues for discussion

### INTRODUCTION

Australian law offers very little protection for freedom of religion and belief and only limited protection against discrimination on the basis of religion and belief. There are few constitutional constraints on the Commonwealth and none on the States (except Tasmania) to prevent actions which limit or even prohibit the freedom of Australians to profess and practise the religions and beliefs of their choice.

Freedom of religion and belief in Australia largely depends on the goodwill of governments and of the majority of the population and not on legal protections. The rights and freedoms contained in the *UN Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief* (the Declaration) form part of the definition of 'human rights' for the purposes of the work and functions of the Human Rights and Equal Opportunity Commission (the Commission) but that does not ensure effective remedies.

In summary, the rights and freedoms contained in the Declaration are

- freedom of religion and belief, including freedom of thought and conscience
- freedom from religion and belief
- freedom to practise a religion or belief
- freedom of religious teaching and education, including the training of religious personnel

- freedom to impart religion or belief to one's children
- freedom from discrimination on the basis of religion or belief and equality without distinction based on religion or belief
- freedom of religious assembly and organisation
- freedom of religious speech and communication.

This chapter seeks comment on domestic compliance with the provisions of the Declaration. You are invited to make written submissions to the Commission on any matter raised in this discussion paper or any other matter concerning religious freedom you believe warrants consideration. The Commission anticipates that it will then submit a report to the federal Attorney-General and advise what action needs to be taken by Australia to comply with the provisions of the Declaration (pursuant to s.11(1)(k) of the HREOC Act).

To assist in the preparation of community submissions, the Commission poses a number of questions. These questions are designed simply to prompt discussion on certain topics. Please feel free to address issues that are not covered by these questions.



## 1. DISCRIMINATION IN EMPLOYMENT

The basic right of all Australians to participate fully in an inclusive society can only be achieved when all Australians, whatever their backgrounds, receive equality of opportunity and treatment in all areas of public life particularly employment.

### a) Discrimination in employment based on religious belief

#### Case study

M refused to pay a levy imposed by his union for the purpose of a Workers Distress Fund. M claimed that as a member of the Independent Baptist Church his religious beliefs prevented him from donating welfare money to any welfare organisation other than his church. Consequently, M was segregated from his work mates, given no work and subsequently sacked.<sup>80</sup>

**Q** Have you ever been denied a job or promotion due to your religious beliefs? If so, what were the circumstances?

### b) Discrimination in employment based on religious non-belief

#### Case study

T had been living in a de facto relationship for a number of years. T applied for a position as a teacher at a Catholic School. In her application she described herself as single and was told nothing about expected lifestyle when she began teaching at the school.

When she applied for maternity leave the school principal expressed concern about her lifestyle and said that it was contrary to the teachings of the Catholic Church. T was dismissed from her employment the day after she returned from maternity leave.<sup>81</sup>

**Q** Have you ever been denied a job or promotion in the workplace due to the absence of religious beliefs? If so, what were the circumstances?

### c) Reasonable accommodation

#### Case study

S, a Muslim woman, accepted a job as a check-out operator at her local supermarket. She was threatened with the sack unless she removed her hijab (head covering). She did so reluctantly.

**Q** Does your workplace allow for special dietary or dress requirements due to your religion or beliefs? If so, how? If not, what are the circumstances?

**Q**

Have you ever been refused leave from work for the purposes of worship, for special religious days or for special religious events/ceremonies? If so, what were the circumstances?

**Q**

Have you received any other form of less favourable treatment in the workplace due to your religion or beliefs? If so, what were the circumstances?

**Q**

## 2. DISCRIMINATION IN OTHER AREAS OF PUBLIC LIFE

Discriminatory acts and practices on the grounds of religion and belief can impede the full participation of some people in society in other areas of public life such as access to goods and services, accommodation, club membership and education.

Smaller religious communities have had difficulty on occasions in obtaining approval to build places for worship or for uses of land relating to other religious purposes. Under Australian laws governing land use, municipal authorities must approve the use of land for particular purposes and the construction of buildings. Both these stages of approval have been used to obstruct the construction of buildings for religious use.

### a) Goods and services

**Q** Have you ever been denied goods or services (including government services) due to your religion or beliefs? If so, what were the circumstances?

### Case study

An application for the construction of a Muslim primary school in a residential area was rejected by the local council on the grounds that the school would be detrimental to the amenity of the neighbourhood and was opposed by local residents 82

### b) Accommodation 3. PLANNING AND ENVIRONMENT LAWS

Have you ever been denied accommodation or housing due to your religion or beliefs. If so, what were the circumstances?

**Q**

**Q** Has your religious community had difficulty in obtaining approval to build a place for worship or obtaining approval for any other uses of land for religious purposes? If so, what was the nature of the difficulties?

### c) Club membership

**Q** Have you ever been denied access to or membership of a club due to your religion or beliefs? If so, what were the circumstances?

### d) Education

**Q** Have you ever been denied access to or received less favourable treatment by an educational institution due to your religion or beliefs? If so, what were the circumstances?

#### 4. VIOLENCE, INTIMIDATION AND HARASSMENT

The Commission's 1991 inquiry into racist violence in Australia considered evidence of many incidents of violence and harassment against members of Australia's Indigenous, Jewish and Muslim communities.<sup>83</sup>

The *Racial Hatred Act* (Cth), introduced in October 1995, extended coverage of the *Racial Discrimination Act 1975* (Cth) to allow people to complain about offensive or abusive behaviour based on racial hatred. It aims to ensure that people of all ethnic backgrounds can live a dignified and peaceful life free from racial vilification, intimidation and harassment. Religion or belief is not included as a ground of complaint.

**Q Have you ever been publicly attacked (physically or verbally), intimidated, harassed or subjected to any other kind of public acts of hatred due to your religion or beliefs? If so, what were the circumstances?**

#### 5. INDIGENOUS BELIEFS

In Australia some limited and indirect protection is provided for the religious beliefs of Aboriginal and Torres Strait Islander peoples through the operation of heritage protection legislation.

The federal *Aboriginal and Torres Strait Islander Heritage Protection Act* as well as separate legislation in each state and territory provides the legislative framework for protection. The federal law is discretionary. There is no legislative imperative that Indigenous culture and heritage receive protection within the Australian system.

##### Case study

The Gamileroi community near Boggabilla on the NSW/Queensland border applied under federal legislation for an emergency declaration to halt water skiing on Boobera Lagoon. The Aboriginal people claim that the Lagoon is a sacred site, a significant resting place of Gurriya, the Rainbow Serpent. The community believes that the continuation of water skiing on the lake will desecrate the site. An emergency declaration has been declined.

The community has also applied for a declaration protecting the Lagoon permanently from desecration. As yet a declaration has not been made. Water skiing and other recreational water activities continue on the Lagoon to the great distress of the local Aboriginal community.

**Q Is the current level of legislative protection of Indigenous beliefs, customs and sacred sites adequate? If not, what amendments to the current legislative regime would you suggest?**

## 6. LEGISLATION

Articles 4 and 7 of the Declaration require national governments to take positive measures to counter discrimination and intolerance on the ground of religion and belief and implement appropriate legislation to protect the rights and freedoms contained in the Declaration.

### Discrimination

**Q** Do you consider national legislation prohibiting discrimination on the ground of religion and belief in the areas of employment, goods and services, accommodation, clubs, education and land use is warranted?

**Q** What exceptions to the principle of non-discrimination and equality before the law would be appropriate and why?

### Intolerance

**Q** Do you think national anti-vilification or hatred laws on the ground of religion and belief are warranted?

**Q** Should such laws provide for any exemptions and, if so, what?

## 7. OTHER MATTERS

**Q** Are there any other issues you wish to raise concerning freedom of religion and belief?

If you would like to make any comments on any of the *issues in this paper* please *write* to

### Human Rights Commissioner

.....  
Human Rights and Equal Opportunity  
Commission, Level 8 133 Castlereagh St  
Sydney NSW 1042

Email: [humanrts@hreoc.gov.au](mailto:humanrts@hreoc.gov.au)

## FOOTNOTES

- 1 Naylor A and Sidoti C, 'Leap of Faith: Religious Freedom in Australia' in Tay A and Leung C (eds), *Australian Law and Legal Thinking in the 1990s*, University of Sydney, 1994.
- 2 Australian Bureau of Statistics *1991 Census of Population and Housing*. The census does not require answers to the question on religion. In 1991 10.2% did not answer the question. Census data report self-description. They do not give any indication of the extent of active religious participation. At the time of the publication of this discussion paper, 1996 census data was not available.
- 3 Dixon R, *The Catholics in Australia*, AGPS, Canberra, 1996, pp. 1-9. See also O'Farrell P, *The Catholic Church and Community An Australian History*, New South Wales University Press, Kensington, NSW, 1985.
- 4 see Blombery T, *The Anglicans in Australia*, AGPS, Canberra, 1996, pp. 12-19.
- 5 NSW Anti-Discrimination Board, *Islam in Australia*, NSW ADB, Sydney, 1985, p. 1.
- 6 *ibid.*, p. 26.
- 7 see Adam E and Hughes P, *The Buddhists in Australia*, AGPS, Canberra, 1996, p. 11.
- 8 *ibid.*, p. xi.
- 9 *ibid.*, p. 7.
- 10 Rubinstein W D, *Judaism in Australia*, AGPS, Canberra, 1995, p xi.
- 11 *ibid.*, p 5-7.
- 12 see Bilimaria P, *The Hindus and Sikhs in Australia*, AGPS, Canberra, 1996, pp. 7-11.
- 13 NSW Anti-Discrimination Board, *Discrimination and Religious Conviction*, NSW ADB, Sydney, 1984, p. 82.
- 14 *ibid.*, p. 96.
- 15 (1983) 154 CLR 120.
- 16 s.10.
- 17 S.116 is modelled on s.3 of Article VI and the First Amendment to the United States Constitution.
- 18 (1981) 146 CLR 559 (the DOGS case).
- 19 The funding was provided by the Commonwealth to the States as an appropriation by the federal parliament under s.96 of the Constitution. The funds were grants to the States on condition that they be paid by the States to non-government schools to finance their educational programs, including the erection of school buildings.
- 20 579-580 (per Barwick CJ), 598 (per Gibbs J), 615-616 (per Mason J).
- 21 *Attorney-General (Victoria): Ex rel Black v The Commonwealth* (1981) 146 CLR 559 at 624.
- 22 *ibid.*, at 623.
- 23 (1943) 67 CLR 116.
- 24 *ibid.*, at 155 (per Starke J).
- 25 (1878) 98 US 146 at 164. It is interesting to note that, while the High Court found it convenient to rely upon the Supreme Court's approach to the US Constitution in the *Witnesses' case*, it chose to adopt a more traditional English common law approach in the *DOGS* case.
- 26 (1983) 154 CLR 120.
- 27 see McLeish S, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116', (1992) 18 *Monash University Law Review* 207, pp. 210-211.
- 28 (1983) 154 CLR 120, at 131-132.
- 29 see eg *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Dietrich v R* (1992-93) 177 CLR 292; *Nationwide News Pty Limited v Wills* (1992-93) 177 CLR 1; *Australian Capital Television Pty Limited v The Commonwealth* (1992-93) 177 CLR 106; and more recently, *State of Victoria v Commonwealth of Australia*; *State of South Australia v Commonwealth of Australia*; *State of Western Australia v Commonwealth of Australia* (1996) 138 ALR 129; *Wik People v The State of Queensland and Ors*; *The Thayore People v The State of Queensland and Ors* (B8 of 1996) unreported 23 December 1996.
- 30 Constitution s.51 (xxix).
- 31 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 at 646, 674, 688; *R v Poole; Ex parte Henry (No 2)* (1939) 61 CLR 634; *Airlines of New South Wales v New South Wales (No 2)* (1965) 113 CLR 54 at 82, 102, 118, 126, 141; *Commonwealth v Tasmania (the Franklin Dam case)* (1983) 158 CLR 1; *State of Victoria v Commonwealth of Australia*; *State of South Australia v Commonwealth of Australia*; *State of Western Australia v Commonwealth of Australia* (1996) 138 ALR 129. Some judges have suggested that is not enough for a challenged law to give effect to treaty obligations; the law must, of itself, also deal with a subject of 'international concern' to be valid under s.51 (xxix): eg per Stephen J *Franklin Dam case* at 216. Also see Zmes L, *The High Court and the Constitution*, 3rd ed, Butterworths, Sydney, 1992, Ch 13.
- 32 HREOC Act, s.3(1).

- 33 HREOC Act, s.10A.
- 34 The following are examples of significant interventions undertaken by the Commission: *Suburban Islamic Association v The Council of the City of Campbelltown* - approval for the building of a Mosque; *Tarumi v The Council of the City of Bankstown* - approval for the building of an Islamic school; *P. VP.*; *Re L* - sterilisation of a young woman; *Wu Yu Fang v Minister for Immigration and Ethnic Affairs and the Commonwealth of Australia* - access to lawyers by persons in detention; *Minister of State for Immigration and Ethnic Affairs v Teoh* - deportation of the father of seven children; *L v Minister for Immigration and Ethnic Affairs* - 'one child policy' of the People's Republic of China; *Albert Langer v Australian Electoral Commission* - freedom of political speech.
- 35 Sections 9 - 16.
- 36 Sections 9 and 9(1A).
- 37 Sections 18B to 18F.
- 38 [1979] 2 NZLR 531. Richardson J held that: a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.
- 39 [1983] 1 All ER 1062.
- 40 First, 'a long shared history of which the group was conscious as distinguishing it from other groups and the memory of which it kept alive' was necessary. Further, the group must have a 'cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance', *ibid.* at 1069.
- 41 [1993] EOC 92-502. This was prior to the amendment of the Act to include ethno-religious origin.
- 42 [1989] ILR 8.
- 43 In *Crouss Suppliers (PSA) v Dawkins* [1991] IRLR 327, the Employment Appeal Tribunal found that Rastafarians were a religious cult and failed to meet the two essential characteristics for ethnic groups stipulated in *Mandla*.
- 44 [1988] EAT 86
- 45 House of Representatives, *Hansard*, 15 November 1994, p 3336.
- 46 The *Racial Hatred Act 1995* forms a new Part IIA of the RDA.
- 47 A proposed constitutional amendment to extend s.116 to cover the States was defeated at the referendum in 1988.
- 48 Section 46 of the *Constitution Act 1934* (Tas) provides:
- (1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
- (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.
- 49 Victoria: *Equal Opportunity Act 1995* (Vic) s.4. Queensland: *Anti-Discrimination Act 1991* (Qld) s.7(1).
- Western Australia: *Equal Opportunity Act 1984* (WA) s.53.
- Australian Capital Territory: *Discrimination Act 1991* (ACT) s.7.
- Northern Territory: *Anti-Discrimination Act 1992* (NT) s.19(1)(m).
- 50 *Anti-Discrimination Act 1992* (NT) s.4(4).
- 51 *Anti-Discrimination Act 1977* (NSW) s.4(1).
- 52 eg *Christian Family School Association of Australia v Public Transport Corporations* (1990) EOC ¶ 92-300.
- 53 *Anti-Discrimination Act 1991* (Qld) s.5. *Equal Opportunity Act 1984* (WA) s.54(3); *Discrimination Act 1991* (ACT) s.11 *Anti-Discrimination Act 1992* (NT) s.24.
- 54 *Discrimination Act 1991* (ACT) s.11.
- 55 *Equal Opportunity Act 1994* (WA) s.54(3).
- 56 *Equal Opportunity Act 1995* (Vic) s.38. *Anti-Discrimination Act 1991* (Qld) s.109. *Equal Opportunity Act 1984* (WA) s.66(1).
- 57 see eg Sex Discrimination Commissioner, *Review of Permanent Exemptions under the Sex Discrimination Act 1984*, AGPS, Canberra, 1992.
- 58 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
- 59 'Study of Discrimination in the Matter of Religious Rights and Practices', United Nations Publications, Sales No. 60.XIV.2, 1960, p. v.
- 60 United Nations, General Assembly, 'Implementation of the Declaration on the Elimination of All

- Forms of Religious Intolerance and of Discrimination Based on Religion or Belief, Note By the Secretary-General, UN Doc. A/50/440, 18 September 1995, p. 3.
- 61 McDougal M, Lasswell H & Chen L, *Human Rights and World Public Order*, Yale University Press, New Haven, 1980, p. 673.
- 62 Alston P, 'The Fortieth Anniversary of the Universal Declaration of Human Rights: A Time More for Reflection Than for Celebration' in Bening J, *Human Rights in a Pluralist World: Individuals and Collectives*, Meckler Ltd, London, 1990, p. 1.
- 63 Cited in Department of Foreign Affairs and Trade, *Human Rights Manual: 1993 International Year of the World's Indigenous People*, AGPS, Canberra, 1993, p. 1.
- 64 See generally Odio-Benito E, 'Study of the Current Dimensions of the Problems of Intolerance and of Discrimination on Grounds of Religion or Belief, UN Doc E/CN.4/Sub.2/1987/26, p 4.
- 65 *ibid.*, p. 1.
- 66 Nef S, 'An Evolving International Legal Norm of Religious Freedom: Problems and Prospects', (1977) 7 *California Western International Law Journal* 543, p. 564.
- 67 These incidents refer to the so-called 'swastika epidemic' in the late 1950s which included, mainly in Europe, attacks against Jewish institutions and the daubing of swastikas on their buildings. See Lerner N, 'Religious Human Rights Under the United Nations' in van der Vyver J and Witte J (eds), *Religious Human Rights in Global Perspective*, Martinus Nijhoff, The Hague, 1996.
- 68 See Sub-Commission on Prevention of Discrimination and Protection of Minorities Res 3(XII), January 1960; Commission on Human Rights Res 6(XVI), March 1960; GA Res 1510(XV), December 1960; and GA Res 1779(XVII), December 1962.
- 69 See GA Res 3027(XCVII), December 1972.
- 70 Lerner N, *Group Rights and Discrimination in International Law*, Martinus Nijhoff, Dordrecht, 1991, p 79.
- 71 Sullivan D, 'Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination', (1988) 82 *The American Journal of International Law* 487 at p. 488.
- 72 *ibid.*, p. 488.
- 73 The first three paragraphs of Article 18 of the ICCPR correspond with Article 1 of the Declaration.
- 74 Human Rights Committee, CCPR/C/21/Rev.1/Add.4. p. 1.
- 75 This qualification is in the same terms as Article 18 of the ICCPR.
- 76 Moens G, 'The Action-Belief Dichotomy and Freedom of Religion', (1989) 12 *Sydney Law Review* 195, p. 197.
- 77 CCPR/C/21/Rev.1/Add.4. p. 3.
- 78 Article 14 of CROC states:
1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
  2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
  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.
- 79 Lerner N, 'Religious Human Rights Under the United Nations' in van der Vyver J and Witte J (eds), *Religious Human Rights in Global Perspective*, Martinus Nijhoff, The Hague, 1996, p. 119.
- 80 *Marett v Petroleum Refineries Australia* (1987) EOC pp92-206 and then on appeal to the Victorian Supreme Court (1988) EOC pp92-237. See O'Neill N and Handley R, *Retreat from Injustice: Human Rights in Australian Law*, Federation Press, Victoria, 1994, p 367.
- 81 *Thompson v Catholic College, Wodonga* (1987) EOC pp92-217. See O'Neill N and Handley R, p 367.
- 82 *Tarumi v Bankstown City Council* (1987) EOC pp92-214. On appeal to the Land and Environment Court, the court said that the application had to be considered on its merits in accordance with planning laws. It therefore held that the application should be approved.
- 83 see Human Rights and Equal Opportunity Commission, *Racist Violence: Report of National Inquiry Into Racist Violence in Australia*, AGPS, Canberra, 1991, Chapter 6.

**GLOSSARY**

**CERD** *UN International Convention on the Elimination of Racial Discrimination*

**Commission** Human Rights and Equal Opportunity Commission

**CROC** *UN Convention on the Rights of the Child*

**Declaration** *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*

**HREOC Act** *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*

**ICCPR** *UN International Covenant on Civil and Political Rights*

**ICESCR** *UN International Covenant on Economic, Social and Cultural Rights*

**ILO** International Labour Organisation

**ILO 111** *International Labour Organisation Discrimination (Employment and Occupation) Convention (No. 111) 1958*

**RDA** *Race Discrimination Act 1975 (Cth)*

**UDHR** *Universal Declaration on Human Rights*



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**Free to believe? The right to freedom of religion and belief in Australia**

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# Appendix

## UN Resolution 36/55 25 November 1981

### DECLARATION ON THE ELIMINATION OF ALL FORMS OF INTOLERANCE AND OF DISCRIMINATION BASED ON RELIGION OR BELIEF

The General Assembly,

**Considering** that one of the basic principles of the Charter of the United Nations is that of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action in co-operation with the Organization to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

**Considering** that the Universal Declaration of Human Rights and the International Covenants on Human Rights proclaim the principles of non-discrimination and equality before the law and the right to freedom of thought, conscience, religion and belief,

**Considering** 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,

**Considering** 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, **Considering** that it is essential to promote understanding, tolerance and respect in matters relating to freedom of religion and belief and to ensure that the use of religion or belief for ends inconsistent with the Charter of the United Nations, other relevant instruments of the United Nations and the purposes and principles of the present Declaration is inadmissible,

**Convinced** that freedom of religion and belief should also contribute to the attainment of the goals of world peace, social justice and friendship among peoples and to the elimination of ideologies or practices of colonialism and racial discrimination, **Noting** with satisfaction the adoption of several, and the coming into force of some, conventions, under the aegis of the United Nations and of the specialized agencies, for the elimination of various

forms of discrimination,

**Concerned** by manifestations of intolerance and by the existence of discrimination in matters of religion or belief still in evidence in some areas of the world,

**Resolved** to adopt all necessary measures for the speedy elimination of such intolerance in all its forms and manifestations and to prevent and combat discrimination on the ground of religion or belief, **Proclaims** this Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

#### 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 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.

#### Article 2

1. No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs.
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 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 beliefs 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.