4

Freedom of religion and belief in Australia

A brief history

4.1 A wide variety of religions both Christian and non-Christian has been represented in Australia since 1788, including the largely unrecognised religious traditions of Indigenous Australians. Despite this diversity, religious freedom has not been a particularly prominent feature of the development of Australian society and its institutions. Australia's governments and laws evolved from English, Protestant, particularly Church of England, institutions and still reflect these traditions. Nineteenth Century European Australia was a mainstream Christian society:

> into which first Nonconformists and finally Jews were admitted with some degree of reluctance. Insofar as Australians thought about other non-Christian religions at all, they associated them with 'the heathen Chinee' or the 'Mahommedan', for even those religions were more acceptable to them as religions than the beliefs of the indigenous non-Christians, the Aborigines.[1]

4.2 There was little regard for the spiritual beliefs of the indigenous population. In fact, in 1688, the explorer, William Dampier has been said to have encapsulated the established Church's attitude to Indigenous beliefs for the next 300 years with 'I did not perceive that they did worship anything.' The attitude of some clergy towards Indigenous Australians was one of dismissive benevolence. The Anglican Bishop of Adelaide

---

1 NSW Anti-Discrimination Board, **Discrimination and Religious Conviction**, 1984, pp. 35, 37. Indigenous religious traditions are considered in Chapter 9.

declared in 1860: 'I would rather they died as Christians than drag out a miserable existence as heathens.'[2]

4.3 Although the Church of England was, for some time, regarded as the established church for the colony, Anglican chaplains received rather indifferent treatment from both the local and English authorities. Initially, it was also difficult for the Catholic Church to have priests accredited to Australia. Indeed, indifference has been said to describe the attitude of the colony generally.

> A penal colony, fighting for survival, was not interested in religion, in any case, the time and circumstances of its foundation suggest that Australia may best be understood as the first genuinely post-Christian society. Its founding fathers, in contrast with those of the American colonies, came from a society where religion was in decline and disarray, eroded by scepticism and indifference. The climate they established was that of indifference to religion generally, although toward Catholicism, Methodism also, this was sharpened into active hostility.[3]

4.4 Presbyterians had to wait some time for their first minister, while Jews established their first permanent synagogue in 1844. The validity of marriages certified by non-Anglican clergy was not completely resolved in NSW until 1855. Convicts were obliged to attend Anglican church services, whatever their beliefs.[4]

4.5 Legislation and administration in NSW was based on the assumption that it was a Christian state with a responsibility to preserve this religion and no other. In 1836, Governor Bourke's *Church Act* promoted the building of Churches and Chapels and provided maintenance for ministers of religion.[5]

4.6 While early Governors sought to establish one official church, Bourke wrote to Lord Stanley in 1833 arguing for spreading financial assistance between the various Christian Churches of the colony, rather than selecting and recognising one in particular.

---

2 S N Stone, **Aborigines in White Australia: a Documentary History of the Attitudes affecting Official Policy and the Australian Aboriginee, 1967-1973**, (Heinemann Educational Australia, 1974), pp. 15, 45.

3 Patrick O'Farrell, **The Catholic Church and Community in Australia: A History** (Melbourne, Nelson, 1977), p. 17.

4 NSW Anti-Discrimination Board, p. 38.

5 J S Gregory, **Church and State: With Particular Reference to Victoria Since Separation** (Melbourne, Cassell, 1973), p. 29.

> I would observe that, in a New Country to which Persons of all religious persuasions are invited to resort, it will be impossible to establish a dominant and endowed Church without much hostility and greater improbability of its becoming permanent.[6]

4.7 Bourke was, however, only referring to the three main Christian faiths of the time: Anglican, Catholic and Presbyterian. Despite arguments from some, such as W C Wentworth, that Jews contributed equally to revenue raising and were therefore entitled to equal benefits, neither the colonial or English authorities envisaged extending financial aid to non-Christian religious groups. This was, however, eventually extended to Jews in 1858.[7]

4.8 Government aid to religious bodies for such matters as education came into question toward the end of the century. Thus, State aid to religion was withdrawn by South Australia in 1851, Queensland in 1860, New South Wales in 1862, Tasmania in 1869, Victoria in 1870 and Western Australia in 1890. Freedom of religion in Australia really only came into focus in the lead up to Federation and the drafting of the Australian Constitution.[8]

4.9 The-then Human Rights Commissioner, Mr Chris Sidoti, drew attention to the fact that, from the earliest days of settlement, there was religious discrimination in Australia. From 1788 to about 1970, there was tension between Anglican and Protestant Christians and the Catholics.[9]

> Sectarianism was endemic. Catholic and Protestant children would meet on the street and taunt each other with rhymes; job advertisements advised 'no Catholics need apply'; mixed marriages resulted in ostracism.[10]

4.10 These tensions in Australian society were particularly marked between Protestants and Irish Catholics, evidenced by public debate and with Irish Catholics suffering discrimination in areas such as employment. Underlying tensions were heightened during World War I, with Catholics being labelled as anti-British, against the Empire and anti-Australian.[11]

4.11 Mr Sidoti noted that the kind of discrimination that resulted from these tensions was now very much a thing of the past. Smaller religious

---

6 Cited in NSW Anti-Discrimination Board, p. 39.

7 Gregory, p. 29.

8 NSW Anti-Discrimination Board, p. 41.

9 Discussed, for example, in Edmund Campion, **Rockchoppers**, (Ringwood, Penguin 1983).

10 Stuart Macintyre, the **Oxford History of Australia**, **vol 4**, (Melbourne, OUP, 1986), pp. 67-8.

11 Campion, pp. 77-103.

communities or their members still experienced discrimination in employment, housing and establishing places of worship of the type that the now predominant denominations experienced in the past. He suggested that the problems of such minority groups still tended to be ignored.[12]

4.12 Since the 1950s, immigration from Southern Europe, South East Asia and the Middle East has further expanded this cultural and religious diversity. Numbers of those identifying with non-Christian religions have shown the largest increase in numbers since the early 1990s. Australia now features an increasing number of minority religious groups and growing numbers of previously established groups.[13]

Commonwealth provisions

Section 116

4.13 The Australian Constitution was the subject of debate for a decade before its adoption in 1901. The references to God in the Constitution were intended to satisfy the religious views of different groups of delegates participating in the pre-Federation conferences, including a movement to have some recognition of God in the Constitution. The religious climate at the time of Federation in Australia has been characterised as one of tolerance based on a concern for the general advancement of Christian religion or an "anti-sectarian endorsement of religion". It has been argued that, given this climate:[14]

> … s. 116 was an attempt to ensure that religion was kept out of public discourse and that religious considerations would not colour issues of public policy. At no stage do the founders of the Australian federation seem to have been motivated by the sense that engagement between religion and the state itself was in itself an undesirable thing.[15]

4.14 Section 116's originator was Tasmanian Attorney-General, Andrew Inglis Clark. Although well-versed in United States constitutional law, Clark's

12 Transcript, 6 March 2000, p. 271.

13 Exhibit No 58, p. 1. NSW Anti-Discrimination Board, pp. 3-4, 82.

14 Stephen McLeish, 'Making sense of Religion and the Constitution: a Fresh Start for S116,' **Monash University Law Review** 18(2) 1992, p. 217.

15 Joshua Puls, 'The Wall of Separation: Section 116, The First Amendment and Constitutional Religious Guarantees,' **Federal Law Review,** 26 (1), 1998, p. 151.

motivation for pushing for religious freedom in particular perhaps stemmed from his own Unitarian background. Meanwhile, Edmund Barton and Henry Bournes Higgins were concerned that a reference to God not indicate an implicit federal power to legislate with respect to religion and proposed a safeguard to ensure this did not occur. Initially neither the motion for recognition nor the safeguard were passed.[16]

4.15 A motion proposed by Patrick McMahon Glynn to include the words 'humbly relying on the blessing of Almighty God' in the Preamble to the Constitution was later successful. This was perhaps as much a political exercise as one of religion, for Glynn argued that the words would 'recommend the Constitution to thousands to whom the rest of its provisions may for ever be a sealed book.' Higgins again proposed a clause to ensure protection against federal intervention. With some slight changes, this clause was eventually enacted as s. 116.[17]

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

4.16 This does not amount to a complete guarantee of protection. It does not apply to the States, nor does it provide individuals with any avenue of legal redress if their rights have been violated. A number of cases have appeared before the High Court of Australia concerning the establishment and free exercise provisions of s. 116. The religious observance and public office provisions have not yet been judicially considered.[18]

4.17 The first consideration of s. 116 by the High Court was in the case *Krygger v Williams*, in 1910. In what is now seen by some to be a rather narrow interpretation of s. 116, the Court ruled that the compulsory military training provisions of the *Defence Act 1903-1910* did not violate the free exercise of religion.[19]

4.18 In 1943, there was a more extensive consideration of s. 116, in *Adelaide Company of Jehovah's Witnesses v the Commonwealth*. This case concerned the Commonwealth's attempt to prohibit the advocacy of doctrines it considered prejudicial to the war effort. The Jehovah's Witnesses argued

16 NSW Anti-Discrimination Board, p. 42. Unitarians had been subject to persecution and a lack of acceptance for some time. Puls, p. 140.

17 **Official Record of the Debates of the Australasian Federal Convention** (rep 1986) Vol v at p. 1732.

18 Exhibit 17, p. 14.

19 *Krygger v Williams* (1912) 15 CLR p. 366. Puls, p. 142.

that the measure contravened s. 116. Chief Justice Latham noted that s. 116 must operate 'irrespective of varying opinions in the community as to the truth of particular religious doctrines' and that 's. 116 was required to protect the interests of religious minorities, particularly unpopular ones.' His Honour, however, ultimately found that a law will not necessarily be impugned because it interferes with freedom of religion, that freedom of religion was not absolute and that the Court had to consider whether an infringement was 'reasonably necessary.'[20]

4.19 In 1981, in what became known as the DOGS case, Victorian tax-payers challenged a Commonwealth grants scheme to the States. Funding was conditional on a proportion being directed to private schools, the majority of which were Catholic schools. The claimants argued that this was in breach of s. 116, as it amounted to an establishment of religion.[21]

4.20 The High Court held that a law which provided for financial aid to the educational activities of church schools was not a law for establishing a religion, even though the law might indirectly assist the practice of religion. The majority rejected the argument that any law which tended to support, aid or recognise a religion was in breach of s. 116 and that the Commonwealth should for that reason avoid any involvement with religion. The Court took the view that a religion is only 'established' for the purpose of s. 116 when it becomes identified with the civil authority as a national institution.[22]

4.21 However, Justice Murphy dissented and argued that s. 116 should be interpreted more widely, as not simply limiting the legislative power of the Commonwealth but also fundamentally guaranteeing the right of every Australian to freedom of and from religion. He argued that even non-preferential aiding or sponsoring of religion could be interpreted as establishing a religion. Justice Murphy's approach drew on the interpretation of the American Constitution.

4.22 In 1983, the High Court took a wider view in the Scientology case, in which the definition of religion was also considered. In this case, s. 116 was interpreted as providing fundamental guarantees, rather than merely imposing restrictions on the powers of the legislature.

> the guarantees in s.116 of the constitution would lose their character as a bastion of freedom if religion were so defined as to

20 *Adelaide Company of Jehovah's Witnesses Inc v the Commonwealth* (1943) 67 CLR 116, pp. 123, 124, 149, 155, 157.

21 The case was brought by an organisation called Defence of Government Schools.

22 Exhibit No 17, p. 14; Puls, p. 144-5.

> exclude from its ambit minority religions out of the main streams of religious thought.[23]

4.23 In recent years, the High Court has demonstrated a general trend towards greater awareness of human rights in a number of recent decisions. Despite this, the wording of s. 116, nonetheless, remains limited in scope. Alone, it does not amount to a constitutional guarantee of the right to freedom of religion and belief.[24]

Extending the scope of Section 116

4.24 In recent years, there have been suggestions that the negative protections in the Constitution should be supplemented by legislation to achieve greater positive protection. The High Court has not proved eager to extend interpretations of s. 116 in this way. Examining cases in which it has considered s. 116, Michael Hogan argued that:[25]

> All the indications are that s. 116 imposes scarcely any restraint on a determined Commonwealth Government and offers virtually no guarantee of religious freedom or equality to the churches.[26]

and that,

> Religious freedom has a value in the Commonwealth constitution only in so far as the practise of such freedom does not offend against the accustomed community rights of other Australians. That this is the exact opposite of what could be expected from a provision guaranteeing religious freedom against the 'tyranny of the majority' has not concerned the High Court.[27]

4.25 Similarly, Stephen McLeish argued that s. 116 needs to be made more coherent, particularly by developing a reading which pays greater attention to civil rights rather than legislative power.[28]

4.26 Some academics have argued that the most obvious addition would be to extend the operation of s. 116 to the States. The Section's position in the Constitution, in the Chapter dealing with the States, seems to suggest that

---

23 *Church of the New Faith v Commissioner for Payroll Tax* (Vic) (1983) 154 CLR 120, pp. 131-132.

24 Exhibit No 17, p. 15.

25 See, for example, submissions from HREOC and the NSW Anti-Discrimination Board. The particular cases were *Krygger v Williams* (1912) 15 CLR 366, *Adelaide Company of Jehovah's Witnesses Inc. v The Commonwealth* (1943) 67 CLR and the State Aid Case (1981).

26 Michael Hogan, 'Separation of Church and State: Section 116 of the Australian Constitution,' **Australian Quarterly**, 52(2) 1981, p. 226.

27 *ibid*, p. 227.

28 McLeish, p. 208.

this may have been the original intention. Such an amendment was proposed under the *Constitution Alteration Bill 1944*, but defeated in the subsequent referendum. Again, at the annual Constitutional Convention in 1978, a motion that s. 116 should also be binding on States and Territories was rejected. Finally, in 1988, the *Constitutional Alteration (Rights and Freedoms) Act 1988* (Cth) sought to apply s. 116 equally to the States and Territories; to cover any government act, not just legislation; and to remove 'for,' such that the government could not 'establish any religion' or 'prohibit the free exercise' thereof. This was also unsuccessful.[29]

4.27 Mr Joshua Puls argues, however, that the extension of s. 116 would serve no real purpose and that it is 'both adequate and appropriate' considering 'the extent that there can be adequate and appropriate protection of freedom of religion and adequate prohibition of establishment of religion'.[30]

4.28 Reports from HREOC and the NSW Anti-Discrimination Board, as well as a number of submissions to this inquiry, expressed the view that s. 116 is, in a number of ways, inadequate of and that there is a need for reform.[31]

4.29 HREOC's 1998 Report, **Article 18: Freedom of religion and belief**, concluded that the level of protection afforded under Commonwealth, State and Territory laws was 'relatively weak compared to many other countries and that Australia did not satisfy its international obligations relating to freedom of religion and belief.'[32]

4.30 In its 1984 report, **Discrimination and Religious Conviction**, the NSW Anti-Discrimination Board made 30 specific recommendations and found that:

- The Constitutional guarantees of s. 116, strictly applicable only to Federal areas, have provided little practical protection against the kind of injustice and discrimination detailed in that Report, whether experienced by religious people or those opposed to religion or indifferent to it, because of narrow judicial interpretations.[33]

29 Puls, p. 143.

30 *ibid*, p. 163.

31 For example, Mr Geoff Pickering, Submission No. 64, and the ACT Quakers, Submission No 74.

32 Submissions, p. 575. HREOC's role and powers, and its Report on Article 18, are considered in more detail in the next section of this Chapter.

33 NSW Anti-Discrimination Board, p. 53.

- Amending s. 116 to make it applicable to the State/Territory as well as to Federal legislation, as was originally intended, was long overdue.
- An enforceable Bill of Rights should be written into the Australian Constitution.

4.31 It also stated that individual religious liberties needed to be more adequately protected by human rights and anti-discrimination legislation.[34]

Section 44

4.32 Submissions from Christians Speaking Out and Mr Neil Ryan raised concerns that:

> …that observance of UN legislation such as Article 18 of the Universal Declaration of Human Rights is in conflict with s. 44 and undermines Australia's sovereignty.[35]

4.33 Section 44 of the Constitution provides that any person who:

> (i) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power: or
>
> (ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer:
>
> …. shall be incapable of being chosen or of sitting as a senator or a member in the House of Representatives.

Federal discrimination laws

4.34 Under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) (the HREOC Act), the Commission has a variety of functions and powers relating to the protection and promotion of human rights for all people in Australia. The Commission has the power to investigate violations of human rights, including the right to freedom of religion and belief, where the alleged violator is the Commonwealth or an agent of the

34 NSW Anti-Discrimination Board, pp. 53-54.

35 See Christians Speaking Out, Submissions, p. 34 and Mr Neil Ryan, Submissions, p. 157.

Commonwealth or the violation occurs under a Commonwealth enactment.[36]

4.35 The *Racial Discrimination Act 1975* (Cth) (RDA) provides some protection against discrimination on the basis of religion. Under this Act, direct and indirect discrimination on the ground of race are unlawful, as is public behaviour based on race which offends, insults, humiliates or intimidates a person or group. If a religious group can also be classified as a 'racial' or 'ethnic' group, the RDA offers protection from discrimination and vilification. The RDA also arguably covers discrimination on the basis of religion in certain circumstances without this classification. Under the indirect race discrimination provision of the RDA, discrimination on the basis of religion is unlawful when the discriminatory act or practice disadvantages an ethno-religious group disproportionately.[37]

4.36 The *Workplace Relations and Other Legislation Amendment Act 1996* includes a range of provisions intended to prevent and eliminate discrimination in employment. Religion is among the specified grounds of employment discrimination prohibited by this Act.

State/Territory legislation

4.37 Section 116 of the Commonwealth Constitution does not affect the legislative powers of the States and Territories.

> the Constitution does not touch the States — and it is the States and Territories which have the most responsibility for the social regulation that is likely to have some impact on the practice of religion.[38]

4.38 Tasmania is the only State to provide for religious freedom in its constitution. Section 46 of the *Constitution Act 1934* (Tas) provides:

> Freedom of conscience and the free profession and practise of religion are, subject to public order and morality, guaranteed to every citizen.
>
> 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

36 Exhibit No 17, p. 90. HREOC's role and functions are discussed in more detail later in this Chapter.

37 Exhibit No 17, p. 91.

38 Dr Reid Mortensen, cited in Exhibit No 17, p. 13. Some relevant State / Territory legislation is listed in Appendix D, from Submission No 44, at pp. 359-361.

> religious test shall be imposed in respect of the appointment to or holding of any public office.

4.39 This provision has not yet been tested judicially and provides limited protection, as it can be overridden by any Act of the State's Parliament, or if it is inconsistent with an Act of the Commonwealth Parliament.[39]

4.40 Victoria, Queensland, Western Australia, the Northern Territory and the ACT have passed legislation prohibiting direct and indirect discrimination on the ground of religion. Under each of their Acts, it is 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 their Acts contain a definition of religion or religious belief. The Northern Territory Act, however, does provide that religious belief and activity includes Indigenous spiritual belief and activity.

4.41 The New South Wales *Anti-Discrimination Act 1977* does not prohibit discrimination on the grounds of religion. The definition of 'race' in the New South Wales Act does now include ethno-religious background, hence providing a measure of protection against discrimination for a religion associated with a particular racial or ethnic group.[40]

4.42 Anti-discrimination laws in South Australia and Tasmania do not deal specifically with discrimination on the ground of religion. In Victoria, Queensland, Western Australia, the ACT and the Northern Territory, legislation prohibits direct and indirect discrimination on the grounds of religious belief and religious activity in the areas of employment, education, the provision of goods and services, accommodation and club membership.[41]

4.43 Queensland legislation also applies to superannuation, insurance and the administration of State laws and programs. While Victorian legislation also prohibits members of local government councils from discriminating against other members on the basis of their religious practices or beliefs.

4.44 Most of the State and Territory Anti-Discrimination Acts recognise that some accommodation of the special needs of individuals should be made in circumstances where it would not be an unreasonable requirement. Under ACT legislation, for example, it is unlawful to discriminate by refusing an employee permission to observe religious practices during working hours, where:

---

39 Exhibit No 17, p. 16.

40 *ibid*, p. 92.

41 *ibid*, pp. 92-3.

- it is recognised as necessary or desirable by persons of the same religious conviction as the employee;
- it is reasonable having regard to the circumstances of employment;
- it does not subject the employer to unreasonable detriment.

4.45 WA legislation includes a similar provision, while the remainder 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 would be an unreasonable imposition to do so.

4.46 There are a number of exemptions in each Act, which permit discrimination on the grounds of religious beliefs and activities. Most of these are for the benefit of religious organisations. For example, a religious school may discriminate between applicants for employment on the basis of their religious convictions or absence of religious convictions to avoid injury to the religious susceptibilities of the adherents of that religion. State and Territory anti-discrimination legislation also contains provisions for broader exemptions for religious organisations if the discrimination is on the basis of religion, and is to avoid injury to the susceptibilities of adherents of that religion.[42]

4.47 Victorian legislation also contains a provision which allows discrimination where

> the discrimination is necessary for the [discriminator] to comply with the person's genuine religious beliefs or principles[43]

4.48 There is a lack of uniformity between the NSW and Victorian provisions with regard to exemptions, some of which are very broad and effectively amount to an absolute exemption for acts of conscience.[44]

4.49 The level of protection for the right to freedom of religion and belief under state law has been tested judicially in South Australia. In *Grace Bible Church Inc v Reedman* (1984), the Supreme Court confirmed that there is no legal remedy available to any person who believes their rights in regard to religion or belief have been violated by that State's Parliament or Government.[45]

---

42 *ibid*, p. 93.

43 *Equal Opportunity Act 1995* (Vic) s. 77.

44 Exhibit No 17, p. 94.

45 *Grace Bible Church Inc v Reedman* (1984) 54 ALR 571, Exhibit No 17, p. 16.

The powers and role of HREOC

4.50 The Human Rights and Equal Opportunity Commission (HREOC) is an independent statutory authority of the Commonwealth, established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

4.51 The Commission has specific legislative functions and responsibilities for the protection and promotion of human rights and the elimination of discrimination. In particular, the Commission is required:

- to promote the understanding, acceptance and public discussion of human rights and equal opportunity in employment and occupation;
- to inquire into 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;
- to 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, and
- to advise on what action, in the opinion of the Commission, Australia needs to take to comply with the provisions of the ICCPR, the Declarations annexed to the Act or any relevant international instrument declared under the Act.[46]

4.52 The major functions of the Commission are outlined in:

- Section 11(1) and 46C(1) of the Act which established it. This Act provides for the Commission's administration and gives it responsibility for observing seven international instruments ratified by Australia. These instruments are:
  - ⇒ The *International Covenant on Civil and Political Rights* (ICCPR).
  - ⇒ International Labour Organisation *Discrimination (Employment and Occupation) Convention* (ILO 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.*

46 Exhibit No 17, p. 2.

⇒ The Act also empowers the Aboriginal and Torres Strait Islander Social Justice Commissioner to report on and promote the human rights of Indigenous Australians.

- s. 20(1) of the *Racial Discrimination Act 1975* gives effect to Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD). Its major objectives are to:
  - ⇒ promote equality before the law for all persons, regardless of their race, colour or national or ethnic origin, and
  - ⇒ make discrimination against people on the basis of their race, colour, descent or national or ethnic origin unlawful.
- s. 48(1) of the *Sex Discrimination Act 1984* gives effect to Australia's obligations under the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and certain aspects of ILO Convention 156. Its major objectives are:
  - ⇒ to promote equality between men and women;
  - ⇒ to eliminate discrimination on the basis of sex, marital status or pregnancy and, with respect to dismissals, family responsibilities, and
  - ⇒ to eliminate sexual harassment at work, in educational institutions, in the provision of goods and services, in the provision of accommodation and the delivery of Commonwealth programs.
- s. 67(1) of the *Disability Discrimination Act 1992* has as its major objectives:
  - ⇒ to eliminate discrimination against people with disabilities;
  - ⇒ to promote community acceptance of the principle that people with disabilities have the same fundamental rights as all members of the community, and
  - ⇒ to ensure as far as practicable that people with disabilities have the same rights to equality before the law as other people in the community.

4.53 In addition:

- sections 27(1), 28(1), 28A(1) of the *Privacy Act 1988* confer functions on the Privacy Commissioner, as do several other Commonwealth statutes, and

- s. 209 of the *Native Title Act 1993* confers functions on the Aboriginal and Torres Strait Islander Social Justice Commissioner.[47]

4.54 The Commission can investigate complaints of discrimination in employment or occupation based on religion at all levels of government and in the private sector. However, HREOC's Act does not provide enforceable remedies against discrimination on the ground of religion or belief. Where the Commission finds discrimination within the terms of the Act and the parties are unable to achieve a conciliated settlement, the only course open to the Commission is to submit a report to the Commonwealth Attorney-General for tabling in Parliament.[48]

Article 18 Report

4.55 HREOC's report on Article 18 was the culmination of a review of religious freedom in Australia. It addressed the right to freedom of religion and belief in this country, as provided for in Article 18 of the ICCPR. Its principal recommendation was the enactment of a Religious Freedom Act which would make discrimination and vilification on the ground of religion and belief unlawful.[49]

4.56 It also recommended that:

- The proposed Act should affirm the right of all religions and organised beliefs as defined to exist and to organise and determine their own affairs within the law and according to their tenets.
- This Act should cover the full range of rights and freedoms recognised in Article 18 of the ICCPR and the Religion Declaration, Articles 1, 5 and, 6 including but not limited to:
  - ⇒ freedom to hold a particular religion or belief,
  - ⇒ freedom not to hold a particular religion or belief,
  - ⇒ freedom to manifest religion or belief in worship, observance, practice and teaching,
  - ⇒ freedom from coercion which would impair religion or belief,
  - ⇒ the right of parents and guardians to organise family life in accordance with their religion or beliefs, and
  - ⇒ freedom from discrimination on the ground of religion or belief.

47 http://www.hreoc.gov.au/about/functions/index.html

48 Exhibit 17, p. 90.

49 Exhibit No 17, pp. v-ix (*passim*) It can also be found at: http://www.hreoc.gov.au/human_rights/religion/index.html

- For the purposes of such an Act, 'religion and belief' should be given a wide meaning, covering the broad spectrum of personal convictions and matters of conscience.

4.57 The process and remedies available for contravention of the religious vilification provision should be civil remedies similar to those provided for in the racial hatred provisions of the *Racial Discrimination Act 1975* (Cth).

4.58 The Report also concluded that current laws are inadequate to protect the right to manifest indigenous beliefs and religious beliefs concerning autopsies and medical procedures such as blood transfusions. It recommended development of appropriate laws and guidelines which properly accommodated the right to manifest these beliefs and practices. It also found that laws making some pagan practices criminal offences were discriminatory, violated freedom of belief and should be repealed.

4.59 On 9 February, 1999, in response to a question on notice in the House of Representatives, the Attorney-General stated that the Government did not intend to implement the recommendation for a Religious Freedom Act. The Government has indicated that, at this time, it does not intend to respond to HREOC's Report.[50]

4.60 In its submission to this inquiry, HREOC stated that:

> The Australian Government's efforts will be fruitless if freedom of religion or belief is not fully protected at home. The first step should be the implementation of the recommendations of the Commission in *Article 18*.[51]

4.61 A number of other submissions to this inquiry also called for the implementation of HREOC's recommendations.[52]

Australia's regional and bilateral actions

4.62 While maintaining its engagement at the multilateral level, particularly by its support for the work of the UN, Australia has also devoted considerable attention to regional human rights activities.

---

50 HREOC, Submissions, p. 576.

51 Submissions, p. 576.

52 For example, the Executive Council of Australian Jewry, Submissions, p. 654 and Ms Pat Hillcoat, Submissions, p. 697. This matter is addressed in more detail later in this Chapter.

4.63 The Secretariat for the Asia-Pacific Forum of National Human Rights Institutions is located in Australia, associated with HREOC. In its work, the Forum provides a yardstick with which nations in the region could resist pressures for lower human rights standards. Its work is clearly based on international standards, and the Australian Government has been devoting increased attention to action at the regional level.[53]

4.64 At the last annual meeting of the Forum, in September 1999, the Indonesian human rights organisation, Komnas HAM, requested a study on religious freedom and ethnic and religious conflict within the region. A working party has been established to prepare a detailed proposal for consideration by the Forum.[54]

4.65 Australia has also provided support for such bodies as the Centre for Democratic Institutions (CDI). Its purpose is to give practical effect to the Government's commitment to good governance and human rights. It seeks to promote the common elements vital to the democratic process, such as consent, transparency and accountability.[55]

4.66 Through its development assistance program, Australia has actively increased its support for human rights, particularly in the region. AusAID devotes significant resources to this work. Thus, as part of the recent doubling of expenditure for this purpose, funds provided to the Asia-Pacific NGO Forum have been increased. This body works towards improving the monitoring of human rights.[56]

4.67 Through development assistance funding, the needs of both institutional areas, such as legal and judicial systems, and organisations advocating human rights are addressed.[57]

4.68 Bilaterally, Australia is also active in its general encouragement of human rights. Through these engagements, Australia raises questions about religious freedom through its dialogues in appropriate situations. For example, religious freedom has been on the agenda in all the sessions of the annual bilateral human rights dialogue with China, and is an important issue in the overall relationship with Iran. At a number of

---

53 HREOC, Submissions, p. 574, DFAT: Transcripts, 24 September 1999, p. 25, 28 February 2000, p. 240.

54 Transcripts: HREOC, 6 March 2000, p. 271, DFAT, 24 September 1999, p. 32. DFAT Submissions, p. 1043. See paragraph 5.148.

55 DFAT: Transcripts, 24 September 1999, p. 32, 28 February 2000, p. 247.

56 DFAT: Transcripts, 24 September 1999, pp. 32-33, 28 February 2000, p. 240.

57 Transcript, DFAT, 24 September 1999, p. 32. See also Transcripts: Christian Solidarity (Australasia) 24 September 1999, p. 62, World Vision Australia, 22 October 1999, p. 211. DFAT, Submissions, pp. 1017-1018.

posts, officers seek information and report on human rights situations, and represent the views of the Government.[58]

4.69 DFAT devotes the resources of one section to full-time work on human rights issues, and the international relations law section in the Department also devotes a great deal of time to these matters. This is a significant allocation, but it is not one that can match that of the USA in this field. As it is so much larger than Australia's equivalent body, the State Department's coverage of human rights matters is much wider. It also makes the results of its work freely available.[59]

4.70 The protection of the rights of religion and belief that are guaranteed in international instruments has become an increasingly important and integral component of the foreign policy of the USA. This reflects a developing consensus in that country regarding the promotion of religious liberty.[60]

4.71 In 1998, in pursuit of its concerns, the USA passed the International Religious Freedom Act. This created the Commission on International Religious Freedom, to provide additional advice on the subject to the President and the Secretary of State. The Advisory Committee on Religious Freedom Abroad which reports to the Secretary of State. The State Department's Annual Report on Freedom of Religion takes a detailed, country-by-country approach. There is also a US Ambassador-at-Large on Religion and Freedom.[61]

Australian society today

4.72 During this inquiry, some concerns were raised that multiculturalism has introduced a number of culturally disparate groups with the potential to cause tension and problems. Some fears were also expressed that this tolerance for other religions could pose a threat to Christianity. Overall, however, Australia's multiculturalism is viewed positively, forming a

58 Transcript, DFAT, 28 February 2000, p. 240.

59 Four full-time staff. DFAT: Transcripts, 28 February 2000, p. 240, 24 September 1999, p. 29. DFAT is also assisted in its gathering of information by many individuals and, especially, by NGOs.

60 Exhibit No 62, p. 1.

61 Exhibit No 62, p. 1, Transcript, World Vision Australia, 22 October 1999, pp. 210, 206, 217.

solid basis for a tolerant society and providing an example to the rest of the world.[62]

4.73 With the reputation as a relatively harmonious and successful multicultural society, Australians tend to pride themselves on their easy-going attitude toward different cultures and beliefs. In addition, as the NSW Anti-Discrimination Board's 1984 report found, in general, that 'Australians are rather apathetic about religion and consider it a largely private matter.' Indeed, Australia has been called 'the world's most secular society'.[63]

4.74 Despite this, as is evidenced by numerous examples of intolerance, in practice many Australians 'fail to understand, appreciate and accept the diversity and values of the beliefs and religions of others.' Again, the NSW Anti-Discrimination Board's report stated that: 'They are suspicious of unfamiliar religions and their practices, because they seem to be foreign and different, especially if they are not Christian.' While this situation may have improved since 1984, such attitudes remain prevalent in Australian society.[64]

4.75 Australia does, nonetheless, have a great deal to offer as a diverse but relatively peaceful society with a good record on human rights issues. There is always, however, room for improvement. If this country is to have any credibility pursuing human rights issues around the world, it must set a good example at home in promoting and protecting freedom of religion and belief.[65]

4.76 It can be argued, as it was in the submission from Rev John McNicol for example, that there is a need to acknowledge and provide protection for the beliefs of Australia's Indigenous people and their religious traditions. As has been argued by HREOC and a number of legal academics, there is considerable room to provide increased protection for freedom of religion and belief under Commonwealth and State/Territory legislation. It is also

62 Submission Nos. 81 and 60. Submission No 69, p. 635. See submissions from NSW Anti-Discrimination Board, HREOC, Exhibit 17 and Submission No. 62; Prof Gary Bouma, Submissions, p. 73; Australian Catholic Bishops Conference, Submissions, p. 980. The link between multiculturalism and religious tolerance in Australia is addressed in the next section.

63 NSW Anti-Discrimination Board, HREOC. Muriel Porter, **Land of the Spirit?** (World Council of Churches (WCC), Geneva 1990). Peter Jensen, 'Why Australia is Pagan,' **The Sydney Morning Herald**, 16 February 1985, p. 30 (Saturday Review Section); cited in Exhibit No. 50, p. 2.

64 Exhibit 17, p. 1, NSW Anti-Discrimination Board, p. 192.

65 Prof Gary Bouma, Submissions, p 73; Mr Brian Hurlock, Submissions, p. 235; Ms Anita Chauvin *et al*, Submissions, p. 339; Mr Bob Fung, Submissions, p. 429; Anti-Discrimination Commission Qld, p. 433; Rev Helen Summers, Submissions, p. 1000; Humanist Society of Qld Inc, Submissions, p. 949.

desirable to put into practice these principles at all levels and move beyond 'mere religious tolerance to full religious liberty'.[66]

Multiculturalism in Australia

4.77 A number of submissions referred to multiculturalism in the context of freedom of religion and belief in Australia.

4.78 For example, Prof Gary Bouma stated that Australia had a great deal to offer the world as an example of a successful multicultural and religiously diverse society.[67]

4.79 The Australian Catholic Bishops Conference drew attention to a comment in the Report by the UN's Special Rapporteur, after his 1997 visit:[68]

> Australia therefore provides an original example of integrated multiculturalism and religious tolerance. This multicultural, multiracial and multi-religious edifice, which is in fact recent, is marked by the coexistence of diversity and the management of plurality, while offering the advantage of ensuring respect for the specific character of individual communities and their integration within Australian society.

4.80 The Bishops commented that this unfinished experiment undoubtedly constituted a contribution by Australia to the international community, in terms of a democratic system of society founded on respect for and the viability of diversity, especially religious diversity.

4.81 The submission noted the Australian Government's support for initiatives such as the Asia Pacific Forum of National Human Rights Institutions. It believed that the Government should be able to share some of the fruits of this original example of integrated multiculturalism and religious tolerance with its region. Australia's main influence for the good of religious freedom should therefore be in its region, and with its major trading partners.[69]

4.82 Dr Dallas Clarnette expressed the view that the policy of multiculturalism, pursued without a mandate from the Australian people, was one of the most serious challenges to religious freedom. Because it had potentially

66 Rev John McNicol, Submissions, pp. 20, 25.

67 Submissions, p. 77.

68 Exhibit No 55, paragraph 106, quoted in Submissions, p. 996.

69 Submissions, pp. 996-997.

divisive elements and often produces great conflict, it challenged the very nature of the country into which it had been introduced. Conflicts on the Indian Sub-Continent, across Africa, in the Balkans and even in the United Kingdom were cited in support of this view.[70]

4.83 By pursuing this policy, he stated Australia had shown its contempt for its history, its heritage and its own much envied social harmony. Multiculturalism introduced radically disparate religious, ethical and social beliefs and behaviours into an historically monocultural society. By encouraging Islamic, Buddhist, Hindu and 'other alien cultural factors', Australia had created its own climate for social tension and inter-religious clashes. It was probable that legislation would be necessary to curb the problem that has been created.

4.84 If Australia is to do anything constructive about the preservation of religious freedom, this argument continued, close attention must be given to empirical evidence about the social benefits of the Christian faith and of religious revivals throughout history. On the basis of that evidence, Dr Clarnette believed that Australia would be wise to encourage, rather than to denigrate, those religious and Christian values as a means of guaranteeing that this country remained the land of great tolerance and religious freedom that it has always been.

4.85 Moreover, if Australia is to offer anything to other parts of the world where religious liberty is in jeopardy, the best way to do this was to show that this is a society able to accommodate different religious emphases in an amicable environment. Those emphases should seek to preserve a mono-cultural society, with the same core values, transcendent faith and recognition of the absolutes from which alone sound moral, ethical, civic and personal qualities are derived.

4.86 Mr Neil Ryan referred to Australia's 'apparent bottomless capacity' to embrace a wide range of cultures and diverse religions. Given this agglomeration of cultures and practices, he was concerned about what was holding each segment of society together and the binding of this fragile conglomerate together by edict, law and a myriad of anti-discrimination human rights legislation.[71]

4.87 To date, Australia had demonstrated a remarkable degree of social coherence, free from conflicts of the sort that occur in other parts of the world. It may therefore, justly, attempt to promote ideals, even rules, for

70 Submissions, p. 718.

71 Submissions, pp. 154-155.

racial and religious harmony. But, he asked, how far could a once common culture be stretched?

4.88 He noted the responsible heritage of this 'profoundly unique society'. It should not be destroyed by the tyranny of further complex anti-discrimination legislation, as every minority group sought to demand their 'rights' without regard to the health of the whole community.

4.89 He also suggested that the Australian media had been less than responsible in failing to uphold a favourable image of this country as a cohesive multiracial and multicultural society. While censorship may well be regarded as anathema to freedom of speech, the nation's favourable image was marred when these rights over-ride respect for and responsibility towards national goals and objectives.[72]

4.90 The Australian Ownership and Security Alliance asserted that Australia is an accommodating, Christian nation. Religious tolerance has been extended to those who join this community. Since the advent of multiculturalism, the Alliance believed, Australia had been cultivating distinct communities, quite different from the all-inclusive society that served so well in its formative years.[73]

4.91 Christian Solidarity (Australasia) expressed the view that, in Australia's 'so-called' multicultural society, national Christian tolerance of other points of view was interpreted as weakness by some other faiths. This invited attacks from militant fundamentalist organisations whose voices grow stronger in the country because of rapidly growing numbers.[74]

Proposed Religious Freedom Act

HREOC's recommendation

4.92 A number of submissions recommended that Australia should pass a Religious Freedom Act, in particular HREOC in its 1998 Report on Article 18, that should:

- recognise and give effect to the right of freedom of religion and belief;

72 Submissions, p. 165.

73 Submissions, p. 564.

74 Submissions, p. 635.

- affirm the right of all religions and organised beliefs as defined to exist and to organise and determine their own affairs within the law, and according to their tenets;
- cover the full range of rights and freedoms recognised in the ICCPR, Article 18, and the Religion Declaration, Articles 1, 5 and 6, including the right not to hold a particular religion or belief;
- permit, in accordance with Article 18 of the ICCPR, only those limitations on the right to manifest a religion or belief that are prescribed by law and necessary to protect public safety, health or morals, or the fundamental rights and freedom of others;
- define 'religion and belief' as widely as possible,[75] and
- apply to individuals, public and private bodies, and all other legal persons who may be subject to Commonwealth legislation.[76]

4.93 As has already been pointed out, HREOC believed that the level of protection in Australia to freedom of religion and belief is weak, and that this country does not fully satisfy its international obligations, as set out in the ICCPR and the Religion Declaration.[77]

4.94 This Report also noted that the Commonwealth had the Constitutional power to pass legislation to ensure greater protection of the right to freedom of religion and belief, as set out in the ICCPR and the Religion Declaration.[78]

4.95 HREOC's submission noted that the Commonwealth Attorney-General had stated that the Government did not intend to implement this recommendation from the Article 18 Report.[79]

Other views

4.96 In their submission, the Mitchells of Kyabram in Victoria expressed alarm at the suggestion that such legislation was proposed. They noted that s. 116 of the Australian Constitution specifically stated that the Commonwealth was not to legislate about religion. Freedom from religious persecution was guaranteed by the Constitution, and Australian

75 The suggested definition can be found at paragraph 2.7.

76 Exhibit No 17, Recommendations R2.1-R2.6, pp. 26-27. See also p. 25.

77 See paragraph 4.58, referring to Exhibit No 17, pp. 13, 15-16, 26.

78 See Exhibit No 17, pp. 15, 26.

79 Submissions, p. 576, Transcript, 6 March 2000, p. 271. For the Attorney-General's statement, see House of Representatives, *Hansard*, 9 February 1999, p. 2273. No reason was given. See paragraph 4.59.

society had benefited greatly from this document. Any legislation in this area must be seen as interference with the Constitution, and to existing freedoms. They believed that the spirit of that document must be preserved for the benefit of all citizens.[80]

4.97 OPEN DOORS is a Brisbane-based Christian charitable organisation formed to provide relief and support for needy and disadvantaged people in Third World countries.[81]

4.98 In its submission, OPEN DOORS supported the Religious Freedom Act proposed by HREOC, including penalties for all forms of discrimination based on religious belief. It believed that such legislation would set a powerful example to nations less inclined to recognise and protect freedom of religion and belief. Moreover:

- Australia cannot credibly protest about the lack of religious freedom in other nations unless it can show that it has done everything possible to enact and enforce laws ensuring the protection of this freedom for all of its own citizens;
- having set such an example, Australia would be entitled to promote religious freedom as a basic human right in international forums. It would also be able to adopt appropriate policies in its relationships with other nations, to encourage and persuade them to take the same path, and
- Australian NGOs, especially religious organisations, involved in providing assistance to countries where religious freedom is not guaranteed or enforced, would be able to use this country as an example. By not discriminating in their work, they would be able to reinforce the importance of freedom of religion and belief as a basic human right.[82]

4.99 The ACT Quakers recommended that a comprehensive Religious Freedom and Beliefs Act be passed. They urged the Attorney-General to reconsider his decision not to recommend that Parliament enact such legislation. Failure to do so did not augur well, they argued, for Australia's diplomatic initiatives for governments in the region to take legislative or other action to protect freedom of religion and belief in such countries.[83]

80 Submissions, p. 784.
81 Submissions, p. 602.
82 Submissions, p. 604.
83 Submissions, p. 667.

4.100 The Humanist Societies of Victoria and Queensland supported the proposed legislation.

4.101 The Victorian body believed that it was paramount that there be Commonwealth, not State / Territory, legislation covering freedom of religion and belief, freedom from religion, the prohibition of discrimination on religious or atheistic grounds and the proscription of harmful religious practices. Such legislation should incorporate the precepts of the ICCPR, Articles 18 of the UDHR and the Religion Declaration. Such national legislation would foster respect and tolerance, and lessen what it saw as the inherent divisiveness of organised religions.[84]

4.102 The Queensland body stated that, to create a more harmonious and fairer society, the legislation should be enacted. It should cover the full range of rights and freedoms in the ICCPR and the Religion Declaration. Such an Act, it believed, would ensure protection for all systems of belief, religious and non-religious.[85]

4.103 The Human Rights Commission of the Baptist World Alliance urged the Commonwealth Government to recognise Indigenous spirituality as a religion, and to promote this within the community to protect freedom of religion and belief. This recognition and promotion would be achieved by enacting a Religious Freedom Act, specifically recognising, promoting and protecting Indigenous spirituality. It would also, the Commission believed, give effect to the rights recognised in Article 2 of the ICCPR. Australia has ratified this instrument and is obliged to implement its provisions.[86]

4.104 The Queensland Anti-Discrimination Commission supported HREOC's recommendation. It noted that there were already successful precedents upon which such legislation could be based. The Commission's experience was that anti-discrimination laws had a powerful and positive impact on the community, because:

- they carried symbolic significance as statements of community values and standards;
- they acted as deterrents by providing a complaints and redress mechanism, and
- they provided a vehicle for community education.

84 Submissions, p. 179.

85 Submissions, p. 126.

86 Submissions, p. 324.

4.105 Commonwealth legislation protecting freedom of religion and belief would carry this weight. The Commission believed that the absence of such legislation made a statement and detracted from Australia's potential to act as a leader and role model in this area.[87]

87 Submissions, p. 435.