Religious freedom under attack

by Richard Egan
BA, GradDipLibSc
National Policy Officer, FamilyVoice Australia



VoxBrief
February 2009
FamilyVoice AUSTRALIA

© Copyright FamilyVoice Australia

It seems to happen every ten years. Governments, or government-appointed bodies, think it is time to launch another attack on freedom of religion in Australia. They never call it an "attack", of course – it is usually dressed up, like a wolf in sheep's clothing, as an "extension" of our religious freedom. Christians need to be aware of these past attacks so they can remain vigilant now and in the future.

1988 – attempted Constitutional amendment

The first attack was in 1988. The federal Labor government led by Bob Hawke suggested that religious freedom could be enhanced by amending section 116 of the Australian Constitution. Opinion polls conducted immediately after this announcement found that most Australians favoured the idea. However views began to change as people looked at the facts.

Section 116 of the Australian Constitution states that:

> *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.*

Notably, this section limits *only* the Commonwealth Parliament and *only* its power to make laws. Its effect is that the Commonwealth Parliament:

- **cannot establish a State church** – such as the Church of England in UK, the Lutheran Church in Denmark, the Eastern Orthodox Church in Greece, or the Roman Catholic Church in Argentina;[1]
- **cannot enforce religious observance** – such as the enforcement of five daily prayers, fasting during Ramadan and modesty of women's dress under *sharia* law as in Saudi Arabia[2] and some other Muslim countries;[3,4]
- **cannot prohibit religious observance**, such as the prohibition of house churches in the People's Republic of China;[5]
- **cannot impose a religious test for public office**, such as requiring applicants for university lectureships in Pakistan to pass an examination on Islam.[6]

Former professor of law at the University of Queensland, J D Lumb, in his book entitled *Australian Constitutionalism,* notes that the High Court has declared that this section "will not be given the wide interpretation which has been given to the corresponding clause (First Amendment) in the American Constitution.

"It does not erect a wall of separation between Church and State, nor does it prevent Federal financial assistance from being given to secular activities carried on by religious organizations such as assistance to education or to hospital services. It does prevent the grant of special privileges to a particular religion or religious body such as the setting up of a State church."[7]

On 3 September 1988 the Australian people voted on a referendum with four questions. One of these questions – the "rights and freedoms" proposal – was "to extend the right to trial by jury, to extend freedom of religion, and to ensure fair terms for persons whose property is acquired by any government."[8] This proposal had initially sounded good, but "the devil was in the detail".

The proposal purporting to "extend" freedom of religion would have been more likely to *reduce* freedom of religion. The Minister for Justice at the time, Senator Tate said: "I cannot, nor can anyone, give an absolute ... guarantee" that government funding for Christian schools would be upheld by the High Court under the proposed new constitutional provision.[9]

In the vote, this referendum proposal was rejected decisively by the people of Australia in every State and Territory and by an overall majority of 69.21% to 30.79%.[10] It was the lowest "yes" vote ever recorded for an Australian constitutional referendum question.

1998 - Religious Freedom Act proposed

Ten years later, in 1998, there was another attack on religious freedom in Australia. The Human Rights and Equal Opportunity Commission produced a report entitled *Article 18: Freedom of Religion and Belief* .[11] This report considered the implications of Article 18 of the *International Covenant on Civil and Political Rights 1966* (ICCPR).[12] Article 18 states:

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

The report recommended a Commonwealth *Religious Freedom Act*. The proposed Act was to contain strong provisions prohibiting religious vilification and very narrow exemptions for religious bodies – but not for individual believers – from anti-discrimination laws.

John Howard's Liberal federal government did not act on this proposal. However Labor state governments in Victoria, Queensland and Tasmania later passed religious vilification laws which have undermined the freedom of Christians to preach and teach the gospel.

2008 – Freedom of Religion project

Ten years later, in 2008, freedom of religion is again under debate. The Australian Human Rights Commission (AHRC) – formerly called the Human Rights and Equal Opportunity Commission – launched the *Freedom of Religion and Belief in the 21*st *Century in Australia* project. The Discussion Paper for this project

raises questions affecting many aspects of religious freedom, including religious expression, discrimination, vilification and exemptions.[13]

Religious expression is rightly understood in the broader context of freedom of speech or freedom of expression and is analogous to political expression. Both religious and political expression involve the expression of personally held beliefs, which may or may not be supported by evidence. Both religious and political ideas may be controversial and lead to vigorous debate.

The essence of freedom of expression, whether political or religious, is not merely the freedom to express ideas that are comfortable. It is the freedom to disagree, to dispute or to cause controversy. The ICCPR recognises freedom of expression as a right in Article 19:

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

The restrictions on freedom of expression set out in sections 3(a) and (b) are sufficiently limited in scope to preserve freedom to engage in vigorous or even hostile debate on political and religious beliefs.

Respect for the reputations of others is protected in Australia by defamation laws, which have been uniform since 2005. These laws all provide that truth or substantial truth is a defence against a complaint of defamation.[14] This rightly affirms truth as more important than reputation.

Protection of national security and public order are essential for the preservation of civilised society and in Australia that protection is provided for by a ban on *sedition*.[15] Importantly, the law defines sedition in terms of the *action*, such as urging the overthrow of the government or urging violence within the community, *irrespective of whether the action is associated with race, religion, nationality or political opinion*.[16] This rightly affirms the *action* as primary, not the characteristics of those involved.

Religious discrimination

The most pressing human rights issue associated with freedom of religion in Australia today is the increasing discrimination against religious practice imposed by tribunal decisions under so-called anti-discrimination or equal opportunity laws. Thus anti-discrimination laws have worsened discrimination against religion.

It is important to recognise that religion involves both *belief* and *conduct*. This follows from the legal definition of *religion* determined by the High Court of Australia in its judgement on the "Scientology case".[17] Justices Mason and Brennan held that "for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief…"[18]

This judgement declares that a religion involves not merely *belief* but also *conduct giving effect to that belief*. Consequently, freedom of religion involves both *freedom of belief* and *freedom of conduct giving effect to that belief*.

Anti-discrimination laws represent a direct attack on religious freedom by proscribing some conduct that may be required to give effect to religious beliefs. Religious beliefs generally make moral distinctions between right and wrong, good and bad. Anti-discrimination laws may declare conduct based on such morality to be unlawful.

Limited exceptions

Most anti-discrimination laws include provisions for "exemptions" or "exceptions" for religious bodies, or educational bodies founded for a religious purpose and, in some cases, for individuals acting in accordance with their own genuine religious beliefs or principles.

Only Victoria has an exception for *individual religious believers* from the provisions of anti-discrimination law. Section 77 of the Equal Opportunity Act 1995 provides an exception "if the discrimination is necessary" for a "person to comply with the person's genuine religious beliefs or principles". The anti-discrimination laws in all other jurisdictions operate in such a way as to compel religious believers to act against their "religious beliefs or principles" whenever these conflict with the anti-discrimination laws.

For example, the NSW Equal Opportunity Tribunal penalised a Christian doctor for acting in accordance with his conscience in refusing to let his home to an unmarried cohabiting couple.[19]

The exceptions for religious bodies are limited in some jurisdictions. For example, Section 109 of Queensland's Anti-Discrimination Act 1991 excludes work or education from the exception which protects acts which are "in accordance with the doctrine of the religion concerned; and necessary to avoid offending the religious sensitivities of people of the religion".

Threats to exceptions

In its 2008 submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the effectiveness of the Sex Discrimination Act 1984, the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission, AHRC) argued that "the rights to religious freedom and to gender equality must be appropriately balanced in accordance with human rights principles."[20]

"Balanced" in this context, of course, means "limited". It is disturbing that the body supposedly defending human rights in Australia wants the right to religious freedom to be curtailed.

The submission goes on to argue: "The existing permanent exemption provides little incentive for religious bodies to re-examine their beliefs about the role of women and to ensure adequate representation of women in areas that do not conflict with the doctrines, tenets and beliefs of the religion. The permanent exemption does not provide support for women of faith who are promoting gender equality within their religious body."[21]

It is disturbing that the AHRC sees its role as supporting only one side of an internal conflict in a religious body.

The AHRC also recommends that the current exemption be made subject to a three year sunset clause and that "the right to religious freedom must be balanced by the right to equality. It considers that, at a minimum, the exemption may be narrowed".

Adverse decisions

The 2008 decision by the Equal Opportunity Division of the Administrative Decisions Tribunal (NSW) against Wesley Mission in a case dealing with the application of two homosexual men to act as foster parents raises grave concerns about the interpretation of the religious exception in the NSW Anti-Discrimination Act 1977.[22]

In its extraordinary findings, the Tribunal said that the religion of the Wesley Mission was Christianity and that Christianity has no doctrine that "monogamous heterosexual partnership within marriage" is both the "norm and ideal".[23]

In effect, the Tribunal has set itself up as an authority on religious beliefs. There was no doubt that Wesley Mission workers shared a religious belief that precluded accepting homosexual couples as foster carers. The Tribunal ruthlessly trampled on the religious freedom of these believers by claiming to know what their religion teaches better than the believers themselves.[24]

In 2009 the Victorian Civil and

Administrative Tribunal is to hear a complaint from a homosexual group Way Out against a Christian Brethren campsite for refusing to accept a Way Out booking.[25] This case is going ahead despite the comprehensive religious exceptions in Victorian law – illustrating the burden which anti-discrimination laws place on religious freedom.

Incitement to hatred

The Victorian Racial and Religious Tolerance Act 2001 has imposed profound restrictions on religious freedom and freedom of speech.

The prolonged action against Pastors Daniel Scot and Danny Nalliah for conducting a seminar on Islam in a Christian church in 2002 represents a low point in religious freedom in Australia, notwithstanding the quashing of the findings against the pastors by the Court of Appeal of the Supreme Court of Victoria over four years later.[26] The case was finally settled in 2007 and cost the pastors over half a million dollars in legal fees and other expenses.



Vindicated: the pastors (left) outside the Court of Appeal

The initial adverse decision by Judge Higgins in 2004 illustrated the profound hazards to religious freedom posed by laws prohibiting religious vilification.

Judge Higgins made numerous errors in his consideration of strictly religious matters. At times he completely misrepresented Pastor Scot's comments. For example, the Court of Appeal found that Judge Higgins had wrongly claimed that Scot had said: "Muslims are demons". Judge Higgins had failed to follow Scot's quotes from the Quran about jinns (demons) becoming Muslims. The Higgins decision ignored all Scot's favourable comments about Muslim people.

The financial burden, time and stress imposed on the two pastors have been an intolerable attack on freedom of religion.

Religion and the state

Freedom of religion is critically connected with freedom of association, since most religious believers express their beliefs by meeting together as well as other ways. Freedom of association provides the basis for civil society, which has been defined by the London School of Economics Centre for Civil Society as follows:

> *Civil society refers to the arena of uncoerced collective action around shared interests, purposes and values… Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organizations such as registered charities, development non-governmental organizations, community groups, women's organizations, faith-based organizations, professional associations, trade unions, self-help groups, social movements, business associations, coalitions and advocacy groups.*[27]

The links between civil society and democracy were explored by 19th century French political thinker Alexis de Tocqueville and developed by 20th century theorists like Gabriel Almond and Sidney Verba, who identified civil society as having a vital role in a democratic order.[28] Healthy democracy is best served by giving associations the freedom to operate without intrusive government interference.

Undue influence?

Western systems of government like ours in Australia recognise the right of the citizen to freedom under the law.[29] This fundamental freedom is expressed in many ways, including the right to stand for election and vote. It is also expressed through freedom of association, such as the right to form or join an association with the purpose of influencing governments.

The fundamental right to associate with others in order to influence governments is legitimate – irrespective of the basis of association, which may for example be regional, industrial, environmental or religious.

Influence on governments becomes "undue influence" when it is associated with criminal activities such as bribery, corruption, blackmail, sedition or threats of violence. Such undue influence should be prohibited irrespective of the basis of association of the group.

Government control over associations becomes "undue influence" when it interferes with the freedom of associations to define their own rules. Anti-discrimination legislation has unreasonably diminished the freedom of people to associate as they choose. People should be free, for example, to form male sporting clubs or female business clubs – or vice versa. People should be free to associate on the basis of religious or other beliefs they hold in common, and not be subject to the undue influence of anti-discrimination laws.

Faith-based agencies

Faith-based agencies are involved in services such as schools and hospitals for reasons tied closely to their religious beliefs. The contribution of Christian churches to education, health care and welfare services in Australia since European settlement is immeasurable.

When governments choose to engage faith-based agencies to deliver services on behalf of government or to directly or indirectly fund such services, then the integrity of the faith-based agencies needs to be fully respected.

Threats to the integrity of Christian health care services have arisen recently through demands that all health care providers offer certain procedures, even though some religious providers consider them to be ethically wrong.

For example, Victoria's Abortion Law Reform Act 2008 imposes on medical practitioners who have a conscientious objection to abortion an obligation to refer a woman seeking an abortion to another medical practitioner who is known not to have such an objection.[30] Thus by law, Victorian doctors, nurses and pharmacists who are morally opposed to the deliberate killing of an unborn child must nevertheless facilitate such killing against their conscience.

This provision poses a direct threat to the continued involvement of churches such as the Catholic Church in health care. The Wesley Mission case cited earlier illustrates a similar threat to Christian involvement in the provision of foster care.

A genuine freedom of religion would give full scope for faith-based agencies to deliver services in accord with the belief systems on which these agencies are based. If a secularising society attempts to dragoon such agencies into supporting its agenda then it could ultimately lose the irreplaceable contribution of these agencies. Governments do not have the resources to directly supply all the health, education and welfare services provided by faith-based agencies.

Faith-based agencies should be subject to laws for the protection of national security and public order, such as the law against sedition. Schools or training organisations which urge violence in the community or overthrow of the government should not be permitted, irrespective of whether the action is associated with race, religion, nationality or political opinion.

Religious holy days

Australia is a nation with a Christian heritage and Christianity remains the majority religion today.

It is therefore appropriate that the major Christian feasts – Christmas, Easter and the weekly Sunday – continue to be marked by society as a whole. It is inappropriate to treat the holy days of minority religions on the same basis.

Local governments ought to be able to take into account the sensibilities of local residents, and the cultural heritage of Australia, in giving or withholding permission for building places of worship for non-Christian religions.

Aftermath of September 11

Following the attack on New York's World Trade Centre on 11 September 2001, the Sydney *Daily Telegraph* reported that several churches in Sydney were attacked.[31]

It is clear from this report that latent Muslim jihadists in 2001 were ready to engage in violence against Christians and churches in Australia when emboldened by overseas jihadist events. In 2003, an al-Qaida cell in Australia was reported to have planned attacks against Jewish synagogues and schools.[32]

In 2008, a self-proclaimed Muslim cleric Abdul Nacer Benbrika and five of his followers were found guilty of being part of a home-grown terrorist cell plotting to wage violent jihad on Australian soil.[33] The primary mission of the group was "the overthrow of the godless regimes and their replacement with an Islamic regime". Other missions included "assassinating enemy personnel as well as foreign tourists" and "blasting and destroying the places of amusement, immorality and sin".[34]

It would be naïve to ignore the reality of aggressive forms of Islam in today's world.

Traditional Islam views religion and politics as one thing – there is no separation. The goal of Islam is to gain land and power as the base for a unified Islamic community which lives in submission to Islamic (*sharia*) law and which subordinates non-believers in accordance with that law.

Some proponents of traditional Islam support the use of terrorism to achieve these goals. Others may advocate non-violent means, while still aiming eventually to replace the existing political system in countries like Australia with an Islamic system.

These fundamental facts mean that policies on religious freedom need to take into account the particular nature of Islam.

Is an increasing Islamic population a potential threat to freedom in Australia? Do Islamic schools need to be monitored more closely than other religious schools to ensure that students are not being taught in ways which could pose a threat to the security and integrity of Australia? Are concentrated areas of Islamic occupation a threat to local communities through attempts to impose Islamic practices such as sex-segregated use of public swimming pools, removal of pork products from local shops, and the banning of dogs from local parks?

The valid concerns raised by the particular nature of Islam should never be used as an excuse for imposing unwarranted restrictions on Christian churches and other religious bodies which do not share Islam's religio-political mindset.

Sexuality and freedom

Beliefs about sexuality and sexual behaviour (its purpose and meaning) are essential to many religions. These are matters for religious bodies and their adherents to address – not for governments to impose.

In its 2008 Discussion Paper, the Australian Human Rights Commission asks a series of questions which assume the view that all varieties of sexuality are morally equivalent and valid expressions of human nature. This view is not shared by the majority of world religions or of religious believers.

For example the question: "How can faith communities be inclusive of people of diverse sexualities?" assumes that faith communities should be "inclusive of people of diverse sexualities". Recognition of freedom of religion implies recognition that some faith communities may explicitly reject some sexual behaviour as immoral.

Conclusion

Freedom of religion in Australia in the 21st century cannot be taken for granted. Influential bodies such as the Australian Human Rights Commission and its state counterparts are dominated by secularist thinkers who see the right to freedom of religion as subordinate to many other rights.

Freedom of religion is in danger of being curtailed, not just by valid laws dealing with national security or public order and morality, but by unreasonable demands from minority interests. Some Muslims have sought to suppress religious debate to avoid scrutiny of their own beliefs. Some homosexual activists demand not just acceptance but endorsement of their lifestyle by religious groups, including employment by Christian churches and schools.

Christians need vigorously to defend the right to freedom of religion as a fundamental human right so that "we might lead a quiet and peaceable life, godly and respectful in every way" and so that the gospel may be freely preached and people may be "saved and come to knowledge of the truth."[35]

References

1. "State religion", *Wikipedia*; http://en.wikipedia.org/wiki/Establishment_(church).
2. "Saudi Arabia Law Enforcement", *Encyclopedia of the Nations*; http://www.country-data.com/cgi-bin/query/r-11681.html.
3. Westervelt, Eric, 11 October 2007, "Police Enforce Ramadan Fasting Rules in West Bank", *NPR*; http://www.npr.org/templates/story/story.php?storyId=15178892.
4. Perlez, Jane, 27 June 2006, "Spread of Islamic Law in Indonesia Takes Toll on Women" *The New York Times*; http://www.nytimes.com/2006/06/27/world/asia/27indo.html.
5. "China – Son of Christian Leader Beaten Unconscious", November 2008, *Barnabas Fund Prayer Focus Update*, No 145.
6. Pakistan-born Daniel Scot had to pass an exam on Islam before gaining a lectureship in mathematics at the University of Punjab, see: Phillips, Roslyn, May 2005, "Religious vilification: the Daniel Scot decision", *Light* (Festival of Light Australia), p 8.
7. Lumb, R D, 1983, *Australian Constitutionalism*, (Butterworths), p 124.
8. *Constitution Alteration (Rights and Freedoms) 1988.*
9. Phillips, David & Bowen, J K, August 1988, "Implications of the 1988 Constitutional Referendum", *Light*, p 10.
10. "Australian referendum, 1988 (Rights and Freedoms)", *Wikipedia*: http://en.wikipedia.org.
11. *Article 18: Freedom of Religion and Belief*, July 1998, report by the Human Rights and Equal Opportunity Commission; http://www.humanrights.gov.au/human_rights/religion/index.html#Article.
12. *International Covenant on Civil and Political Rights 1966*; http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.
13. *Freedom of Religion and Belief in the 21st Century in Australia,* August 2008, discussion paper by the Human Rights and Equal Opportunity Commission; http://www.hreoc.gov.au/frb/frb_2008.html.
14. For example, the *NSW Defamation Act 2005*, s 26: "It is a defence to the publication of defamatory matter if the defendant proves that: (a) the matter carried … imputations … that are substantially true…"
15. *Cth Criminal Code Act 1995*, s 80.2.
16. *Ibid.*, s 80.2(5).
17. *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) [1983] HCA 40; (1983) 154 CLR 120.*
18. *Ibid.*, para 17; their judgement was qualified by also holding that "though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion."
19. Harradine, Brian, *Senate Hansard*, 1 May 1986, p 2178.
20. *Submission 69*, Human Rights and Equal Opportunity Commission, p 166; http://www.aph.gov.au/senate/committee/legcon_ctte/sex_discrim/submissions/sub69.pdf.
21. *Ibid.*
22. *Anti-Discrimination Act 1977 (NSW)*, s 56.
23. *OV and anor v QZ and anor (No.2) [2008] NSWADT 115*, at 119, 126-128.
24. This case is the subject of an appeal.
25. Michael Bachelard, 7 September 2008, "Gay support group gets straight 'no' from Brethren", *The Age*.
26. *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc [2006] VSCA 284* (14 December 2006); http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html.
27. *What is civil society?* Centre for Civil Society, London School of Economics, 1 January 2004.
28. Almond, G, & Verba, S; *The Civic Culture: Political Attitudes And Democracy In Five Nations,* Sage, 1989.
29. Lumb, R D, 1983, *Australian Constitutionalism*, (Butterworths: Sydney), Ch 1.
30. *Abortion Law Reform Act 2008 (Vic)*, s 8.
31. *The Daily Telegraph*, Wednesday 10 October 2001, p 5.
32. Harris, Trudy, 23 August 2003, "Help us pay for security, say Jews", *The Weekend Australian*, p 9.
33. Hughes, Gary, 16 September 2008, "Benbrika, five followers guilty of terror plot", *The Australian*, p 1.
34. Hughes, Gary, 20 September 2008, "Step-by-step terror guide - Benbrika cell used al-Qa'ida manual", *The Weekend Australian*, p 2.
35. I Timothy 2:2-4, *The Holy Bible*, Revised Standard Version.