

# Dangerous Protections

How some ways of protecting the freedom of religion may actually diminish religious freedom

I wish to thank the Centre for Independent Studies (<http://www.cis.org.au>) for the privilege of delivering this third Action Lecture on Religion and Freedom and also for the whole Religion and the Free Society project which lies behind it. It is gratifying that the leading think tank in Australia acknowledges the importance of religion in our national life.

My title tonight is “Dangerous Protections: How some ways of protecting the freedom of religion may actually diminish religious freedom.”<sup>1</sup>

## A. Introduction: the issue

Australia is one of the freest countries in the world for the holding and expressing of religious beliefs and behaviours, especially when compared with the widespread denials of religious freedom of in so many nations today. A recent survey *Report 2000 On Religious Freedom In the World*<sup>2</sup> presents us with an unhappy picture of serious and oppressive restrictions; in most Muslim countries, in those nations of the former USSR dominated by one Christian church, in the few remaining communist nations such as China, and even in some European nations like France and Greece with their anti sect laws. It might seem churlish then to raise concerns about relatively minor threats to liberty here when there is so much more that is troubling overseas. However, the issues of freedom in our society are still important. Interestingly the preface of *Report 2000* itself focuses on a particular kind of danger to religious liberty in liberal democracies.

Good intentions don't always lead to good outcomes. In his book *Why Things Bite Back: Technology and the Revenge Effect*<sup>3</sup> Edward Tenner gives examples of technologies that, under certain conditions, had the exact opposite effect of what they were intended to have; computerised offices that see a drop in productivity because of the extra work computers cause, antibiotics which lead to more virulent diseases, improved padding and helmets in American Football leading to more injury, and so on.

---

<sup>1</sup> I wish to thank Jeremy Halcrow of Anglican Media Sydney for his stimulation and help in preparing this lecture, together with the Rev. Peter Kurti, Prue Gregory, Anne Judd and Owen Harries

<sup>2</sup> Andrea Morigi, Vittorio Emanuele Vernole and Chiara Verna *Report 2000 On Religious Freedom In the World* (Aid to the Church in Need Rome 200)

<sup>3</sup> Edward Tenner *Why Things Bite Back; Technology and the Revenge Effect* (Fourth Estate London 1996)

Public policy can have same effect. There is a growing recognition that under certain circumstances the provision of state welfare can actually increase the human misery it is designed to alleviate. Could the same dynamic be working in the protection of religious freedom?

In the last 50 years we have witnessed a remarkable growth in laws purporting to protect religious freedom in Western countries as part of the increased interest in human rights since the horror of the last world war. George Weigel in the last Acton Lecture<sup>4</sup> showed how the Christian Church has been a major defender of human rights in the last part of the 20th Century and outlined how this change has come particularly thanks to the ministry of John Paul II. It was a very positive picture.

Yet not all has been so rosy, even here in Australia. A number of recent proposals for human rights legislation have represented real threats to the freedom of religion in this country.<sup>5</sup> Fortunately, after significant outcries, final outcomes have been much less problematic than first proposals. But the threat to freedom represented by law reform commissions and anti discrimination boards should be of concern to lovers of liberty, irrespective of religious convictions or their absence.

## B. What is religious freedom?

Let us begin with article 18 of *The International Covenant on Civil and Political Rights* [adopted by the United Nations in 1966, and ratified by Australia in 1980]. The first clause sets out the basic rights.

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.

Religious freedom is not just freedom to think certain things, but to act on them, in concert with others. The later UN “Religion Declaration”<sup>6</sup> Article 6 is valuable in unpacking further freedoms included in this freedom, including freedoms to assemble,

---

<sup>4</sup> George Weigel *The Moral Foundations of Freedom: Lessons from the Religious Encounter with Democracy* CIS 2000

<sup>5</sup> I am thinking of the Victoria’s Racial and Religious Tolerance Act 2001, the New South Wales Law Reform Commission’s Review of the Anti-Discrimination Act (1977) (Report 92), and the Human Rights and Equal Opportunities Commission “Draft Guidelines On Religious Criteria In Employment For Organisations That Provide Community Services On Behalf Of The Commonwealth” issued in 2000.

<sup>6</sup> 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 State and Territory governments, the Declaration was declared to be a ‘relevant international instrument’ for the purposes of the HREOC Act.

maintain appropriate buildings, establish and maintain appropriate charitable institutions.<sup>7</sup> The second clause of the *International Covenant on Civil and Political Rights* sets out the important condition that these freedoms necessarily involve a freedom from coercion.<sup>8</sup>

Importantly for our discussion, religious freedom is not absolute. The third clause spells out the appropriate limits to these freedoms saying they must be subject to what is ‘necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’. To pre-empt my discussion to come, a goal of maintaining social harmony, for example is not a valid justification for the government to impose a limit on religious freedom. Of course, we all wish to live in a tolerant, harmonious and happy society, as well as a free one. The question is how much, if at all, should the government use legislation to ensure such a society, and how much social goals of tolerance and equality when, legally enforced, endanger freedom. In wrestling with this question we should certainly bear in mind the afore mentioned law of unintended consequences.

### ***The rights to discrimination and to ‘act offensively’***

I wish to draw attention to two features of religious freedom which are most difficult to accommodate in modern society. Real freedom of religion includes the freedom to discriminate and to act in a way that may offend. As giving offence and discriminating seem unworthy activities, why should we accept that the right so to do is integral to religious freedom?

Freedom to discriminate under certain circumstances is integral because in some contexts there is the need to make distinctions between people on religious and moral

---

<sup>7</sup> “In accordance with article I 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.

<sup>8</sup> “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.”

grounds to protect the integrity of the religious community. Religion is rarely simply a matter of private and personal issues alone. It involves communities and institutions and thus the need to give shape to the distinctive identity of those communities and institutions. Religious groups need to be able to choose their leaders, other workers and members on explicitly 'moral' or religious grounds that may not otherwise be acceptable or even lawful. For example, many religious groups discriminate according to the sex of their leaders and the behaviour and belief of adherents.

And the right to act in a way that gives offence? I believe Salman Rushdie was correct when he once declared that there is no such thing as the right not to be offended. On the contrary, to act in a way that may give offence is an inevitable consequence of the right to organise religious life and belief in a diverse society like ours. The issue here is not the *intention* to injure others, but the unintended consequence of seeking to persuade people to adopt a religion or to teach adherents the faith. This is true simply because the beliefs of a number of religions are offensive to some who do not share them. Because what is offensive is as much due to the sensibilities of the 'offended' party as the motives or intentions of the 'offender,' the simple declaration of one person's sincere 'truth' can be another's deep offence. I am not defending proselytising that is coercive but I am defending proselytising that is persuasive in character. To deny the freedom to act in way that may give offence is thus restrictive of the freedom publicly to espouse beliefs.

Let me give an example. I am an Anglican Christian of the Evangelical tradition. We believe that there is one true and living God who created the universe, who sent his eternal son to die and be raised from the dead as Lord over the Universe, and that all people who have ever lived will give account of their lives to this Jesus Christ. We believe that everybody is obligated to turn to and give their lives to Jesus now. We believe that insofar as any other religious or other teaching is inconsistent with the centrality of Jesus they are wrong and dangerous. We believe that Christians have a duty to be committed to sharing the gospel of Jesus with others, though with gentleness, respect and not with manipulation or compulsion.

Now you will be aware I have put these basic and traditional Christian beliefs in a way that is a little confronting. You may think I am wrong or even a fundamentalist. That is not the point. The issue here is not, 'Are these claims true?' but 'Do I have the freedom in a liberal society to hold, practice and espouse such beliefs?' The issue of freedom is raised, not when we all happen to agree, but when we don't agree.

However, sometimes the impression is given that all forms of discrimination or giving offence are forbidden under the relevant UN conventions<sup>9</sup>. However a careful reading shows that this is not the case. What is forbidden, is not all discriminations what-so-ever but discrimination under the law.<sup>10</sup> What is forbidden is not the giving of offence as such but certain kinds of incitement to hostility.<sup>11</sup>

### ***Churches hands not clean***

It is appropriate at this point to stress that the largest Christian churches in this country have not had a good record over the centuries in regards to religious freedom. The long partnership between Church and government in Europe has lead to basic denial of many freedoms. Speaking as an Anglican I need only draw your attention to the substantial domination of national life by the established Church of England until the nineteenth century.

In modern times we have witnessed a widespread conversion—including by the mainstream churches— to the principle of the freedom of religion. This is a real change, though we must make sure we are not just adapting to the new circumstances out of self interest. The test will be our attitude to the few relics left, like the existing law against blasphemy which is defined as “a publication containing contemptuous, reviling, scurrilous or ludicrous matter relating to God, Jesus Christ, the Bible or the formularies of the Church of England which are calculated to provoke outrage in the feelings of any sympathiser or believer in Christianity” and is still (surprisingly) common law in this country.<sup>12</sup> There can be no justification of this law or anything like it. There must be no special protection to Christians (or even Anglicans!) from being offended at the statements and views of others.

---

<sup>9</sup> For example, *The report of the Human Rights and Equal Opportunity Commission into Religious Freedom “Article 18 Freedom of religion and belief”* 1998 gives just this impression p. 66

<sup>10</sup> Article 26 of the International Covenant on Civil and Political Rights reads as follows: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. *In this respect*, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” (Italics added) The Region Declaration is more general in forbidding discrimination, though here too it is circumscribed to discrimination which has “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.”

<sup>11</sup> The International Covenant on Civil and Political Rights Article 20 reads “2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.” Of course incitement to discrimination must mean “incitement to *unlawful* discrimination” not any discrimination for any cause.

<sup>12</sup> *The report of the Human Rights and Equal Opportunity Commission into Religious Freedom “Article 18 Freedom of religion and belief”* p.93

## C. Religious freedom in the culture of late modernity

### **Values and facts**

Lesslie Newbigin who as a missionary in India for many years was a trained observer of different cultures. Upon returning to Britain in the early 1980s he saw his home society with new eyes. One of the key features Newbigin saw in his home culture was pluralism. But he noticed that it was a very discriminating pluralism that made a sharp distinction between so called 'facts' and 'values.' Newbigin was struck by the realisation that some of life's biggest questions were not understood by Westerners to be questions about what is true or false at all.

On the question of [...] the purpose for which human beings exist — we are pluralists. It is a matter of personal choice, of having “a faith of your own”. We do not ask whether the belief is true, but whether the believer is sincere in holding the belief. On the other hand it does not occur to ask whether a person is sincere in his beliefs about physics; we ask whether the belief is correct.<sup>13</sup>

Newbigin argues that this has profound consequences for any religious claims, for example those made by the Christian church.

It follows that, in this culture, the Church and its preaching belong to the world of “values”. [...] The Church is not generally perceived as concerned with facts, with the realities which govern the world and which we shall in the end have to acknowledge whether we like it or not. In this cultural milieu, the confident announcement of the Christian faith sounds like an arrogant attempt of some people to impose their values on others<sup>14</sup>

The point I am making is not about the truth or falsehood of any particular Christian claims (or any other religious or atheistic claims, for that matter) but rather about the taken-for-granted assumption in Western culture, and especially among the more educated elites who determine public policy, that religion is not really about the search for truth. This has important implications in the issue of guaranteeing religious freedom.

### ***The identification of religion with ethnicity not a truth claim: the ideology of multiculturalism***

The matter is further complicated by some changes in the last 20 years. One is the advent from 1973 of multiculturalism as government policy. This ideology is in practice a

---

<sup>13</sup> Lesslie Newbigin *The Gospel in a Pluralist Society* (Eerdmans 1989) p.15

<sup>14</sup> *The Gospel in a Pluralist Society* p.7

somewhat half baked guiding philosophy to help manage our diverse social reality.<sup>15</sup> As an ideology, multiculturalism involves much more than recognising the fact of Australia's racial and cultural diversity and the very laudable aim that we should all live in harmony. It is based on three key concepts: maintenance of social cohesion, equality and especially respect for cultural identity<sup>16</sup>. The agenda has moved to protecting cultural identity and values, which, because religion is vitally important in the history of some cultures, has involved religious belief and practice.

Two issues arise from this. Firstly, multiculturalism differentiates religious belief from other kinds of 'non-cultural' ideology such as political beliefs. As a result you are free to challenge and attempt to challenge and change someone's political affiliation but you are not free to change someone's religious belief because doing so threatens their cultural identity. This attitude is aided and abetted by those religious leaders who attempt to defend members of their particular religious community from being the focus of any attempts to change their religion as (in the words of one prominent religious leader in Sydney) "an affront to civil liberties and democracy." (This is not the only instance of institutions or communities seeking protection from the cold winds of competition in a liberal society by appealing to a special cultural status. The arts industry is another.)

Secondly there is a tendency under multicultural ideology to try to group all religious practice and belief under this category of ethnicity, whether it is relevant or not. A good example can be seen in comments made on the ABC Religion Report this year by Professor Mary Kalantzis, from RMIT.

[N]one of us choose our faith necessarily, or choose what colour we are or where we're born. If we are believers in anything, then it's a fate that's made for us, it's a choice made for us. We don't say, Excuse me God, or Allah, I want to be an Arab or an Australian (*sic*), it's just God's variety or the variety of the planet.<sup>17</sup>

---

<sup>15</sup> Multiculturalism, as John Hirst in the second Barton Lecture "More or Less Diverse" suggests, is more about ideology than social reality. He writes "It is best thought of not as controlling events, but in reconciling people to change. In the 1940s and 1950s the policy of assimilation reassured old Australians that their world was not going to change when of course it did. In the 1970s and 1980s the policy of multiculturalism reassured ethnic leaders that their communities and culture were not going to weaken and disappear when in fact they were." None the less as an ideology it is powerful in framing legal attitudes to religious freedom.

Jeremy Halcrow draws our attention to the contradiction in Australian multiculturalism "So from the very beginning Australian governments wanted 'to have their cake and eat it' in regards to multiculturalism. They wanted to adopt the Canadian concept of protecting the integrity of separate ethnic cultures while at the same time advocating the 'melting pot' concept favoured in the US which acknowledged the dynamic push-pull between migrant cultures and the core culture as they enmesh to produce something new. These two seemingly contradictory goals have caused tension and confusion ever since." ("Enduring Freedom" in *Southern Cross*, November 2001)

<sup>16</sup> SMH 26/9/01 and

<sup>17</sup> The Religion Report ABC Radio 19 Sept 2001

Kalantzis sees each different religion as concerned not about what is true, but simply as culturally ‘different ways of satisfying the same range of needs for faith’ and as such morally equivalent.

The ideology of multiculturalism assumes that culture is static and therefore ultimately makes religious identity hereditary. Such attitudes regard religious freedom primarily in terms of the freedom to engage in one’s particular religious tradition and rituals. On the other hand, any activities which are intended to persuade others to change their religion or adopt a religion are treated with suspicion and even hostility. A wonderful expression of this was given in a Sydney Morning Herald editorial<sup>18</sup> in response to the (then) new Anglican Archbishop of Sydney’s outrageous suggestion that Christians ought to talk about their faith with their workmates. The editorial drew a direct line from multiculturalism to the denial of the right to share one’s faith.

It is appropriate, indeed, vital in a free society that individuals should be able to cherish their religious beliefs. It is arrogant and dangerous, however, for anyone to assume a right or duty to convert others. [...] In the multicultural, multi-god nation that modern Australia is, proselytising can only needlessly provoke community tensions. In Australia, one’s religion is largely a private matter. It should remain that way.

The motivation ‘don’t needlessly provoke community tensions’ perfectly expresses a view now common in legal reform commissions and human rights boards. We can confidently say that the claim that ‘all religions are basically the same’ is something now in the fact box.

While preparing this lecture I came across an interesting example of the attempted suppression of the freedom of religious speech for just such reasons. It is, of course, from an institution calling itself a university. In keeping with what is called the “commitment to multiculturalism,” Southern Cross University in Northern NSW has issued a draft protocol on spiritual practice. While admitting that, for some, “sharing the expression of spiritual belief is part of their spiritual practice” nonetheless in the words of the proposed protocol, “at the University it must not include proselytising (seeking to convert) others about a particular faith or denomination”.<sup>19</sup> I wonder if there are any of you here who remember the good old days when Universities were places of free speech and vigorous debate.

---

<sup>18</sup> The Sydney Morning Herald 21 August 2001

<sup>19</sup> Spiritual Practice at Southern Cross University Draft For Comment 15 October 2001 Statement of Policy

## ***The reason to protect religious freedom: truth or harmony?***

With such a background it not surprising to find that it is common these days to defend laws purporting to protect religious freedom on the grounds that such protections ensure social harmony. Mr D. Briskey (Member for Cleveland) defended the amendments to the Queensland Race and Religious Offences Bill on the basis that it was to target ‘religious hatred’ saying that the intention was not to ‘deny people freedom of speech or to stifle debate on issues of public importance, but to prohibit acts that undermine the social stability and cohesion of our multicultural community’.<sup>20</sup>

I do not wish to deny the value of such goals but only point to their inadequacy as a justification for legal restrictions on freedom. Worse, such proposals can create unhelpful laws which actually undermine religious freedom.

I believe that the only solid justification of religious freedom is that it is an essential condition of a *free* society, not just a *harmonious* one. A free society is one in which people can search for truth without compulsion, legal or otherwise. As Attilio Tamburrini demonstrates in the preface to the *Report 2000 On Religious Freedom In the World*<sup>21</sup> nothing less than the right to search for truth is at stake in such freedom. ‘The natural right that precedes religious profession is at stake,’ he writes. Tamburrini goes on to say that this right to the search for truth requires three conditions:

‘the freedom of conversion, that is the free choice of truth which in conscience one adheres to, the freedom of public practice of the cult, the freedom of international relations with those sharing the same faith. Any attempt to separate these elements, coercing some, creates a wound in the religious freedom as a whole’.<sup>22</sup>

The problem for Western societies is that we no longer define religious freedom as dependent on our freedom to search for truth. Instead we put the emphasis upon creating a social, harmonious and multicultural community. As a result, our governments will

---

<sup>20</sup> D. Briskey Member for Cleveland QLD May 30 2001

<sup>21</sup> Andrea Morigi, Vittorio Emanuele Vernole and Chiara Verna *Report 2000 On Religious Freedom In the World* (Aid to the Church in Need Rome 200)

<sup>22</sup> Tamburrini is following the direction of the Vatican Declaration on religious freedom in grounding the right to freedom of religion, even false religion, is based on human being’s right to search for truth and the necessity of freedom from coercion

In the words of the Vatican Declaration section 2

“It is in accordance with their dignity as persons—that is, beings endowed with reason and free will and therefore privileged to bear personal responsibility—that all men should be at once impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth. They are also bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth. However, men cannot discharge these obligations in a manner in keeping with their own nature unless they enjoy immunity from external coercion as well as psychological freedom. Therefore the right to religious freedom has its foundation not in the subjective disposition of the person, but in his very nature. In consequence, the right to this immunity continues to exist even in those who do not live up to their obligation of seeking the truth and adhering to it and the exercise of this right is not to be impeded, provided that just public order be observed.”

tend to enact laws that restrict activities of religious groups which challenge such harmony, and thus restrict the religious freedom of our society. It is on this basis that policy makers feel compelled to restrict religious groups from saying or doing things which cause offence or to discriminate.

## D. The threat to religious freedom in the name of freedom

Finally I will take some examples of proposed changes in the law which cause unease about freedom.

### ***Anti Vilification laws***

Freedom of speech must be limited to certain circumstances. Freedom to manifest one's beliefs involves freedom of speech. As we have seen the International Covenant on Civil and Political Rights limits religious freedom to that which is 'necessary to protect public safety, order, health or morals or the fundamental rights and freedom of others'. There is rightly some limitation on speaking with the aim to inflame violence, certain kinds of dangerous panic and on certain forms of defamation.

In recent times there has been an effort to extend these limitations under the heading of anti-vilification laws. For example, let us take the Victorian State Government's Racial and Religious Tolerance legislation. A discussion paper and model bill were issued in December 2000 which led to an unprecedented number of responses and complaints, some 5,000, and a much more modified Victorian bill, 'Racial and Religious Tolerance Bill 2001', was passed.

The underlying motivation for proposing this restriction on speech which was given by the Premier's opening comments in the draft:

Expressions of racial and religious vilification not only undermine people living in our community, they also threaten the fairness and tolerance of our society. Therefore what was proposed was 'legislation to reinforce the right of all Victorians to live without fear of vilification in their public and private lives'.

The explanatory memorandum to the final 2001 bill said the object of the legislation was 'to prevent racial and religious vilification damaging the cohesion and harmony of Victoria's culturally diverse community'. Already we have come a long way from simply protecting people's *fundamental* human rights. What was intended was to set in legislative concrete a certain vision of society and religion's place in it.

This was not the most alarming example of a proposed justification for restricting freedom of speech that I came across. What do we make of the NSW Law Reform Commission's assertion that "One of the most important rights that the right to free speech must be tested against is the emerging right to equality."<sup>23</sup> It is interesting to speculate what theory of human rights lies behind the idea of a right 'emerging' like this and how far it will go in restricting liberty by the time it has fully emerged.' We are reminded of Lord Acton's comment on the French Revolution, "The passion for equality made vain the hope of freedom."<sup>24</sup>

What did the draft Victorian bill count as vilification? It was conduct that 'a reasonable observer would believe is likely in all the circumstances', among things, 'seriously to offend, insult or humiliate the person or class of persons or to threaten or intimidate a person or class of persons on the ground of the religious belief or activity of that person'. The motive of such behaviour is regarded as irrelevant. This prohibition would even have applied to remarks overheard, let alone openly published.

Certainly severely ridiculing and insulting people is not a good thing and is not openly advocated or mandated by any religious belief I know of. The Christian faith in particular urges believers to be gentle and respectful of others. However in the light of the cultural context I have been outlining, statements of the central Christian doctrines such as the uniqueness and supremacy of Christ and the liability of unbelievers to God's judgement and so on may easily be taken as severely ridiculing other people.

The draft Act itself understood that there is a problem here by allowing certain exemptions from the prohibition. These exemptions follow the exemptions already in the National Antidiscrimination Act and reveal some of the assumptions in this Victorian proposal. Apparently under the law it was possible to engage in action which would otherwise be regarded as religious vilification. If it was done, however, reasonably and in good faith in the performance of artistic work or the course of any statement or discussion for genuine academic, artistic or scientific purpose or otherwise in the public interest or in making a fair and accurate report, it was not to be forbidden. It is very interesting to notice that artists were given an immunity which was not granted in the original draft to religious practitioners. You cannot severely insult someone if you yourself do it for religious purposes but you can do it for artistic ones. Therefore the artistic work *Piss*

---

<sup>23</sup> Report 92 Review of the Anti Discrimination Act 7.62

<sup>24</sup> Cited in Gertrude Himmelfarb "Lord Acton: in pursuit of first principles" *New Criterion* Vol. 18, No. 10, June 2000

*Christ* consisting of a representative statue of Jesus in a bottle of urine would not be prohibited, however offensive it might be. But a severe criticism of Christians as evil or misled would be prohibited if you had done it because you are a Moslem or a Buddhist. The then Roman Catholic Archbishop of Melbourne, George Pell, pointed out the strange anomaly of this provision:

Citizens rightly resent any attempt to limit their free speech more than the free speech of their “betters”. It is quite unfair that the deliberate conduct of the artist or the politician is exempted but the clumsy contribution of the less educated is made criminal. If any serious movement for racial or religious persecution were to gain momentum, then no doubt it would have been led and nourished by certain misguided politicians, academics and artists. <sup>25</sup>

Archbishop Pell has a point. Why does anyone need to be exempted if the conduct is so bad? Many critics pointed out that this proposed law would have been unduly restrictive particularly on the right to convince others to change or to adopt religious practice. As it turned out, the bill was amended to add religious purposes under the exemptions. With the changes, the amended bill comes into action at the beginning of 2002. It will be very interesting to see whether social harmony and tolerance is achieved and what the price will be in fundamental human freedoms.

It is right to have legal restrictions against extreme cases where religious groups may deny fundamental human rights, such as keeping adherents under lock and key, or threatening violence to those who might change their religion. My point is that restriction of the right to act in a way that may offend inevitably restricts some religious groups from sharing their point of view with the wider community and therefore restricts the freedom of the community as a whole to investigate the truth of that group’s (somewhat offensive) claims. One Christian friend of mine claimed that to be denied the right existentially to offend others with Christian truth was itself offensive to her. The right to give offence may be uncomfortable and even not helpful for the goal of a harmonious society. However it is a fundamental requirement, I believe, of a free society. Free societies are not always harmonious and quiet. If we are to have religious tolerance laws, why are political tolerance laws not considered? The answer is clear. Politicians can see that a ‘right not to be offended’ stifles legitimate debate and would limit political freedoms. The same is true in the sphere of religious beliefs. Religious tolerance laws undermine religious freedom.

---

<sup>25</sup> *The Age*, 16.3.01

## ***Anti discrimination law proposals***

Antidiscrimination laws also present a problem. At first it might be thought that to protect people from discrimination on religious grounds is a very good thing. However, religious communities and institutions have a problem existing in an environment with extensive anti discrimination laws as they need to preserve the right to discriminate in order to preserve their very identity and purpose, as we have already seen. It is an established principle of anti discrimination law to provide an exemption to religious groups.<sup>26</sup> Not that this is entirely a happy position for religious groups to find themselves in. They now exist as exceptions to the norm and are positioned outside the legal (or by implication) ethical mainstream.

After years of consultation in 1999 the New South Wales Law Reform Commission issued Report 92, a 944 page review of the Anti-Discrimination Act (1977) which recommended extensive enhancements of anti discrimination law including the addition of religion as prohibited ground for discrimination and removing some of the exemptions in the previous law. The remarkable outcome of prohibiting religious discrimination in the provision of services and employment as such would be that religious groups would be prohibited by law to discriminate on the basis of religion as to who received their religious services, that is to whom sacraments, rites and other ceremonies could be given. In other words, Christians could not refuse either Holy Communion or Baptism to unbelievers. On any terms the proposal represented a serious threat to the freedom of religion, in that it would make the maintenance of order and identity of a religious community impossible.

The matter was made more serious by the proposal to remove the religious exemption to discrimination. The existing Anti Discrimination Act in NSW (1977), and the corresponding acts in other states, contain exempted practices that are '*necessary to avoid injury to the religious susceptibilities of the adherents of that religion*'. The proposal to omit this wide ranging exemption would severely limit real religious freedom. The freedom to ensure the religious compatibility of those employed by the religious body was also compromised by such an omission, leaving only the much narrower exemption of what is 'is necessary to comply with the doctrines, tenets or beliefs of a particular religion' (28.5) This is much more restrictive than it looks. What is 'necessary to comply with doctrine' is not quite the same thing as what is good, even necessary, to maintain

---

<sup>26</sup> *The report of the Human Rights and Equal Opportunity Commission into Religious Freedom "Article 18 Freedom of religion and belief* p.83

the life and vitality of a religious body. It is instructive to see what freedoms are to be granted to political organisations

6.424 The Commission accepts that a politician and local government councillor should be entitled to select staff who share his or her political beliefs. That principle should also apply to other employees providing services (such as research) on a political basis, and to clubs which provide services or support on a political basis. The promotion and propagation of political beliefs may properly involve distinctions on this ground.

Surely it is exactly the same with religious beliefs?

*The Report 2000 On Religious Freedom In the World* draws our attention to the tendency in some nations to give police and government agencies power to define 'what are the admissible forms of religion'. This endangers religious freedom, the report states, because of 'an attitude that defines any "strong" religious experience as "sectarian"'. The report expressed concern at the 'worrisome symptom' of the 'danger of an "obligatory relativism" which can be perceived in some Nations.' I suspect that it was anti-sect laws in some European countries which was in mind, although the comment can equally apply to tendencies here in Australia. So far the recommendations of Report 92 have not been accepted by the NSW government, and God willing, never will. Political good sense has prevailed.

## E. What is needed to keep freedom real

Religious communities need to genuinely embrace religious freedom and not support it only as self-interest dressed up as principle. It is sad to see some religious groups in Australia defending freedom of religion while they do not do so in countries dominated by their religion. Religious groups need to be unafraid of being offended and committed to the freedom of others, to criticise them in ways that they may find unpleasant. This applies as much to the majority Christian groups as minority ones. I am saddened when I hear Christian leaders complaining about artworks and other things and asking for some kind of legal protection against offence. It is a dangerous road to go down, one which will ultimately limit religious freedom as a whole. As there is a clear link between the religious freedom we enjoy today and the development of a non-sectarian secular society<sup>27</sup> all religious groups need to be clear in supporting such a society.

---

<sup>27</sup> Jeremy Halcrow 'Enduring Freedom' in *Southern Cross*, November 2001, p 24-25.

People of good will, of religious commitment or none, need to be committed to a society which allows genuine freedom even if at times this has tension with the good of cultural harmony.

I am particularly concerned about the danger of entrenching some of these problems through bills of rights and other forms of judicial oversight of religious freedom. My examples from New South Wales and Victoria suggest that governments on the whole are less likely to offend than are judicial and antidiscrimination boards. Without wishing to go too far, I have come away from this study with the strong conviction that many such bodies are staffed by people who show ignorance of the true nature of religious belief and communities, are too wedded to an inappropriate multicultural ideology, and even at times demonstrate what can only be described as a prejudice against strong religious belief. It would be very serious for our country if such bodies were given more power than they have at the moment. A free society is not a perfect society nor is it a society which is free from the messiness of conflicting, strongly held viewpoints in the public arena.

## Conclusion

IS there a better way forward? Let me make a suggestion that warrants further thought. I believe that in Australia there is little need for any more legal restrictions on the behaviour of religious groups. In Australia especially, such over-legal involvement is a dangerous phenomenon. We are much better to rely upon societal standards rather than more laws. In his Barton Lecture this year on Australian culture John Hirst drew our attention to what has been a core value of Australian culture that has been here almost since the settlement.

It is the belief that there should not be poisonous divisions between people; [...] The Australian style is to keep differences quarantined and not to let them rampage in the world at large.

It is much better to rely upon core cultural values in Australia such as these than create laws designed ostensibly to protect religious freedom but may turn out in the long run to be dangerous protections indeed.