

Discussion Paper

Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, 1981

Introduction

Australia has been active for some time in the international community's attempts to formulate and to articulate certain basic rights and freedoms for individuals and for nations.

We note that recently, a number of judges of superior courts have recognised that international law is "a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights². This does not contradict the recognised principle of international law that international instruments, whatever their character, be they convention, declaration or protocol, do not have force, as of right, in domestic or municipal law³. It should be remembered, of course, that international instruments are forged in discussions between peoples of diverse cultural, religious, political and legal traditions. Equally, the instruments, in enun

¹ For a brief history in this regard see the article by J.G. Starke Q.C., "Australia and the International Protection of Human Rights," in *International Law in Australia*, (Second Edition) (ed. K.W. Ryan) (Sydney: The Law Book Company, 1984) 136-154.

² *Mabo v. The State of Queensland [No.2]* (1992) 175 CLR 1 at 42 per Brennan J. Mr. Justice Brennan prefaced the statement quoted, saying that "the common law does not necessarily conform with international law..." See also the remarks of Mr. Justice Kirby, President of the New South Wales Court of Appeal, where, in the course of referring to a number of recent decisions of the High Court and the Supreme Court of New South Wales, he refers to international instruments as a "touchstone and a stimulus for decision." "The United Nations Convention on the Rights of the Child and the Declaration of the Rights of the Child as Part of International Law and Municipal Law," paper delivered, Sydney, 6th July, 1993 at the First World Congress on Family Law and Children's Rights.

³ See e.g. the discussion in J.G. Starke, *Introduction to International Law*, (Tenth Edition) (Sydney: Butterworths, 1989) 71-91; I. Brownlie, *Principles of Public International Law*, (Fourth Edition) (Oxford: Clarendon Press, 1990) 32-57; J. Crawford & W.R. Edeson, "International Law and Australian Law," in *International Law in Australia*, *op. cit.*, 71-135 and D.C. Pearce & R.S. Geddes, *Statutory Interpretation in Australia*, (Third Edition) (Sydney: Butterworths, 1988) 41-45.

ciating principles to which states can decide to accede to or not and then to implement or not in a variety of ways, attempt to address the same broad range of human situations.

We are advised that the Religion Declaration (our short-hand term for the United Nations Declaration under consideration) could not, and would not, amend Section 116 of the Australian Constitution which, among other things, precludes the Commonwealth from establishing any religion, imposing any religious observance or prohibiting the free exercise of religion.⁴ However, it would appear that if the action of the former Attorney-General, Mr. Duffy, in declaring the Religion Declaration an international instrument relating to human rights and freedoms pursuant to section 47(1) of the *Human Rights and Equal Opportunity Commission Act* 1986 stands⁵, it would authorise the Human Rights and Equal Opportunity Commission (the HREOC), among other things, to consider, and report on, whether Commonwealth agencies are complying with the Declaration. We observe that the operational and jurisdictional charter of the HREOC is prescribed by the Act under which it was created and that the character and role of the HREOC is that of a monitoring and reporting body only. It is the preserve of Parliament alone, after due processes of consultation and debate, to enact legislation.

With these brief remarks, and as a contribution to community discussion, we offer the following summary observations on the Religion Declaration.

General Observations

(i) The right to profess and to practise religious belief is a fundamental right. The following documents, to all of which Australia has acceded as a member of the United Nations, refer to either the right to freedom of thought, conscience and religion, and/or the rights of parents to choose for their

⁴ For an overview of decisions of the High Court of Australia on Section 116, see S. McLeish, "Making Sense of Religion and the Constitution: A Fresh Start for Section 116," *Monash University Law Review* 18 (1992/2) 207-36. See also, W. Sadurski, "On Legal Definitions of "Religion"," *Australian Law Journal* 63 (Dec. 1989) 834-43.

⁵ We note that there are formal notices of motion before the Senate which seek to disallow the Attorney-General's reference and, at the same time, to recognise some of the principles set out in the Religion Declaration. See Senate *Hansard* (26 May, 1993) p.1337 (Senators Walters and Calvert), (27 May, 1993) pp.1399-1400 (Senator Vanstone) and The Senate *Notice Paper* (No.15) (18 August, 1993) pp.2-3.

children schools, other than those established by public authorities, to ensure the religious and moral education of their children in conformity with their own convictions. *Universal Declaration of Human Rights, 1948; Convention Against Discrimination in Education, 1960; International Covenant on Economic, Social and Cultural Rights, 1966; International Covenant on Civil and Political Rights, 1966; International Convention on the Elimination of All Forms of Racial Discrimination, 1966 and the Convention on the Rights of the Child, 1989*

The *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* 1981 belongs to this group of documents. This Declaration, adopted by consensus after 19 years of debate, attempts to define more precisely, but not exhaustively, certain protections for religious freedom. It seems evident that an important object of this instrument is to protect individuals and religious groups from undue intrusion by the state or any other body into the ethos, principles and conduct of religious practice.⁶

In relation to this important aspect of religious liberty, we note the following remarks by the Permanent Observer Mission of the Holy See in relation to the Religion Declaration.

(ii) The Permanent Observer Mission of the Holy See commented on the draft of the Religion Declaration in 1973, and has commented favourably, on a number of occasions, subsequent to its finalisation by the United Nations. It is instructive to note a few of the remarks of Sr. Janet Richardson and Sr. Janet Carroll, advisers to the Permanent Observer of the Holy See.

Religious liberty is addressed as a "fundamental freedom" which must be safe-guarded. In paraphrasing parts of the important "Declaration on Religious Liberty" 1965 (*Dignitatis Humanae*, pars.2 & 3) by the Second Vatican Council, the Permanent Observer says:

Evidently when one speaks of "religious liberty" one does not simply refer to the recognition of the right of individuals to have their own religious convictions (it is obvious that the purely internal acts of a human being escape all controls and can be neither forbidden nor imposed), but rather one speaks of that right of the individual (a right rooted in the social nature of men

⁶ In this regard, note the following comment from the Second Vatican Council "Declaration on Religious Liberty," December 1965 (*Dignitatis Humanae*) par.3:

...the civil authority, the purpose of which is the care of the common good in the temporal order, must recognise and look with favour on the religious life of the citizen.

But if it presumes to control or restrict religious activity it must be said to have exceeded the limits of its power.

and women) to be able to give external expression to his or her religious sentiments, to communicate with others in matters of religious faith and to profess one's religion within a community.⁷

In a final comment on the Religion Declaration, the Permanent Observer notes:

Respect for [the] principle of religious freedom ...will...contribute to strengthening international peace and security, which, on the contrary, is threatened by any violation of human rights, but most especially, by violations of the objective rights of the spirit, of human conscience and creativity, including a person's relationship to God. Only the effective protection of the fullness of rights for every individual without discrimination can guarantee peace down to its very foundation.⁸

The Permanent Observer concludes, saying that "we deem it most necessary of all that due attention be given to the elaboration of an International Convention on the promotion and protection of religion or belief."⁹

The Religion Declaration

We note that text writers on public international law recognize that there is an often quite confusing range of terms used to describe international instruments, such as treaty, covenant, declaration and protocol.¹⁰ It appears, too, that preliminary statements of policy are sometimes made by declaration.¹¹ If the Religion Declaration comes into the category of a 'preliminary statement of policy', a thorough

⁷ "XXXIX Session of the General Assembly - III Committee: Intervention of the Permanent Observer Mission of the Holy See on Item 95 ELIMINATION OF ALL FORMS OF RELIGIOUS INTOLERANCE," Press Release (26 November, 1984) p.3.

⁸ "Intervention of the Permanent Observer of the Holy See in the Third Committee of the General Assembly on Item 101: The Elimination of All Forms of Religious Intolerance," Press Release (25 November, 1985) p.5.

⁹ *ibid.*

¹⁰ See, for example, Professor D.W. Grieg's remarks in his *International Law*, (Second Edition) (London: Butterworths, 1976) 450ff.

¹¹ See here the remarks of Professor D.P. O'Connell, *International Law*, (Second Edition) (London: Stevens & Sons, 1970) Vol.I, 195-210. For a discussion of the problems which face the United Nations in determining what are or should be human rights, see P. Alston, "Conjuring Up New Human Rights: A Proposal for Quality Control," *The American Journal of International Law* 78 (1984) 607-621.

review of it, including its international status, is somewhat problematical. Nonetheless, because it is an instrument of the international community, and because it may come within the formal brief of the HREOC, it warrants some detailed comment.

(i) In an international instrument dealing with religion and belief, one would expect to find some definition of how these terms are intended to be understood by those reading the Declaration. However, there is no definition of "religion" or "belief". Only when one reads the *travaux préparatoires* documents extrinsic to the Declaration, is a definition found which includes "theistic, non-theistic and atheistic beliefs."¹²

The High Court of Australia has commented at length on the definition of "religion". For the sake of convenience, and to enable a comparison to be made easily between the definition of "religion and belief" in the *travaux préparatoires* to the Declaration and the legal definition of "religion" in Australia, we set out some of the pertinent remarks of the High Court in *Church of the New Faith v. Commissioner for Payroll Tax (Vic.)*. After observing that "[f]reedom of religion, the paradigm

¹² It appears to be a not uncommon, but nonetheless debatable, practice in international law to refer to the preamble of treaties and *travaux préparatoires* in efforts to interpret and to give effect to international instruments. See further, D.P. O'Connell, *International Law*, Vol.I, *op. cit.*, 259-265 and D.C. Pearce & R.S. Geddes, *Statutory Interpretation in Australia*, *op. cit.*, 41-45. Note too the following remarks of D.J. Sullivan on the definition of "religion or belief." She says:

Although none of the definitions that were proposed at various stages of the drafting process won acceptance, the *travaux préparatoires* reveal general agreement that "theistic, non-theistic and atheistic beliefs" are all embraced by the phrase "religion or belief."

In a footnote she adds:

During drafting discussions, it was asserted that "religion or belief" should be understood to include, inter alia, monotheism, polytheism, atheism, agnosticism, free thought and animistic beliefs.... Conversely, some governments identified systems of thought that should be specifically excluded from the definition such as racism, Nazism and apartheid, ...and theories on subjects such as philosophy, history, politics, art and science....The view that the phrase "religion or belief" was well understood to refer to both religious and nonreligious beliefs prevailed, and proposed definitions were rejected.

"Advancing the Freedom of Religion or Belief Through the UN Declaration on the Elimination of Religious Intolerance and Discrimination," *The American Journal of International Law* 82 (1988) 487-520 at 491.

freedom of conscience, is of the essence of a free society," the then Acting Chief Justice, Sir Anthony Mason and Mr. Justice Brennan said:

...the state has no prophetic role in relation to religious belief....The courts are constrained to accord freedom to faith in the supernatural....

...What man feels constrained to do or abstain from doing because of his faith in the supernatural is prima facie within the area of legal immunity, for his freedom to believe would be impaired by restrictions upon conduct in which he engages in giving effect to that belief.

...We would...hold 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, though canons of conduct which offend against the ordinary laws are outside the area of immunity, privilege or right conferred on the grounds of religion¹³.

(ii) Rightly, the Declaration recognises and bases its protection on "the dignity and equality inherent in all human beings" (paragraph 1 of the preamble). It attempts to articulate the principles of, and right to, freedom of 'thought, conscience, religion or whatever belief' and tolerance for all. The state is enjoined specifically to "take effective measures to prevent and eliminate discrimination on the grounds of religion or belief..." (*Article 4*). There is only vaguely worded, general guidance as to how the state is to do this (*e.g. Article 4,2*).

(iii) *Article 1,1* expressly includes the "freedom to have a religion or whatever belief of his choice, 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" (emphasis added).

We have noted earlier the many international instruments which recognise the right of parents to have their children educated in schools which reflect their own tenets of belief and morals. The Church has claimed this basic right on many occasions¹⁴. In our view, in order to give effect to *Article*

¹³ (1983) 49 *Australian Law Reports* 65 at 69, 72, 73 & 74. The Court noted also, citing with approval the remarks of a former Chief Justice (Latham CJ), that "it would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world." *ibid.* 70.

¹⁴ See especially *Dignitatis Humanae*, par.5 and the following documents: "Declaration on Christian Education" (*Gravissimum Educationis*, 1965) pars.6, 7 & 8; *Charter of the Rights of the Family - Presented by the Holy See to All Persons, Institutions and Authorities Concerned with the Mission of*

1,1 and Articles 5,2 and 6(e), all of which we interpret as being related. There must be the correlative right of religious schools to recruit teachers whose presence and participation will promote, or at least not conflict with, the values for which that school exists, and seeks to communicate to its students. If the right of parents to expect their children to be taught by persons who promote the values and beliefs of that religious school did not extend to the correlative right to discriminate positively in favour of such teachers, it would render Article 1,1 meaningless.

The positive rights of parents are set out in Article 5 of the Declaration (on which we comment below). The correlative right in relation to employment in Catholic educational institutions may be implied in Article 6(e). In our view, it needs to be made an express right in terms even more precise than those found in Article 5,2. In this regard, we note the statutory definition of discrimination in the *Human Rights and Equal Opportunity Commission Act* 1986. It provides (s3) that discrimination does not include any distinction, exclusion or preference:

in respect of a particular job based on the inherent requirements of the job; or in connection with employment as a member of staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed

(iv) The rights of parents are set out in some detail in Article 5. More general rights are presented in Article 6. As to the rights of parents and children, there are a number of points.

Quite rightly, Article 5,1 recognises the rights of parents, or legal guardians of a child, to organise the life of the family "in accordance with their religion or belief bearing in mind the moral education in which the child should be brought up" (emphasis added). Article 5,2 affirms further the right of children to have access to education "in the matter of religion or belief in accordance with the wishes of his parents." It extends the principle to protect the child from receiving teaching on religion or belief "against the wishes of his parents...." This, too, is as it should be. The text refers to

the Family in Today's World, Article 5; from the Sacred Congregation for Catholic Education - "Catholic Schools" (*Malgré les déclarations*, 1977) par.14; "Lay Catholics in Schools: Witnesses to the Faith," 1982; "The Religious Dimension of Education in Catholic Schools," 1988.

"the best interests of the child being the guiding principle." We would understand this principle in the context of the prior right of parents set out in *Article 5,1*.¹⁵

Conclusion

We affirm the essential principle of religious liberty. Shortly, as a further contribution to the discussion, we will publish a paper detailing Catholic teaching on human rights, with specific reference to religious liberty.

We note that the Religion Declaration seeks to affirm the basic principle of religious liberty, although its expression is imprecise in a number of aspects which tends to cloud the important precepts involved. We note the legitimate role of the state to safe-guard religious liberty. The state has a responsibility to ensure that its own practices do not conflict with or restrict basic human rights. In referring the Religion Declaration to the HREOC, the Government is opening its institutions to scrutiny in regard to religious discrimination.

September, 1993.

¹⁵ In this regard, we note the particular reservation of the Holy See in acceding to the *Convention on the Rights of the Child*:

...that [the Holy See] interprets the Articles of the Convention in a way that safeguards the primary and inalienable rights of parents, in particular insofar as these rights concern education (Articles 13 and 28), religion (Article 14), association with others (Article 15) and privacy (Article 6)...

L'Osservatore Romano, 7th May, 1990, p.7.