



AUSTRALIAN CATHOLIC BISHOPS CONFERENCE

General Secretariat

25 September 2015

Mr Tim Wilson
Human Rights Commissioner
Australian Human Rights Commission
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SYDNEY NSW 2001

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Dear Mr Wilson

Religious Freedom Roundtable

The Australian Catholic Bishops Conference (ACBC) is a permanent institution of the Catholic Church in Australia and the instrumentality through which the Australian Catholic Bishops act nationally and address issues of national significance.

The Catholic Church contributes in a wide variety of ways across the spectrum of Australian society. As an integral part of its core mission, the Church seeks to assist people experience the fullness of life. It is concerned with all that impacts on human wellbeing. It comprises many thousands of different entities which have different purposes and modes of governance.

The ACBC appreciates the Australian Human Rights Commission's (AHRC) invitation to make a submission to this inquiry.

Freedom of religion is a fundamental human right. Its existence and importance is acknowledged in the Australian Constitution and in international covenants to which Australia is a signatory. It is a freedom which arises from a fundamental and constitutive attribute of being human: the search for a truth and meaning greater than ourselves, which shows us how to live good and fulfilling lives.

Religion is a natural human good which contributes to and fosters the flourishing of the human person and their physical, social, emotional and spiritual wellbeing. The value of religion arises from the sincere consideration of truth, meaning and value which is intrinsic

to the human condition; and in particular the consideration of whether there is some ultimate, greater-than-human source for them.¹

For this reason, freedom of religion must not be ignored, treated with embarrassment or suspicion by policy and decision makers, or read down and so narrowly interpreted that it is reduced to mean nothing more than freedom of worship. While ensuring that the rights and freedoms of others are protected, Governments are also obliged to ensure that freedom of religion and the freedom to manifest religious beliefs in public is recognised and protected by law. It applies equally to participation in religious observance and to the delivery of services by religious people and agencies, for both religious organisations and their members.

Most people who adhere to religious belief exercise their religious freedom in the service of the common good. Overwhelmingly they do so in a spirit which respects the rights and freedoms of others, and as Australian citizens they expect in fairness that they will be accorded equal respect in the exercise of their rights to practice and manifest their religious beliefs.

Section 116 of the Australian Constitution states: “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.”

The right of religious freedom is also captured in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR):

- Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty (UDHR, Article 2);
- Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance (UDHR, Article 18);
- Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex,

¹ Beth Azar, “A Reason to Believe”, *Monitor on Psychology* (American Psychological Association), 2010, 41:11, 52; Justin L. Barrett, *Cognitive Science, Religion and Theology*, Templeton Press, 2011; Robert P. George, *Making Men Moral: Civil Liberties and Public Morality*, Oxford University Press, 1995.

language, religion; and political or other opinion, national or social origin, property, birth or other status (ICCPR, Article 2(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 (ICCPR, Article 18(1));
- No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice (ICCPR, Article 18(2));
- 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 (ICCPR, Article 18(3));
- 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 (ICCPR, Article 18(4));
- 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 (ICCPR, Article 26).

The right to religious freedom (ICCPR, Article 18) is a “non-derogable” right under Article 4(2), meaning that governments may not act to restrict or suspend this right even in times of public emergency.

The right to religious freedom is not an absolute or unlimited right. Like many other rights – including the right to be free of unjust discrimination – it must be balanced against the fundamental rights and freedoms of others (ICCPR, Article 18(3)).

The ACBC recognises that all rights, almost by definition, conflict with other rights. The objective of the law in such circumstances should be to strike the correct balance between competing rights, so that, for example, the right to be protected from unjust discrimination is not pursued in a way which undermines religious freedom.

The ACBC contends that the focus should be on the common good, so that necessarily competing rights can be balanced by taking into account the interests of all, as opposed to an approach which, by concentrating on individual rights, leads inevitably to irreconcilable conflict of freedoms. Governments must recognise that when talking about people of faith, they are talking about their own citizens, whether from a Christian, Jewish, Muslim or other faith tradition.

Issues for discussion

There are several issues that the ACBC wishes to raise for discussion in the proposed religious freedom roundtable.

The ACBC suggests freedom of religion, like any other right, must be construed in accordance with Sir Isaiah Berlin's famous distinction between positive freedom ('freedom to' do something) and negative freedom ('freedom from' external restriction). The ACBC submits that unless both aspects of freedom of religion are recognised as fundamental to a meaningful expression of freedom of religion, there will be an inevitable curtailing of the freedom, either by design or default.

Mutual respect

The statement under this heading in the AHRC's 'Statement of Purpose and Guiding Principles' that "religious freedom is not unlimited" should be properly contextualised by an express acknowledgement that many other rights, including the right to be free of unjust discrimination, are also "not unlimited". And like these other rights, it should be emphasised religious freedom is a right to be balanced with competing or conflicting rights.

Hold, manifest and proclaim

Like other Australian citizens, people of religious belief must be free to hold, manifest and proclaim their beliefs in the wider community while respecting the rights and freedoms of others. People do not develop in isolation from others, but in community and relationships. Community is often strengthened and renewed through people coming together around shared beliefs. That is why freedom of religion must be identified and defined as including the community of people practising their religion, the agencies and institutions of their faith which support them to practice their faith and the wider community where they live and work.

Schooling

The right of parents to send their children to the school of their choice, to be taught in accordance with their religious convictions (ICCPR, 18(4)) must be respected and protected. For example, parents choose Catholic schools for their children because they expect that this education will be provided by school staff in a manner consistent with the doctrines, beliefs and practices of the Catholic Church.

The positive and negative dichotomy is exemplified in the question of freedom of religion in education.

All staff in Catholic schools have professional obligations to the school as a Catholic school. These obligations include fidelity to the religious nature and identity of the school. One formulation of this obligation is that staff in Catholic schools should publicly support or refrain from undermining the teachings of the Church. If a school staff member in a Catholic school publicly argues against church teachings or publicly acts in a manner which rejects those teachings, the school must have the freedom to refuse to employ that person, while respecting their rights and at all times dealing with them in a pastoral and just manner.

The Catholic Church does not impose its beliefs on anyone and no one is obliged to work for a church agency. Neither is it unreasonable nor unjust to expect staff in Catholic works and agencies to support their mission. To prohibit this would have the effect of preventing faith-based works from upholding and renewing the values which led them to undertake a work for others in the first place, and would forcibly secularise these works by stealth.

The expectation that those working in a Catholic agency will support its mission applies to everyone without discrimination. This same expectation applies to corporations, political parties and other non-profit groups; no employer is obliged to select or to continue to employ staff who are unable to support their values and purposes or whose public statements and actions contradict the objectives of the organisation.

Exceptions

Commonwealth anti-discrimination law recognises religious freedom by allowing exceptions to the law. The language of exemptions and exceptions is misleading and fails to recognise that religious freedom is not a special permission to discriminate granted by government in contradiction to the general law, but a fundamental human right that government is obliged to protect. To make this clear and to remove the potential for misunderstanding, the language of exemptions and exceptions should be replaced in legislation with language that recognises and accommodates the overlapping rights and freedoms that co-exist in a pluralist society such as Australia, without devaluing them.

Mission

On an equal footing with other groups in Australian society, religious groups should be free to compete for government funding consistent with their mission, for example, in providing social services. Beyond the usual and accepted requirements for accountability and transparency in the use of government funding, there is a risk of an expectation developing that government funded services should be provided without regard to the religious beliefs and mission of the provider, even when this may require a faith-based provider to act against the beliefs and teachings of the religious community to which it is responsible.

Even when they assist in providing services on behalf of government, religious service providers are much more than an arm of the state. Catholic social welfare agencies provide services to everyone without discrimination, because this is what our deepest beliefs call us to do. At the same time there may be services which, also because of our deeply held beliefs, we cannot provide. Faith-based services must be allowed to serve the community according to the beliefs that inspire and sustain them in undertaking this work, while acknowledging the freedom of other non-religious service providers to provide services in accordance with their beliefs as well.

Proclaiming beliefs

Mediating institutions like churches, driven by religious belief and mission, are important sources of constructive criticism for the state and society. Religious freedom helps churches and other religious bodies to disagree with the state and each other on key social issues, contributing to a strong and respectful public debate. It is important for both the state,

churches and other religious bodies that the state resist the temptation to enforce conformity of views, particularly in situations where a powerful consensus arises which overlooks important questions of rights or justice, for example for minorities.

Tax exemptions

In Australia governments have long granted concessions and funding to organisations in civil society defined as charities, including religious bodies, not as a special favour, but in recognition of the contribution they make to the community which often governments cannot achieve as well.

Where churches disagree with the state on key social issues, this sometimes leads to the suggestion churches should no longer be eligible for tax exemptions as charities. The High Court decision in *Aid/Watch Incorporated v Commissioner for Taxation* [2010] HCA 42 in December 2010 clarified this, acknowledging that being involved in political activity so long as this concerns matters arising under one of the heads of charity is itself an activity beneficial to the community.

Comments on the Religious Freedom Roundtable ‘Guiding Principles’

The ACBC has a number of comments on the ‘Guiding principles’ as set out by the Australian Human Rights Commission. In order for such principles better to be understood, they need to be defined as positive or negative freedoms. Doing so will also clarify the mechanism by which such rights can best be protected.

Principle 2 states “religious freedom is a fundamental human right ... unless it infringes on the rights of others.” Religious freedom is not a fundamental right conditionally. It is a fundamental right which can only be limited to protect the rights and freedoms of others (ICCPR, Article 18(3)). This also applies to many other rights as well. As this principle is currently formulated, it suggests that religious freedom is an inferior right which can be displaced by others, rather than a fundamental right which must be balanced with them. It is a right that must coexist with overlapping rights and freedoms in a pluralist society such as Australia. Indeed, religious freedom is one of four core principles along with life, liberty and independence, first proclaimed in the Atlantic Charter, the forerunner of international human rights law issued by the Allies in 1941.

Principle 6 states “no Australians should be unnecessarily excluded from participation in public life ...”. This principle might be better expressed in a more positive way such as “All Australians have the right to participate in public life or civic affairs regardless of their faith, age, disability, gender, race, sexual orientation, or other irrelevant attribute.”

Principle 10 would be better phrased as: “Australia’s faith communities offer valuable spiritual and moral guidance to our country. Like other groups and communities in Australia, they will continue to work constructively with government and other public agencies to uphold the law and to build a just and cohesive society.”

Principle 11 states “individuals and communities should be free to exercise religious freedom within the framework of Australian law.” The word “should” offers little assurance

- "must" would be better. The words "exercise religious freedom" would be better expressed as "hold, manifest and proclaim their religious beliefs" as an expression of positive freedom of religion.

I would welcome the opportunity to discuss these issues further.

Yours sincerely

A handwritten signature in black ink, appearing to read "Rev Brian Lucas". The signature is written in a cursive style with a large initial "B" and "L".

Rev Brian Lucas
General Secretary