

AHRC 'Freedom of Religion and Belief Project' Information Hour

A presentation by Andrew Cameron

at the St Andrew's Cathedral Chapter House 30th October 2008

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'At this stage, the opinions expressed in the presentation are mine alone; however I think my views broadly reflect some existing Diocesan policies.' – Andrew Cameron

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- d) Stay tuned & note 2010/11 in your diary!

If you are new to the areas I will cover in this presentation, it will all seem a bit daunting at first. The Australian Human Rights Commission is set to examine a very wide range of issues relating to religion and belief, all of which have been simmering away in our culture for hundreds, even thousands, of years. That does mean it can take some time to digest what is going on, and to find it all a bit hard at first is quite normal! If you feel that way, you are not stupid; that is just a normal part of finding our way into something complex. The good news is that we all have a few years ahead during which we can learn about the issues and start to form an opinion. This presentation is intended as a start to that journey.

I won't go through the biblical basis for freedom, or the theological reasons for freedom of religion. Of course I think those discussions are hugely important; indeed, freedom in the modern West has been forged through a history of Christendom, about which there is now a high degree of cultural amnesia! But for the moment I just want to fill you in on what is happening as I understand it.

1. Project overview

a) What is the AHRC?

The Australian Human Rights Commission (AHRC, formerly HREOC) is a body formed by Commonwealth statute. It describes itself as 'Australia's national, independent statutory authority which administers Commonwealth human rights laws' (discussion paper p. 5). Its task is to examine international human rights agreements, and to make recommendations to Federal Government accordingly.

The organisation has always taken time to use a focus-group style of listening to community concerns. In its various reports, it will often quote stories, opinions and experiences of ordinary Australian at length. In this way it gives a 'sounding' of the thoughts and opinions of everyday people who are vocal enough to articulate their views. This is an important role, and should be valued.

However AHRC admits that these stories are often unverified, and it acknowledges that it is often in the business of communicating some community perceptions to government. AHRC recommendations would therefore always need to be weighed against other evidence, and against other legal and social input. That is often what Government and members of parliament often find themselves doing after the AHRC has spoken.

b) What does the project seek to do/achieve?

The AHRC has begun what it calls the '**Freedom of Religion and Belief in the 21st Century Project**'. In September it launched a discussion paper outlining this Project. It can be found via a link toward the middle of the web page overviewing the Project:

http://www.humanrights.gov.au/partnerships/projects/freedom_religion.html

As the AHRC tells it, this project comes out of a 'National Action Plan to Build on Social Cohesion, Harmony and Security'. It has commissioned three researchers from the Australian Multicultural Foundation to conduct the project and prepare its report. It will build on earlier reports:

- *Article 18: Freedom of Religion and Belief* (HREOC 1998)
- Religion, Cultural Diversity and Safeguarding Australia (DIMEA 2004)
- Two other reports (2003, 2007) studying the experience of Muslim people will also be relevant.

But why bother with this Project?

Because 'freedom of religion' is a U.N.-recognised human right. The project seeks to map the state-of-play for freedom of religion and belief in Australia. It seeks to find out about the experiences and place in civil society of every religious belief (including 'secular belief'), and especially that of Muslim communities. It will seek to remedy what it takes to be any infringements of the right to freedom of belief, or any instances where some religious belief and practice is infringing some other 'fundamental human right'. The Project is an example of the AHRC doing its human-rights related job, this time in reference to 'religious rights'.

c) *What is the project's timeline?*

- The researchers are taking written submissions from the community until 31 Jan 2009 (and I encourage you to send them something if you have something to say).
- They will consult around the nation with citizens, including religious leaders, during 2008-2010.
- A final report will be presented to Government during 2010.
- The report and any recommendations would probably coincide with a second-term Labor government, or a new conservative government.

d) *What is the UN backdrop?*

Australia is a signatory to the International Covenant on Civil and Political Rights 1966 (ICCPR) Article 18: (based on UN Declaration of Human Rights 1948, also Article 18):

- 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.*

There are a few points to note from this U.N. backdrop:

- ‘Religion or belief’: the reference to ‘or belief’ is a deliberate expansion of the concept of ‘freedom of religion, to allow for the rights of those who do not profess to religious belief and/or who profess to non-religious beliefs.
- ‘Either individually or in community’: There is a clear provision for assembly with like-minded others (including intra-family, point 4).

(This community provision is amplified in a later ‘Declaration on Elimination of All Forms of Discrimination Based on Religion or Belief’, UN Resolution 36/55, Art. 6. However U.N. Declarations are not binding in the same way that Covenants bind signatories.)

- ‘In public or private, to manifest’ religion: There is ongoing controversy over extent of ‘manifest’: see point 3, where religion made ‘manifest’ may not infringe others’ ‘fundamental rights and freedoms’.

Also in the ICCPR, Art. 2.3a states that ‘Each State Party to the present Covenant undertake to ensure that any person whose rights or freedoms ... violated shall have an effective remedy...’

From where the UN sits, that usually means that **laws** should be enacted to protect people’s rights. Since Australia is a ‘states party’, and since the AHRC is set up to tell Government when it thinks Australia is falling foul of this Covenant, it follows that the AHRC often recommends new legislation to cover what it thinks are gaps in the protection of our rights. As we will see, it has consistently proposed new laws in relation to religion and belief.

2. Seven areas under review in the Project

I will now go through the Project in a bit more detail to outline what the researchers want to look at.

1) Evaluation of the relevance and impact of the **1998 HREOC report**, *Article 18: Freedom of Religion and Belief* (the recommendations of which are reproduced on pp. 11-13 of the discussion paper, including the recommendation for a federal ‘Religious Freedom Act’).

This report and its recommendations did not make much headway under the Howard government; but if I were on the AHRC, I wouldn’t want it to go to waste either! There is some acknowledgement that things have changed since it was drafted, and the AHRC wants to hear opinions about whether it still remains relevant. There is also a degree of complexity here, since the terrain covered in *Article 18* overlaps with the six areas following ...

2) Assessment of the adequacy of the Australian Constitution’s Section 116 to protect freedom of religion, especially in the absence of a **Charter of Rights**.

This is the part of our Constitution which prevents our Government from showing favouritism to any one religion, while apparently allowing Government to work with all religions to an extent. Some think there are inadequacies with the protections given by this section of the Constitution. Some think that a new Charter of Rights would be a good way to remediate these inadequacies.

3) Investigation of interactions between religion and the **delivery of services** (e.g. in education and human services [i.e. welfare]).

There are a number of partnerships in place between government and faith-based schools, hospitals and care organisations. Of course these are a perennial source of debate for many reasons, often surrounding privileges for and restrictions upon these organisations when taxpayer money is involved. Suffice to say that this section of the Project will set a number of hares running.

4) Consideration of the impacts upon religious freedom of **September 11 2001**.

This is the point where the AHRC is quite overt about their special intention to examine how Islamic communities are travelling. A previous report in relation to Islam highlighted many stories after 9/11 where Muslim people felt marginalised, vilified and misunderstood. The ARHC is looking for ways to help these communities without necessarily encouraging any sort of extremism.

5) Examination of how religious belief affects **political and cultural aspirations** (e.g. for gender equality, or in relation to civic responsibility).

7) Scrutiny of instances where religious freedom seems **directly to contradict** 'fundamental human rights' (e.g. for disabled people, or in relation to sexuality).

I find it easiest to take these sections together. This is where the project seeks to examine whether someone's human rights are being infringed by someone else's claim to religious freedom. There are several ways in which this might occur. For example, one question in the discussion paper very helpfully highlights the way disabled people simply might not have access to religious meetings or worship, which should obviously be quickly addressed.

But a more controversial reason for this discussion has to do with *exemptions to anti-discrimination law*. That is, religious organisations have wide-ranging freedoms in relation to their employment and other practices, which in other circumstances would be regarded as prohibited forms of discrimination. Some think that these exemptions are necessary for true religious freedom. Others think they are an inappropriate infringement of fundamental human rights. The AHRC's project seeks to reopen this matter for debate (and in other contexts, influential officers of AHRC/HREOC have advocated against exemptions as they now stand).

6) Consideration of whether **media practices** and emerging technologies affect religious freedom.

This interesting section is mainly concerned to discover if media organisations are doing any religious groups a disservice.

3. 'Big Picture' questions

The Project and its UN backdrop raises some 'big picture' questions for me, which I will now pause to note.

a) Rights or not?

A most basic 'big picture' question is whether or not 'rights' are a fruitful category in which to frame public and social policy.

Now from the perspective of the AHRC and of people who work in human rights law, my comment seems bizarre. After all, the protection of rights seems to be such a helpful way into protecting the little people from the State, and for arbitrating between people's claims.

At the launch of this project Tom Calma, the AHRC's Race Discrimination Commissioner, described human rights as 'both a system of laws and a body of ethics'. But I am not so sure: I think rights are used to *list* some goods that are worth defending, but I'm not sure they have what it takes to be a whole 'system' or 'body' of thought.

But the AHRC is tasked to think in terms of rights, so there is not much point questioning their whole reason for being. The matter will however come up in the context of a different discussion, which the Federal Government intends to pursue with the community, about whether or not Australia should enact a Federal Charter of Rights.

b) Nature of religion and belief?

The terms 'religion' and 'belief' are so broad that the Project has to cover enormous breadth. Because 'freedom of religion' also has to encompass 'freedom of non-religion', it then has to take into consideration all sorts of beliefs and opinions in the culture. In various documents the AHRC has had a go at defining 'religion and belief' and I am not saying that the attempt shouldn't be made. I am simply noting that it is very ambitious to conduct a study of so many kinds of thought that have been embedded in human history for so long. It is hard to see how even an army of researchers could do the matter justice!

c) Individual versus communal?

That previous point may seem a bit harsh. After all, there is no harm in trying to talk about the place of complex ideas in a society. But in the discussion paper, religion is spoken of in a way that is contestable in one particular area. I'll just make a general claim here without giving examples; you'll have a look at the discussion paper and see if you agree.

It seems that religion is considered primarily to be a matter for individual choice, rather than a communal affair. Religious people often meet together in organised groups, and traditionally the 'freedom of religion' has also been a defence of the life and identity of these groups. This concern is reflected in the UN Convention when it mentions the place of religious communities, and when it allows the religious education of children. But I could argue that some questions for discussion are prejudiced in favour of individual rights at the expense of the life of religious communities.

d) The nature and extent of 'public manifestation'?

We saw that the UN covenant affirms that it is proper to 'to manifest' religion 'in public'. But there are limits: the State also has to protect 'public safety', 'order', and 'health'. We might be able to imagine some conflicts between religious freedom and those other areas, but to date, those limitations generally seem workable.

But it begins to get endlessly murky at the other two limits: the limitation upon freedom of religion in order to protect 'morals' or 'the fundamental rights and freedoms of others'.

Now I am not exactly sure what is meant by 'morals', but I can see plenty of room for endless disagreement over the State's estimate of a 'moral' over a religion's estimate of a 'moral'.

I can also imagine plenty of instances when a religious community is in conflict with the wider community over what constitutes a 'fundamental human right'.

The upshot of all this is that the nature and extent of acceptable 'public manifestations' of religion is far from clear. I am told by one legal expert that on the whole, international jurisprudence invariably tends to judge the right to 'public manifestation' as the lesser right.

This problem area is much bigger than the AHRC of course. From where I sit, I cannot help wondering if they too have been saddled with some unclear thinking at the UN level.

e) Uses of law in society?

I noted that in accordance with the UN, the AHRC tends to recommend new law as a solution of choice. Don't get me wrong; they often have much longer lists of very sensible solutions for how a diverse society can learn to live well with each other. But to show you what I mean, here is the main reason for their proposal to introduce religious anti-vilification law (from the 1998 report):

'[L]aws are expressions of the values which the community considers important. Australian society abhors violence or intolerance for any reason. Equally as abhorrent is the incitement to violence on the basis of race, religion or belief. The implementation of legislation proscribing such behaviour would be a positive expression of community distaste for and disapproval of this type of behaviour. It is also required by international law.' (Article 18, p137)

There is a specific question, which I am still learning the answer to, of whether existing laws against violence obviates the need for specific laws against religious vilification. But that's not the point here. I simply want you to notice two things.

Firstly, law is needed to articulate a community's ethics. (A former president of HREOC once said that she thinks laws should lead the community rather than merely follow the community.)

Secondly, we are told that we need a new law because international law tells us so. But I'm not convinced that this is a good reason for a new law.

As one legal thinker puts it,

'Where ... governments impose standards of behaviour through law on a reluctant population, they risk more than they gain. ... [T]he legislation undermines belief in a shared community of interest between governors and governed. ... Legislation defines legality and illegality, but legitimacy is something different. ... It is the legitimacy of law, and not its constitutional legality, which matters most for stable and harmonious societies.' (Patrick Parkinson)

To my mind the AHRC has not always adequately demonstrated the need for new laws. Yet new law can be a tempting shortcut for the legislation-factories that our parliaments have become. They can be a cheap, easy policy fix. They can make it seem that something is getting done; they look good on the world stage; but they may or may not have anything to do with actual conditions in society.

4. Areas of concern that Christians have already signalled

The Project touches on some areas that conservative Christians are usually edgy about. Here are that mains ones:

a) Relationship to 'rights' and a Federal 'charter of rights'?

It is hard to know exactly what the interaction will be between this Project, and the discussion of a Federal Charter of Rights (in which the AHRC will also play a part). Those who have doubts about the value or 'rights' in law, will also have some doubts about this project.

b) Anti-religious vilification law and evangelism?

The AHRC has repeatedly recommended Federal laws to prohibit religious vilification. Christians are quick to worry that this will put the brakes on criticising other religions as false. To be fair, those who propose these laws want to make it possible to discuss the truth of falsehood of religion and religions. However in practice, I don't know if that will prove as easy as they hope. The law may distinguish between inciting hatred of persons and criticising their beliefs. In practise though, strong condemnation of a belief system can end up feeling and looking like an attack upon the believer.

This is a complex area that I find myself thinking about a lot lately, so I won't say too much more. I am not a fan of this kind of law, and I can think of many strong arguments against it. At the same time, it may be helpful to have a law to state the 'outer limits' of free of expression. But I find this hard to think about and am currently trying to understand lawyer-thinking about this area.

c) Changes to anti-discrimination exemptions?

I've already mentioned those above.

d) An attack on 'Christian heritage'?

Some Christians argue that Australia is a 'Christian country' since it was founded on Christian principles and grew from British Christian stock. As a result, any attempt to shift the national status-quo away from Christianity and toward some other religion or belief, is wrong. For these Christians, the AHRC's project is likely to be considered an attack on our 'Christian heritage'.

Yet many Australians deny the Lordship of Jesus Christ, do not profess to follow him, and know nothing of repentance and forgiveness before God. Hence evangelicals tend not to call Australia 'a Christian country', because that would mask the way this generation of Christians needs to show other Australians how Christ is good news for them.

For the purposes of the AHRC project, then, I think it is best to say that Australia 'is not a Christian country, but is not a blank slate either'. Australia needs to find a way to share cultural space between people of different beliefs, while never pretending away the depth of its Christian roots. It follows that any attempt to banish public manifestations of Christianity is a silly denial of our past. (Of course neither should we attempt to banish public manifestations of other beliefs.)

5. Recommendations for action

a) Check out the project:

- See further http://www.humanrights.gov.au/partnerships/projects/freedom_religion.html (alternative address <http://www.hreoc.gov.au/frb>).
- At the bottom of this main page, see also the related set of enquiries with discussion papers and calls for submissions: e.g. <http://www.hreoc.gov.au/frb/hw/index.html> .
- See also Social Issues briefing #079 at www.sydneyanglicans.net/socialissues

b) Be alert, not alarmed.

There is enough time for us to make our voices heard, and to develop wide, considered responses to this Project and its outcomes.

c) Use the process!

Why not make a brief submission by 31/01/09. (See the AHRC discussion paper for details on how to submit.) We are being ask for an option now! It will not do to say nothing at this stage, and then get upset when the process is nearly complete.

d) Stay tuned

Note 2010/11 in your diary! That will when the final AHRC report comes in, and when any recommendations to Government are considered by Government. The Social Issues Executive will be keeping track of the matter as it unfolds.

- **Andrew Cameron**
30th October 2008