New South Wales Ecumenical Council

Position Paper on Religious Freedom

Rationale

“As people of faith we are concerned about the rights and freedoms that are essential to a civil, democratic society, that recognises and honours the dignity of every person. If the Church is to be, as Christ calls it to be, a beacon for grace, truth and reconciliation, it cannot live in a ghetto designed only for self-preservation and self-congratulation”. (The Reverend Dr Ray Williamson OAM, President of the NSWEC)

“A Christian hankering after prestige and power is not something [new]. Nor is it in any way peculiar to Australia. It runs like a dark thread through the long and chequered history of the church. … The craving for power and prestige is natural. It should never surprise us. Even when it’s wearing the trappings of religion.

“[The] gospel invites us to think some revolutionary thoughts. To disentangle ourselves from worldly notions of power and prestige, and to rediscover serving, caring, as the name of the game”. (The Reverend David Gill AM)¹

These quotations capture the rationale for this submission: the Christian community, the Church, is not seeking power and prestige for itself, but is seeking to place religious rights in the context of advocating for all human rights to be secured within a civil and democratic society.

Purpose of the Position Paper

The New South Wales Ecumenical Council (NSWEC) is comprised of sixteen member churches within NSW/ACT and is one of six state ecumenical bodies affiliated with the National Council of Churches in Australia. In the spirit of the rationale above, as a council of churches, the NSWEC is submitting this Position Paper as an expression of a Christian perspective in the current debate about religious freedom and the Australian Government’s intention to bring legislation to the Parliament.

The Situation in Australia

Australia is a pluralistic society where the separation of Church and State has led to a generally cohesive and flourishing society, for both secular and religious people, but despite this there is a perception that religious freedoms have been eroded.

¹ Quoted from a sermon prepared by the Reverend David Gill for the Killara Uniting Church on the 22nd Sunday after Pentecost (21st October 2018), for which the Gospel passage was Mark 10.35-45. David Gill is a retired Uniting Church Minister of the Word, a former General Secretary, Uniting Church in Australia, 1980-88, and a former General Secretary, Australian Council of Churches/National Council of Churches in Australia, 1988-2001.
Against that perception, however, the Ruddock Review confirmed that Christians and other major religious groups in Australia suffer very little religious discrimination and almost no persecution. The Report stated that:

... as a whole, Australians generally enjoy religious freedom.

Most stakeholders of faith acknowledged that, by and large, they have been free to observe their religious beliefs. Those from faiths that face persecution overseas were particularly vocal in acknowledging the relative safety that Australia affords people of different faiths.

Part of the reason for that safety is the separation of church/synagogue/ mosque/temple and state. This separation is due to the provisions of Section 116 of the Australian Constitution which states that:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.²

Though there is some confusion regarding the provisions and application of Section 116 of the Constitution due to these prohibitions applying to the Commonwealth and not to the States, nonetheless these constitutional prohibitions have led to an harmonious relationship between religious bodies and the state.

There have been nine enquiries, plus other reports, regarding religious freedoms in Australia over recent decades. In 2012, when the Gillard Government tried to consolidate all the federal anti-discrimination laws and include religion as a ‘protected attribute’, some churches and other religious groups argued – as they also had done previously – against religion being protected in law.

In recent times, however, the situation has changed: the issue of religious freedom quite obviously has become a ‘contested space’, many religious bodies have now changed their position and are advocating for religious protections in law.

**How did we get here?**

Broadly speaking, there has been a discernible change in the context in which religious bodies find themselves, especially in the aftermath of the Royal Commission into Institutional Responses to Child Sexual Abuses. As David Gill observed, “most churches are suffering from a sort of institutional post-traumatic stress disorder. In recent times, they have experienced a loss of prestige …, a loss of power …, a loss of privilege”.³

More specifically, there are several identifiable factors that have led some to perceive a need for a Commonwealth Religious Discrimination Bill, for instance:

- The Australian Marriage Law Postal Survey and subsequent legislation allowing for same-sex marriages. Almost two thirds of Australians supported this change, but a significant proportion of the Australian population, particularly conservative religious groups, have perceived it as a diminution of ‘traditional values’.


- The Safe Schools Programme. This was introduced to create safer and more inclusive environments for same sex attracted, intersex and gender diverse students, staff, and families, but perceived by many as actively advocating promiscuity.
- The rise of militant Islam in the Middle East. This has given the increasing proportion of Australian residents who are Christians whose countries of origin are in the Middle East cause to perceive the threat of militant Islam impacting on Australian society.

Other perceived factors include secularization, consumerism, and militant atheism.

All of this has recently been compounded by the situation in relation to Israel Folau.

**Proposed Government Response**

It is understood that the Australian Government is planning to introduce a *Religious Discrimination Bill* in the current session of the parliament, and that the Bill will follow the framework of existing anti-discrimination legislation, in particular in the use of exemptions to allow discrimination by religious bodies, educational institutions and charities.

The NSWEC strongly endorses the view that legislation that is based on exemptions is unacceptable and is not the way to proceed. This is because such an approach seeks to protect the religious freedom of religious bodies by providing ‘exemptions’ from otherwise applicable anti-discrimination provisions. “People of faith should not request or be granted privileges or favours that are not available to those without faith, or to those of a particular faith, or that are in competition with others’ rights”.\(^4\) This is precisely the problem with such legislation: people of faith would be granted special exemptions from having to obey the law that the general population has to obey; people of faith would be given the “right to discriminate”. Having such a ‘right’ is morally objectionable.

It is not acceptable to faith groups that the right to thought, conscience and belief is expressed as an ‘exemption’. In the International Covenant on Civil and Political Rights, religious freedom is not expressed as a narrow exception to the principle of non-discrimination. Rather, the ICCPR “expresses a positive right to freedom of religion and conscience and permits only 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”’

Should the government introduce a Bill based on anti-discrimination legislation, the NSWEC would not support it.

**Finding a Way Forward**

In seeking an alternative way forward, it is important not to be diverted. Despite its prominence in the media, the debate about Israel Folau’s comments is a distracting diversion. Firstly, what he is understood to have said is based on a very narrow interpretation of scripture misquoted. Secondly, as Fr Frank Brennan SJ AO and many others have observed, the Israel

Folau matter is a “simple freedom of contract case regardless of Mr Folau’s religious views”. On the other hand, many do see the issue as one of freedom of religious expression. But even so, there has to be limits. As Dr Keith Joseph observed, “religious talk that justifies racism or violence is outside the pale”. He went on to say: “It should also be noted that if Mr Folau is successful in his arguments regarding the immunity of expressions of religious viewpoints under contract law, then it could have interesting implications for religious institutions such as schools. They will be hard put to justify disciplining members of staff who publicly put forward religious viewpoints at variance with that of the institution: such staff members will just as surely assert their claim to religious freedom regardless of contractual obligations. Accordingly, I am not sure that the case of Israel Folau is the best case upon which to sort out these issues, especially as any resolution is going to be in the very limited field of contract law. This will give no protections or clarifications in the area of criminal law or other fields of civil litigation and I doubt that the moral issues are going to be much illuminated”. Altogether, it is the wrong case on which to focus in seeking a way to secure religious freedom.

One way would be to work within the framework of a Religious Discrimination Act in order to protect both individuals and belief-based organisations from adverse action on the basis of religious belief. But rather than being based on “religious exemptions”, it would use a general limitation clause to balance competing human rights by ensuring that it is a ‘legitimate aim’ for a belief-based organisation to conduct all its operations according to its basis of belief. Whilst this proposal is being advocated by a number of faith organisations and individuals, such a framework for legislation is only a minimum response to the current situation. It has the advantage of expressing in positive terms the rights of people of faith to maintain their religious identity and ethos in belief-based organisations, but it does not address all the issues; it is a proposed step to address the current gap in Australian law in relation to religious discrimination, and so is a proposal still being shaped by the context of the Commonwealth’s complex and confusing anti-discrimination laws. Therefore, the NSWEC sees this approach as a diversion from broader issues, and strongly advocates for something more.

Another way would be a Religious Freedom Act. The advantage of such an Act would be to broaden the issue of religious freedom out of the narrow context of anti-discrimination, but as with the previous approach, there would be serious questions about the definition of ‘religion’, ‘belief’ and ‘belief-based organisation’. The most commonly quoted definition of religion from Australian case law comes from the High Court in 1983 ruling on The Church of the New Faith v Commissioner for Pay-roll Tax (Vic) the Scientology case. That judgement determined 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

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6 The Right Revd Dr Keith Joseph is the Anglican Bishop of North Queensland. The quote is from his Presidential Address to the Diocesan Synod: https://www.anglicannq.org/bishops/bulletin/265-bishop-s-bulletin-4-2019
order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion”. To indicate the difficulty with definitions, it could be argued that this definition does not capture Buddhism, Confucianism or Indigenous religions; it could also be argued that the Act would need to be more restrictive of religious freedom other than what does not “offend against the ordinary laws” – but what would those restrictions be?. In addition to such complexities, this option remains still in the confines of ‘religious’ freedom, and the NSWEC calls for a more comprehensive approach.

A Charter of Human Rights

It is important for the language to be shifted away from religious freedom to the freedom of thought, conscience and belief; but it is equally important to go further to advocate for an Australian Charter of Human Rights. As Dr Keith Joseph said in his Presidential Address, “questions of freedom of speech in general, and freedom of religion in particular, do need to be clearly sorted out. We can no longer rely on the common law to deal with these issues and other human rights. The time has come for a Bill of Rights which provides legal force for the ethical issues that are at stake”.

The NSWEC supports that opinion and would urge the Australian Government to address the issue of religious freedom in the wider context of other freedoms. For example, in recent weeks the issue of the freedom of the press has become a matter of deep concern for many people. There has been concern about what the AFP raids on a journalist’s home and on the ABC’s offices mean for press freedom and journalism. The Human Rights Commission found the raids “deeply disturbing”, and others have pointed out that Australia is the only liberal democracy that does not protect free speech and freedom of the press through a Charter or Bill of Rights. If those freedoms are diminished in any way, democracy is undermined.

An Australian charter would not be like the Bill of Rights in the USA. It would be a piece of parliamentary legislation, not a constitutional bill. There are a number of charters of Human rights already: in Victoria, ACT and Queensland (coming into effect very soon). They articulate our rights and Australia’s obligations to uphold them under the international human rights treaties and conventions that Australia has signed – by no means least, the obligation to protect the rights of all vulnerable people. A Charter of Rights would be developed by the Parliament, like all other laws, and can be changed by the parliament. It would explicitly outline what the Government is required to do to protect and uphold and promote the rights affirmed by the Charter. It would be a means of securing a society in which everyone is included, thereby building a more civil society.

Conclusion

David Gill has given a profound reason why an ecumenical council of churches should be making a submission of this kind. “The pope has a wonderful title, …Servus Servorum Dei – Servant of the Servants of God. It’s a good label, and not only for popes. It should be written into the job descriptions, carved into the desks, of all who are called to leadership in the church. A reminder … that those who lead should do so not through domination but through service. Their authority is to be ministerial, not magisterial. They should be driven not by the love of power, but by the power of love. And not leaders only. Each and every one of us”.

The great Hebrew prophets were radically insightful in their teaching. They were concerned with the most fundamental changes in society and how change could be achieved. They were disturbing. They did not leave room for complacency. Provocatively and imaginatively, they brought their religious traditions to speak to the contemporary realities of their society.

The community of Christian faith – the Church and every individual member – shares that prophetic heritage. Its concerns cannot be confined to its own situation and interests; its focus cannot be inward-looking, seeking its own welfare. It is to be outward-looking, bringing its faith to address the current realities of this society, in order that a civil, democratic, just and equitable society may be built and secured.

It is in that spirit that this submission is being presented.

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