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A. Keith Thompson  
*University of Notre Dame Australia*, keith.thompson@nd.edu.au

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# A Commonwealth Religious Discrimination Act for Australia?

## **Abstract**

There have been a number of attempts to create a constitutional bill of rights in Australia, but all have failed. The most recent exploration of the idea of a constitutional bill of rights by the Rudd government in 2010 stalled because of church opposition. Yet Australia has embraced international norms outlawing racial and sexual discrimination passed as ordinary legislation using the Commonwealth's external affairs power.

This paper discusses whether religious freedom is a norm sufficiently well established in international law that it could also be passed as ordinary legislation in Australia. It then investigates what an Australian religious freedom law might look like and whether it could be crafted so as to allay the church opposition which has shut down previous attempts to create a constitutional bill of rights.

## A Commonwealth Religious Discrimination Act for Australia?

Keith Thompson

### I. Introduction

This paper observes that even though the Commonwealth of Australia has unsuccessfully tried to implement a full range of human rights in the Constitution on a number of occasions, the Parliament already has the power to implement human rights in Australian domestic law by virtue of the external affairs power in the Constitution. That power has previously enabled comprehensive legislation in relation to race, gender equality and workers' rights.

Separate Commonwealth laws could be passed for each human right in the international human rights instruments that Australia has ratified. That is what happened with the *Racial Discrimination Act 1975* (Cth), the *Sexual Discrimination Act 1984* (Cth) and the *Industrial Relations Act 1988* (Cth). Alternatively, a comprehensive Human Rights Act that mirrored or was premised on the *Universal Declaration of Human Rights (UDHR)* and the *Covenants on Civil and Political, and Economic, Social and Cultural Rights (ICCPR and ICESCR)* could be undertaken. The individual rights approach seems more likely to succeed since it worked in 1975, 1984 and 1988 while attempts to protect human rights as a whole by placing them in the Constitution have always failed. The legislation of individual human rights would enable specific debate about that right and avoid the generalised opposition that arises in Australia when a comprehensive constitutional bill of rights has been proposed. This individual approach could also tailor human rights to Australian requirements rather than simply adopt overseas boilerplates.

My suggestion in this article is that our next human rights implementation effort should focus on freedom of religious belief and practice. I make that suggestion because it is arguably the most foundational human right that is not yet protected in Australia and because concerns with the adequate protection of this right have seen religious organisations oppose previous attempts to create a constitutional Bill of Rights in Australia. Freedom of conscience and belief was also the subject of an international declaration which was ratified by Australia in 1993,<sup>1</sup> a declaration that the Australian Human Rights and Equal Opportunity Commission (HREOC) recommended that Australia should implement in 1998 though that recommendation has not yet been followed.<sup>2</sup> If religious organisations were convinced to support a detailed and specific Commonwealth Act protecting religious belief and practice as part of conscience, then it is possible that organized religion might later support other elements of the human rights project.

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<sup>1</sup> *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, (the 'Religion Declaration') Proclaimed by General Assembly of the United Nations on 25 November 1981 (resolution 36/55); reaffirmed by the United Nations by resolution 48/128 in 1993, and declared "an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) by Michael John Duffy as Commonwealth Attorney-General on February 8, 1993.

<sup>2</sup> *Article 18, Freedom of religion and belief*, Human Rights and Equal Opportunity Commission, Australia, 1998.

I address this task in two parts. First, I explain why the Commonwealth Parliament already has the power to implement such legislation even though previous attempts to enact a constitutional bill of rights have always foundered. That discussion will focus on previous High Court jurisprudence surrounding the Commonwealth Executive and Parliament's external affairs' power to implement declarations, treaties and conventions which manifest 'international concerns'. In Part II, I suggest why freedom of conscience and belief should be Australia's next federal human rights project. In part, that is because religious organisations and individual religious believers in Australia have been concerned that freedom of conscience and belief is not and cannot be adequately protected by human rights laws. To answer that concern, I show that religious freedom legislation need not follow the brief generalities of familiar human rights precedents, but can be tailored to answer specific concerns.

I then suggest that the protection of minority freedom of conscience and religion in a comprehensive Religious Freedom Act would contribute to a more favourable view of human rights legislation generally in Australia and in time, could lead to the more complete domestic implementation of the *ICCPR*. I acknowledge that secular liberal elites in Australia will reject my suggestion that a comprehensive Religious Freedom Act, would enhance the quality of Australian society. I also acknowledge that some believe that a just Australian society would be more quickly achieved if homogenous belief were coerced by the suppression of all speech and action that vilified or offended minorities. Without canvassing the voluminous literature which exists around that argument, I explain why I believe that a tolerant and respectful society is the more likely product of a society which fully respects freedom of conscience and belief where that belief does not interfere with public safety, order, health or morals, or the fundamental rights and freedoms of others.

I conclude that Australian experience with the *Racial Discrimination Act 1975* (Cth) and the *Sexual Discrimination Act 1984* (Cth) confirm that a Commonwealth Religious Freedom Act could answer the concerns of organized religion about freedom of religious belief and practice in Australia. Such legislation could also give judges clear direction on how anti-discrimination legislation should be interpreted when it conflicted with religious freedom consistent with Australia's international commitments under the *ICCPR* and the *Religion Declaration*.

## II. Commonwealth Legislative Power

The High Court has consistently held that international legal obligations have no effect in Australian domestic law until they are given effect through Australian domestic legislation.<sup>3</sup> The High Court recognized as early as 1949, that domestic Australian legislation could be justified under the external affairs power if such legislation was necessary to prevent sedition against any of Australia's allies.<sup>4</sup> The

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<sup>3</sup> In *Chow Hung Ching v The King* (1948) 77 CLR 449, Dixon J said that the ratifying of a treaty only committed externally and had "no legal effect upon the rights and duties of the subjects of the Crown" (ibid 477-478). The High Court has followed this view in many subsequent cases including *Dietrich v The Queen* (1992) 177 CLR 292 (per Mason CJ and McHugh J) and *Kiao v West* (1985) 159 CLR 550 (per Gibbs CJ).

<sup>4</sup> *R v Sharkey* (1949) 79 CLR 121, 136-137

majority of the Court built upon that reasoning in the *Seas and Submerged Lands Case*<sup>5</sup> when it decided in 1975 that the external affairs power justified Australia's assertion of sovereignty over submerged sea-bed land in the continental shelf well beyond the traditional 12 mile limit. But there has been continuing diversity as to whether the external affairs power is engaged in cases of 'mere externality', if the underlying matters were merely issues of 'international concern', or whether Australia must have also accepted obligations under a formal international treaty.<sup>6</sup> What is now settled and is most relevant for the purposes of this article, is that following the *Tasmanian Dam*<sup>7</sup> and *Industrial Relations Act*<sup>8</sup> cases, Australian domestic legislation can always be justified under s 51(xxix) if that legislation is necessary to implement a commitment that Australia has made in a treaty. Perhaps the first step in that direction was taken in the decision in *Koowarta v Bjelke-Petersen* where the High Court rejected Queensland's challenge to the validity of the *Racial Discrimination Act 1975* (Cth) which had been passed to implement Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*.<sup>9</sup>

Even though the *Koowarta* decision is more than 30 years old, and several other panels of the High Court have considered the reach of the external affairs power since, that decision along with the decision in the *Industrial Relations Act* case<sup>10</sup> arguably provide the last High Court word on the question of how closely follow-on Commonwealth domestic legislation must track the relevant treaty to be a valid exercise of the external affairs power in s 51(xxix). The following discussion of the scope of the external affairs power outlined in *Koowarta* and in the *Industrial Relations Act* case,

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<sup>5</sup> *New South Wales v Commonwealth (Seas and Submerged Lands Case)* (1975) 135 CLR 337. Note that while "the whole Court" found "that the provisions of the [*Seas and Submerged Lands Act 1973* (Cth)] relating to the continental shelf were within the legislative power of the Commonwealth under s. 51(xxix) of the Constitution" (ibid 338, headnote [1]), there was diversity as to whether that power arose because of the 1958 Geneva Conventions on the law of the sea, because of the power to authorize laws "with respect to Australia's relationships with foreign countries" (ibid headnote [2]), or merely on the ground that the waterways concerned were external to Australia.

<sup>6</sup> For example, note that Brennan J in *Polyukhovich v Commonwealth (War Crimes Act Case)* (1991) 172 CLR 501 thought that mere externality was not enough to engage the external affairs legislative power; there must additionally be a 'sufficient Australian connection' (ibid, 550-552), and though he agreed with the majority in the *Tasmanian Dam Case* (1983) 158 CLR 1 that the external affairs power could be used to implement any treaty obligation assumed by Australia, he maintained that there must be strict conformity with the treaty obligations. In the different factual context of *XYZ v Commonwealth* (2006) 227 CLR 532, Callinan and Heydon JJ rejected the argument that Australia domestic legislation could be justified under s 51(xxix) solely on the grounds of geographic externality. They considered instead that the constitutional 'external affairs' phrase, only authorised legislation necessary to preserve Australia's relationships with other countries (ibid, 586-592). Winterton's most recent editors have accordingly questioned whether it is correct to assert that the High Court has accepted Evatt and McTiernan JJ's assertion in *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 687 that the external affairs power extends to authorise domestic legislation to implement mere international recommendations or draft international conventions (*Winterton's Australian Federal Constitutional Law, Commentary and Materials*, Peter Gerangelos (General Editor), 3<sup>rd</sup> ed, Lawbook Co., Pyrmont, NSW, 2013, 648).

<sup>7</sup> *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1.

<sup>8</sup> *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416.

<sup>9</sup> Opened for signature 21 December 1965, 660 UNTS 195; entered into force 4 January 1969, and ratified by Australia on 30 September 1975 which is the same day as the *Racial Discrimination Act 1975* (Cth) was passed.

<sup>10</sup> *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416.

will also review the Full Federal Court's subsequent treatment of the same issues in *Toben v Jones* in 2003.<sup>11</sup>

### ***The scope of the external affairs power in the 'Koowarta' and 'Industrial Relations Act' cases***

John Koowarta challenged the Queensland Government's refusal to transfer a lease of Wik homelands to him as a member of the Wik aboriginal nation as a breach of the *Racial Discrimination Act 1975* (Cth). Queensland defended by asserting that the Commonwealth Government did not have constitutional power to pass the *Racial Discrimination Act 1975* upon which Mr Koowarta relied. Gibbs CJ said that

[t]he crucial question in the case [wa]s whether under the power given by [s. 51\(xxix\)](#) the Parliament can enact laws for the execution of any treaty to which it is a party, whatever its subject-matter, and in particular for the execution of a treaty which deals with matters that are purely domestic and in themselves involve no relationship with other countries or their inhabitants.<sup>12</sup>

Gibbs CJ was concerned that too liberal an interpretation of s 51(xxix) would remove “[n]early all the limitations imposed upon Commonwealth power by the...Constitution” and engage “a unitary system of government”<sup>13</sup> and so found that

an international agreement w[ould] only be a valid law under [s. 51](#) (xxix) if the agreement [wa]s with respect to a matter which itself c[ould] be described as an external affair...[and] if the provisions to which it g[ave] effect answer that description.<sup>14</sup>

Because “[a]n Australian law...designed to forbid racial discrimination by Australians against Australians within the territory of Australia [was not]...international in character”,<sup>15</sup> “ss. 9 and 12 of the Act were not within the legislative power conferred by s. 51(xxix) and [we]re invalid”.<sup>16</sup>

While Aickin and Wilson JJ agreed with the Chief Justice, Stephen, Mason, Murphy and Brennan JJ did not. They interpreted the Commonwealth's power under s 51(xxix) more liberally. Stephen J said that because areas of international concern were “ever expanding”<sup>17</sup> and “because Australia had assumed an international obligation to suppress all forms of racial discrimination [which norm had become]...part of customary international law...the subject of racial discrimination should be regarded as an important aspect of Australia's external affairs”.<sup>18</sup> There was also “a quite precise treaty obligation...which call[ed] for domestic implementation within Australia.”<sup>19</sup>

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<sup>11</sup> *Toben v Jones* (2003) 199 ALR 1.

<sup>12</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 192 [23].

<sup>13</sup> *Ibid* 199 [29].

<sup>14</sup> *Ibid* 200 [31].

<sup>15</sup> *Ibid* 202 [34].

<sup>16</sup> *Ibid* 203 [36].

<sup>17</sup> *Ibid* 217 [25].

<sup>18</sup> *Ibid* 220 [35].

<sup>19</sup> *Ibid* 221 [36].

For Mason J, because the Commonwealth powers in s 51 were plenary, they were “to be construed liberally, not narrowly and pedantically”.<sup>20</sup> He continued that the power to pass laws implementing treaties passed by virtue of the external affairs power only required the Court to determine whether the relevant treaty was genuine.<sup>21</sup> It was

illegitimate to approach any question of interpretation of Commonwealth power on the footing that an expansive construction should be rejected because it will effectively deprive the States of a power which has hitherto been exercised or could be exercised by them.<sup>22</sup>

As O’Connor J had said in *Jumbunna Coal* in 1908,

the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose.<sup>23</sup>

For Mason J, “the existence of a treaty [wa]s [not] an essential pre-requisite to the exercise”<sup>24</sup> of the Commonwealth’s power in s 51(xxix). Following the High Court’s reasoning in *Burgess and Airlines (No. 2)*, that power might be exercised if a matter had “becom[e] the topic of international debate, discussion and negotiation”<sup>25</sup> and it certainly covered “the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination.”<sup>26</sup>

For Murphy J, “there [wa]s an external affair whenever Australia [wa]s involved with any affair...outside Australia”.<sup>27</sup> In the case of the *Convention on the Elimination of All Forms of Racial Discrimination*, because Australia had been complaining almost daily about “violations of human rights in other countries...[t]he Executive Government’s concern with racial discrimination in Australia [wa]s related, perhaps inextricably, to its concern with racial discrimination elsewhere”<sup>28</sup> and brought the *Racial Discrimination Act 1975 (Cth)* “easily within the external affairs power as an implementation of this treaty.”<sup>29</sup>

For Brennan J, s 51(xxix) was “available to support [a] law” “[w]hen the subject-matter of [the] law [wa]s the subject of a treaty obligation and [wa]s ‘indisputably international in character’”.<sup>30</sup> Though “a colourable attempt to convert a matter of internal concern into an external affair would fail”,<sup>31</sup> quoting Windeyer J in

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<sup>20</sup> Ibid 223 [5].

<sup>21</sup> Ibid 224 [6].

<sup>22</sup> Ibid 226 [14].

<sup>23</sup> Ibid 227 [15] quoting O’Connor J in *Jumbunna Coal Mine N.L. v. Victorian Coal Miners’ Association* (1908) 6 CLR 309, 368.

<sup>24</sup> Ibid 234 [30].

<sup>25</sup> Ibid.

<sup>26</sup> Ibid 234 [31-32].

<sup>27</sup> Ibid 237 [2].

<sup>28</sup> Ibid 239 [10].

<sup>29</sup> Ibid 241 [13].

<sup>30</sup> Ibid 256 [8].

<sup>31</sup> Ibid 260 [14].

*Airlines (No. 2)*, "a law necessary to give effect to a particular treaty obligation of the Commonwealth is a law with respect to external affairs."<sup>32</sup>

However, Brennan J was explicit in the *Polyukhovich*<sup>33</sup> case nine years later against all his brethren on that Court, that the Commonwealth was not empowered by s 51(xxix) to pass laws about just anything external to Australia. In that later case, he said the Commonwealth had to demonstrate an Australian nexus – "[t]he 'affairs' which [we]re the subject matter of the power, [we]re...the external affairs of Australia, not affairs which have nothing to do with Australia".<sup>34</sup> The problem with the laws in the *Polyukhovich* case was that they retrospectively criminalized actions that had taken place wholly outside Australia before *Polyukhovich* was an Australian resident or citizen. But Brennan J was satisfied with the Australian connection with the treaty in the *Koowarta* case. In that case, he also explained how the Australian domestic law must conform to the provisions of the treaty which the domestic law was implementing. He said:

It remains to inquire whether ss. 9 and 12 of the Act, which are the only provisions upon which Mr Koowarta's claim for relief might depend, were enacted in performance of Australia's obligation under the Convention. It was rightly conceded that ss. 9 and 12 were enacted in implementation of the Convention. If there were a disconformity between ss. 9 and 12 on the one hand and the Convention obligation on the other, the Convention obligation might fail to stamp the character of an external affair upon some part of the subject-matter of ss. 9 and 12, and further consideration would have to be given to their validity (cf. *R. v. Burgess; Ex parte Henry; Airlines of N.S.W.*[No.2], esp. per Menzies J. (48).

If there had been a material disconformity, it may have been necessary to consider whether any parts of ss. 9 and 12 which were not in implementation of the Convention might have been supported as an appropriate legislative means of performing an obligation to elimination racial discrimination as an obligation binding in international law de hors the Convention. It is unnecessary to examine the nexus between a non-treaty obligation and a law enacted in purported reliance on par. (xxix) in performance of such an obligation. I would defer that examination until the circumstances of some particular case require it. It suffices in this case that ss. 9 and 12 were enacted in performance of the Convention obligation and therefore valid.<sup>35</sup>

Changes in the composition of the Court between 1983 and 1996 saw a much more unified decision in the *Industrial Relations Act Case* in 1996. In that case, the question was whether the Commonwealth had power under s 51 (xxix) of the Constitution to pass amendments to the *Industrial Relations Act 1988* (Cth) by virtue of various international Conventions and Recommendations which the Executive had ratified and whether the domestic laws that had been passed sufficiently conformed to those international Conventions and Recommendations. The joint judgment of Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ found that

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<sup>32</sup> Ibid 258 [12].

<sup>33</sup> *Polyukhovich v Commonwealth (War Crimes Case)* (1991) 172 CLR 501.

<sup>34</sup> Ibid 550-551.

<sup>35</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 260-261.



[i]t would be a serious error to construe part (xxix) as though the subject matter of those relations to which it applied in 1900 were not continually expanding.<sup>36</sup>

Despite his dissent in the *Tasmanian Dam* case because the continuing expansion of s 51 (xxix) left the external affairs power open-ended as a matter of constitutional theory,<sup>37</sup> even Dawson J concurred in a separate judgment.

In the words of the joint majority

To be a law with respect to ‘external affairs’, the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty.<sup>38</sup>

However, in the *Industrial Relations Act Case*, the Court held that some of the provisions in the follow-on legislation were invalid because they were not ‘appropriate and adapted’ to the purpose of the international instruments relied on in that case.<sup>39</sup> Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ explained:

When a treaty is relied on under s 51(xxix) to support a law, it is not sufficient that the law prescribes one of a variety of means that might be thought appropriate and adapted to the achievement of an ideal. The law must prescribe a regime that the treaty has itself defined with sufficient specificity to direct the general course to be taken by the signatory states...

To be a law with respect to ‘external affairs’, the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty...

It has been said that a law will not be capable of being seen as appropriate and adapted in the necessary sense unless it appears that there is ‘reasonable proportionality’ between that purpose or object and the means adapted by the law to pursue it. The notion of ‘reasonable proportionality’ will not always be particularly helpful...whether the law selects means which are reasonably capable of being considered appropriate and adapted to achieving the purpose or object of giving effect to the treaty, so that the law is one upon a subject which is an aspect of external affairs.<sup>40</sup>

In this case, the provisions in the Commonwealth’s follow-on legislation prevented the termination of employment without valid reason or where the termination was ‘harsh, just or unconscionable’. The addition of the requirement that otherwise valid terminations not be ‘harsh, just or unconscionable’ went beyond the requirements of the Convention and to that extent were invalid. The lesson is thus that it is necessary to ensure that the drafting of the domestic follow-on legislation is consistent with the

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<sup>36</sup> *Victoria v Commonwealth (Industrial Relations Act Case)* 1996 187 CLR 416, 482.

<sup>37</sup> Sir Daryl Dawson, “The Constitution – Major Overhaul or Simple Tune-up?” (1984) 14 *Melbourne University Law Review* 353, 358.

<sup>38</sup> *Victoria v Commonwealth (Industrial Relations Act Case)* 1996 187 CLR 416, 486.

<sup>39</sup> For example, the provisions in the Commonwealth’s follow-on legislation that prevented the termination of employment without valid reason or where the termination was ‘harsh, just or unconscionable’ were invalid but severable (ibid 517-518).

<sup>40</sup> Ibid 486-488.

international instrument being followed.

The lesson from the *Industrial Relations Case* is that the domestic follow-on legislation passed to implement the obligations that Australia has accepted under the relevant international instrument, must follow the terms of that instrument closely to count as a valid and reasonably adapted implementation of those treaty obligations in Australia.

### ***Would a Religious Freedom Act be valid under the Australian Constitution?***

That discussion brings us to the question of whether the Commonwealth has power to pass domestic legislation to implement its commitments under the *Religion Declaration* referred to above at note 1. Given that Australia ratified the *ICCPR* in 1980, it is not necessary to further consider whether protecting the religious freedom of Australia's residents is a matter of sufficient international concern to enliven the Commonwealth's power to pass follow-on domestic implementation legislation under the external affairs power in s 51 (xxix). That power is now beyond doubt given the authority of the decisions in the *Tasmanian Dam* and *Industrial Relations Act* cases and the residual question is thus what such follow-on legislation should look like to satisfy the rule that it was 'appropriate and adapted' to the purpose of the international instruments relied on – namely the *ICCPR* and the *Religion Declaration*. Because the power of the Commonwealth Parliament to pass a Religious Freedom Act has been by Australia's Human Rights and Equal Opportunity Commission in its 1998 Report, I briefly set out the reasoning before I pass on to the residual question of what a Commonwealth Religious Freedom could or should look like. The Commission opined

The Australian Constitution gives the Commonwealth power to make laws with respect to external affairs. This head of power enables the Commonwealth to make a law implementing an international treaty ratified or acceded to by Australia provided the law gives effect to the terms of the instrument in a reasonably appropriate and proportional way.

Australia has ratified or otherwise indicated its support for a number of international instruments in the area of human rights. Some of them clearly foreshadow that they will be implemented through domestic legislation. *ICCPR* article 2 requires Australia to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the *ICCPR*, to take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the ... Covenant and to ensure that any persons whose rights or freedoms ... are violated ... have an effective remedy. The *Religion Declaration* article 7 provides

The rights and freedoms set forth in the present Declaration shall be accorded in national legislation in such a manner that everyone shall be able to avail himself of such rights and freedoms in practice.<sup>41</sup>

The Attorney-General's declaration that the *Religion Declaration* is an

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<sup>41</sup> *Article 18, Freedom of religion and belief*, Human Rights and Equal Opportunity Commission, Australia, 1998, 13.

international instrument for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) is strong evidence that the *Religion Declaration* is a matter of sufficient concern to justify the passage of follow-on legislation under s 51(xxix) of the Australian Constitution. But even without the Attorney-General's declaration referred to above,<sup>42</sup> Australia's ratification of the *International Covenant on Civil and Political Rights 1966* (the ICCPR) on 13 August 1980 including its affirmation of freedom of religion and belief in Article 18, puts the matter beyond doubt. That is because Australia agreed under the ICCPR to ensure those rights to all individuals within its territory,<sup>43</sup> to adopt legislation that will more fully enable those rights<sup>44</sup> and because the ICCPR has now arguably been accepted as creating enforceable international law.<sup>45</sup>

While the High Court has not been required to further consider what legislation satisfies the 'appropriate and adapted' interpretive rule since the *Industrial Relations Act Case* in 1996, the Federal Court was required to adjudicate related issues in *Toben v Jones* in 2003<sup>46</sup> and that Court's treatment of the 'appropriate and adapted' requirement is instructive.

Frederick Toben had challenged the validity of orders made by the Federal Court to enforce determinations earlier made by the Human Rights and Equal Opportunity Commission in 2000. Those orders had confirmed that various of his publications on a website as Director of the Adelaide Institute, had vilified Jews in breach of the *Racial Discrimination Act 1975* (Cth) as amended in 1995. Toben appealed Branson J's 2002 orders in the Federal Court to the Full Federal Court. He alleged that the 1995 amendments to *Racial Discrimination Act 1975* (Cth) exceeded the legislative power of the Commonwealth under s 51(xxix) because the *Racial Discrimination Convention*<sup>47</sup> relied on as the foundation of that legislative power, "was only intended to proscribe acts which could be characterised as expressions of racial hatred."<sup>48</sup>

While the Court agreed that "Part IIA of the Act d[id] not fully implement the Convention",<sup>49</sup> the Convention and other international instruments which Australia was obliged to enforce, were also

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<sup>42</sup> Ibid.

<sup>43</sup> ICCPR, Preamble and Article 2.

<sup>44</sup> Ibid, Article 2(2) and 3.

<sup>45</sup> "[M]any international lawyers argue that the [Universal] Declaration [of Human Rights] has come to form part of customary international law and in this way can be seen as binding on all nations...Australia has ratified both Covenants [the ICCPR and the *International Covenant on Economic, Social and Cultural Rights*] and thereby agreed to assume the obligations they set out." (George Williams, Sean Brennan and Andrew Lynch, *Blackshield & Williams Australian Constitutional Law & Theory*, 6<sup>th</sup> ed., The Federation Press, 2014, 1134-1135). However as explained above in the text, these international obligations do not become binding in Australian domestic law until follow-on implementation legislation is passed by the Commonwealth Parliament.

<sup>46</sup> *Toben v Jones* (2003) 199 ALR 1.

<sup>47</sup> The *International Convention on the Elimination of all Forms of Racial Discrimination* (the *Racial Discrimination Convention*) adopted and opened for signature and ratification by General Assembly resolution 2106 on 21 December 1965 and entered into force on 4 January 1969 in accordance with Article 19; ratified by Australia on 30 September 1975 and used as the basis for the passage of the *Racial Discrimination Act 1975* (Cth) the same day.

<sup>48</sup> *Toben v Jones* (2003) 199 ALR 1, 9 [16] per Carr J.

<sup>49</sup> Ibid.

directed at deterring public expressions of offensive racial prejudice which might lead to acts of racial hatred and discrimination...[A] state party [c]ould legislate to ‘nip in the bud’ the doing of offensive, insulting, humiliating or intimidating public acts which are done because of race, colour or national or ethnic origin before such acts can grow into incitement or promotion of racial hatred or discrimination.<sup>50</sup>

Citing the joint judgment in the *Industrial Relations Act Case*, Carr J continued that “it [wa]s for the legislature to choose the means by which it carrie[d] into or g[a]ve effect to a treaty”.<sup>51</sup> Kiefel J concurred with Carr J on the constitutional issues arising, but Allsop J took judicial notice of the context when the Convention was conceived and then observed that State parties had agreed to rapidly pursue “a policy of eliminating racial discrimination in all its forms and promoting understanding among all races” by “all appropriate means”.<sup>52</sup>

Allsop J went on to observe that Article 4(ii) of the *Racial Discrimination Convention* expected “immediate and positive measures”<sup>53</sup> and Article 4(iii) expected States Parties “to declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts”.<sup>54</sup> His Honour noted concern in the Commonwealth Parliament in 1974 and 1983 about how such measures would erode freedom of speech, and he noted the repetition of those concerns in the early 1990s.<sup>55</sup> Proposed criminal sanctions were ultimately rejected, but the 1994 Bill made “acts unlawful which reasonably caused offence”.<sup>56</sup> These amendments were made to “strengthen...social cohesion and [to] prevent...the undermining of tolerance in the Australian community”.<sup>57</sup> He also cited the Attorney-General’s speech when the Amendment Bill was presented to the Parliament,<sup>58</sup> but despite the appellant’s contention that the Act should be read down to “encompass only the expression of racial hatred”,<sup>59</sup> “the context and aim of the Convention were” the elimination of racial discrimination in all its forms.<sup>60</sup> “Absence of precision in the treaty...d[id] not lead to...a lack of obligation” on State Parties.<sup>61</sup> Neither was “a deficiency” in the implementation of the Convention’s regime “fatal” to the constitutional validity of the implementing Act unless that deficiency was “so substantial as to deny the law the character of a measure implementing the Convention”.<sup>62</sup> The law which the Commonwealth Parliament had passed was “reasonably capable of being considered as appropriate and adapted to implement the obligations” which arose under the Convention.<sup>63</sup> While the law the Commonwealth had passed was “only one means of the achievement of the ideal”, it

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<sup>50</sup> Ibid 10 [19].

<sup>51</sup> Ibid 10 [20] citing the *Industrial Relations Act Case* (1986), 487.

<sup>52</sup> Ibid 24 [104] citing Article 2(ii) of the *Convention for the Elimination of All Forms of Discrimination* (1965).

<sup>53</sup> Ibid 24 [107].

<sup>54</sup> Ibid 21 [88].

<sup>55</sup> Ibid 26 [114-117].

<sup>56</sup> Ibid 31 [128].

<sup>57</sup> Ibid 31 [129] quoting the Explanatory Memorandum to the 1995 Amendment Act.

<sup>58</sup> Ibid 32 [131].

<sup>59</sup> Ibid 33 [133].

<sup>60</sup> Ibid 33 [136].

<sup>61</sup> Ibid 35 [140].

<sup>62</sup> Ibid 35 [142] citing the *Industrial Relations Act Case* (1986), 488-489.

<sup>63</sup> Ibid 35 [144].

was not inconsistent with the relevant part of the Convention.<sup>64</sup> The balance to be struck “between freedom of speech and expressions of intimidation and hate” was “to be struck by Parliament”.<sup>65</sup>

While the High Court in the *Industrial Relations Act Case* found that some provisions in the follow-on legislation in that case were not ‘appropriate and adapted’ to the purpose of the international instruments relied on, the Full Federal Court in *Toben v Jones* found that the 1995 amendments to the *Racial Discrimination Act 1975* (Cth) were ‘appropriate and adapted’. It did not matter that the amendments did not track the international convention exactly or were only partial because it could not be said that the non-alignment was “so substantial as to deny the law the character of a measure implementing the Convention.”<sup>66</sup> It was for the Commonwealth Parliament to strike the appropriate domestic implementation balance for the *Racial Discrimination Convention* in Australia.

Commonwealth legislation implementing international human rights instruments also has considerable potential to shape law and attitudes throughout Australia. For even though the Commonwealth legislature did not intend that the *Racial Discrimination Act 1975* (Cth) should override racial protection provisions in the later *Anti-Discrimination Act 1977* (NSW), the High Court held that they did in *Viskausas v Nilaud*.<sup>67</sup> The Commonwealth then amended its legislation in an effort to save the additional protection afforded by the New South Wales legislation,<sup>68</sup> but that amendment and the further litigation that followed,<sup>69</sup> confirmed that federal anti-discrimination legislation will readily be interpreted by the High Court as creating a code that covers the field trumping state legislation that is in any way inconsistent with it.

The decisions of both courts confirm that the power of the Commonwealth Parliament to legislate with respect to external affairs is not unlimited, but allows our legislators a ‘margin of appreciation’ to design legislation in a manner that meets Australian needs, even if that involves the partial or progressive implementation of the treaty obligations. What the Commonwealth Parliament cannot legislate is a regime that bears the name of an international convention but has no relationship to its terms. With this understanding of the Commonwealth Parliament’s power to pass domestic laws implementing Article 18 of the *ICCPR* and the *Religion Declaration*, I will now discuss why the domestic legislation of a comprehensive Religious Freedom Act should be Australia’s next human rights project.

### III. Why should we now pass religious freedom legislation in Australia?

In essence the answer to this question is that the human rights project in Australia has stalled because of distrust and can only be jump started if religious objection is engaged, understood and respectfully accommodated. But before we can

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<sup>64</sup> Ibid.

<sup>65</sup> Ibid 36 [148].

<sup>66</sup> Ibid 35 [142] citing the *Industrial Relations Act Case* (1986), 488-489.

<sup>67</sup> *Viskausas v Nilaud* (1983) 153 CLR 280.

<sup>68</sup> Section 6A(1) of the *Racial Discrimination Act 1975* (Cth) now provides:

This Act is not intended...to exclude or limit the operation of a law of a State or Territory that furthers the objects of the *Convention* and is capable of operating concurrently with this Act.

<sup>69</sup> *University of Wollongong v Metwally* (1984) 158 CLR 447.

discuss how that might be done, we need to understand why the development of human rights in Australia has slowed so much when there was genuine enthusiasm when the UDHR was originally expressed. However, because I want to focus on freedom of religion and conscience, I will not discuss Australia's original antipathy towards racial toleration and equality nor how that was resolved on paper. I observe only that although freedom of religion and conscience got off to a better start, Australia has returned to its hesitant 1901 form.

### ***Freedom of Religion and Belief in Australia***

There are a variety of reasons why Australia has resisted human rights legislation in the past. Most recently the Rudd government rejected the Brennan Committee's "31 recommendations...for improving and promoting human rights in Australia...[because] this would be divisive".<sup>70</sup> Some commentators have suggested the primary reasons for the rejection were seated deep within the Labor party itself.<sup>71</sup> Others have pointed to the continuing concerns of the churches.<sup>72</sup> Patrick Parkinson has published reasons for those "Christian Concerns"<sup>73</sup> and I will review those reasons because they are representative of religious objection generally and because it seems pointless to seek to protect the conscience rights of Australian religious believers if the majority of them are unsupportive for enduring legitimate reasons. However, I observe as a general principle, that human resistance to change because it is uncomfortable does not present as a worthy reason for resisting change that could improve important outcomes in any society.

### ***Political doubts about implementing human rights in Australia***

'Labor Party' resistance to change has been attributed to persuasive elements within the party which believed that human rights are anti-democratic and obstructive of efficient executive government management. The anti-democratic argument holds that Bills of Rights transfer a measure of government control from the elected members of the Parliament to 'unelected judges' who can then subvert Executive government action mandated by the electorate. The argument continues that under Australia's Westminster form of democratic government, the Parliament should always be sovereign and that no judge should be able to tell the Parliament that it has overstepped.

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<sup>70</sup> Blackshield and Williams, above n 45, 1147-1148.

<sup>71</sup> <<http://treatyrepublish.net/content/rudd-government-rejects-human-rights-charter>>

In fact, the most vehement opposition to a charter came from within the Labor Party, spearheaded by former New South Wales Premier Bob Carr. During his decade in office from 1995 to 2005, Carr instituted a series of "law and order" measures, handing unprecedented powers to the police, boosting the state's jail population to record levels and backing the introduction of matching federal and state "anti-terrorism" legislation.

Carr and other Labor figures demagogically claimed that any human rights law would hand power to "unelected" judges and override parliamentary sovereignty. In reality, their objections are to any restriction, however perfunctory, on the increasing tendency of executive governments to ram police-state measures through parliament, under the false pretence of protecting ordinary people from crime and terrorism.

<sup>72</sup> Carolyn Maree Evans, *Legal Protection of Freedom of Religion in Australia*, The Federation Press, Leichardt, New South Wales, 1990, 167 citing Patrick Parkinson, "Christian Concerns about an Australian Charter of Rights", (2010) 15(2) *Australian Journal of Human Rights* 87

<sup>73</sup> Parkinson, above n 72. See also Patrick Parkinson, "Religious vilification, anti-discrimination laws and religious minorities in Australia: The freedom to be different", (2007) 81 *Australian Law Journal* 954, and Joel Harrison and Patrick Parkinson, "Freedom Beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society", 40 *Monash Law Review*, 2, 413.

While it is not the purpose of this paper to review the philosophical foundations of this argument, it is appropriate to observe that New Zealand and the United Kingdom have experimented with Human Rights Act protection models that are respectful of traditional Westminster parliamentary sovereignty but which have arguably improved human rights outcomes in both countries.<sup>74</sup> While domestic Bills of Rights in the ACT and Victoria have not yet earned unequivocal pass marks when it comes to improving human rights outcomes in those jurisdictions, few have suggested that human rights generally are less protected in the ACT and Victoria than they were before their Charters of Rights were enacted. It is also appropriate to observe that Australia diluted parliamentary sovereignty in favour of the judiciary in a limited way at federation more than a century ago, and again, there has been no chorus of criticism suggesting that this limited dilution of the Diceyan ideal has had catastrophic consequences.

Still it is impractical to ignore the lobbying power of elements within the political system resistant to change or the public apathy towards freedom of conscience and religion in generations raised without serious ideological bloodshed close at hand.<sup>75</sup> But what of the Christian objection that legislated or constitutionalized human rights never end up protecting religious liberty? What are those arguments and are there answers?

### ***Religious doubts about implementing human rights in Australia***

Carolyn Evans outlined the primary concern of religious organisations about human rights legislation when she wrote about non-discrimination laws in 2012.<sup>76</sup> She said

Most non-discrimination regimes, including Australia's, began with quite substantial exemptions for religious bodies from the provisions of at least some of the discrimination laws....Over time, however, many countries, particularly in Europe, have seen the scope of exemptions for religious groups narrow. There has been increasing public debate in Australia over whether the exemptions in Australian discrimination Acts should likewise be narrowed.<sup>77</sup>

The concern of religious organisations is that religious freedom gets diluted as newer demands for equality claim that religious exemptions are privileges that are inconsistent with open-ended equality. Evans then distinguishes between exemptions and exceptions. She uses the term 'exception' "to refer to provisions in the law that explicitly exclude a religious group from the operation of some or all of the requirements of the non-discrimination law."<sup>78</sup> Exemptions permit religious bodies "to discriminate with respect to a particular circumstance."<sup>79</sup> Religious bodies argue that contemporary demands for new 'equalities' seldom take a long term view and the human rights journey is thus punctuated with the continual erosion of individual

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<sup>74</sup> See for example, Blackshield and Williams, above n 45, 1141 citing the *New Zealand Bill of Rights Act 1990* (NZ) and the *Human Rights Act 1998* (UK).

<sup>75</sup> Writing in an American context, Martha Nussbaum has observed that the origins and wisdom of religious equality, and what she calls "the battle for equal respect...[must] be refought in each new era" (Martha C. Nussbaum, *Liberty of Conscience*, Basic Books, New York, 2008, 361).

<sup>76</sup> Evans, above n 72, chapter 6.

<sup>77</sup> Ibid 139 citing Fyfe, Costello, Brennan, de Kretser and Croome.

<sup>78</sup> Ibid 140.

<sup>79</sup> Ibid.

conscience and religious group autonomy. Stand-alone claims that religious exceptions and exemptions are privileges and are unfair, never adequately balance the identity and dignity interests of religious conscience against trendy contemporary demands.

Professor Patrick Parkinson has added that even though churches want human rights recognized, they do not believe that Charters assist.<sup>80</sup> Their concerns stem from the perception that current standard form Charters “may be used to support agendas hostile to religious freedom”, do not always “enact the grounds of limitation contained in Article 18” of the *ICCPR*, and that “governmental human rights organisations [can be]...rather selective about the human rights they choose to support.”<sup>81</sup> He says that

the heart of Christian concerns...is that secular liberal interpretations of human rights Charters will tend to relegate religious freedom to the lowest place in an implicit hierarchy of rights established not by international law, but by the intellectual fashions of the day.<sup>82</sup>

Although most Christian organisations support the ideology of anti-discrimination law, the narrow interpretive approach taken by the institutions implementing any new version of equality to ‘genuine occupational requirements’ for jobs in church institutions, see the Christian “moral code”<sup>83</sup> sidelined. If the government or its supervising human rights institutions consider society’s interest in promoting the new equality is sufficiently compelling, then they “curtail religious freedom”<sup>84</sup> to the extent required to achieve the government goal despite lofty pronouncements about the foundationality and even the non-derogability of freedom of conscience and religion. Quoting McConnell, Parkinson says that even though governments assert that they do not take sides when religious and philosophical differences arise in society, the more recent idea that all citizens and their institutions also need to be neutral, prevents religious believers standing for anything they consider important.<sup>85</sup>

In the context of an evangelical school “established to provide an explicitly Christian environment for children and young people”,<sup>86</sup> it is as reasonable for the sponsors to seek employees who adhere to “the fundamentals of the Christian faith” as it is for the proprietors of a Thai restaurant to prefer Thai employees or the owners of a gay bar to want “to appoint only gay staff”.<sup>87</sup> “A right of positive selection is rather different from discrimination”.<sup>88</sup> The law should not proscribe reliance on characteristics which are relevant to employment.<sup>89</sup> Such affirmative selection is essential to the maintenance of multiculturalism because it promotes diversity<sup>90</sup> and because it imbues our society with a hybrid vigour that is lost when the law imposes homogeneity requirements.

Parkinson goes on to explain that the churches are skeptical about the

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<sup>80</sup> Patrick Parkinson, above n 72, 83.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.* 87.

<sup>83</sup> *Ibid.* 89.

<sup>84</sup> *Ibid.* 90.

<sup>85</sup> *Ibid.* 91.

<sup>86</sup> *Ibid.* 94.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.* 96.



implementation of further Charters in Australia since Victoria did such a poor job of implementing the religious limitation in the *ICCPR*. Instead of copying it and confirming that religious freedom should only be limited if limitation is *necessary* “to protect public safety, order, health or morals or the fundamental rights and freedoms of others”,<sup>91</sup> the Victorian drafters created a general balancing provision with so much discretion that the necessity provision in Article 18(3) was eviscerated.<sup>92</sup> But Parkinson concedes that even the “[p]roper enactment of the protections for religious freedom in the *ICCPR*” would not sweep away all the church concerns.<sup>93</sup> The fact that Victoria understood very well the concerns about medical doctor conscience when it passed the *Abortion Law Reform Act 2008* (Vic), did not protect that conscience at all.<sup>94</sup> Parkinson says that Frank Brennan was absolutely right in his scathing criticism:

This was the first real test of the Victorian Charter of Human Rights and Responsibilities and it failed spectacularly to protect a core non-derogable *ICCPR* human right.<sup>95</sup>

Even though a Victorian law which protected doctor conscience might not have protected doctors with conscience concerns about even peripheral involvement in abortion if that law was interpreted narrowly, still the anti-religious belief bias would not have been as palpable.<sup>96</sup>

After noting the view of some influential Australian human rights advocates that many religious beliefs were discriminatory and unacceptable in our pluralist, secular society,<sup>97</sup> Parkinson concluded that

Christians who are opposed to a Charter of Rights...would be less opposed...if they thought that the legislators and policy makers would take all human rights seriously, and faithfully protect freedom of religion and conscience in the manner required by Art 18 of the *ICCPR* and other human rights instruments. The suspicion that those advocating for a charter don't take freedom of religion and conscience nearly seriously enough – a concern which has been fuelled by the track record of the human rights lobby and the drafting of the two Charters that already exist in Australia – has certainly played a significant part in enlivening opposition to a national Charter.<sup>98</sup>

Writing more recently with Joel Harrison, Parkinson has opined that the competing dignity demands of religious believers and those who consider that their beliefs are misogynistic and homophobic could be reconciled if it were accepted that anti-discrimination norms should only apply in public space – the commons.<sup>99</sup> Their admittedly incomplete project suggests that a multicultural society needs ‘mediating

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<sup>91</sup> *ICCPR* Article 18(3).

<sup>92</sup> Parkinson, above n 72, 98-101.

<sup>93</sup> *Ibid* 101.

<sup>94</sup> *Ibid* 104.

<sup>95</sup> *Ibid* 105 quoting Frank Brennan “The place of the religious viewpoint in shaping law and policy in a pluralistic democratic society: a case study on rights and conscience”, paper given at the conference *Values and Public Policy: Fairness, Diversity and Social Change*, Centre for Public Policy, University of Melbourne, 19 February 2009.

<sup>96</sup> *Ibid* 106.

<sup>97</sup> *Ibid* 109-113 citing Tom Calma, Denise Meyerson and Michael Gorton.

<sup>98</sup> *Ibid* 114.

<sup>99</sup> Harrison and Parkinson, above n 73.

institutions’; not in the sense that they facilitate balance between “two poles of authority”,<sup>100</sup> but in perhaps De Tocqueville’s 1830s sense that they recognize and enable separate lawful sources of identity which protect the individual as a bulwark of liberty against the encroaching power of the state.<sup>101</sup>

Part of the thesis of this paper is that the articulation of freedom of conscience and religion in the *UDHR* and *ICCPR* has always been thin and incomplete. The vision of freedom of conscience there expressed was always a work in progress and is inadequate when compared with the legislative substance that is provided for other freedoms in stand-alone acts that can run to 70 or more clauses. The *Religion Declaration* shows that the religious part of conscience is multi-faceted and requires more detail that was expressed in 1948 and 1966 when the UN was struggling to find generalities acceptable behind the Iron and Bamboo curtains and in the Middle East. Carolyn Evans has suggested internationally that the prospects of creating a more specific and detailed Treaty or Convention to protect freedom of religion and conscience are slim for the same reasons as in the past.<sup>102</sup> But that does not mean that there is not enough material for Australia to work with in passing its own federal Religious Freedom Act. There is enough detail in the *ICCPR* and the *Religion Declaration* to justify comprehensive Australian legislation and as freedom of religion and conscience has come under siege internationally, there have been many legal cases that show how such a new Act could be framed. Indeed, I suggest that the proliferation of litigation challenging religious conscience provides material that can enable Australian legislators to demonstrate their commitment to freedom of conscience and liberty. Such legislation could be so detailed and specific that it may convince the churches and religious believers that the Parliament was ‘serious’ about freedom of conscience and religion - to use Parkinson’s word - and ‘serious’ enough to make it difficult for secularly minded judges to dilute the freedoms intended. The real question is how the political will to pass such legislation could be mustered, but the answer to that question is beyond the scope of this paper.

#### **IV. What a Commonwealth Religious Freedom Act could look like?**

In its 1998 report entitled *Article 18, Freedom of religion and belief*<sup>103</sup> HREOC recommended that the Commonwealth enact a Religious Freedom Act which would cover the following matters:

- It should recognize and give effect to the right to freedom of religion and belief<sup>104</sup>
- The right of all religions to exist, organize and determine their own affairs within the law and according to their own tenets<sup>105</sup>
- All rights and freedoms recognized in Article 18 of the *ICCPR* and the *Religion*

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<sup>100</sup> Ibid 436.

<sup>101</sup> Alexis De Tocqueville, *Democracy in America*, David Campbell Publishers Ltd, Everymans Library, London, originally published 1830, copyright 1945, renewed 1972, Vol 1, 303-308, Vol 2, 20-28.

<sup>102</sup> Carolyn Maree Evans, “Time for a Treaty? The Legal Sufficiency of the Declaration on the Elimination of All Forms of Intolerance and Discrimination”, 3 (2007) *BYU Law Review* 617.

<sup>103</sup> *Article 18, Freedom of religion and belief*, Human Rights and Equal Opportunity Commission, Australia, 1998.

<sup>104</sup> Ibid, v, R2.1.

<sup>105</sup> Ibid, v, R2.2.

*Declaration* including but not limited to

- a) freedom to hold a particular religion or belief
  - b) freedom not to hold such
  - c) freedom to manifest religion or belief in worship, observance, practice and teaching
  - d) freedom from coercion which would impair religion or belief
  - e) the right of parents and guardians to organize family life in accordance with their religion or beliefs
  - f) freedom from discrimination on ground of religion or belief<sup>106</sup>
- such freedom of conscience and religion would be subject only to those limitations prescribed by law and necessary to protect public safety, health or morals or the fundamental rights and freedoms of others<sup>107</sup>
  - the definition of religion would be wide and inclusive but would but not so wide as to include beliefs occasioned by mental illness<sup>108</sup>
  - the obligations should apply to individuals, corporations, public and private bodies and all other legal persons<sup>109</sup>
  - it should make unlawful all direct and indirect discrimination on the ground of religion and belief in all areas of public life subject to two exceptions
    - a) any preference (including on grounds of religious belief) because of the inherent requirements of a job should not be unlawful, and
    - b) similarly any preference (including on grounds of religious belief) because of the need to avoid injury to the religious susceptibilities should not be unlawful provided it is not arbitrary and is consistently applied<sup>110</sup>
  - the offence of blasphemy should be abolished in all States and Territories<sup>111</sup>
  - the advocacy of religious hatred, discrimination and violence should be proscribed but with an exemption for good faith
    - a) works of art
    - b) any communication for a genuine academic, artistic, scientific or public interest purpose, and
    - c) news reports in the public interest<sup>112</sup>
  - its process and remedies should be civil remedies similar to those provided in the racial hatred provisions of the *Racial Discrimination Act 1975* (Cth).<sup>113</sup>

HREOC confirmed, as Professor Parkinson has noted,<sup>114</sup> that the UN Human Rights Committee “does not permit any limitations whatsoever on the freedom of thought or conscience or on the freedom to have or adopt a religion or belief of one’s choice.”<sup>115</sup>

<sup>106</sup> Ibid, v, R2.3.

<sup>107</sup> Ibid, v, R2.4.

<sup>108</sup> Ibid, vi, R2.5.

<sup>109</sup> Ibid, vi, R2.6.

<sup>110</sup> Ibid, viii, R4.1.

<sup>111</sup> Ibid, ix, R5.1.

<sup>112</sup> Ibid, ix, R5.3.

<sup>113</sup> Ibid, ix, R5.4.

<sup>114</sup> Parkinson, above n 72, 96 where he observed that churches in Australia are skeptical about the implementation of Human Right Charters since the Victorian Charter ignore the requirement under Article 18(3) of the *ICCPR* that religious freedom should only be limited if such limitation was necessary “to protect public safety, order, health or morals or the fundamental rights and freedoms of others”. Instead, the Victorian drafters created a general balancing provision with so much discretion that the necessity provision was eviscerated (ibid 98-101).

<sup>115</sup> *Article 18, Freedom of religion and belief*, above n 103, 10, quoting UN General Comment No. 22 (1993) paragraph 3.

HREOC continued quoting the UN Human Rights Committee, that “freedom of thought and conscience or...the freedom to have or adopt a religion of one’s choice...are protected unconditionally.”<sup>116</sup> Limitations in the public interest only apply to manifestations of religion if required by law and necessary in the interests of the public safety, order, health or morals or the fundamental rights and freedoms of others.

Since the Victorian Charter of Rights does not follow the *ICCPR* or *UN General Comment No. 22* to the extent it does not enable the unconditional protection of doctor conscience in Victoria, it is submitted that a Commonwealth Religious Freedom Act should be declared a code for Australia intended to ‘cover the field’ and trump any inconsistent state legislation under s 109 of the Australian Constitution to ensure overall Australian compliance with the applicable international instruments.<sup>117</sup>

HREOC’s Recommendation 2.3 referred specifically to Articles 1, 5 and 6 of the *Religion Declaration* with non-exclusive examples. The table in appendix A provides a list of examples including litigated cases where proponents of freedom of conscience and religion believe that freedom of conscience and religion was not considered properly, was unreasonably challenged or was interfered with in the result. I suggest that the examples in the table should be used to prepare sections in a new Commonwealth Religious Freedom Act consistent with the *ICCPR* and *Religion Declaration*. Legislative provisions crafted to protect freedom of religious belief and practice could ensure that judicial decisions inconsistent with freedom of religious belief and practice are not legally possible in Australia.

The point of this discussion has been to show that if the Australian Commonwealth Parliament chose to honour its commitments to protect freedom of religious belief and practice under the *ICCPR* and the *Religion Declaration*, it has the power to do so. Not only could detailed domestic legislation be tailored so that it fell within the constitutional external affairs power, but it could be designed to satisfy the minority religious believers who Professor Parkinson suggests have lost faith in human rights as a way to protect their beliefs and practices.<sup>118</sup> And if minority believers were satisfied after a trial period that their religious liberty could be and had been satisfactorily protected by a Commonwealth Religious Freedom Act, then the prospect of other human rights legislation in Australia would have been enhanced.

## V. Conclusion

Visionary Australians were involved in chartering the UN, adopting the *UDHR* and ratifying the *ICCPR* and, the *ICESCR*. Further visionary Australians ratified and implemented the 1965 *International Convention on the Elimination of All Forms of Racial Discrimination* (the *Race Convention*) and the 1981 *Convention on the Elimination of All Forms of Discrimination Against Women*. They have made Australia

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<sup>116</sup> *Ibid.*

<sup>117</sup> Current High Court interpretation of s 109 of the Australian Constitution holds that state law inconsistent with valid Commonwealth law passed to cover the field on a particular topic, trumps inconsistent state law to the extent of the inconsistency. While s 109 provides that the inconsistent state law is invalid to the extent of the inconsistency, the High Court has interpreted that provision to mean that the inconsistent state law is merely inoperative for the duration of the inconsistency (*Carter v Egg and Egg Pulp Marketing Board (Vic)* (1942) 66 CLR 557, 573 per Latham CJ; see also *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373).

<sup>118</sup> Above n 72.

a better place. It has been slow and patient work, but their vision and persistence has improved the Australia they left to later generations. But the most challenging improvement envisaged by those pioneers, remains to be implemented. That is because it has always been difficult to achieve a high level of consensus about the importance of freedom of religious belief and practice.

I have shown that the domestic legislation of a Commonwealth Religious Freedom Act is within the existing legislative power of the Australian Commonwealth Parliament without the need for constitutional amendment confirmed by a referendum. Such legislation would satisfy the commitments Australia has made to implement Article 18 of the *UDHR* and the *ICCPR*, as well all the provisions of the *Religion Declaration*. That is because there has been ‘international concern’ about freedom of religious belief and practice since at least 1945 and because Australia has made commitments under the international instruments that have followed. The binding *ICCPR* covenant which Australia ratified in 1980, and the follow on *Religion Declaration* which she ratified a year later, spell out some of the detail that could be included in domestic implementation legislation.

I have also shown from Australian federal case law that Australian implementation legislation does need not to correspond exactly with the international instruments that legislation is implementing. It can be tailored to address Australia’s unique religious belief and practice problems, provided it is reasonably adapted to that purpose.

## Appendix A

Adverse cases	Draft provision	Religious Declaration reference point
<p><i>Christian Youth Camps Limited &amp; Ors v Cobaw Community Health Services Limited &amp; Ors</i> [2014] VSCA 75 (16 April 2014); <i>Lee v Ashers Bakery Co Ltd &amp; Anor</i> [2015] NICity 2; <i>Gifford v McCarthy</i> (2016) NY Slip Op 00230; <i>Elane Photography LLC v Willock</i> (2013) NMSC -040, 309 P. 3d, 53; <i>Ontario (Human Rights Commission) v Brockie</i> [2002 22 DLR (4<sup>th</sup>) 174; <i>Wheaton College v Burwell</i> 791 F. 3d 792 (7<sup>th</sup> Circuit 2015)</p>	<p>No provider of goods or services shall be obliged to provide services to any person or organization where the provider or its directing mind has a bona fide conscience objection to doing so, provided that this rule shall not apply in any case where the conscience objection is premised on the race or ethnic background of the proposed service recipient. Neither shall goods or service providers with conscience objections breach any anti-discrimination norm by posting a notice in their place of business advising potential customers of their conscience objection to the provision of particular goods and services</p>	<p>Articles 1-4, 6-8.</p>
<p><i>Catch the Fires Ministry Inc v Islamic Council of Victoria</i> [2006] VSCA 284; <i>Pastor Ake Green</i> Case B 1050 05, 29 November 2005;<sup>119</sup> <i>Archbishop Julian Porteous</i> (Tasmania, Australia – case did not proceed); <i>Bishop Frederick Henry</i> Alberta, Canada – case did not proceed); <i>Chamberlain v Surrey School District No. 36</i> [2002] 2 SCR 235</p>	<p>No person or institution involved in the publication of any spoken or written material for bona fide conscience purposes shall breach any anti-discrimination norm by reason of such publication, but this protection shall not extend to any publication required by law and necessary in the interests of the public safety, order, health or morals or the fundamental rights and freedoms of others</p>	<p>Articles 1-4, 6-8.</p>
<p><i>Eweida v British Airways PC</i> [2010] EWCA Civ 80; <i>Mandia v Dowell-Lee</i> [1983] 2 AC 548; <i>Sikh headgear cases</i><sup>120</sup></p>	<p>It shall be unlawful to pass a law or impose a rule or policy that requires any person to wear or not to wear anything that would interfere with that person's bona fide conscience beliefs, but this protection shall not extend to any item required by law</p>	<p>Articles 1-4, 6-8.</p>

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<[https://web.archive.org/web/20120218220008/http://www.domstol.se/Domstolar/hogstodomstolen/Avgoranden/2005/Dom\\_pa\\_engelska\\_B\\_1050-05.pdf](https://web.archive.org/web/20120218220008/http://www.domstol.se/Domstolar/hogstodomstolen/Avgoranden/2005/Dom_pa_engelska_B_1050-05.pdf)>.

<sup>120</sup> <<http://fateh.sikhnet.com/s/NYPDLandmark>>.

	and necessary in the interests of the public safety, order, health or morals or the fundamental rights and freedoms of others	
<i>Hozack v Church of Jesus Christ of Latter-day Saints</i> [1997] FCA 1300 (27 November 1997); <i>Challenges to Catholic Education Office right to terminate employees on agreed moral grounds</i> , <sup>121</sup> <i>Trinity Western University v British Columbia College of Teachers</i> [2001] SCR 772; <i>Strydom v Nederduitse Gereformede Gemeente, Mooreletta Park</i> (2009) 4 SA 510 (Equality Court, TPA, South Africa)	No employer, whether a person or an institution, who subscribes to a bona fide conscience ethos, shall breach any law by the announcement, imposition or observance of a rule or policy that requires employees to be faithful to that conscience ethos if that employer has given notice of that conscience ethos to prospective employees before the commencement of employment. Nor shall such employer breach any law by taking disciplinary action (including the termination of employment) to enforce employee fidelity to that conscience ethos if the prospect of such discipline was made clear in the pre-employment notice.	Articles 1-4, 6-8.
<i>Victorian and ACT abortion laws; College of Physicians and Surgeons of Ontario</i>	No person who has a conscience objection to involvement in any medical procedure shall be required to be involved in any process or action touching or concerning that medical procedure. Any employer or institution which takes action against such person in breach of this section commits a Commonwealth offence. Penalty – 1000 penalty units	Articles 1-4, 6-8.
<i>Dielman; Wilkie v Preston and Stallard</i> [2016] TAMC (27 July 2016)	No person who conducts a peaceful protest in any public place to express a bona fide conscience belief, shall breach any law, but this rule shall not protect any peaceful protest which physically endangers the public safety, order, health or morals or the fundamental rights and freedoms of others. For the sake of clarity, no peaceful protest that merely offends another person shall be deemed to	Articles 1-4, 6-8.

<sup>121</sup> For example, Evans and Ujvari advise that the Catholic Education Office in Victoria seeks to discriminate against employees who break their agreed moral code by virtue of exemptions in the Victorian legislation (Carolyn Evans and Leilani Ujvari, “Non-discrimination laws and religious schools in Australia”, (2009) 30 *Adelaide Law Review* 31, 33-35).

	<p>have interfered with public safety, order, health, morals or the fundamental rights and freedoms of that other person. Any person, institution or government which takes action against a peaceful protester in breach of this section commits a Commonwealth offence. Penalty – 1000 penalty units.</p>	
<p><i>Paid religious advertising must be aired on public media</i></p>	<p>No person, corporation or other institution providing commercial advertising to the public may refuse to publish any advertisement or message which has been paid for on standard commercial terms unless that advertisement or message would endanger the public safety, order, health or morals, or the fundamental rights and freedoms of others. For the sake of clarity, no advertisement or message that merely offends another person shall be deemed to have endangered the public safety, order, health, morals or the fundamental rights and freedoms of that other person. Any person, institution or government which refuses to publish an advertisement or message in breach of this section commits a Commonwealth offence. Penalty – 1000 penalty units.</p>	<p>Articles 1-4, 6-8.</p>
<p><i>Public institutions must not take moral positions contrary to religious belief without consent of a majority of their shareholders</i></p>	<p>Save for paid advertisements published by news media organisations, no corporation may publish any message on a moral issue unless that corporation has first obtained consent from a majority of its shareholders in a general meeting or special general meeting. Any person, institution or government which refuses to publish an advertisement or message in breach of this section commits a Commonwealth offence. Penalty – 1000 penalty units.</p>	<p>Articles 1 &amp; 8; ICCPR Article 2.</p>
<p><i>Davis v Miller</i> , <a href="https://www.scribd.com/docu">https://www.scribd.com/docu</a></p>	<p>No person employed to provide goods or services to the public shall</p>	<p>Articles 1-4,</p>



<p><a href="#">ment/310025455/Miller-v-Davis.</a></p>	<p>be required to provide those goods or services in breach of a bona fide conscience objection unless the employer gave the employee notice of that requirement before the commencement of employment. Where a requirement to provide goods or services in breach of a bona fide conscience objection is imposed by law after the commencement of employment and the employer had given no saving notice, the employer shall thereafter be obliged to provide the employee with alternative duties which do not offend the employee’s bona fide conscience objection. Any employer which takes any action against an employee which renders the employee’s employment less favourable because of the bona fide conscience, objection commits a Commonwealth offence. Penalty – 1000 penalty units.</p>	<p>6-8.</p>
<p><i>Parental opt out rights for children from education programs contrary to their beliefs</i></p>	<p>No parent or guardian of a child shall be required to have the child attend an educational program that offends the bona fide conscience of that parent or guardian. Any educational institution which conducts educational programs that offend the bona fide conscience of a parent or guardian, shall provide the child with an alternative educational program that does not offend the bona fide conscience of that parent of guardian. Any educational institution which does not provide any child with an education program that does not offend the bona fide conscience of that parent, commits a Commonwealth offence. Penalty – 1000 penalty units.</p>	<p>Article 5</p>