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INTERNATIONAL RELIGIOUS LIBERTY ASSOCIATION

SOUTH PACIFIC DIVISION

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SUVA, FIJI, 9 JUNE 1993

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The Hon Justice Michael Kirby AC CMG*

BENEFICIARIES OF TOLERANCE – PRACTITIONERS OF INDIFFERENCE

Australia remains profoundly affected by the Christian religion which accompanied the British settlers after 1788. The same tradition came to be accepted by the indigenous people of the Australian continent, the Aboriginals and the Torres Strait Islanders.[1] When the British colonies moved to Federation under the Crown of the United Kingdom in 1901, they did so "humbly relying on the blessing of Almighty God". This appeal to God was inserted into the Preamble to the constitution at the suggestion of the majority of the colonial legislative chambers. It was adopted as a response to numerous petitions received from people at every colony; but not without resistance in the Federal conventions in Adelaide and Sydney. Petitions to the contrary were received.[2] The idea was more readily accepted because of the

specific adoption of a constitutional protection against the establishment of any religion.[3]

To this day the words remain in the Preamble to the Australian Constitution. But like the reference to the Crown, they have lately come under attack - often from the same sources.

The protections for religious liberty in Australia still rest substantially upon the country's inheritance of the English culture of religious tolerance. In this, I can echo the opinion of the past Chief Justice of Ghana (Hon E N P Sowah) that:

> *"Perhaps one of the greatest legacies the British bequeathed ... was the freedom of religion."*[4]

Of course, in Britain itself it was not always so. Fierce sectarian rivalry and religious intolerance marked a great deal of the history of those islands. Reflections of it can still be seen, particularly in northern Ireland, a place of my forebears. But the last time a British heretic was burnt at the stake by order of a court was in 1612. By the 19th century, Unitarians, Roman Catholics and Jews were relieved from all legal disabilities. Charles Bradlaugh had won emancipation for atheists. The *Oaths Act* 1888 permitted non-believers, for the first time, to take seats in Parliament and to give evidence in courts by way of solemn affirmation.[5] The only lingering remnant of earlier intolerant times is found in the abiding requirement that the Sovereign of the United Kingdom must be a member of the Church of England. Because the sovereignty of Australia is that of the United Kingdom, this point of discrimination has relevance for Australia.[6]

Justice Douglas, of the United States Supreme Court, once said of the people of his nation that:

> *"We are a religious people."*[7]

The evidence in Australia suggests a closer reflection of English attitudes to religion than those of North America. Perhaps this is an inheritance of the colonial times where religion was often seen as an element or order, civilisation and autocracy rather than of private spirituality and abiding belief. Perhaps it is an outgrowth of the harsh, rustic circumstances of the early Australian conditions. Perhaps it is simply a reflection of a society quickly converted to consumerism. Whatever the causes, recently research shows since 1966 a significant decline in church attendances in Australia. In the Australian census, a question is asked about religious affiliation. The fastest growing group is no religion. Observers of the scene suggest a significant decline in religiosity in the Australian community.[8] All of the major Christian religions are affected by these moves.[9]

On the other hand, changes in policies concerning immigration (to which reference will be made below) has led to a recent influx of migrants to Australia with new religious faiths. There are now about 210,000 Moslems, compared with about 70,000 Jews.[10] In Britain there has been a similar rise of Islam. According to one newspaper report, by the year 2005, practising Moslems will outnumber Anglicans in Britain. Two new mosques are opened each week in that country. Australia has embarked upon a similar path, although on a much smaller scale. The same changes of migration policy have led to increased communities of Hindus and Buddhists in Australia.

All of these communities in Australia are the beneficiaries of two important guardians of religious liberty. Probably first in terms of importance is the tradition of secularism, the culture of tolerance and the attitude that religion is a private matter which is the business of those concerned and of no-one else. The second guardian is called indifference. Its power has grown with the

decline of religiosity. For many, if not most, Australians organised religion is seen as irrelevant or perhaps worse, a hypocritical, obscurantist hangover from earlier times: to be confined to the ceremonies of marriage and of funerals. In such an environment religious freedom is to be tolerated as the unthreatening, harmless eccentricity of mostly older people having declining relevance to a modern secular, consumer, technological society.

There is, however, a third guardian for religious liberty in Australia. It is inherited from earlier times when the first two guardians were not so strong. In essence, it is another gift of the British legacy. I refer to legal protection. The balance of this paper examines that protection. It is convenient to do so in three historical phases. The first is the period of colonial times. The second is the period of Federalism and "White Australia". The third is the modern period of multicultural Australia.

AUSTRALIAN COLONIAL TIMES

British rule in Australia began with the establishment of the penal settlement at Sydney in 1788. From the start, the Church of England was the most favoured church of the colony, all original clergy being Anglicans and none others being allowed.[11] Obligatory attendance at church services conducted by Anglican chaplains was necessary for all convicts regardless of their religious belief or lack of belief. Unlike the founders of the American colonies, those who came to Australia came from a society where religion "was in decline and disarray eroded by scepticism and indifference".[12] Despite this, there was, at first, sharp hostility towards Roman Catholics and Methodists by the Anglican majority.

By 1825 this position was modified, the other Christian denominations receiving some support for their upkeep from the

government of the colony of New South Wales. The early rôle of the churches in eduction attracted public subventions. In 1861 the Chief Justice of New South Wales delivered a judgment in the Supreme Court of the colony declaring:

> *"The Christians of this colony, who were or would be members of the established Church in the United Kingdom, have never in any statute been recognised as being members of the Church established here by law, any more than members of the Roman Catholic, Presbyterian, Independent, Unitarian or Jewish congregations have been ... The colonial legislature ... has in no instance given precedence to the Church of England over other collections of christians."*[13]

This declaration accompanied the moves for free and compulsory education in the Australian colonies. A third feature of such education was added, viz that it should be secular. By 1890 no Australian government provided State aid directly to any church school. This position endured for nearly seventy years.

Sectarianism was never wholly absent from the early Australian scene. Indeed, denominational disputes contributed significantly to the progress of secular attitudes on the part of governments.[14] But although the formal legal links with government were severed, the ceremonial links remained. Courts administered oaths on the Christian Bible as a matter of course. Parliament opened every sitting day with prayers after the Christian tradition. Great public occasions involved Christian (and generally Anglican) invocations of the Deity. In business and some professions, religious and lodge memberships advanced Protestant boys. From colonial times boys of the Roman Catholic schools gravitated towards the Public Service. Girls - Protestant or Catholic - had no equal opportunities.

FEDERATION AND WHITE AUSTRALIA

It was against this background that those who drew the

Australian constitution in the 1890s were moved to include in it the guarantee for freedom of religion expressed in s 116:

> *"116 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 tests shall be required as a qualification for any office or public trust under the Commonwealth."*

Proposals for a guarantee of this character appeared in the first constitution Bill drafted in 1891. In part, it was a response to the growing pressure to add the invocation of the Almighty in the preambular statements. One of the Founding Fathers, Mr W B Higgins said that the guarantee was necessary to prevent any implication, arising out of the recognition of Almighty God in the Preamble, that the Federal Parliament would have power to legislate upon religious matters.[15] A proposal to add the words:

> *"Nor appropriate any portion of its revenues or property for the propagation or support of any religion."*

was put forward by a Tasmanian participant. It was not accepted in those terms. Tasmania is the only State of Australia which has a constitutional provision concerning religious liberty.[16] However, unlike the Federal counterpart, this can be amended by the State Parliament. To amend s 116 of the Australian Constitution it is necessary under s 128 to secure, at referendum, a majority vote of the people of Australia in a majority of the States.

It is clear that the wording of s 116 of the Australian constitution derived from a combination of article VI s 3 and Amendment 1 to the United States constitution. Much the same motivation lay behind the provisions, especially an objection to the privileged place which the Anglican church had won in the constitutional arrangements of the United Kingdom. However, the

course of interpretations of the United States and Australian provisions has been quite different. Whereas the United States Supreme Court has adopted interpretations which favour a fairly rigid separation of church and state and prohibit state funding of church schools,[17] the Australian High Court has adopted a somewhat more relaxed approach. In particular, it rejected a challenge in 1981 which asserted that Federal funding for church schools in Australia contravened s 116 of the Constitution.[18] Specifically the Court rejected the argument that such funding amounted to the establishment of a religion. Because the funding did not discriminate between different religions, it was concluded that it did not offend the constitutional provision which merely prohibited the creation of a state or national religion or church.

On the way to this important test case in 1981, there were many decisions in the Australian courts concerned with appeals to the protection of s 116 of the Australian constitution. Few of these appeals succeeded.

Thus, in 1912 Mr Edgar Krygger declined to perform military service. He swore that he believed that it was opposed to the will of God. He said:

> *"I spend all my time reading the scriptures."*

The *Defence Act* 1903 imposed the obligation of military training on all males of a designated age. Mr Krygger appealed to the constitution. His appeal was dismissed. The High Court held that he was not exempt from the duty of military service. The Chief Justice declared:

> *"It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec 116, and the justification for a refusal to obey the law of that kind must be found elsewhere. The*

constitutional objection entirely fails."[19]

During the Second World War, there was another major challenge. The Adelaide company of Jehovah's Witnesses wished to continue their instruction that all war was contrary to the Word of God. The Federal authorities sought to dissolve this body and to seize its property, declaring it to be subversive and prejudicial to the defence of the Commonwealth and the efficient prosecution of the war. The company appealed to the constitution. But with equal lack of success. Although Justice Latham's judgment began with a most enlightened declaration of the special need to protect minority religions (pointing out that it was they, not large religions that needed the protection of the constitution) it ended, under the exigencies of the time, with a withdrawal of protection in the particular case. Once again, the constitutional guarantee was given a narrow construction.

By the 1960s the political parties in Australia, vying with each other, were offering to provide Federal financial assistance to Church schools. Naturally, this attracted a revival of early sectarian bitterness. Attacks on the constitutionality of the legislation could not be heard by the courts because of a want of 'standing' on the part of the challengers. Some legal commentators at the time defended the constitutionality of such grants, arguing that the proper characterisation of the funding was for education and not religion.[21] As I have said, the challenge ultimately came before the High Court in 1980. It was dismissed; but with the strong dissenting voice of Justice Murphy. He sought to apply to Australia the jurisprudence developed in the United States Supreme Court under the like provisions. He emphasised that freedom **of** religion included freedom **against** religion.

The foregoing developments occurred in a country which saw

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itself, largely, as a reflection in the Southern Hemisphere of the European civilisation from which it took most of its people and its own basic culture. This self-perception received something of a shock during the Second World War when the geographical isolation of Australia, its military vulnerability and its need to look to the United States (not Britain) for its ultimate protection set in train changes in the national consciousness. These changes were reinforced by a large post-War migration programme. It shifted the intake of people from what it had been previously, overwhelmingly people of the British Isles, to a wider catchment although still basically throughout Europe.

In 1966 the Australian Government determined that highly skilled non-Europeans should be permitted to migrate to Australia. Those present should be entitled to change their status from temporary to permanent residents. This decision was publicly acknowledged as signalling the end of the White Australia Policy.[22] There followed rapid changes in migration rules. These have produced a community with a radically different racial mix. Inevitably, there has been an influx of persons from different cultures, with distinct philosophies and outlooks from those shared in the core culture of Christian Australia.

From the principle of assimilation (which was adopted during the post-War migrant intake) through the policy of integration (adopted by the late 1960s), Australia moved by the 1970s to a largely bipartisan policy of multiculturalism. This was finally set in place by the Fraser (Liberal/National Party) Government in 1977. The goal was stated thus:

> *"We believe, therefore, that our goal in Australia should be to create a society in which people of non-Anglo-Australian origin are given an opportunity, as individuals or groups, to choose to preserve and develop their culture - their languages, traditions and arts - so*

that these may become living elements of the diverse culture of the total society, while at the same time they enjoy effective and respected places within one Australian society, with equal access to the rights and opportunities that society provides and accepting responsibilities towards it."[23]

Obviously, amongst the traditions of such individuals and groups to be preserved by the doctrine of multiculturalism were the differing religious traditions which the individuals and groups brought with them.

The policy of multiculturalism was not adopted without controversy. A noted Australian historian, Professor Geoffrey Blainey, opening a Rotary Conference at Warrnambool in March 1984 declared that the pace of Asian immigration, in particular, was well ahead of public opinion. He said that it threatened to weaken or explode the consensus of the Australian people, particularly by accepting too many refugees.[24] However, many defenders of the multicultural ideal spoke out. I was one of them. It was pointed out that, in some ways, Australia by its policy of multiculturalism was charting the way for other societies in the 21st century. Australia could afford to do so because of its comparative economic wealth, the strength of its core institutions (including the law), the pervasiveness and dominance of its universal language, English, and the confidence and toleration of variety exhibited generally amongst its people. If multiculturalism were to fail in Australia, the hopes for building in the new millennium a world respectful of diversity, including in religion, would not look good.

RELIGION IN MULTICULTURAL AUSTRALIA

It is in this context that it is necessary to see the developments which have occurred in the law in recent years for the respect of ethnic and religious diversity in order to provide effective protections for that diversity.

In 1977, the New South Wales Parliament, following initiatives first adopted in South Australia, enacted the *Anti-Discrimination Act*. That Act now provides remedies for discrimination contrary to the Act on the ground of race, sex, marital status, physical impairment, intellectual impairment, homosexuality and age.[25] There are also Federal statutes providing remedies against discrimination on the ground of race.[26] gender and other abuses of human rights.[27]

A notable exception from the protections of human rights provided by the 1977 Act was the omission of protection against discrimination on the ground of religion. Far from providing for such discrimination to be a ground to attract the machinery of the *Anti-Discrimination Act*, the Act provided expressly a large general exemption from all of its provisions for religious bodies. The provision reads:

> *"56 Nothing in this Act affects -*
>
> *(a) the ordination or appointment of priests, ministers of religion or members of any religious order;*
>
> *(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;*
>
> *(c) the appointment of any other person in any capacity by a body established to propagate religion; or*
>
> *(d) any other practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherence of that religion."*

In 1984 the Anti-Discrimination Board of New South Wales produced a major report titled *Discrimination and Religious Conviction*.[28] The report recommended that the Act be amended

to make it unlawful to discriminate on the ground of religious belief or absence of religious belief. It urged that the amendment should cover not only direct but also indirect discrimination. It should provide that a person is discriminated against by another person on the ground of his or her religious belief where the religious practice of that person is not reasonably accommodated. The only exemption proposed was where, to accommodate the religious practice in question, would cause "undue hardship". A wide definition of "religious belief" was proposed to include religious practice, theistic and non-theistic, Christian and non-Christian beliefs, particular religions and all religions and deeply held beliefs which could broadly be conceived of as religious. Particular legislative provisions were proposed to ensure respect for Aboriginal sacred and significant sites was urged. It was proposed that the offence of blasphemy should either be repealed entirely or replaced with non-discriminating criminal offences to protect non-Christian as well as Christian beliefs from attack.

One of the more controversial recommendations was that the *Anti-Discrimination Act* should be amended to make it unlawful to discriminate on the ground of religious belief or absence of religious belief in the area of education and in the area of employment.[29]

The report attracted hostile reactions from all of the major Christian denominations excepting the Uniting Church in Australia. The Anglican Church in Sydney said in its response:

> *"While there are necessary limits to such legitimate discrimination, to simplistically apply that all religions are equally true or equally false, and that the greatest evil is passing judgment on the truth or otherwise of another religion, is to fail to understand the nature of religious belief."*[30]

So far no action has been taken to amend the

Anti-Discrimination Act to incorporate the recommendations for the prohibition on discrimination on the basis of religious conviction or lack thereof. Governments of differing political persuasions, have felt disinclined to advance the sensible recommendations of the Anti-Discrimination Board which, in turn, respond to the multicultural nature of Australian society today. The pressure of the churches is still quite potent. Their capacity to secure media publicity for antagonistic views is not underestimated by politicians who are thus easily persuaded to leave well alone.

If the implementation of the foregoing proposals of the Anti-Discrimination Board must be counted as a failure in the quest for better legal protections for religious liberty in Australia so must the Bicentennial Referendum of 1988.

That referendum grew out of certain of the recommendations contained in the Final Report of the Australian Constitutional Commission established to mark the Bicentenary of European Settlement in Australia.[31] The Commission proposed many important reforms, including the introduction of a General Bill of Rights into the Australian Federal Constitution. Specifically on the issue of freedom of religion, the Commission proposed that s 116 of the Constitution should be amended by referendum so that the guarantees of freedom of religion stated in the section should apply not only in the Federal sphere but also in the Australian States and Territories. The Constitutional Commission pointed to the anomaly that s 116 restricts only the Federal Parliament from enacting laws discriminating on religious grounds yet it appears in Chapter V of the Constitution which is headed "The States". The reason for this curiosity is that the original clause applied only to the States but was amended when finally the reference to "Almighty God" was included in the Preamble.

One of the matters which inspired the Constitutional Commission to urge the protection of religious freedom in the States was a decision of the South Australian Supreme Court in 1984. That Court held that there was no common law protection for religious freedom in the States of Australia. Such freedom could quite readily be over-ridden by the State Parliaments if they enacted laws which clearly restricted religious liberty.[32] The decision was criticised by academic writers.[33] But it certainly conforms to the general Australian approach of the law, at least until recent times.[34] The ultimate protection for liberties, by this theory, lies not in the fundamental rights protected by the common law, even as against Parliament, but in the democratic will of the people and their control over governments accountable to them at regular elections.

The Australian Government proposed four constitutional amendments in the referendum of 1988. The fourth question was designed to extend (amongst other things) freedom of religion as guaranteed in the Federal Constitution to apply to the Australian States and Territories. The referendum proposal gained 2.3 million supporters or 30.4% of the popular vote. There were 5.4 million opponents (or 69% of the popular vote). The proposal was not accepted in a single Australian State. In New South Wales it only gained 23.3% yes votes. The editorialists called it a "sad triumph for fear and doubt".[35] The defeat was blamed on the low esteem in which politicians are generally held by the Australian public and the failure of the Government to seek out a bipartisan consensus. In the establishment of its Republic Advisory Committee it would appear that the present Government is going down the same track. It will likely secure the same reward.

These may appear to be somewhat depressing developments for the

legal protection of religious liberty in Australia. But on a bleak landscape, there have been some bright beacons.

In 1983 a case was brought to the High Court of Australia by the Church of the New Faith. That church follows the writings of L R Hubbard with a conglomeration of ideas and practices known as "Scientology". The question was whether, under s 10 of the *Pay-Roll Tax Act* 1971 (Vic) the "church" was exempted from pay-roll tax on wages paid to its officers. It claimed to be so on the ground that it was, within the Act, a "religious or public benevolent institution". Its claim had been rejected in the Victorian Supreme Court. But it was unanimously upheld by the High Court of Australia. All of the Justices accepted that the test of religion should not be confined to theistic religions. All of them held that the beliefs, practices and observances of the Church of the New Faith constituted a religion. Justices Mason and Brennan declared that, for the purposes of the law, the criteria of religion were two-fold - belief in a supernatural Being, Thing or principle and acceptance of canons of conduct to give effect to that belief. Justices Wilson and Deane denied that any single characteristic could be laid down as constituting a formularised legal criterion. But they listed a number of relevant considerations. Justice Murphy concluded that the categories of religion were not closed. Anybody which claimed to be religious and whose beliefs or practices were a revival of, or resembled, earlier cults could claim to believe in a supernatural Being or Beings or an abstract God or entity or offered a way to find "the meaning and purpose of life" would qualify as a religion. Needless to say the decision (and especially Justice Murphy's broad view) caused equal alarm amongst theologians[36] and tax collectors. It set in train serious considerations of the justifiability, in a secular state, of allowing tax, rating and

planning exemptions for religion and religious bodies, where such bodies are defined so broadly.

Another important decision of the High Court of Australia adopted a similar non-discriminating approach. The case concerned the zoning of land. A municipal planning scheme permitted the establishment of a "church or chapel" in the relevant zone. It also allowed an "other place of public worship". An Islamic community wished to establish a place for worship in a suburb of Sydney. The local authority objected upon the ground that members of the general public were not permitted access to the place and thus it was not a "place of public workshop". The High Court of Australia rejected this argument. Clearly influencing the Court's decision was the wide variety of religious conviction now found in Australia. The judges declared that a narrow view of what "public worship" would be:

> *"... would be to give the Ordinance an operation which discriminated against a group or sect whose rites of worship are, for any of a variety of possible reasons, closed to the general public ... and reflected an approach that would lie ill with currently accepted standards of religious equality and tolerance in this country."*[37]

By reference to other texts, the judges pointed out Aboriginal religions included provisions for secret, closed ceremonies. The Mormons do likewise. Even in the Coronation Service of the Queen, forty years ago, the anointing was performed privately, under a canopy with the television cameras averted. Seclusion, privacy and isolation are not unknown as attributes of religious liberty.

In courts and tribunals throughout Australia there has been like progress in the acceptance of religious diversity. But it was not always so. As recently as 1972, a judge of the Supreme Court of New South Wales considered the question of whether a member of the Jehovah's Witness's religion should be denied custody of his child

upon the ground that the child might become a member of the same faith. Although the judge eventually rejected the argument on the basis that there was no evidence that the practice of that religion would "destroy our social order", the adoption of that criterion allowed for the relevance of such a consideration. The judge said:

> *"I believe the very basis of our social order is the family unit ... That religion which, by its practice, renders asunder the family unit can be said to be so contrary to our social order that its proliferation is to be prevented for the protection of the community itself."*

There have been similar decisions in the United States involving members of the Amish faith,[39] although the United States Supreme Court upheld the argument that enforcement of the mandatory attendance at school of Amish children would be unconstitutional.[40]

Sometimes anti-discrimination legislation can apply indirectly upon religious opinion. Thus, in New South Wales a Christian couple refused to lease a residence to an unmarried couple because they felt they could not be party to, nor profit from, cohabitation by them. They said that they held their views upon religious grounds. But the Equal Opportunity Tribunal held that the Act did not "operate to allow the members of any religion to impose their beliefs on secular society, so as to exempt them from the operation of the law".[41]

Appeals to religion, as an excuse for conduct deemed by some to be anti-social, are likely to increase in the circumstances of Australia's multicultural population. For example, a male follower of Islam, who forcibly restrained his wife from leaving their home, alleged religious justification for his action. Similarly more cases affecting church government are coming to the courts in Australia. Some of them involve issues of alleged discrimination, such as the recent challenge concerning the ordination of women in the Anglican

Church of Australia.[42]

FUTURE CHALLENGES TO RELIGIOUS LIBERTY

Australia shares with other countries the inheritance of a legal culture of religious liberty and of general separation of the public realm of government from the private realm of religion. As well, Australia has a constitutional recognition of this separation in the provisions of its national constitution. When those provisions have been appealed to in particular cases, they have not proved very powerful. That may be nothing more than an illustration of the fact that the cases brought to court, which invoke the constitution, are at the margin. For the great part, Australia gets by with a high degree of religious toleration and liberty precisely because it is inculcated in the culture and now reinforced by declining religiosity in the community .

With the changing nature of Australian society, new tensions manifest themselves. They present in the form of minority groups, with strong religious convictions, which tend to challenge the core values of the nascent Christian religions which remain an integral part of "official" Australian life. Most of the concerns of these minority groups are governed by State laws. They are thus not given much protection by the Federal constitutional provision. On the other hand, recent court decisions have reflected, in the field of taxation and planning laws, the tolerance of diversity, in religion (as in other things) which is inherent in the multicultural philosophy which infuses the life of modern Australia.

The fact remains that specific protection for religious freedom by way of prohibition of discrimination on religious grounds has not found favour in State laws despite the powerful arguments for it. Three most recent and important developments in this connection must be noted:

* The adoption by the High Court of Australia of a notion of inherent implied constitutional rights devolving from the very nature of the Australian polity.[43] This notion, extended over time, may yet come to challenge the Diceyan concept of the supremacy of Parliament under the constitution. It may afford the occasion for clothing s 116 of the constitution in Australia with new, brighter garments;

* There is also a fresh development noted in the important decision of the High Court on Aboriginal land claims.[44] This authority permits Australian courts, in developing the doctrines of the common law of Australia and in construing ambiguous statutes, to have regard to fundamental human rights recognised by the international community. This is itself an important step forward in the application of basic rights in the law of Australia. It is one which I have long favoured.[45] It may provide the opportunity for Australian courts, mindful of the provisions of the *Universal Declaration of Human Rights*[46] and the *International Covenant on Civil and Political Rights*[47] (to both of which Australia is a party) to uphold attributes of freedom of religion (and to change religion) in court decisions where such issues are relevant; and

* On 8 February 1993 the Australian Federal Attorney-General declared that the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief* which was proclaimed by the General Assembly of the United Nations on 25 November 1991,[48] having been adopted in that Organisation by Australia, was henceforth to be an "international instrument" relating to human rights and freedoms for the purpose of the *Human Rights and Equal*

Opportunity Commission Act 1986.[49] This move will afford jurisdiction to the Australian Human Rights and Equal Opportunity Commission to exercise its powers of complaint resolution and community education where intolerance and discrimination based on religion or belief are brought to its notice.

The last-mentioned development has already produced resistance from a number of the Australian States. They saw in it a revival of the 1988 referendum proposal dressed up in another form. They feared the intrusion of a Federal agency into State legal affairs. Some of the major churches have also expressed anxiety about the implications of the Declaration for their rights to practise their religion and organise their communities as they see fit. We have not seen the last of this debate in Australia. Perhaps out of it will come a revival of discussion of the New South Wales Anti-Discrimination Board's report on Discrimination and Religious Conviction. There is much that is good in the recommendations in that report. It is obviously wholly acceptable to most Australians that churches and religious communities should be entitled to discriminate on religious grounds where religion is relevant, eg in the choice of their personnel, the establishment of colleges and the provision of instruction to their members. But it is equally obvious that discrimination on religious grounds should not be tolerated where the conduct impugned is irrelevant to the practice or propagation of a religion. Thus, in a college, it could be arguably appropriate to confine those involved in the teaching of a religion to members of that religion. But it is scarcely seems justifiable to confine staff in the college kitchen to members of the religion, unless they are obliged to observe religious rituals in the preparation of food. The test should be one which addresses the relevance of the activities in

question, not one designed to create a wall impenetrable by the rest of the community around members of a particular group who will otherwise enjoy the advantages of living in a pluralistic, diverse and multicultural society.

It will be clear from this analysis that, in Australia, we have by no means achieved a perfect collection of laws and practices for the defence of religious liberty. To some extent we have done nom ore than to rely upon the tolerance inherited from the past and the indifference which exists at present. The advent of new communities and the introduction of different, minority religions, in greater numbers than previously, present Australian society with new challenges. They will require fresh legal responses; from the branches of Executive Government and administration, from the courts and from the legislature.

The list of problems for religious liberty in Australia surely include:

1. The achievement of an appropriate harmony between the pluralistic society and the growing number who are proponents of fundamentalist religions and who may not accept the basic premise of tolerance and respect for the opinions of others;
2. The precise definition of religious practices which will not be accepted even by a tolerant multicultural community. Thus, obviously, *suttee* (the burning of the widows of orthodox Hindus) would not be tolerated. Nor female circumcision. But what of discrimination against women in the priesthood? Against priests or teachers in religious school on the ground of sexual orientation? Or of marriage on the part of priests? Such cases present difficulties of line-drawing between the right of members of religion to hold and practice their views and the right of general society to uphold causes of abiding

importance to it;

3. The continuance of public ceremonial observances in the Christian tradition has accompanied many of our core institutions - including Parliament and the courts. It seems likely that these (like the earlier religious broadcasts) will soon adapt to a multicultural society. It is likely that the Lord's Prayer at the daily opening of Parliament on sitting days will give way to the more neutral and universal invocation of the Deity or to the secular removal of prayers altogether. Oaths in court may also give way to a universal, secular promise to tell the truth, to the breach of which the law of perjury will apply.[50] Naturally, there will be traditionalists who will resist these changes. But change seems inevitable, in time, as a reflection of the ultimate badge of religious liberty - religious diversity, the right to change religion and the right to have no religion at all and even to propagate opinions hostile to religion;

4. If the Crown survives in Australia, and in other countries of the Commonwealth of Nations where the Queen is Head of State, I think it is likely that moves will be taken before long to remove from the *Act of Settlement* the offensive provision against the Sovereign of the United Kingdom - or his or her spouse - being or becoming a member of the Roman Catholic faith. Although this has not presented any hint of a practical problem until recently, the provision is clearly objectionable in principle. The Sovereign's religious liberty, like that of her subjects, should be a matter of conscience and should be separated from the rôle of Head of State. In this enlightened time even Kings and Queens should have the right of religious freedom, including the freedom to have no religion. The

provision finds its explanation in history which anyone who troubles to read it will understand. But the symbolism is inappropriate and should be reformed;

5. A marked increase in friction on religious grounds arises from the greater ease of travel today. When Christian and Moslem communities lived in little villages in Bosnia they could live together in relative peace. Introduce the train, the motor vehicle and the jumbo jet and the world is presented with new sources of tension. Modern means of travel have facilitated the influx to Australia of many new religious groups. Their presence will test our commitment to religious liberty and to the wider cause of multiculturalism. Already we have seen in Australia reflections of far-away conflicts between religions and faiths of communities in their lands of origin. With passing time these conflicts tend to fade. But they can be acute. Thus, every clash between Orthodox and Catholic Ukrainians in Kiev sends a ripple to their communities in Australia akin to that felt in earlier times by descendants of the two communities in Ireland. The recent revival of ethnic diversity and tensions in Central and Eastern Europe and the former States of the Soviet Union promise reflections in Australia which we should have legal means to redress;

6. With declining participation by the community in the older Christian religions and growing secularism, it seems likely that pressure will mount upon governments and legislatures in Australia to revise and curtail the privileged position of churches and their institutions in town planning, rating and taxation. The broad definition given by the courts to "religion" will accelerate these moves. It seems likely to me that the courts will see fresh challenges to the

constitutionality of public funding of religious schools. In harmony with the more recent rights-based notions of High Court authority it is by no means inconceivable that the Court would today take a view of s 116 of the Australian constitution different from that taken in 1981. The decline in religious participation in most denominational schools in Australia raises a question as to the justification for a wholly separate system of education which is almost wholly publicly funded. Such separation of the community along religious lines and in impressionable youth may be seen by some as antithetical to the principles of tolerant diversity and multiculturalism; and

7. The increasingly complex and controversial question of morality presented for example by modern technology, require answers of an Australian legislature today which must be given without the assurance of an accepted and recognised moral code or universally respected authorities able to pronounce on such questions. In earlier times, the major Christian churches could present the answers. Today their answers, when offered, are challenged. Many of their perceptions of morality (eg on gender and sexual orientation issues) seem to be out of line with community values in Australia. These developments, without changes on the part of the churches, may tend increasingly to marginalize them, at least so far as law-making is concerned. Judges too can no longer refer to religious views on moral questions for fear of offending the principles of secularism and multiculturalism. But if religion is removed what is to take its place in expressing the accepted moral code of society that lies behind many laws?

Many in the traditional churches in Australia believe that the best course for them, and their adherents, is to hold fast to traditions,

established legal rights and old conventions of pre-eminence. More thoughtful advocates of the religious cause urge a reconciliation with the diverse multicultural society that Australia is today. Thus Dr Bruce Kaye remarks:

> *"The legal framework within which the Australian community operates has traditionally been secular and non-preferential. Recent changes in the character of society in the direction of a more manifestly multicultural community puts a question-mark against traditional ways of thinking on the part of christians in relation to their position in the community. The increasingly secular community attitudes which the christian church are faced with drives home that point. Recent rulings in the High Court only served to confirm the secular distanced position of the law in Australia in relation to religion in general and christianity in particular. Such circumstances combine to create for christianity in this context questions of social and political attitudes which inevitably apply questions of thought patterns and intellectual approaches. At root, what is required is not just an adjustment of social attitudes but a rethinking of the mentality that lies behind them. In this respect, some christian churches in Australia are in need of a fundamental theological reinterpretation of their tradition, and their experience of multicultural secular Australia."*[51]

But in case this instruction should seem too fearsome to proponents of a religious way of life, I would suggest that comfort can be drawn from the conclusions of Professor David Little in a paper aptly titled "Religion: Source of Conflict, Source of Peace". Little concludes in words which I would echo with a bold Amen:

> *"In its simplest terms, my argument comes to this: when religion is pictured in strongly communalist terms, religion is a source of conflict. When religion is pictured in strongly human-rights terms, it is a source of peace. Though the picture in many areas of the world is not at the moment especially encouraging, recent developments in Ukraine, to close with one example, do go some way towards confirming the suggestion that a system of religious liberty and the separation of civil and religious identity is an important condition of peace."*[52]

FOOTNOTES

* President of the Court of Appeal of New South Wales. Chairman of the Executive Committee of the International Commission of Jurists, Geneva.

1. New South Wales Anti-Discrimination Board, *Discrimination and Religious Conviction*, 1984, Sydney, 34.
2. J Quick and R R Garran, "The Annotated Constitution of the Australian Commonwealth", Sydney, Angus and Robertson, 1901, 287.
3. Australian Constitution, s 116. See Quick and Garran, above n 2, 288. See also S McLeish, "Making Sense of Religion and the Constitution: A Fresh Start for Section 116" (1992) 18 *Monash Uni L Rev* 207; W Sadurski "On Legal Definitions of 'Religion'" (1989) 63 ALJ 834.
4. E N P Sowah, "Church and State Relations and the Freedom of Conscience" in Papers of International Religious Liberty Association, 1989, p 67.
5. G Robertson, *Freedom, the Individual and the Law*, Penguin, London, 1989 (6th ed), 383.
6. This is a point fastened on by the Australian Republican Movement in the current Australian debate on republicanism.
7. Douglas J in *Szorach v Klauson* 343 US 306 (1952) 313f.
8. B Wilson, *Can God Survive in Australia?*, Sutherland, NSW, 1983, 13ff.
9. H Mol, *Religion in Australia*, London, 1971.
10. K Suter, *Global Change*, Albatross, Sydney, 1992, 316.
11. See eg J S Gregory, *Church and State*, Melbourne, 1973 and B N Kaye, "Christianity and Multiculturalism in Australia" in

Zadoc (Institute for Christianity and Society) Series Paper No 1, 1989, p 7.

12. P O'Farrell, *The Catholic Church and Community in Australia: A History*, Nelson, Melbourne, 1977, 17, cited A D Board above n 1, 38.

13. *Ex parte King* (1861) 2 Legge 1307 (SCNSW), 1314. See also C L Pannam, "Travelling Section 116 with a US Roadmap" (1963) 4 MULR 41, 50.

14. B N Kaye above n 11, 5.

15. Quick and Garran above n 2, 951.

16. Tasmanian *Constitution Act* 1934, s 46.

17. See eg *Reynolds v United States* 98 US 145 (1878); Everson v Board of Education 330 US 1 (1947) and *Walz v New York Tax Commission* 397 US 667 (1970).

18. *Attorney-General for the State of Victoria (the relation of Black) and Others v The Commonwealth of Australia and Others* (1981) 146 CLR 559. An application of this narrow view may be seen in *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association* (1987) 71 ALR 578 (FFC).

19. *Krygger v Williams* (1912) 15 CLR 366, 369 (per Griffith CJ). This decision may be contrasted with *Judd v McKeon* (1926) 38 CLR 380 where Higgins J, at 387 suggested that the failure to vote on religious grounds might be a valid reason for not complying with the Australian requirement of compulsory voting at Federal elections. See L Zions, *The High Court and the Constitution*, 3rd ed, Butterworths, 1992, 326.

20. *Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116.

21. See eg P H Lane, "Commonwealth Reimbursements for Fees at Non-State Schools" (1964) 38 ALJ 130.

22. J Martin, *The Migrant Presence*, Sydney, 1978, 30, cited Kaye above n 11, 1.

23. Australian Ethnic Affairs Council, *Australia as a Multicultural Society*, 1977, 16.

24. G Blainey, Address March 1984, quoted *The Age*, Melbourne, 19 March 1984, 1. See also G Blainey, "The Asianisation of Australia" in *The Age*, 20 March 1984, 11; cf T Duncan, "Blainey Sees a Threat Emerge to Free Speech" in *The Bulletin*, Sydney, 3 July 1984, 25; cf W P Hayden, *The Courier Mail*, Brisbane, 24 February 1984, 1.

25. *Anti-Discrimination Act* 1977 (NSW). There are similar Acts in most of the Australian States.

26. *Racial Discrimination Act* 1975, (Cth).

27. See eg *Sex Discrimination Act* 1984; *Privacy Act* 1988 (Cth).

28. ADB Report above n 1.

29. *Ibid*, 511, 513.

30. See Anglican Church of Australia, Response of the Standing Committee of the Senate, Diocese of Sydney, 4 February 1985, 2. See also Kaye, above n 11, 8. Cf B N Kaye, "Fair and Faithful - Why Should the Churches be Interested in the Inclusion of Religion in the Anti-Discrimination Legislation", unpublished paper, 1989, p 4.

31. Australia, The Constitutional Commission, *Final Report*, AGPS, Canberra, 1988, vol 1, 608f.

32. *Grace Bible Church v Reedman* (1984) 54 ALR 571 (SCSA).

33. See eg G de Q Walker, "Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion (1985) 59 ALJ 276.

34. See eg the author's views in *Building Construction Employees and Builders' Labourers Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372 (CA), 404ff.

35. *The Age*, 5 September 1988, 13.

36. See eg B N Kaye, "An Australian Definition of Religion" (1991) 14 UNSWLJ 332.

37. *The Council of the Municipality of Canterbury v Moslem Alawy Society Limited* (1987) 162 CLR 145, 149.

38. *Evers v Evers* (1972) 19 FLR 296 (NSWSC) 303 (Carmichael J). Cf *In the marriage of Shulsinger* (1976) 28 FLR 202; *In the marriage of Paisio* (1979) 36 FLR 1.

39. See eg *Wisconsin v Yoder* 182 NW 2d 539 (1971), 546 (CA Wis).

40. *Ibid*, 406 US 205. See Discussion G Moens, "The Action-Belief Dichotomy and Freedom of Religion" (1990) 12 *Syd L Rev* 195.

41. *Burke v Tralaggan & Anor* [1986] EOC Par 92-161 (NSWEOT). See Discussion M Snedden, "Religious Freedom - How Much of a Good Thing Do You Need?" (1988) 62 *Law Inst J* (Vic) 844, 845.

42. See eg *Scandrett & Ors v Dowling & Ors* (1972) 27 NSWLR 483 (CA).

43. See *Australian Capital Television Pty Limited & Ors v The Commonwealth* (1992) 66 ALJR 695 (HC); *Nationwide News Pty Limited v Wills* (1992) 66 ALJR 658 (HC). The Court held that the legislative powers of the Australian Parliament were limited by implication so as to preclude the law interfering with freedom of discussion of public affairs and political matters essential to sustain the system of representative government prescribed by the Australian Constitution. See Note

(1992) 66 ALJ 775.

44. *Mabo v Queensland* (1992) 66 ALJR 408 (HC), 422 (Brennan J).

45. See eg M D Kirby, "The Rôle of the Judge in Advancing Human Rights – By Reference to Human Rights Norms" (1988) 62 ALJ 514. For the *Bangalore Principles* see (1988) 62 ALJ 531. For a typical application see eg *Gradidge v Grace Bros Pty Limited* (1988) 93 FLR 414 (NSWCA).

46. *Universal Declaration of Human Rights*, Article 18.

47. *International Covenant on Civil and Political Rights*, Article 18.

48. Res 36/55 (GA).

49. See *ibid*, s 47(1).

50. See Australian Law Reform Commission, *Evidence*, ALRC 26, Interim Report, Vol 2, Ch 28 p 306ff. The English Court of Appeal has said that it would be "unrealistic not to recognise that, in the present state of society, amongst the adult population, the divine sanction of an oath is probably generally not recognised". *R v Hayes* [1977] 2 All ER 288 (CA), 291.

51. Kaye, above n 11, 7-8.

52. D Little, "Religion: Source of Conflict, Source of Peace", unpublished paper for Symposium on Self-Determination of University of Saskatchewan, Canada, March 1993 in Papers of the Symposium, forthcoming.