THE UNFINISHED EXPERIMENT:[1] A REPORT ON RELIGIOUS FREEDOM IN AUSTRALIA

Reid Mortensen[*]

INTRODUCTION

The organization of government in the Commonwealth of Australia has been described as the "'Washminster' Mutation."[2] Australia was formed as a Federation of six British colonies in 1901, which were recognized as states from that point, perpetuating Westminster systems of responsible government.[3] However, in general, Australia's Founding Fathers were also enamored with the United States' political institutions, and so the Federation brought a U.S. federal structure to the country, including a written and rigid Constitution, a federal—or "Commonwealth"—Parliament with an U.S.-inspired Senate, and judicial review of legislation.[4] The Federal Constitution also reproduced provisions of the U.S. Constitution that were thought relevant to federal arrangements, even though the founding fathers were unsure how those provisions might be important to the regular working of the federation.[5] These Washminster mutations are evident in the constitutional position of religious freedom, which embodies a mixture of U.S.-style religion clauses, older British

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[1] U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Report Submitted by Mr. Abdelfattah Amor, Special Rapporteur, in Accordance with Commission on Human Rights Resolution 1996/23: Addendum: Visit to Australia*, ¶ 107, U.N. DOC. E/CN.4/1998/6/Add.1 (Sept. 4, 1997) (*prepared by* Abdelfattah Amor) [hereinafter *U.N. Report*]. The report described Australia's experience in the area of religious diversity as an "unfinished experiment." *Id.*

[*] Reader in Law, Centre for Public, International & Comparative Law, T.C. Beirne School of Law, University of Queensland. Thanks are given to Chris Fadzel for research assistance in the preparation of this article. Any views expressed in this article are, of course, the author's own.

[2] Elaine Thompson, *The "Washminster" Mutation*, *in* RESPONSIBLE GOVERNMENT IN AUSTRALIA 32, 32 (Patrick Moray Weller & Dean Jaensch eds., 1980).

[3] The six states of Australia are New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia. There are also Federal Territories, most of which are uninhabited or sparsely populated. The three most populous Territories have delegated powers of self-government, and are the Australian Capital Territory, the Northern Territory, and Norfolk Island.

[4] JOHN ANDREW LA NAUZE, THE MAKING OF THE AUSTRALIAN CONSTITUTION 128 (1972).

[5] *See* AUSTL. CONST. §§ 116–18 (including religion in Section 116, privileges and immunities in Section 117, and full faith and credit in Section 118).

traditions of parliamentary self-restraint, and statutory bills of rights, which are more commonly used in the British Commonwealth today.[6]

In the development of Australian statutory bills of rights, the International Covenant on Civil and Political Rights (ICCPR) has determined the shape of the rights adopted.[7] The ICCPR and, to a lesser extent, the 1981 Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1981 U.N. Declaration), have been influential in law reform proposals and legislative developments on religious equality in most States and Territories.[8]

Part I of this Article explains the syncretic constitutional framework for religious freedom, including the recent effect of the ICCPR on the constitutional order. Part II deals with reform proposals and other legislative developments for assuring religious freedom and equality that draw directly on the 1981 U.N. Declaration and the ICCPR. Parts I and II also address the emerging problems of the "fit" within Australian law encountered by the growing population of Muslim Australians. This question, as is the case elsewhere in the Western World, is the most pressing for religious freedom and equality now facing Australia. Part III therefore focuses on a prominent method used to enforce tolerance of Muslims and other religious minorities—anti-vilification or "group libel" laws—and the public and political controversy they have generated. Lastly, the Article draws conclusions as to whether the particular balance that Australian laws have struck between the freedoms and equalities of the 1981 U.N. Declaration and the ICCPR has constructively addressed the problem of Muslim integration, and whether it is an acceptable balance for Australia's "unfinished experiment" in religious freedom.

I. RELIGIOUS FREEDOM IN THE AUSTRALIAN CONSTITUTIONAL FRAMEWORK

A. *The Federal Religion Clauses*

The Federal Constitution has two provisions relating to religion that together represent a compromise on the place of religion in Australian life made at the time of federation. Neither has proved to be significant in

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[6] *See infra* text accompanying notes 9–92.

[7] *See infra* text accompanying notes 92–134.

[8] *See infra* text accompanying notes 145–221.

constitutional adjudication, although the first, Section 116, has the greater potential to shape legislation dealing with religion. Section 116 provides:

> The Commonwealth shall not make any law for establishing any religion [Establishment Clause], or for imposing any religious observance [Observance Clause], or for prohibiting the free exercise of any religion [Free Exercise Clause], and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.[9]

Cumulatively, these clauses are known as the Religion Clauses. It is immediately apparent that this Section is indebted to the First Amendment of the U.S. Constitution, and to its Religious Test Clause.[10] Only the Observance Clause was a homegrown Australian addition to Section 116. These clauses were included in the Constitution as a counterweight to the second provision that has a religious dimension.

The Preamble to the Commonwealth of Australia Constitution Act states that the people of the federating colonies were "humbly relying on the blessing of Almighty God" in agreeing to unite.[11] This phrase was included in the Preamble after a concerted campaign by the Protestant churches, with subsequent Catholic and Jewish support,[12] and was sponsored specifically to mark the Constitution with a permanent declaration of divine omnipotence.[13] The Religion Clauses were therefore added to the Draft Constitution by the Melbourne Convention in 1898 at the behest of the freethinker Henry Bournes Higgins, who argued that the recognition of God in the Preamble might imply that the Federal Parliament could legislate on religion, and that this should be avoided.[14] Sir Edmund Barton, later the first Prime Minister of Australia, made minor adjustments in the drafting stage, and the clauses became Section 116.[15]

The origins of the Religion Clauses betray little about the precise objectives that the Founding Fathers hoped to achieve through them. This has not helped

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[9] AUSTL. CONST. § 116.

[10] U.S. CONST. amend. I.

[11] Commonwealth of Australia Constitution Act, 1900, pmbl. (U.K.).

[12] *See* OFFICIAL RECORD OF THE DEBATES OF THE AUSTRALASIAN FEDERAL CONVENTION: THIRD SESSION 1732–41 (1986) [hereinafter OFFICIAL RECORD]; RICHARD ELY, UNTO GOD AND CAESAR; RELIGIOUS ISSUES IN THE EMERGING COMMONWEALTH 21, 24, 33–35, 38, 45, 69–74 (1976); LA NAUZE, *supra* note 4, at 128. *Cf.* OFFICIAL REPORT OF THE NATIONAL AUSTRALASIAN CONVENTION DEBATES: ADELAIDE 1897, 1184–89 (1986).

[13] OFFICIAL RECORD, supra note 12, at 1733.

[14] *Id.* at 1770; ELY, *supra* note 12, at 76–79, 86.

[15] *See* ELY, *supra* note 12, at 1, 76–88; LA NAUZE, *supra* note 4, at 229.

the High Court of Australia, the highest court of the land, articulate a meaningful role for them in the Australian polity. If anything, the High Court has made the clauses a "dead letter."[16] Although the small effect of Section 116 owes much to its very structure, the particularly restrictive interpretation of the Section's meaning is likely another Washminster mutation.

1. Structural Limitations

The principal reason for the narrow operation of Section 116 is that it places no limitations on the States or, to the extent that they are delegated powers to pass their own legislation, the Federal Territories. The terms of Section 116 only place a prohibition on "the Commonwealth,"[17] which, as the High Court has read it, means the Federal Parliament.[18] The Federal Parliament has no power to legislate with respect to religion, as that power is left to the States.[19] Further, the accepted view has been that even under its corporations power, the Federal Parliament is unable to regulate the activities of religious corporations.[20] The Australian Constitution has no provision equivalent to the U.S. Constitution's Fourteenth Amendment, by which restrictions placed on the federal government are incorporated as equivalent restrictions applicable to the States.[21]

There is further uncertainty about the application of Section 116 to the Federal Territories. One early view was that when the Federal Parliament directly legislated for a Territory, Section 116 might not even apply to the legislation, although no reason for this approach was given.[22] However, the

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[16] KEITH MASON, CONSTANCY AND CHANGE: MORAL AND RELIGIOUS VALUES IN THE AUSTRALIAN LEGAL SYSTEM 118 (1990); *see also* Michael Hogan, *Separation of Church and State: Section 116 of the Constitution*, 53 AUSTL. Q. 214, 226 (1981); N.K.F. O'Neill, *Constitutional Human Rights in Australia*, 17 FED. L. REV. 85, 118 (1987).

[17] AUSTL. CONST. § 116.

[18] *See* Attorney-General of Victoria *ex rel.* Black v. Commonwealth (*State Aid*) (1981) 146 C.L.R. 559 (Austl.).

[19] *See id.*

[20] AUSTL. CONST. § 51(xx); *see also* The Queen v. Fed. Court of Austl. (1979) 143 C.L.R. 190, 234 (Austl.); Huddart Parker & Co. Pty. Ltd. v. Moorehead (1908) 8 C.L.R. 330, 393 (Austl.). A recent expansive reading of the corporations power might require this view to be revised. *See* New South Wales v. Commonwealth [2006] H.C.A. 52, paras. 183–98 (Austl.).

[21] *See* U.S. CONST. amnd. XIV. Section 116 has, however, been used occasionally to shape common law principles that are dealt with in the exercise of State jurisdiction. *See* Nelan v. Downes (1917) 23 C.L.R. 546, 562 (Austl.); Canterbury Mun. Council v. Moslem Alawy Soc'y (1985) 1 N.S.W.L.R. 525, 544 (N.S.W.).

[22] *See State Aid*, 146 C.L.R. at 594; Porter v. The King (1926) 37 C.L.R. 432, 448–49 (Austl.); Harry Gibbs, *Section 116 of the Constitution and the Territories of the Commonwealth*, 20 AUSTL. L.J. 375, 375 (1947). *Cf.* F. D.

more principled position is that Section 116 applies to federal legislation for the government of the Territories.[23] This was confirmed in *Kruger v. Commonwealth*, which questioned the validity of federal legislation, applicable only in the Northern Territory, which had authorized the removal of Aboriginal children for placement in fosterage or institutional care.[24] The legislation had already been repealed, but the issue at the time of the challenge was its validity before its repeal.[25] A Free Exercise Clause challenge to this legislation was brought to support a claim for damages, but failed.[26]

Nevertheless, a majority of the justices recognized that the Free Exercise Clause could speak to legislation of this kind.[27] In an *obiter dictum*, Justice Gaudron, alone among the seven justices, also considered the different question of the potential application of the Free Exercise Clause to legislation passed by a Territory legislature in a self-governing Territory. She thought that the Free Exercise Clause would be inapplicable to that kind of legislation.[28] The reason for this interpretation is unclear, as it means that the federal Parliament can delegate to a Territory's legislature larger powers than federal Parliament has itself. The effect, though, is that the self-governing Territories are put in the same constitutional position as the States in their ability to provide for, or compromise, religious freedom.

2. *The* Jehovah's Witnesses *Approach*

Leaving the incontestable structural limitations in Section 116 to one side, it is effectively the High Court's own interpretation of the provision that has almost read it out of Australian constitutional law. The High Court made some reference to the Religion Clauses in the 1910s and 1920s[29] but did not genuinely attempt to expound their general effect until 1943 in the *Jehovah's Witnesses* case.[30] In 1941, the Jehovah's Witnesses were banned under federal

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Cumbrae-Stewart, *Section 116 of the Constitution*, 20 AUSTL. L.J. 207, 208 (1946); Clifford Pannam, *Section 116 and the Federal Territories*, 35 AUSTL. L.J. 209, 209–10 (1961).

[23] *See State Aid*, 146 C.L.R. at 621, 649; Tau v. Commonwealth (1969) 119 C.L.R. 564, 567, 570 (Austl.); Lamshed v. Lake (1958) 99 C.L.R. 132, 143, 152, 154 (Austl.).

[24] (1997) 190 C.L.R. 1, 73 (Austl.).

[25] *Id.* at 33.

[26] *Id.* at 40–41, 85–87, 122–23, 166–67.

[27] *Id.*

[28] *Id.* at 122–23.

[29] Judd v. McKeon (1926) 38 C.L.R. 380, 387 (Austl.); Porter v. The King (1926) 37 C.L.R. 432, 448–49 (Austl.); Krygger v. Williams (1912) 15 C.L.R. 366, 368–69 (Austl.); Colonial Sugar Refining Co. v. Attorney-General (1912) 15 C.L.R. 182, 195 (Austl.).

[30] Adelaide Co. of Jehovah's Witnesses, Inc. v. Commonwealth (1943) 67 C.L.R. 116, 131–33 (Austl.).

national security regulations, by which the Government could declare a group illegal if the group was thought prejudicial to the efficient prosecution of the war.[31] Among the consequences of a national security ban was that the group's doctrines would become illegal, and they could not lawfully print or publish their beliefs or hold meetings advocating them.[32] On a number of occasions, the Witnesses challenged the ban on the ground that it offended the Free Exercise Clause.[33]

In the High Court proceedings, it was accepted that the Witnesses' teachings, such as the belief that Satan ruled the world through organized material agencies like the British Commonwealth, was prejudicial to the national war effort.[34] Ultimately, the High Court held that the ban on the Witnesses was invalid and struck down the regulations.[35] Strictly, there was no need to consider the Free Exercise Clause, as the regulations were held to be *ultra vires*, outside the scope of the parent National Security Act and, in part, the Constitution's defense power.[36] Justice Williams also held that the Free Exercise Clause invalidated the regulation that made it illegal to print or publish "unlawful" doctrines, or to hold meetings advocating them.[37]

However, this did not prevent the other justices from expounding on the scope of the Free Exercise Clause. Chief Justice Latham's judgment, in particular, represented the broadest interpretation of the Free Exercise Clause, which remained unchallenged for 40 years.[38] First, the Chief Justice, along with Justice Starke, relied on contemporaneous decisions of the U.S. Supreme Court to help define limitations to the protection of religion.[39] These decisions endorsed significant rights for both individual choice and excesses in religion.[40] Second, the Chief Justice recognized that Section 116 dealt with both the purpose and the effect of legislation. He held that, in considering whether a law was "for prohibiting the free exercise of any religion" and so invalid, "[t]he word 'for' shows that the purpose of the legislation in question

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31 *Id.* at 118–20.

32 National Security (Subversive Organisations) Regulations, 1940, rr. 2, 3, 7–9, 11 (Austl.).

33 *See* Smith v. Handcock (1944) 44 W.A.L.R. 21, 23–24 (W. Austl.).

34 *Jehovah's Witnesses*, 67 C.L.R. at 117–18, 122.

35 *Id.* at 148, 150, 156, 157, 168.

36 *Id.*

37 *Id.* at 164–65.

38 *See generally id.* at 122–34.

39 *Id.* at 128, 154–55.

40 *Id.*; *see* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 599 (1940), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940); Schneider v. Town of Irvington, 308 U.S. 147, 160, 164 (1939).

may properly be taken into account."[41] This interpretation has led some to suggest that the Chief Justice narrowed the reach of the Free Exercise Clause to the purposes of federal legislation only.[42] However, the Chief Justice made no suggestion that the Free Exercise Clause restricted only legislative purposes; to the contrary, the he and the rest of the Court in *Jehovah's Witnesses* assumed that a facially-neutral regulation directed at the suppression of subversive organizations, burdening religion in its effect, could offend the Free Exercise Clause.[43]

Third, the High Court allowed for only the narrowest possible limitations on religious freedom: those limitations that are required for the maintenance of an organized political society and that relate most directly to political and social stability.[44] Chief Justice Latham said that there could be no protection of any liberty outside the continued existence of an organized society. He concluded as follows:

> It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community.[45]

This limitation in *Jehovah's Witnesses* probably benefited from the decision's concern with the operation of the defense power and issues that involve real threats to the continued existence of the Australian Commonwealth. Although, however imprudently, the Witnesses conceded that their beliefs *were* prejudicial to the Australian war effort, the Court was unconvinced that they presented any genuine threat to the nation's existence, even though the decision was rendered at the height of the Pacific War.[46]

3. An Establishment Clause Mutation

The principal interpretive restriction on the Free Exercise Clause originated in the High Court's first and only decision on the Establishment Clause—the

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[41] *Jehovah's Witnesses*, 67 C.L.R. at 132.

[42] *See* PETER HANKS, CONSTITUTIONAL LAW IN AUSTRALIA 433 (1991).

[43] *Jehovah's Witnesses*, 67 C.L.R. at 136, 147–48, 150, 155–56, 165.

[44] *See id.* at 126, 129, 131–32, 149–50, 154–55, 157, 160.

[45] *Id.* at 131. In a similar vein, Justice Mason later held that any denial of Commonwealth sovereignty is inconsistent with a claim made under Section 116 of the same Constitution that establishes that sovereignty. Coe v. Commonwealth (1979) 24 A.L.R. 118, 118 (Austl.).

[46] *Jehovah's Witnesses*, 67 C.L.R. at 116.

State Aid case in 1981.[47] The case arose from a challenge to federal legislation providing for financial assistance to private schools, which, in Australia, are mainly religious and predominantly Catholic.[48] A majority of the High Court rejected the challenge, holding that the Establishment Clause only prohibited the Federal Parliament from passing legislation that purposefully created a national church or religion.[49] The *State Aid* decision is a genuine Washminster mutation. Despite the Establishment Clause's clear descent from the First Amendment, the majority rejected the use of U.S. precedents for its interpretation.[50] Given the public furor that often surrounded U.S. Establishment Clause decisions, this rejection was almost inevitable.[51] However, the majority also ignored a collection of decisions made in Australian matrimonial courts that could be understood as responding to imperatives of the Establishment Clause.[52] Instead, to interpret the Establishment Clause, the High Court looked to English and Scottish cases of the early twentieth century that, in different ways, had addressed the meaning of "establishment."[53]

The broader consequences of *State Aid*, which would also direct the legal understanding of the Free Exercise and Observance Clauses, stem from the bloated significance that the Court gave to the word "for." This word is not found in the U.S. First Amendment.[54] The majority held that the law that would be prohibited by the Establishment Clause in Section 116 would be a law that deliberately intended the creation of a national church.[55] But if a law was intended for some other purpose and merely had the effect of creating something like a national church, it would not violate the Establishment Clause.[56] That leaves little for the Establishment Clause to do. It only bans something about which the Federal Parliament appears to have no positive power to legislate—the creation of a national church.[57] The interpretation of

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47 Attorney-General of Victoria *ex rel.* Black v. Commonwealth (*State Aid*) (1981) 146 C.L.R. 559 (Austl.).

48 *Id.* at 575.

49 *Id.* at 612, 619, 635, 661.

50 *Id.* at 578–79, 598–99, 609–10, 615–16, 652–53.

51 Justice Murphy dissented on this point, although his use of U.S. Supreme Court precedent was selective. *See id.* at 622–23, 632–33; *see also* Reid Mortensen, *Judicial (In)Activism in Australia's Secular Commonwealth*, 8(1) INTERFACE 52, 62–63, 65–66 (2005).

52 Mortensen, *supra* note 51, at 59–60.

53 *State Aid*, 146 C.L.R. at 582, 607, 616, 635, 653 (*citing* Gen. Assembly of the Free Church of Scotland v. Lord Overtoun, [1904] A.C. 515 (U.K.); Marshall v. Graham, [1907] 2 K.B. 112, 116 (U.K.)).

54 U.S. CONST. amend I.

55 *State Aid*, 146 C.L.R. at 579, 583–84, 604, 615–16, 653.

56 *Id.*

57 *See id.*

"for" in *State Aid*, however incompatible it seems with the High Court's approach in *Jehovah's Witnesses*, further narrowed the operation of the Free Exercise Clause.[58]

4. *The Free Exercise Clause and the* State Aid *Mutation*

By extending the *State Aid* interpretation of the word "for" to the Free Exercise Clause, it follows that if Parliament had the necessary secular purpose it could validly and effectively prohibit the free exercise of any religion. The Federal Court's decision in the *Lebanese Moslem Association* case supported this extension.[59] In this case, a judge set aside an order (made under federal migration legislation) to deport the Imam of the Lakemba Mosque in Sydney.[60] From the time of his arrival at the Mosque in 1982, the Imam quarreled publicly with and litigated against other leaders of Muslim communities and attracted security concerns by endorsing suicide bombings in Lebanon.[61] The deportation did not necessarily offend the Free Exercise Clause, but the deportation order was held to be invalid because, in making the decision, the Government had not explicitly considered the free exercise implications of the impact of the imam's deportation on the Lakemba Mosque.[62]

On appeal, the Full Court of the Federal Court set aside this decision.[63] Justice Jackson adopted the *State Aid* view that the Religion Clauses controlled only the governmental purpose.[64] There was no deliberate intention to restrict the practice of religion in the Mosque.[65] Justice Jackson held that the restriction of free exercise was not the purpose, effect, or result of the deportation, although indirectly it could have disrupted public worship in the Lebanese Muslim community.[66]

The application of the *State Aid* interpretation of the word "for" to the Free Exercise Clause was also subsequently adopted by the High Court itself in *Kruger v. Commonwealth*.[67] The gist of the free exercise claim in *Kruger* was that the removal of children from their tribal communities prevented them from

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58 Mortensen, *supra* note 51, at 65.

59 *See* Lebanese Moslem Ass'n v. Minister for Immigration & Ethnic Affairs (1986) 67 A.L.R. 195 (Austl.).

60 *Id.* at 195.

61 *Id.* at 197–98.

62 *Id.* at 213.

63 Minister for Immigration & Ethnic Affairs v. Lebanese Moslem Ass'n (1987) 71 A.L.R. 578, 594 (Austl.).

64 *See id.* at 584–85.

65 *Id.* at 578.

66 *Id.* at 593–94.

67 (1997) 190 C.L.R. 1, 40–45 (Austl.).

practicing their customary beliefs at sacred sites and on traditional lands.[68] This claim failed, and a significant reason for its failure was the *State Aid* interpretation of the word "for." On this point, the majority of the Court accepted Justice Gummow's view that "for" did not limit the Court to assessing the Parliament's motives for passing legislation, but allowed it to consider the objects or ends of the legislation.[69] The Court suggested that, if necessary, it might take extraneous considerations into account to determine whether the Parliament was using "a concealed means or circuitous device" to escape the application of the Free Exercise Clause.[70]

Although this is a slightly broader view of the Religion Clauses than was taken in *State Aid*, it would not see the legislation struck down. According to Justice Gummow, the legislation "no doubt may have had the effect" of prohibiting the practice of the child's religion, but this was not its object.[71] Here, Justice Gaudron dissented.[72] Despite endorsing the majority view that the Free Exercise Clause only restricted governmental purposes, Justice Gaudron considered that the legislation prevented the child from participating in religious tribal practices, and on that ground it should have been invalid.[73]

Kruger represents the current orthodoxy for the Australian Free Exercise Clause. It roughly parallels the position that the U.S. Supreme Court maintained in the early 1960s,[74] which Justice Scalia adopted in 1990 in *Employment Division, Department of Human Resources v. Smith*.[75] The most significant difference with U.S. jurisprudence, however, remains that the Religion Clauses have no application to the polities that, under the Constitution, are most likely to legislate in ways that affect religious life—the States and Territories. Australia's Federal Constitution can only be altered if

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[68] *Id.* at 7, 13–14; *see also* Reid Mortensen, *Interpreting a Sacred Landscape: Aboriginal Religion and the Law in Australia in the 1990s*, *in* RELIGION IN COMPARATIVE LAW AT THE DAWN OF THE 21ST CENTURY 281, 285 (E. Caparros & L. Christians eds., 2000).

[69] *Kruger*, 190 C.L.R. at 160–61.

[70] *Id.* at 161.

[71] *Id.*

[72] *Id.* at 131–34.

[73] *Id.*

[74] *See generally* Braunfield v. Brown, 366 U.S. 599, 606–09 (1961) (holding that a Pennsylvania criminal statute proscribing Sunday retail sale of certain enumerated commodities did not violate the Free Exercise Clause); Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617, 631 (1961) (holding that Massachusetts' Sunday Closing Laws did not violate the Free Exercise Clause).

[75] 494 U.S. 872, 877 (1990). Compare *Smith* with the position of the Supreme Court of Canada in *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 (Can.) (holding the Lord's Day Act, which prohibited sale of goods on Sunday, unconstitutional) and *Edwards Books & Art Ltd. v. R.*, [1986] 2 S.C.R. 713 (Can.) (upholding the Retail Business Holidays Act, which prohibited Sunday retail sales).

the amending bill is approved by a majority of the people voting in referendum and a majority of the voters in a majority of the States.[76] There have been two attempts to extend the Religion Clauses to the States and Territories—in 1944 and 1988—and in both years the referendum failed. In 1988, the Catholic bishops were concerned that the proposed change to Section 116 could have led to a re-agitation of the question of government funding for private schools. Along with the Federal Opposition's rejection of the proposal, the bishops' intervention in the referendum campaign was undoubtedly a significant reason for why the Religion Clauses still bind only the Federal Parliament.[77]

B. The States and Territories

The failure of the 1988 referendum on the Religion Clauses meant that, in *Kruger*, Justice Gaudron could still note that "the States . . . are completely free to enact laws . . . prohibiting the free exercise of religion . . . ."[78] She therefore concluded that "[i]t makes no sense to speak of a constitutional right to religious freedom in a context in which the Constitution clearly postulates that the States may enact laws in derogation of that right."[79] Although States usually do not do so, there are exceptions. There is a fundamental difference between the Federal Constitution and State or Territory constitutional law—it is unlikely that the States and Territories can provide for entrenched guarantees of religious freedom that could not be compromised by the provisions of ordinary legislation. State constitutions are generally flexible in the sense that they can be amended by an ordinary act of the State Parliament.[80] It is possible to entrench some provisions in State constitutions by requiring some special procedure, usually approval of a change to the provision by referendum, so long as the entrenched provision concerns the constitution, powers or procedures of the State Parliament.[81]

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[76] AUSTL. CONST. § 128.

[77] For some of the views presented in the campaign, see 162 PARL. DEB., H. Rep. (1988) 376–77, 578–81 (Austl.); 128 PARL. DEB., Sen. (1988) 550–53 (Austl.); Richard Alston, *The No Case*, *in* THE CONSTITUTIONAL COMMISSION AND THE 1988 REFERENDUMS 84, 101–02 (Brian Galligan & J. R. Nethercote eds., 1988); Frank Brennan, *The 1988 Referendum—A Lost Opportunity for an Australian Declaration on Religious Freedom*, 69 AUSTRALASIAN CATH. REC. 205, 207, 215–16 (1992); Peter Reith, *The No Case*, AUSTL. L. NEWS, Aug. 1988, at 25.

[78] Kruger v. Commonwealth (1997) 190 C.L.R. 1, 125 (Austl.).

[79] *Id.*; *see* Grace Bible Church, Inc. v. Reedman (1984) 54 A.L.R. 571, 582, 585 (S. Austl.). *But cf.* Aboriginal Legal Rights Movement, Inc. v. South Australia (1995) 64 S.A. St. R. 551, 552, 554–57 (S. Austl.).

[80] McCawley v. R., [1920] A.C. 691, 693 (U.K.).

[81] *See* Colonial Laws Validity Act, 1865, § 5 (U.K.); Australia Act, 1986, § 6 (U.K.).

It seems unlikely that State bill of rights provisions could, in constitutional terms, equate with the powers of the State Parliament.[82] Consequently, even if a State Parliament did attempt to entrench a religious freedom guarantee (and none yet has) it probably still could be compromised by inconsistent provisions of any subsequent, ordinary act of the State Parliament. Australian courts have recognized that rights implied in State constitutions can be qualified by ordinary legislation.[83]

For the self-governing Territories, the possibility of entrenching rights encounters a different problem which springs from their political status as creatures of the Federal Parliament.[84] The Territory Constitutions are acts of the Federal Parliament and can only be amended by that Parliament.[85] This means that rights could be entrenched in the Territories to the extent that the Territory legislatures have no power to amend their Constitutions or enact legislation incompatible with them.[86] However, no Territory Constitution contains any bill of rights provisions, and moreover, unlike the State Parliaments, the Territory legislatures could not add constitutional rights of religious freedom to their constituent documents.[87]

The result is that religious freedom in Australia is secured principally by the older British and colonial tradition of parliamentary self-restraint and a political consciousness that government should not interfere in the religious life of the people.[88] As other contributions in this Symposium show, this tradition has been superseded elsewhere in the British Commonwealth, with the result that, with two exceptions, the polities of the Australian federation are unique in the Western World in resisting the introduction of comprehensive bills of rights.[89] Given the fundamental structures of Australian State and Territory constitutional law, any bill of rights applicable to State or Territory

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[82] GERARD CARNEY, THE CONSTITUTIONAL SYSTEMS OF THE AUSTRALIAN STATES AND TERRITORIES 165 (2006).

[83] Indep. Comm'n Against Corruption v. Cornwall (1993) 38 N.S.W.L.R. 207, 253 (N.S.W.); R. v. Brisbane T.V. Ltd. (1998) 2 Qd.R. 483, 496 (Queensl.).

[84] CARNEY, *supra* note 82, at 436.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 437–40, 448–50, 461–63.

[88] *See generally id.* at 29–34.

[89] *Id.* In the present volume, see Rex J. Ahdar, *Religious Liberty in a Temperate Zone: A Report from New Zealand*, 21 EMORY INT'L L. REV. 208, 214-15 (2007), and Peter Cumper, *The United Kingdom and the U.N. Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief*, 21 EMORY INT'L L. REV. 13, 16-19 (2007).

law could only be of legislative status.[90] Even if rights were embodied in the Constitution Act itself, they could still be qualified by other legislation. For this reason, the United Kingdom's Human Rights Act of 1998 and the New Zealand Bill of Rights Act of 1990 have been instrumental in modeling statutory bills of rights for two Australian polities: the Australian Capital Territory (ACT) and Victoria.[91] Interestingly, it is also at this point that international human rights instruments, especially the ICCPR, have been important in shaping the rights that were introduced in these polities. There is no constitutional or legal reason why reference to international law should be made for the States or Territories.[92] The weight that has been given to the ICCPR in developing these bills of rights may just reflect the interests and expertise of their original author.

1. Australian Capital Territory

In 2002, Jon Stanhope, the ACT Chief Minister, commissioned a Consultative Committee to investigate the introduction of a bill of rights for the Territory.[93] The Consultative Committee, chaired by Professor Hilary Charlesworth, one of the country's leading international law scholars, recommended not only that a statutory bill of rights be introduced for the ACT, but also that the rights it recognized be framed by reference to the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESR).[94] A bill of rights was thought worthwhile because the existing protection of rights under the combination of federal and Territory law, constitutional law, common law and, possibly, international law applicable in the ACT was "partial and haphazard" and therefore inadequate.[95]

There were certainly other bills of rights models available to the Consultative Committee, especially from other countries in the Commonwealth, and there was opportunity to develop an autochthonous scheme of rights.[96] However, using international covenants to which Australia was party was attractive for two reasons. First, there was already substantial

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[90] CARNEY, *supra* note 82, at 29–34.

[91] BILL OF RIGHTS CONSULTATIVE COMM., AUSTL. CAP. TERR., REPORT: TOWARDS AN ACT HUMAN RIGHTS ACT 47–49 (2003) [hereinafter ACT REPORT].

[92] There must be a particular reference to one of Australia's international obligations for the Federal Parliament to introduce human rights legislation.

[93] ACT REPORT, *supra* note 91, at 19.

[94] *Id.* at 49.

[95] *Id.* at 41.

[96] *Id.* at 44–53.

international jurisprudence available that could help to give more specificity to the rights adopted without local adjudication on the rights.[97] Second, there was concern within the Territory that the federal government, which has refused to explore the possibility of a federal bill of rights, may move to override the Territory's adoption of a bill of rights—an action that is within the federal Government's power in relation to the Territories.[98]

The Consultative Committee also considered that the implementation of rights that gave effect to Australia's existing international obligations was less likely to attract federal concern or grounds for intervention.[99] Accordingly, the Human Rights Act was passed by the Territory legislature in 2004. The legislature limited the rights adopted to civil and political rights and refused to implement economic and social rights from both the ICCPR and the ICESR.

Section 14 of the Human Rights Act states:

> (1) Everyone has the right to freedom of thought, conscience and religion. This right includes—
>
> (a) the freedom to have or to adopt a religion or belief of his or her choice; and
>
> (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in public or private.
>
> (2) No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.[100]

Section 14 parallels both Article 18(1)-(2) of the ICCPR[101] and Article 1(1)-(2) of the 1981 U.N. Declaration—it is nearly identical except for the use of

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97 *Id.* at 90.

98 *Id.* at 45.

99 *Id.* at 38, 89.

100 Human Rights Act, 2004, §14 (Austl. Cap. Terr.).

101 International.Covenant on Civil and Political Rights, art. 18(1)-(2), Dec. 19, 1966, SEN. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]. Article 18 states as follows:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

Id.

gender-sensitive language.[102] But the limitations on religious practice permitted by Article 18(3) of the ICCPR were not adopted. Instead, the rights of Section 14 can be qualified only in accordance with the Act's general limitation provision that allows human rights to be "subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society."[103]

Although the Consultative Committee recommended adoption of the provision in Article 18(4) of the ICCPR which states that parents have a liberty to "ensure the religious and moral education of their children in conformity with their own convictions,"[104] this (along with other economic and social rights) was not adopted by the legislature for the final version of the Act.[105] The comprehensive implementation of the language of international law in the ACT is reinforced by providing, in the Act's interpretation clause, that "[i]nternational law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right."[106]

The Consultative Committee intended that this reference to international jurisprudence should neither be compelled in all cases nor favor the decisions of any one court. However, the Consultative Committee did expect that the opinions of the U.N. Human Rights Committee would provide the basis of the relevant international jurisprudence.[107] Furthermore, *other* ACT legislation must also be interpreted, if possible, in ways consistent with the maintenance of human rights.[108] This rule of interpretation is the same mandate of the

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[102] Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, art. 1(1)-(2), G.A. Res. 36/55, 36th Sess., 73d plen. mtg., U.N. Doc. A/36/684 (Nov. 25, 1981) [hereinafter 1981 U.N. Declaration]. Article 1 reads as follows:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

Id.

[103] Human Rights Act, 2004, § 28 (Austl. Cap. Terr.).

[104] ICCPR, *supra* note 101, art. 18(4); ACT REPORT, *supra* note 91, app. 4, at 21, app. 5, at 34, app. 6, at 25.

[105] *See generally* Human Rights Act, 2004 (Austl. Cap. Terr.).

[106] *Id.* § 31(1).

[107] *See* ACT REPORT, *supra* note 91, at 92–93.

[108] Human Rights Act, 2004, § 30 (Austl. Cap. Terr.).

statutory bills of rights in the United Kingdom and New Zealand.[109] In relation to the religious freedoms of Article 18 of the ICCPR, the Consultative Committee also referred to the 1981 U.N. Declaration as an additional interpretational aid for what was to become Section 14.[110]

When it came to the means of enforcing the rights spelt out in the Human Rights Act, once again the United Kingdom and New Zealand's experiences were influential, especially in the way the Act deals with legislators' concerns about preserving, if only in a legal sense, the ultimate powers of the legislature to decide how rights should be ordered. The ACT now uses both pre-legislative Government scrutiny of bills for compliance with the Human Rights Act and post-legislative consideration by the Territory Supreme Court for compliance or incompatibility with the Act. Whenever a Government bill is to be placed before the legislature, the Attorney-General (who in Australian polities is a Minister of the Crown who sits in the legislature) must prepare a statement of the bill's compatibility with the Human Rights Act, and have that brought to the legislature's attention when the bill is introduced.[111] If alerted to a bill's potential violation of rights in the Act, the legislature can still pass the bill without the incompatibility having any effect on its validity.[112]

Similarly, if the Supreme Court hears a case that raises a question as to whether a Territory law is consistent with a human right enumerated in the Act, the Court may declare that the law is not consistent with the human right.[113] That declaration does not affect the validity of the law or anyone's rights.[114] The declaration must, nevertheless, be referred to the Attorney-General,[115] who must present it to the legislature and, within six months, give a written response to the Court's declaration.[116] The purpose of these mechanisms is to inform the legislature and the general public of laws that are incompatible with civil and political rights in the ICCPR, to either compel reform or to secure political justification as to why the Territory wishes to

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[109] Human Rights Act, 1998, § 3 (U.K.); New Zealand Bill of Rights Act 1990, 1990 S.N.Z. No. 109, § 6 (N.Z.); Ahdar, *supra* note 89, at 215-16; Cumper, *supra* note 89, at 16-19.

[110] ACT REPORT, *supra* note 91, app. 6, at 25.

[111] Human Rights Act, 2004, § 37 (Austl. Cap. Terr.).

[112] *Id.* § 39.

[113] *Id.* § 32(2). The Attorney-General and the Territory's Human Rights Commissioner have an opportunity to intervene in proceedings when this happens. *Id.* §§ 34-36.

[114] *Id.* § 32(3).

[115] *Id.* § 32(4).

[116] *Id.* § 33(2)-(3).

maintain that law in violation of rights. As yet, there have been no judicial declarations of incompatibility in the ACT.

2. Victoria

The ACT model for a bill of rights served as the basis of the Charter of Human Rights and Responsibilities Act, which was passed by the Victorian Parliament in 2005 and commenced in 2007.[117] The State of Victoria is not exposed to the constitutional possibility that the federal government could override its legislation, including the ACT. The state's reasons for recognizing the same rights in the ICCPR included: the importance of having Victorian law comply with Australia's international obligations, the advantage of having a substantial body of jurisprudence imported into the State's law, and the advantage of having the development of a bill of rights jurisprudence across Australia that was standardized and relatively uniform, given that the ACT Human Rights Act was already framed in the language of the ICCPR.[118] Further, if the language of the ICCPR required updating, the method of expression used in the ACT Human Rights Act would be adopted.[119] In part because it had learned from the ACT experience, the Victorian Consultation Committee only recommended that a State bill of rights include civil and political rights,[120] although this was not to be taken as exhaustive of the human rights of Victorians.[121]

Submissions were received from religious groups, including the Uniting Church's Synod of Victoria and Tasmania and the Islamic Council of Victoria, which asserted that religious freedom guarantees should be given.[122] The Islamic Council wanted religious rights to follow the terms of Article 18 of the ICCPR.[123] As a consequence, Section 13 of the Charter also adopts the language of Article 18(1)-(2) with only small differences in expression.[124] There is also a general provision outlining as the permissible limitations on freedoms, "reasonable limits as can be demonstrably justified in a free and

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[117] HUMAN RIGHTS CONSULTATION COMM., VICT., REPORT: RIGHTS, RESPONSIBILITIES AND RESPECT 2005, § 32 (2005) [hereinafter VICT. HUMAN RIGHTS REPORT].

[118] *Id.* §§ 31-32.

[119] *Id.* § 32.

[120] *Id.* §§ 27-29.

[121] *Id.* § 31.

[122] *Id.* § 27.

[123] *Id.* § 26.

[124] *See id.* § 13; ICCPR, *supra* note 101, art. 18. The Charter of Rights and Responsibilities Act, 2006, § 14(2) (Vict.) states "A person must not be coerced or restrained in a way that limits his or her freedom."

democratic society based on human dignity, equality and freedom . . . ."[125] International law and the decisions of international courts and tribunals can be used in the interpretation of the Charter's rights.[126] The interpretation provisions of the Charter, like those in the ACT, where possible also require courts to interpret *other* Victorian legislation in a way that is compatible with Charter rights.[127]

Apart from the Charter's more powerful directive for the interpretation of State legislation in accordance with the imperatives of Charter (and therefore ICCPR) rights, it incorporates the same mechanisms for enforcement as the ACT Human Rights Act does.[128] Thus, the Charter ensures pre-legislative scrutiny of the compatibility of other bills with the Charter[129] and provides for the possibility that the Supreme Court of Victoria will make a declaration of incompatibility with the Charter.[130]

If a declaration of incompatibility is made, it must be tabled in both Houses of the State Parliament.[131] The Victorian mechanisms are more refined than the mechanisms in the ACT. Reinforcing Parliament's supremacy in questions of the ordering of rights, it is open to the State Parliament to declare, by a statement in an Act, that it overrides the Charter. The override only lasts for five years, although it is renewable.[132] If there is an override provision in an Act of Parliament, the Supreme Court cannot consider issuing a potential declaration of incompatibility regarding that Act.[133] The Human Rights Scrutiny Committee, in pre-legislative stages, can report independently on the compatibility of a bill with the Charter and can make recommendations to Parliament on the effect of any declaration of incompatibility made by the Court, independent of the Attorney General.[134]

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125 VICT. HUMAN RIGHTS REPORT, *supra* note 117, § 7(2).

126 Charter of Rights and Responsibilities Act, 2006, § 32(2) (Vict.).

127 *Id.* § 32(1).

128 *See* Human Rights Act, 2004, §§ 27-29 (Austl. Cap. Terr.).

129 Charter of Rights and Responsibilites Act, 2006, § 36.

130 *Id.* §§ 33, 37. Inferior courts must refer a question of potential incompatibility to the Supreme Court. *Id.* § 33(1).

131 *Id.* §§ 37(5), 38.

132 *Id.* § 31(5)-(6).

133 *Id.* § 31(1)-(4).

134 *Id.* §§ 30, 38(3)-(4).

3. Tasmania

The Tasmanian Constitution Act of 1934 is the only State Constitution that has Free Exercise and Religious Test clauses.[135] Section 46 provides:

> (1) Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.
> (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.[136]

Although expressed as a general freedom of religion, Section 46 originates in the political emancipation of Catholics in the British Empire.[137] In 1830, Tasmania's Colonial Legislative Council adopted the Roman Catholic Relief Act of 1829.[138] This Act removed doubts, albeit not serious ones, as to whether Roman Catholics could hold offices under the Crown in the colony.[139] The Constitution Act of 1934 was a consolidation of legislation relating to the government of the State, and it incorporated and modernized the provisions of the Roman Catholic Relief Act.[140]

Two points must be kept in mind regarding the Tasmanian Free Exercise Clause. First, the permissible limitations on religious freedom under the clause regarding measures relating to "public order and morality" are extremely broad.[141] Second, Section 46 is not entrenched—it can be amended or qualified by an ordinary act of Parliament.[142] Therefore, it does not serve as a genuine constraint on legislative power.[143] For instance, Tasmania's Anti-Discrimination Act has very few exceptions for religious practices, and in a number of respects, might be incompatible with religious freedom in the State.[144] However, the invalidity of any Tasmanian anti-discrimination law is

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135 Constitution Act, 1934, c.94, § 46 (Tas.).
136 *Id.*
137 Roman Catholic Relief Act, 1829, 10 Geo. 4, c. 7 (Eng.).
138 *See id.*
139 *See id.*
140 Constitution Act, 1934, § 46.
141 *Id.*
142 *Id.*
143 *Id.*
144 Reid Mortensen, *A Reconstruction of Religious Freedom and Equality: Gay, Lesbian and De Facto Rights and the Religious School in Queensland*, 3 QUEENSL. U. TECH. L. & JUST. J. 320, 325 (2003).

unlikely, and the Free Exercise Clause can be qualified simply by the passage of ordinary legislation like the Anti-Discrimination Act.

II. THE ICCPR AND THE 1981 U.N. DECLARATION IN AUSTRALIAN LAW

Australia ratified the ICCPR on August 13, 1980. The 1981 U.N. Declaration, which stated in more detail aspects of the Universal Declaration on Human Rights, the ICCPR, and other international covenants on human rights, was subsequently adopted by the U.N. General Assembly in November 1981, with Australia's support. This has particular significance for the articulation of rights of religious freedom in Australia, especially at a national level. Like other countries that inherited the structures of English law, Australia's legal system is, in the international sense, dualist. International legal obligations do not become municipal legal obligations anywhere in Australia unless the local Parliament specifically adopts international legal obligations.[145]

However, from the early 1980s, the development of the interpretation of federal power has seen Australian constitutional law recognize that the Federal Parliament has competence to pass legislation under the external affairs power of the Constitution once an international legal obligation arises.[146] Accordingly, when (by the exercise of Crown prerogative) the federal government makes Australia a party to a treaty or convention, the Federal Parliament gains power to enact legislation to implement it.[147] In this way, the Federal Parliament has entered the field of human rights and anti-discrimination law, granting it powers it otherwise would not have.[148] Further, it has become possible for the Federal Parliament to set national human rights standards that override State and Territory laws that violate them.[149] It remains

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[145] Bradley v. Commonwealth (1973) 128 C.L.R. 557, 582–83 (Austl.); Dietrich v. R. (1992) 177 C.L.R. 292, 305, 359–60 (Austl.); Minister for Immigration & Ethnic Affairs v. Teoh (1995) 183 C.L.R 273, 286–87, 298, 304, 315 (Austl.).

[146] *See generally* AUSTL. CONST. § 51(xxix).

[147] Commonwealth v. Tasmania (1983) 158 C.L.R. 1, 122, 218–19, 259 (Austl.); Richardson v. Forestry Comm'n (1988) 164 C.L.R. 261, 295–96 (Austl.).

[148] *See, e.g.*, Age Discrimination Act, No. 64, 2004 (Austl.); Disability Discrimination Act, No. 135, 1992 (Austl.); Sex Discrimination Act, No. 4, 1984 (Austl.); Racial Discrimination Act, No. 52, 1975 (Austl.); Soulitopoulos v. La Trobe Univ. Liberal Club (2002) 120 F.C.R. 584 (Austl.); X. v. Commonwealth (1999) 200 C.L.R. 177 (Austl.); Aldridge v. Booth (1988) 80 A.L.R. 1 (Austl.); Koowarta v. Bjelke-Petersen (1982) 153 C.L.R. 168 (Austl.).

[149] *See, e.g.*, Mabo v. Queensland (1988) 166 C.L.R. 186 (Austl.); Viskauskas v. Niland (1983) 153 C.L.R. 280 (Austl.); *Koowarta*, (1982) 153 C.L.R. at 168.

unclear to what extent, in passing legislation, the Federal Parliament can rely on an international instrument, like a U.N. declaration, that does not itself create an obligation under international law.[150]

A. Federal Implementation

While the federal government has slowly extended human rights through federal anti-discrimination laws,[151] it has been less enthusiastic about sponsoring other kinds of human rights law. The primary instrument that guides the federal government in its implementation of human rights law is the Human Rights and Equal Opportunity Commission Act of 1986.[152] A weak implementation at best, the Act establishes the Human Rights and Equal Opportunity Commission (HREOC).[153] This agency, through its commissioners, administers federal anti-discrimination law.[154] In practice, anti-discrimination law is the most important pre-occupation of the HREOC.[155] The HREOC's other primary functions include public education in human rights, the examination of federal and Territory statutes for compliance with human rights, the investigation of practices by a federal agency or in a Territory for compliance with human rights, reporting to government on ways of giving effect to the provisions of the ICCPR and other international instruments, and examining the consistency of international instruments with the ICCPR and other instruments.[156]

The ICCPR has a prominent place in the scheme set out in the HREOC Act. For example, human rights issues listed in the HREOC's investigations, reports, and public education programs are the same issues that are dealt with in the ICCPR.[157] The Government can also add other international instruments to the HREOC, and on February 8, 1993, the 1981 U.N. Declaration was added for these purposes.[158]

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150 Victoria v. Commonwealth (1996) 187 C.L.R. 416, 509 (Austl.); Commonwealth v. Tasmania (1983) 158 C.L.R. 1, 171–72, 258–59 (Austl.); R. v. Burgess (1936) 55 C.L.R. 608, 687 (Austl.).

151 *See supra* text accompanying note 145.

152 Human Rights and Equal Opportunity Commission Act, 1986 (Austl.).

153 *Id.* § 7.

154 *Id.*

155 *Id.*

156 *See id.* §§ 3(1), 11(1).

157 *Id.* § 3(1).

158 *Id.* §§ 3(1), 47.

Nothing in the HREOC Act elevates the provisions of the ICCPR or the 1981 U.N. Declaration to the status of the municipal law in Australia.[159] Instead, the HREOC recommends ways that the Government and Parliament can ensure compliance with international human rights standards. In the end, the Government and Parliament ultimately decide whether or not to comply with these standards. In only one situation has the Federal Parliament directly enacted provisions of the ICCPR. This action occurred when Article 17's right of privacy—to the extent that it concerns sexual relations between consenting adults—was enacted in 1994, after the U.N. Human Rights Committee issued an opinion that Tasmania's sodomy laws put Australia in breach of its obligations under the ICCPR.[160] Apart from the Religion Clauses of the Constitution, Australia has no federal religious freedom or religious discrimination law.[161]

B. Federal Reform Proposal

In 1997, Chris Sidoti, the HREOC Human Rights Commissioner, released *Free to Believe?*, a discussion paper that outlined the legal status of religion in Australia in conjunction with Australia's international obligations under the ICCPR and the 1981 U.N. Declaration.[162] Although the Commissioner's paper dealt with Article 18 of the ICCPR and Article 20's prohibition of the advocacy of religious hatred[163] (despite Australia's having made a reservation to Article 20),[164] it was principally an elaboration of the 1981 U.N. Declaration.[165] Reflecting the HREOC's own institutional focus, the paper called for submissions on discrimination in the following areas: employment, education and the marketplace, town planning, religious vilification, and

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159 *See generally id.*

160 Human Rights (Sexual Conduct) Act, No. 179, 1994, § 4 (Austl.); *see* U.N. Human Rights Comm., *Communication No. 488/1992: Australia 04/04/94*, U.N. Doc. CCPR/C/50/D/488/1992 (Apr. 4, 1994).

161 Reid Mortensen, *Rendering to God and Caesar: Religion in Australian Discrimination Law*, 18 U. QUEENSL. L.J. 208, 216–17 (1995). There are protections for ethno-religious groups under the Racial Discrimination Act of 1975, including the federal racial vilification laws. *See* Racial Discrimination Act, No. 52, 1975, § 18 (Austl.). The protection of ethno-religious identity arose primarily from claims brought by Jews. *See* Toben v. Jones (2003) 199 A.L.R. 1 (Austl.); Jones v. Scully (2002) 71 A.L.D. 567 (Austl.).

162 HUMAN RIGHTS & EQUAL OPPORTUNITY COMM'N [HREOC], FREE TO BELIEVE? THE RIGHT TO FREEDOM OF RELIGION AND BELIEF IN AUSTRALIA: HUMAN RIGHTS DISCUSSION PAPER NO. 1, at 11–19 (1997) [hereinafter DISCUSSION PAPER 1].

163 *Id.*

164 Australia (with other Commonwealth countries and the United States) reserved the right not to have to enact any measures beyond its existing legislation. *See* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS—CCPR COMMENTARY 479 (2d ed. 2005).

165 DISCUSSION PAPER 1, *supra* note 162, at 19–23.

indigenous beliefs.[166] *Freedom to Believe?* distinguished itself from the 1981 U.N. Declaration because it raised no specific issue of freedom from legislative or governmental interference with religious practice.[167]

After more than a year in which submissions were received, the HREOC issued its follow-up report, *Article 18—Freedom of Religion and Belief* ("*Article 18 Report*"), which reverted to the policy concerns of the ICCPR.[168] The Commission strongly recommended that the Federal Parliament pass a Religious Freedom Act. Although some recommendations of the HREOC were specific to the constitutional responsibilities of the States and Territories, the proposal largely encouraged a national law in the form of a federal Religious Freedom Act.[169] This recommendation rested on the HREOC's conclusion that laws in Australia did not give comprehensive protection of religious freedom, that the available protection was weak relative to that available in comparable countries, and that Australia therefore "does not fully satisfy" its obligations under the ICCPR and the 1981 U.N. Declaration.[170]

The *Article 18 Report* addressed a broad range of concerns that religious groups in Australia had in their dealing with the law, the government, and others in the community. These concerns included the uneven protection of tribal Aboriginal heritage (a complex question that implicates landholding, mining and development); the special needs of Aboriginal people, Muslims, Buddhists, and Jews in burials and when undertaking autopsies; inherited bans on the practice of witchcraft and fortune-telling; and the coercive methods of some "cults" and new religious movements.[171]

In the submissions, some expressed concerns about the discrimination inherent in the common use of Christian symbolism on public occasions, the adoption of Christian feasts as public holidays, the denial of employment to Jews and Seventh-Day Adventists who refused to work on Saturdays, and religious (particularly Christian) instruction in State schools.[172] There were specific complaints about the vilification of Christians and their symbols at gay and lesbian festivals, of Jews from some Christian and Muslim sectors, of Muslims in the mainstream media, and of Scientologists in the Parliament of

166 *See id.*
167 *Id.* at 25–28.
168 HREOC, ARTICLE 18: FREEDOM OF RELIGION AND BELIEF iii (1988) [hereinafter ARTICLE 18 REPORT].
169 *Id.* at 24.
170 *Id.* at 23–24.
171 *Id.* at 27–33, 36–42, 51–52, 60–61.
172 *Id.* at 69–75.

New South Wales (NSW).[173] A few submissions expressed concern about the age threshold for marriage (18 years), Australia's strict monogamy laws, blood transfusions involving Jehovah's Witnesses and their children, and the circumcision of Jewish boys.[174] However, the HREOC made no recommendations about these concerns. The cultural practice of female genital "circumcision" by some African groups was explicitly rejected as deserving any protection as a religious practice, and a tightening of legislative bans was recommended.[175]

The proposed Federal Religious Freedom Act was to include a national guarantee of religious freedom (as expressed in the ICCPR and the 1981 U.N. Declaration);[176] a civil prohibition on direct and indirect religious discrimination, with exemptions where religious adherence was a genuine occupational qualification or necessary to give effect to a religious group's tenets;[177] and a civil ban on expression that incited religious hatred that constituted incitement to discrimination, hostility, or violence laws in terms similar to Article 20 of the ICCPR (despite Australia's reservation).[178] The *Article 18 Report* was tabled in Federal Parliament in late 1998, but in February 1999 the Federal Attorney-General, Daryl Williams, informed Parliament that the Government would not move to introduce the recommended Religious Freedom Bill.[179] No reason was given for this stance.[180]

In 2003, the HREOC undertook the *Isma ع–Listen Project* to assess the extent to which Arab and Muslim Australians had experienced increased hostility after September 11, 2001.[181] The HREOC heard evidence that reported incidents of discrimination against Arab Australians had risen as much as twenty-fold since the September 11th attacks.[182] Incidents of discrimination were high due to the heightened social and interfaith tension

173 *Id.* at 88–93.
174 *Id.* at 34, 36, 42–45, 47.
175 *Id.* at 58–59.
176 *Id.* at 24.
177 *Id.* at 111–12.
178 *Id.* at 139.
179 PARL. DEB., H.R. (Feb. 9, 1999) 2273 (Austl.).
180 *Id.*
181 HREOC, ISMAع—LISTEN: NATIONAL CONSULTATIONS ON ELIMINATING PREJUDICE AGAINST ARAB AND MUSLIM AUSTRALIANS 15–16 (2006) [hereinafter ISMAع—LISTEN REPORT].
182 *Id.* at 43–47.

after the Bali bombings of October 2002 and with Australia's involvement in the invasion of Iraq in 2003.[183]

The Commission heard evidence of the increased abuse of, and violence towards, Muslims in public places, the open criticism and avoiding of women who wear the *hijab*, and added police surveillance of Muslim men near women (especially in Sydney, where gang-rapes of Anglo-Celtic women by Lebanese Muslim men have helped bring interfaith and interracial tensions to serious and violent levels).[184] However, the HREOC's legislative recommendations in the *Isma ε–Listen Report* were not specially tailored to the Muslim question, which is undoubtedly one of the most urgent challenges that Australian law encountered in the early 2000s. Instead, the Commission renewed its recommendation that the Religious Freedom Act contemplated in the *Article 18 Report* be passed, although as the problems identified in the report concerned social relations and not the impact of legislation, it limited its recommendation to the implementation of religious discrimination and religious hatred laws.[185] The *Isma ε–Listen Report* was released in 2004, but the recommendations have received no response from the Government.[186]

C. *State and Territory Laws*

Except for NSW, South Australia, and Norfolk Island, all States and self-governing Territories have religious discrimination laws.[187] In addition, in Queensland, Tasmania, and Victoria, there are anti-vilification laws that make it unlawful to incite hatred, ridicule, or contempt of a person or a group on the ground of their religion.[188] Australian anti-discrimination and anti-vilification laws generally create civil liability, but not criminal responsibility, where a breach is proved. In Queensland or Victoria, if an act of religious vilification is serious or severe, and is accompanied by a threat of injury to person or damage to property, the act then rises to the level of a criminal offense.[189]

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183 *Id.*

184 *Id.* at 78–82.

185 *Id.* at 120–29.

186 HREOC, ANNUAL REPORT 2004–2005, at 21 (2005).

187 Discrimination Act, 1991, § 7(1)(h) (Austl. Cap. Terr.); Anti-Discrimination Act, 1992, § 19(1)(m) (N. Terr.); Anti-Discrimination Act, 1991, § 7(i) (Queensl.); Anti-Discrimination Act, 1998, §§ 16(o)-(p) (Tas.); Equal Opportunity Act, 1995, § 6(j) (Vict.); Equal Opportunity Act, 1995, § 53 (W. Austl.).

188 Anti-Discrimination Act, 1991, c. 4, § 124A (Queensl.); Anti-Discrimination Act, 1998, § 19 (Tas.); Racial and Religious Tolerance Act, 2001, § 8 (Vict.).

189 Anti-Discrimination Act, 1991, § 131A (Queensl.); Racial and Religious Tolerance Act, 2001, § 25 (Vict.).

There is no need for an international obligation to support anti-discrimination legislation. The States and Territories have plenary powers to enact these laws even without reference to an international instrument. In Australia, anti-discrimination law in particular owes more to the structures of Commonwealth and U.S. anti-discrimination law than it does to those of international instruments. However, it is relatively common for law reform agencies to draw on the example of international law when developing or recommending legislation. For instance, the Queensland Anti-Discrimination Act appeals in explicit terms to the federal government's ratification of the ICCPR (and other conventions and declarations) and gives the State's support to the ratification of those instruments, before recounting that the provisions of the Act are meant to give them effect.[190] In fact, the original religious hatred law in the Queensland Act adapted the language of Article 20 of the ICCPR (again despite Australia's reservation to Article 20) in making the "advocating [of] racial or religious hatred or hostility" so as to "incite unlawful discrimination or another contravention of the Act" a criminal offense.[191] No prosecutions were brought under the provision, which is unsurprising, as Article 20 was drafted to respond to threats akin to the violent anti-Semitism of National Socialism.[192] The Queensland Parliament repealed this provision in 2001 and replaced it with the standard form of anti-vilification law, which, unlike Article 20, does not require proof of incitement to discrimination or violence as well as the incitement of hatred.[193]

D. South Australia and New South Wales Reform Proposals

NSW and South Australia are the only States not to have religious discrimination laws. In 2006, the South Australian government moved to introduce a diluted form of religious discrimination law in a bill which, if passed, would have made it unlawful to discriminate on the ground of "religious appearance or dress."[194] The bill was responding specifically to issues like those highlighted in the *Isma€–Listen Report* and had the support of Muslim, Buddhist, Jewish, Scientologist, and Seventh-Day Adventist communities.[195] However, it was withdrawn later in the year when the

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[190] Anti-Discrimination Act, 1991, pmbl. (Queensl.).

[191] Anti-Discrimination Act, 1991, § 126 (repealed) (Queensl.). The HREOC recommended this as the preferred formulation of a federal religious hatred law. *See* ARTICLE 18 REPORT, *supra* note 168, at 102.

[192] NOWAK, *supra* note 164, at 468.

[193] Anti-Discrimination Amendment Act, 2001, § 8 (Queensl.).

[194] Equal Opportunity (Miscellaneous) Amendment Bill, 2006, H.A. Bill No. 70, § 60 (S. Austl.).

[195] Jeremy Roberts, *Christian Pressure Kills Off Bias Ban*, AUSTRALIAN, Nov. 20, 2006, at 6.

Western Christian churches along with the Greek Orthodox Church and the Greek Evangelical Church lodged objections.[196] The churches explicitly raised serious concerns about public speech—preaching, criticism of other faiths and evangelism[197]—none of which were implicated in the bill, as it did not include anti-vilification laws, but rather only dealt with distinctions based on appearance. It is difficult to see the churches' objection to this bill as anything but a consequence of the heightened sensitivity towards religious discrimination and anti-vilification laws that has emerged across Australia in the wake of the *Catch the Fire Ministries* case.[198]

In NSW, Australia's most populous and pluralized State, a comprehensive and detailed survey of the position of religion was undertaken by the State Anti-Discrimination Board between 1978 and 1984.[199] The *Discrimination and Religious Conviction Report* provided the definitive account of the status of religious groups and beliefs under Australian law in the late 1970s and early 1980s, comparable to the *Article 18 Report*'s account of the 1990s.[200] The general conclusion was the following:

> Australia has religious equality, but . . . it has been the kind of equality in which some religions are more equal than others. Religious liberty, under which religion is not a cause for either privilege or denial, is another matter altogether. Australian experience suggests that individual religious liberties need to be more adequately protected by human rights and anti-discrimination legislation.[201]

As would be recounted in the *Article 18 Report*, the concerns about privilege and inequality stemmed from the predominance of the inherited Christian institutions[202] in national and State polities, including laws relating to blasphemy, sacrilege and desecration, jury-service exemptions for Christian clergy, oaths in the legal process, Sunday closing laws, prayers in Parliament and local councils, and religious education and Christian observances in State schools.[203] The protection of Aboriginal sacred sites was also considered a

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196 *Id.*

197 *Id.*

198 *See infra* text accompanying notes 230–62.

199 ANTI-DISCRIMINATION BOARD, N.S.W., DISCRIMINATION AND RELIGIOUS CONVICTION 3 (1984) [hereinafter N.S.W. REPORT].

200 *Id.*

201 *Id.* at 54.

202 ARTICLE 18 REPORT, *supra* note 168, at 92–102; *see also* N.S.W. REPORT, *supra* note 199, at 31, 42.

203 N.S.W. REPORT, *supra* note 199, at 99–107, 173–74, 179–82, 314–43.

privilege, although one that the Board wanted to have reinforced.[204] *Discrimination and Religious Conviction* dealt at length with the legal, social, and economic difficulties confronting non-Christian minorities, whether they belonged to established world religions or new religious movements.[205] Even in 1984, when Islam was the largest non-Christian religion in NSW, Muslims were reported to have encountered difficulties with government practices for autopsies and burials; non-compliance with *Halal* slaughtering rites in the meat industry; obtaining leave and even losing employment for praying at work, Friday Mosque attendance, or observance of holy days; and refusal of rental accommodation (because it was believed that Muslims slaughtered sheep and goats in their own yards).[206] Buddhists, Mormons, and members of the Unification Church met difficulties securing planning approvals for places of worship, usually because of objections lodged by local churches.[207]

In crafting its recommendations in *Discrimination and Religious Conviction*, the Anti-Discrimination Board referred to the ICCPR and the 1981 U.N. Declaration.[208] The Declaration, in particular, was identified as "the 'norm' against which discriminatory practices can be gauged, and on which world opinion can focus."[209] In conformity with these standards, the Board's central conclusion was that the State Parliament should legislate to make it unlawful "to discriminate on the ground of religious belief or [its] absence," with stated exceptions to safeguard the freedom of religious groups to discriminate.[210] Nothing has yet happened in this respect in NSW, while other States and the Federal Territories have, in effect, responded to these recommendations by passing strong religious discrimination laws.[211] NSW itself has gradually legislated to remove many of the inherited Christian preferences in its own law, but despite pioneering anti-discrimination law in general in Australia, has only had its race discrimination laws amended for the

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204 *Id.* at 96–99.

205 *Id.* at 191–281.

206 *Id.* at 119–21, 355, 361–62, 368, 376, 384–85, 456–62, 477.

207 *Id.* at 226–36. Although the report did not detail similar objections about mosques, Muslims in Sydney have commonly encountered the same difficulties. *E.g.* Canterbury Mun. Council v. Moslem Alawy Soc'y (1985) 1 N.S.W.L.R. 525, 544 (N.S.W.).

208 N.S.W. REPORT, *supra* note 199, at 54–60.

209 *Id.* at 60.

210 *Id.* at 508–16.

211 *See supra* text accompanying notes 187–93.

protection of "ethno-religious" groups.[212] This was almost certainly already the position under race discrimination laws, even without such clarification.[213]

NSW has seen an unusual and broad coalition of institutions expressing resistance to the introduction of religious discrimination laws. In 1999, the NSW Law Reform Commission recommended that religious discrimination laws be adopted and, as is customary, noted the example of the ICCPR and the 1981 U.N. Declaration.[214] The Commission concluded that it was "perhaps ironic, given the importance attached, both in our Constitution and in international instruments to which Australia is a party, to protection from religious persecution, that discrimination on the grounds of religious belief is not covered by [the State's anti-discrimination statute]."[215] And the Commission believed it even more anomalous given the protection from religious discrimination available in other States.[216] However, this recommendation was made against the submission of the Anti-Discrimination Board itself which, in a reversal of its position in 1984, argued against religious discrimination laws because of the difficulty of defining the term "religion" or its derivatives "without introducing criteria which are discriminatory in themselves."[217] The Anglican Archdiocese of Sydney and Christian parliamentarians also objected to the recommendation, although largely on grounds of preserving church autonomy.[218] The Government took the recommendation no further. A bill to make religious vilification unlawful (in terms similar to existing Queensland laws) was introduced in the Upper House of the NSW Parliament in 2005, but was roundly defeated when the vote was taken in 2006.[219] The *Catch the Fire Ministries* case[220] was offered by most opponents to the bill as the reason for rejecting it.[221]

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212 Anti-Discrimination Act, 1977, § 4(1) (N.S.W.).

213 *See supra* note 157 and accompanying text.

214 LAW REFORM COMM., N.S.W., REPORT 92: REVIEW OF THE ANTI-DISCRIMINATION ACT, 1977, ¶¶ 3.2, 5.9, 5.143 (1999).

215 *Id.* ¶ 5.144.

216 *Id.*

217 *Id.* ¶ 5.166 (internal citation omitted).

218 *Id.* ¶¶ 5.151-52; PARL. DEB., L.C. (Nov. 15, 2000) 9937 (N.S.W.).

219 PARL. DEB., L.C. (Sept. 15, 2005) 17,827 (N.S.W.).

220 *See infra* notes 230–62 and accompanying text.

221 PARL. DEB., L.C. (Mar. 1, 2006) 20,776 (N.S.W.).

III. ISLAM, ANTI-VILIFICATION AND RELIGIOUS FREEDOM

In 1984, the *Discrimination and Religious Conviction Report* had already identified the difficulties that Muslims, along with other non-Christian minorities, encountered when trying to find a social "fit" in Australia. These difficulties were unfortunately exacerbated by the events of September 11th, the Bali bombings, and the Iraq War. The passage of anti-terror laws by Australian State parliaments through 2004 raised concerns about the legislation's impact on Muslim communities and the need for, but difficulty in getting, Muslim cooperation in their administration. Still, the need to learn the lessons of the *Isma ε–Listen Report* was recognized during debates about anti-terror laws and the Iraq War,[222] and ongoing reviews have shown concern about the "profound impact" of the anti-terror laws on Muslims that includes a growing sense of fear and alienation from other Australians.[223]

But of all the issues that have specifically drawn post-September 11th Islam into legal disputes, the anti-vilification laws have provoked the most controversy. As noted, these laws exist in three States. The Queensland and Tasmanian laws only apply to expression by a "public act,"[224] and the Queensland laws (which the proposed NSW laws copied) give further concessions to freedom of expression in allowing defenses of fair report; privileges available in defamation claims; expression for academic, artistic, scientific, or research purposes; or for other purposes in the public interest (such as public discussion and debate).[225] The implied constitutional freedom of public and political expression has also been applied as a defense in the Queensland laws. During a federal election campaign in Queensland, outlandish claims that Muslims were unable to live within the secular law were published in a campaign pamphlet, and were later held to be lawful expression.[226]

Although the Victorian laws have similar defenses to those of Queensland,[227] they have a broader reach, claiming extraterritorial operation

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222 11 PARL. DEB., H.R. (2004) 31,687 (Austl.); 7 PARL. DEB., S. (2004) 24,299 (Austl.); 10 PARL. DEB., S. (2004) 26,467 (Austl.).

223 SECURITY LEGISLATION REVIEW COMM., OFFICE OF THE ATT'Y-GENERAL, AUSTL., REPORT OF THE SECURITY LEGISLATION REVIEW COMMITTEE 142, 141–46 (2006).

224 Anti-Discrimination Act, 1998 § 19 (Tas.); Anti-Discrimination Act, 1991 § 124A(1) (Queensl.).

225 Anti-Discrimination Act, 1991 § 124A(2).

226 Deen v. Lamb (2001) Q.A.D.T. 20.

227 Racial and Religious Tolerance Act, 2001, § 11 (Vict.). An amendment made in 2006 states expressly that proselytizing is allowed. *Id.* § 11(2).

and application to private communications (unless it is reasonable to expect that the parties to the communication desired it to be heard or seen only by themselves).[228] These laws were introduced against exceptionally hostile objections from Evangelical and Pentecostal churches,[229] and the first case to invoke the laws only compounded religionists' profound dissatisfaction with them. In 2004, in *Islamic Council of Victoria, Inc. v. Catch the Fire Ministries, Inc.*,[230] the Victorian Civil and Administrative Tribunal upheld a complaint of religious vilification against a Pentecostal church and two of its pastors.[231] In December 2006, the State Court of Appeal set that decision aside, and remitted the case to the Tribunal for rehearing.[232] However, in the meantime the Tribunal's decision against the pastors became a symbolic political argument against religious vilification laws generally and, more tenuously, against all religious discrimination laws. The pastors had conducted a seminar called "Insight into Islam," which would provide "tremendous insight into Islam and the future of Australia."[233] Three people from the Islamic Council attended and took notes. The church also published articles on Islam on its website and in a newsletter.

The evidence of what was said in the seminar was voluminous. In the Tribunal, Judge Higgins found that one pastor made statements including that the Qur'an promoted violence and killing and incited terrorism, that Muslims had a plan to overrun western democracy by the use of violence and terror, and that Muslims intended to make Australia an Islamic nation.[234] It should be emphasized that the Court of Appeal found that although other extreme claims about Islam were made, the pastors had *not* made these particular statements.[235] The Tribunal also found that the newsletter suggested that Muslim immigrants to Australia would bring rape, torture, and murder with them and that the website article made claims that Islam was an inherently

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228 *Id.* §§ 8, 12.

229 For histories of these submissions, see JENNY STOKES, SALT SHAKERS, RELIGIOUS VILIFICATION LAWS IN VICTORIA—BACKGROUND TO THE LAW AND CASES (2005), *available at* http://www.saltshakers.org.au/pdf/300269_ARTICLES_ON_VILIFICATION.pdf.

230 Catch the Fire Ministries, Inc. v. Islamic Council of Victoria, Inc. (*Catch the Fire Ministries I*) [2004] V.C.A.T. 2510 (Vict.), *available at* http://www.austlii.edu.au/au/cases/vic/VCAT/2004/2510.html.

231 *Id.* ¶¶ 395–96.

232 Catch the Fire Ministries, Inc. v. Islamic Council of Victoria, Inc. (*Catch the Fire Ministries II*) [2006] V.S.C.A. 284, ¶¶ 114, 119, 134 (Vict.), *available at* http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html.

233 *Catch the Fire Ministries I*, [2004] V.C.A.T. ¶ 34 (quoting from "Exhibit T," advertising material for the conference).

234 *Id.* ¶ 80.

235 *Catch the Fire Ministries II*, [2006] V.C.S.A. ¶¶ 38–62.

violent religion with terrorism in its very nature.[236] As a result of its findings, the Tribunal held that the church and the pastors had incited hatred and ridicule of Muslims. The seminar was "essentially hostile, demeaning and derogatory of all Muslim people,"[237] and the newsletter sought "first of all to create fear . . . of being harmed by Muslims."[238] No defense succeeded. The availability to the pastors of the constitutional freedom of public and political communication was ruled out early in the proceedings,[239] and was later dismissed by the Court of Appeal.[240] In the Tribunal, Judge Higgins ordered that the pastors make public apologies and promise not to make similar statements in the future.[241]

In some Christian churches, the Tribunal decision led to mounting fear of the effect of religious vilification laws on the legality of giving expression to religious disagreements and on proselytism. As previously seen, the proposed South Australian discrimination laws relating to religious appearance or dress failed because churches raised concerns about their effect on evangelism.[242] The private member's bill for religious vilification laws in New South Wales met the argument that *Catch the Fire Ministries* was not wanted in the State.[243]

In June 2005, NSW Premier Bob Carr told Parliament that "the Victorian experience" showed that religious vilification laws were too easy to abuse.[244] In Victoria itself, the opposition leader, Ted Baillieu, responded to appeals from churches (and simultaneously raised the ire of Jewish and Muslim organizations) by promising that, if his party secured the Government, he would move to have the anti-vilification laws rewritten.[245]

The Court of Appeal's decision in *Catch the Fire Ministries* could possibly allay some of these concerns, but it is too early to assess whether, in a political

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236 *Catch the Fire Ministries I*, [2004] V.C.A.T. ¶¶ 383, 391–94.

237 *Id.* ¶ 383.

238 *Id.* ¶ 392.

239 Islamic Council of Victoria, Inc. v. Catch the Fire Ministries, Inc. [2003] V.C.A.T. 1753, ¶¶ 10–17 (Vict.) (preliminary argument), *available at* http://www.austlii.edu.au/au/cases/vic/VCAT/2003/1753.html.

240 *Catch the Fire Ministries II*, [2006] V.S.C.A. at 111–13, 198–210.

241 Islamic Council of Victoria, Inc. v. Catch the Fire Ministries, Inc. [2005] V.C.A.T. 1159 (Vict.) (remedy and tribunal orders), *available at* http://www.austlii.edu.au/au/cases/vic/VCAT/2005/1159.html.

242 *See supra* text accompanying notes 194–98.

243 *See supra* text accompanying notes 213–20.

244 PARL. DEB., L.A. (June 21, 2005) 17,085 (N.S.W.).

245 Rick Wallace, *Jewish Fury at Baillieu Stance*, AUSTRALIAN, Aug. 11, 2006, at 3; Tony Koch, Rick Wallace, Sid Marris, Ashleigh Wilson & Amanda O'Brien, *State of the Nation: The View from the Australian's Political Writers*, AUSTRALIAN, Aug. 12, 2006, at 31.

sense, it will salvage the public reputation of religious vilification and religious discrimination laws. In the Court of Appeal, the judgments of Justice Nettle and Justice Neave, while agreeing in the result, differed in some important respects. For the most part, the third judge, Justice Ashley, agreed with Justice Neave's approach. The Court explained the religious vilification laws and their defenses at some length. Three important aspects of the decision are discussed here.

First, Justice Nettle believed that the Tribunal disregarded significant aspects of the pastor's seminar that might have shown it to be more balanced than the Tribunal concluded.[246] In particular, the pastor's repeated exhortations to show love to Muslims, in the hope of converting them to Christianity, might have precluded the conclusion that his criticisms of Islam were inciting others to hate Muslims.[247] Justices Ashley and Neave agreed that these statements should be taken into account in deciding whether there was unlawful vilification,[248] but warned that in some cases "the invocation to love" may suggest merely "feigned concern" for a vilified group.[249]

Second, Justice Nettle's interpretation of the anti-vilification laws was deeply influenced by considerations of religious freedom.[250] Accordingly, he believed that the truth of any statements was generally irrelevant to a determination that those statements incited hatred, ridicule, or contempt.[251] False statements might not have this effect, and true statements about another religion could still incite hatred for its adherents.[252] Whether the world was a better place as a result of evangelism and whether the pastor's approach to evangelism was offensive were largely irrelevant.[253] In the end, the defense of making statements for legitimate religious purposes would often hold when the purpose was proselytization.[254]

Third, these characteristic aspects of religious freedom informed Justice Nettle's conclusion that the anti-vilification laws make a distinction between inciting "hatred of the religious beliefs of Muslims," which is lawful, and

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246 Catch the Fire Ministries, Inc. v. Islamic Council of Victoria, Inc. (*Catch the Fire Ministries II*) [2006] V.S.C.A. 284, ¶¶ 69–78 (Vict.), *available at* http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html.

247 *Id.* ¶ 79.

248 *Id.* ¶¶ 132, 195.

249 *Id.* ¶ 196.

250 *Id.* ¶ 34.

251 *Id.* ¶ 36.

252 *Id.*

253 *Id.* ¶ 80.

254 *Id.* ¶ 90.

less positive about the comfort of their position in Australia since September 11, 2001.[271] Still, in 1999, this positive report on religious freedom was largely the result of the tradition of parliamentary self-restraint and legislative responses to secure religious equality, which the U.N. report characterized as Australia's "attachment to democracy, its sound democratic institutions," and a multicultural policy that was aimed at integration rather than assimilation.[272]

So far as positive legislative reforms have contributed to this "unfinished experiment,"[273] the ICCPR has had much more influence than have Washminster institutions. It has been selectively implemented through the weak federal initiative of the HREOC Act and State and Territory religious discrimination laws.[274] Even Article 20, which Australia has no obligation to implement, was made law for some time in Queensland, and an HREOC recommendation to adopt it as federal law still stands.[275] Typically, however, the freedoms of Article 18 of the ICCPR and Article 1 of the Declaration—which Australia *is* obliged to implement—have been less attractive for adoption as legislation because they affect parliamentary power more directly than the equalities of the former instruments. Questions of religious freedom thus do not, even infrequently, find themselves posed in Australian courts. There has been little opportunity in Australian adjudication to help articulate the boundaries of religious freedom.

Herein lies the broader significance of the Victorian Court of Appeal's decision in *Catch the Fire Ministries*, beyond the way that interfaith disagreement should be approached and how Muslim Australians are best qualified to deal with the difficult social position they find themselves in post-September 11th Australia. Charlesworth's ACT Human Rights Act first brought the freedoms of the ICCPR into Australian legislation, and in the interests of uniformity, these are now also in place in the Victorian Charter.[276] The religious freedoms of Article 18 and the 1981 U.N. Declaration can therefore drive the interpretation of legislation in the ACT and Victoria and place stronger procedural restrictions on the legislatures in both jurisdictions.

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271 ISMAϵ—LISTEN REPORT, *supra* note 181, at 77.

272 *U.N. Report*, *supra* note 1, ¶ 105.

273 *See id.* ¶ 107; Thompson, *supra* note 2, at 32.

274 *See supra* text accompanying notes 152–221.

275 *See supra* text accompanying notes 173, 185–89.

276 *See supra* text accompanying notes 117–34.

The religious vilification laws dealt with in *Catch the Fire Ministries* are undoubtedly a restriction on religiously motivated speech and, consequently, on freedoms that may be protected by Article 18. Although they might still be justified under international law as permissible limitations on these freedoms,[277] they are not *necessary* to give effect to Article 20 (even if Australia were internationally obliged to do so). It is doubtful that they are a wise intrusion on the freedoms of Articles 18. In this respect, the Victorian religious vilification laws (before the Charter was introduced) manifest the general problem of not having adequate constitutional or legal guarantees of *freedoms* to offset some strong legal commitments to the enforcement of social *equalities*.[278] Nevertheless, in Victoria the Charter could add force to a more speech-friendly application of the anti-vilification laws than was apparent in the Tribunal's decision in *Catch the Fire Ministries*. As that case predated the commencement of the Charter, the Court of Appeal did not draw on its mandate to interpret laws in accordance with the Charter's (and the ICCPR's) list of human rights. But by appealing to characteristic aspects of religious freedom as a matter of policy, Justice Nettle's judgment in *Catch the Fire Ministries* may well foreshadow ways that the Charter could force stronger recognition of the freedoms of Article 18 and the Declaration in Victorian law.

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277 NOWAK, *supra* note 164, at 478–79.

278 Nicholas Aroney suggests that religious vilification laws would probably survive judicial review against any applicable constitutional freedoms in Australia. Nicholas Aroney, *The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation*, 34 FED. L. Rev. 287, 315–16 (2006).