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Part III

Reviews

Religious Freedom in Australia since European Settlement

La libertà religiosa in Australia dopo l'insediamento europeo

A. Keith Thompson

Abstract

The paper examines the status of the protection of the right to religious freedom within the Australian legal system since the European Settlement and traces the legislative evolution regarding religious freedom and the protection of fundamental human rights.

Keywords

Religious freedom; Australia; Oceania

Riassunto

Il contributo esamina il grado di tutela del diritto di libertà religiosa all'interno dell'ordinamento australiano e ripercorre l'evoluzione legislativa in tema di libertà religiosa e di protezione dei diritti fondamentali della persona.

Parole chiave

Libertà religiosa; Australia; Oceania

1. Introduction

First Nations Peoples.

There is no doubt that the First Nations Peoples of Australia believed, worshipped and tolerated each other most of the time before European Settlement. But their sacred beliefs about the creation are protected by the Euro-

pean label "legend" and for the most part, Australia's First Nations Peoples are content to have their ancestral beliefs superficially acknowledged as "the dreamtime"[1]. This author knows more about some of those accounts than it is proper for him to record. Suffice to say that he acknowledges their existence and respects their accuracy.

The establishment of Australia as an English colony.

This article has a more limited scope. It aspires to tell the story of religious freedom in Australia since the First Fleet arrived in Botany Bay on 17 January 1788[2]. That fleet of supervised prisoners left England for Australia on 13 May 1787 because English convicts could no longer be transported to America following the loss of the War of Independence. So while Australia was settled from England after a claim of sovereignty made by Captain James Cook in 1770[3], the new colony which he had named New South Wales, was originally established as a penitentiary under the governorship of Captain Arthur Phillip.

Structure of this article.

There is a natural division in that story – the period before federation in 1901 when the six colonies were administered by Governors with separate reporting lines back to the English Parliament, and the period afterwards when the separate colonies agreed to unite in an indissoluble but limited Commonwealth. The story of religious freedom in that limited Commonwealth government has also been affected by the slow path that Australia took to full independence from England. While the final step in the slow evolution of Australian independence was the passage of the Australia Act on 2 March 1986, Australia was arguably always independent from the English Church[4].

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[1] For example, see 'The Dreaming', *Working with Indigenous Australians*, *Muswelbrook Shire Council,* June 2020, in *http://www.workingwithindigenousaustralians.info/content/Culture_2_The_Dreaming.html*.

[2] For those who have visited Sydney, Botany Bay is the inlet where Kingsford Smith International Airport is now located. Circular Quay in Port Jackson about 20 kilometres away is where the fleet relocated in the interests of a deeper and more sheltered anchorage on 26 January 1788. Australia Day is currently celebrated annually on 26 January and is the source of some irritation to Australia's First Nations Peoples since an estimated 90% of their population had died before federation on January 1, 1901 ('Australia Day: Why we need to change the date, *Australia Ethical*, 22 January 2020, in *https://www.australianethical.com.au/blog/australia-day-why-we-need-to-change-the-date/*).

[3] 'Cook Claims Australia', National Museum of Australia, 16 November 2022, in *https://www.nma.gov.au/defining-moments/resources/cook-claims-australia#:~:text=Lieutenant%20James%20Cook%2C%20captain%20of,naming%20it%20New%20South%20Wales*.

[4] I briefly discuss whether the Church of England was ever "established" in the penal colony of New South Wales in part one of this article.

That is despite the fact that all of the colonies "received" English common law and secular statutes, arguably from the respective dates of the establishment of those colonies[5]. This article is therefore divided into three parts. In part one I briefly discuss the state of religious freedom in the Australian colonies before federation. In part two I discuss the state of religious freedom from federation to the end of the second world war when Australia signed the *Universal Declaration of Human Rights* (*UDHR*) but did not rush to ratify the Conventions which were intended 18 years later to enable the aspirations in the Declaration to be made binding in international and domestic law. And in part three I discuss how religious freedom has fared in Australia after 1976 when Australian ratified the *International Covenant on Social, Economic and Cultural Rights* (*ICESCR*) and more relevantly in 1980 when she ratified the *International Covenant on Civil and Political Rights* (*ICCPR*).

2. Part One – Religious Freedom in Australia between European settlement and Federation

English intolerance of religion during the Tudor and Stuart period.

As already indicated in the Introduction, Australia was an English colony and inherited not only English law, but also English attitudes. Before the 1830s, England was not a pleasant or safe place to live if you did not follow the religion of the monarch. And the atmosphere had become markedly worse when King Henry VIII wanted to divorce the Spanish princess, Catherine of Aragon. Though he sought to remain silent, the former Lord Chancellor Thomas More lost his head because he would not positively support the King's wish for a divorce or his separation of the English Church from Rome. When

[5] There is some academic debate about the date of reception of English common law and statutes, in part because the original governors of the penal colony of New South Wales were said by some scholars to have personally administered the colony as a prison. But the First Fleet included free settlers who could lay claim to rights as English citizens and there were early cases where even convicts were successful in asserting tort claims against other citizens and officials as English citizens (*Kable v Sinclair* (July 1788, unreported). Normally a convict would not have been able to bring a suit, but the Governor apparently allowed this suit because this new society would not be able to function if three quarters of the residents had no legal rights). Blackstone's commentaries assert that all the English colonies received their English law from the date of settlement, cession or conquest (see for example, Alex C. Castles, *The Reception and Status of English Law in Australia*, in *Adelaide Law Review*, 1, 1963), though Renae Barker notes Blackstone qualified this statement and said the colonies only received so much English law as was applicable there (Renae Barker, *State and Religion, The Australian Story,* Routledge, London, 2020, pp. 51-52, 64-65). In the case of the original colony of New South Wales, that fact was put beyond doubt by the passage of the *1828 Act for the Administration of Justice in New South Wales and Van Diemen's Land*..

Catherine's daughter Mary ascended the throne, she conducted a bloody purge worthy of the French revolutionaries 240 years later. Many officials lost their heads in England including the Archbishop of Canterbury, Thomas Cranmer. And Elizabeth I was only marginally more kind to religious dissent. She made it treason for anyone who was a Catholic to remain in England[6], though she did not prosecute her anti-religious laws as zealously as her half-sister. The Gunpowder Plot in 1605 was a hot-headed Catholic reaction to yet more persecution when it became obvious that the nervous new Scottish king (James I) was not going to relax Elizabeth's anti-Catholic strictures even though his wife was Catholic. To ensure that the English did not rebel, James I moved to make it clear he was going to be an even tougher Protestant than Elizabeth I had been. And as is well known, some of his subjects who were no longer prepared to suffer in silence, fled to the more neutral low countries and then to America aboard the Mayflower in pursuit of religious freedom and their dream of a righteous city on a hill in New England.

The beginning of religious tolerance in England.

Though the story of Cromwell's Commonwealth is normally told in political terms – Charles I followed his father in insisting on his divine right as king and would not keep promises he made to Parliament when they met his funding requests – Cromwell's revolution also had significant religious freedom tones. After the Tudors and the early Stuart kings, England was no longer divided into two simple religious parts – Anglican and Catholic. There were all manner of other Protestants including followers of Knox and Calvin – Wesleyans, Puritans and Quakers among others. Under Cromwell the Puritans had ascendancy, but that ascendancy was wound back far enough after the Restoration of the Monarchy, that the Puritans and the Anglicans were again the subject of persecution. Many of the complaints against James II in the 1689 Bill of Rights were sourced in his reinstatement of Catholic practices including their right to bear arms when that right was denied to Protestants. And one of the most famous conditions of William and Mary's joint ascension to the throne was a requirement of their promise that no Roman Catholic could ever again sit upon the English throne. The *Act of Settlement*[7] reinforced that promise and added that anyone who married a Roman Catholic could not sit on the throne either. That provision that was not repealed in England until the *Perth Agreement* of 2011 which came into effect on 26 March 2015.

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[6] The *Act against Jesuits and Seminarists* (1585) 27 Elizabeth, Cap. 2 made it treason for any priest to come to or remain in England.

[7] The *Act of Settlement* (1701) 12 and 13, William Cap. 2.

Enduring intolerance of Catholics till the 19th century.

Anti-Catholic feeling following the Gunpowder Plot and the Restoration of the Monarchy did not subside in England until the end of the 18th century. That meant Roman Catholics were not afforded religious tolerance until the *Catholic Relief Acts* of 1778 and 1791 allowed them to purchase land, join the army and worship freely. Thereafter the *Catholic Emancipation Act* of 1829 allowed them to sit in Parliament, vote in elections and hold public office including as officers of the court so that they could again practice law. Those changes were inherited in Australian law at the same time as they took effect in England. They are a part of the reason why the American First Amendment words which were copied into the *Australian Constitution* do not mean the same thing as they do in the United States (US). I discuss that language in part two. However, unlike the US, Australia had not been colonised by people seeking religious freedom. Australia was colonised by people who had inherited religious freedom and who did not need to rebel against an executive and legislature that were proscribing their freedoms and persecuting even the most harmless of religious practices.

Did Australia ever have an established Church?

Renae Barker has explained the considerable academic and judicial debate as to whether the Church of England was the de facto established Church of the colony of New South Wales between federation and 1836[8]. But she is satisfied if it ever was established, that the Church of England was no more than a voluntary association after state aid to all religion in the colony of New South Wales was abolished in 1862[9]. While the Church of England may have been treated as if it was the established church before 1836 since some of its clergy sat on the first Legislative Councils mirroring English practice with Church of England clergy sitting in the House of Lords[10], from the time when non-Church of England clergy arrived in the colony, there was sufficient toleration that they were able to practice their religion and establish schools without significant impediment.

Religious tolerance in colonial Australia.

By 1836, but probably from much earlier, all Christian churches were able to practice their religions without impediment. But they were such a large ma-

[8] Renae Barker, *op. cit.*, pp. 43-67.

[9] *Ivi,* pp. 58-59 citing Latham CJ and Dixon J in *Wylde v Attorney-General for New South Wales* (1948) 78 CLR 224 and referring to the judgment of Roper CJ in the court below.

[10] *Ivi,* pp. 63-64.

jority that non-Christian religion did not warrant mention. In the 1901 census, 96.1% of the new nation's population of 3.7 million identified as Christian[11]. However, the Convention Debates which worked out whether the Australian colonies should federate and if they did, what form the federation should take, saw the question of religious establishment seriously debated.

3. Part Two – Religious Freedom in Australia between Federation and WWII

The reasons why the Australian colonies chose to federate in 1901.

There were two primary reasons why the Australian colonies considered federation and they were not related to religious freedom. The first issue was defence. Germany and Russia had both manifested imperialist interests in the Pacific during the 1880s and 1890s and Germany had secured Western Samoa as a colony. While Australia's English colonies were never threatened, they were all concerned about their capacity to resist international aggression and reasoned that a single federated nation would be able to defend itself more efficiently. Thus, it was easily agreed that the military and naval defence of a federated nation would be one responsibility of the new Commonwealth government if and when it was formed. The other primary motivator of federation was the removal of trade and tariff barriers. All were agreed that economic prosperity would increase if each colony dropped all internal tariffs and bounties on production, and if the new Commonwealth government supervised both internal compliance and the impositions if any which would be levied on foreign goods.

The federation model that was chosen and why.

When Australia was deciding to federate, there were only two federation models which were seriously considered. While Canada was also a British colony, it was centrally administered and had only a Dominion line of authority back to the mother country. Each Australian colony had been separately established and each had developed its own identity. While the federated cantons of Switzerland were considered as a model, the English origins of the US meant its legal and governmental institutions were much easier to adapt. But Australia was never interested in the republican form which the Americans had chosen. While the Americans had purposely chosen their republican model to avoid the risk of

[11] Dianne Heriot, *The Federation Census, 1901*, 23 June 2017, *Parliament of Australia*, available at *https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2017/June/Federation_census*.

autocratic dictatorship by either a King or an overseas parliament, by the time Australia chose to federate the English monarch and parliament had better learned how to accommodate the residents of their colonies so they did not need to fight wars of independence to secure reasonable treatment. The result was that Australia chose an entirely English form of representative and responsible government but with significant non-republican parts of the American model cut and pasted into their various drafts. The blend that resulted has aptly been described as a 'Washminster' form of government[12].

Discussion of religious establishment and freedom during the federation debates in the 1890s.

The religious freedom issue surfaced during the Melbourne session of the Australian Constitutional Convention in 1898[13]. The simple version of the story is that a Catholic delegate from South Australia named Patrick Glynn insisted that the *Australian Constitution* needed to acknowledge Almighty God and so the Preamble was amended to 'humbly rely' upon His blessing[14]. But when that proposal received overwhelming support, it set off a firestorm of criticism. While there are questions whether the acknowledgement of Almighty God was a Trojan Horse intended to provide a legislative power to enforce some forms of majoritarian Christian religious observance[15], the reaction saw Henry Bournes Higgins, a delegate from Victoria, reintroduce some of the American First Amendment language to ensure there was no formal establishment of religion anywhere in the new nation. While his first proposal would have denied both the new states and the federal government the power to pass laws that would:

- establish religion,
- prohibit free exercise,
- impose any religious observance or
- impose the taking of a religious oath as a requirement for any public office,

in the course of the following debates, those prohibitions were lifted from the states so that the state governments retained the power to regulate all potentially harmful religious practices[16].

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[12] Elaine Thompson, *The Washminster mutation*, in *Politics*, 2, 1980, pp. 32-40.

[13] Luke Beck, *The Constitutional Prohibition on Imposing Religious Observances*, in *Melbourne University Law Review,* 41, 2017, pp. 500-501.

[14] *Ivi*, p. 504.

[15] *Ivi*, pp. 495-500.

[16] Keith Thompson, *Religious freedom has always been about including minorities*, in *Inclusion,*

The settled text in the Australian Constitution in relation to religion.

The upshot of the debate was that the final version of s 116 of *Australian Constitution* reads:

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

The Australian States retain their power to regulate religion despite the Federal Constitution.

The situation of this section in the chapter of the *Australian Constitution* headed 'the States', means that even though the states are not mentioned in the text of s 116, the intention was to make clear that they retained comprehensive legislative power to regulate religion in any way they chose without any limitation. That intentional result distinguishes the Australian expression from similar language in the *US Constitution*[17] since the US language has been progressively applied to prevent the US states as well as their federal government from passing laws which would establish any religion or prohibit free exercise[18]. During the Covid pandemic, the Australian states were able to forbid all church attendance but significant litigation foreclosed that possibility in the US. Nor was a 1988 referendum proposal that the *Australian Constitution* be amended so that such regulative power might be denied to the states as well as the federal government successful. That referendum was defeated in every state and federally[19].

Exclusion and Religious Freedom in Contemporary Australia, Shepherd Street Press, Redland Bay, Queensland, 2021, pp. 217-221.

[17] The *US First Amendment* reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

[18] The 'Free Exercise Clause' of the US First Amendment was formally incorporated by the Supreme Court in *Cantwell v Connecticut* 310 U.S. 296 (1940) and the 'Establishment Clause' in *Everson v Board of Education* 330 U.S. 1 (1947), but the process of requiring the US states to comply with the US Federal Constitution was a gradual one beginning as early as 1883 (see Bruce E. Auerbach, '*Incorporation of the First Amendment',* September 19, 2023, *Free Speech Center at Middle Tennessee State University,* available at *https://firstamendment.mtsu.edu/article/incorporation-of-the-first-amendment/#:~:text=First%20Amendment%20freedoms%20provide%20the,the%20least%20contentious%20concerning%20incorporation*).

[19] George Williams, Sean Brennan, Andrew Lynch, *Blackshield & Williams Australian Constitutional Law & Theory*, 7th ed., The Federation Press, Commonwealth of Australia, 2018, pp. 1217-1223.

Freedom of religion is not guaranteed under the Australian Constitution.

While the language of the Australian constitutional provision presents as a guarantee of religious freedom, it has not been interpreted generously and several High Court judges have reminded the legal profession that it is not a guarantee of the religious freedoms expressed in international human rights instruments, but only a narrow limitation on federal government power[20]. And that assertion is borne out by the two cases in the High Court about religious freedom before the *UDHR* was promulgated in 1948.

Narrow treatment of religious freedom before WWI.

The first case in 1912 concerned an assertion by Edward Krygger, a Jehovah's Witness adherent, that he did not have to do compulsory military training because the federal legislation enforcing compulsory military training was a law prohibiting his free exercise religion as a pacifist[21]. The two High Court judges who issued judgements in the case gave his arguments short shrift. There was no prohibition of his free exercise of religion because he remained free to attend church services and otherwise observe his religion despite compulsory military training[22].

Narrow treatment of religious freedom during WWII.

The second case also concerned Jehovah's Witness adherents and was brought during World War II[23]. The federal government did not appreciate the strident anti-war preaching of the South Australian branch of that church during the war and made regulations under the defence power in the *Constitution* to dissolve the Church association and forfeit its assets. The Church claimed such steps were beyond the federal government's power because of the prohibition on free exercise of religion in s 116 of the *Constitution*. While the Chief Justice acknowledged that s 116 was necessary to protect minorities[24], he qualified:

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[20] See for example *Kruger v Commonwealth* (1997) 190 CLR 1 per Gaudron J at p. 133.

[21] *Krygger v Williams* (1912) 15 CLR 366.

[22] Chief Justice Griffith said that '[t]o require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion…[and] to base a refusal to be trained in non-combatant duties upon conscientious grounds [wa]s absurd' (*ivi*, pp 369-370). Justice Barton added that 'the *Defence Act* [wa]s not a law prohibiting the free exercise of the appellant's religion' and that it was 'absurd' for 'the appellant' to have alleged that he 'could not exercise his religion freely if he did the necessary drill' (*ivi*, pp. 372-373).

[23] *Adelaide Company of Jehovah's Witness Inc v Commonwealth* (1943) 67 CLR 116.

[24] *Ivi*, p. 124.

> Section 116…is based upon the principle that religion should, for political purposes, be regarded as irrelevant…Can any person, by [honestly] describing… his beliefs and practices as religious exempt himself from obedience to the law? Does s 116 protect any religious belief or religious practice, irrespective of the political or social effect of that belief or practice?...[I]n 1900 it had been thoroughly established in the United States that the provision preventing the making of any law prohibiting the free exercise of religion was not understood to mean that the criminal law dealing with the conduct of citizens generally was not to be subject to exceptions in favour of persons who believed and practised a religion which was inconsistent with the provisions of the law…it is left to the court to determine whether the freedom of religion has been *unduly* infringed by some legislative provision[25].

Religious freedom cannot be used to protect disobedience to law.

Justice Rich was even less empathetic. He said that '[f]reedom of religion may not be invoked to cloak and dissemble subversive opinions or practices and operations dangerous to the common weal'[26]. Justice Stark added that '[t]he liberty and freedom predicated in s. 116 of the Constitution…does not protect antisocial actions or actions subversive of the community itself[27].

Conclusion of the WWII case.

While the Church was ultimately successful in having the High Court reverse the federal legislation which had dissolved their Church entity and forfeit their assets, that was because the federal regulations overreached the defence power and were not necessary in the prosecution of the war effort[28]. Those regulations were not invalid because they breached s 116 of the *Constitution*.

Lack of commitment to United Nation's human rights norms in domestic legislation.

The somewhat ambivalent Australian attitude towards the religious freedom of even minority religion appeared likely to improve when Australia became one of the Charter members of the United Nations in 1945 and provided the General Assembly with its first president.[29] Nor did the international diffi-

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[25] *Ivi,* pp. 126-130 (emphasis original).

[26] *Ivi*, pp. 149-150.

[27] *Ivi*, p 155.

[28] *Ivi,* p. 116.

[29] Herbert Vere Evatt served as first president of the General Assembly of the United Nations in

culty experienced in turning the aspirational human rights expressions in the *UDHR* into binding covenants 18 years later (1966) improve the Australian appetite for the implementation of binding rights guarantees in domestic legislation. For it was not until 1976 that the *International Covenant of Cultural, Economic and Social Rights* (*ICESCR*) was ratified and ratification of the *International Covenant on Civil and Political Rights* (*ICCPR*) was delayed four years longer and there has been no comprehensive federal legislation passed to make either of these conventions binding in domestic law. The grudging and piecemeal approach to the formal protection of human rights (and religious freedom in particular) in Australia since the symbolic ratification of the *ICESCR* and the *ICCPR* in 1976 and 1980 respectively, is the subject of part three of this essay.

4. Part Three – Religious Freedom in Australia since 1976

Unwillingness to protect human rights and religious freedom in Australian domestic law.

The simplest way to express the grudging piecemeal approach to religious freedom in Australia since the late 20th century is to provide a timeline and then to comment. The timeline that follows does not identify every effort made, but it does identify the so-called highlights, though they are not very high:

1973 – Federal Attorney-General Lionel Murphy unsuccessfully attempted to implement a Bill of Rights.

1985 – Federal Attorney-General Lionel Bowen unsuccessfully introduced legislation to create a statutory Bill of Rights.

1988 – A referendum proposal that would have bound all the states and territories to observe the legislative restrictions imposed upon the Commonwealth by s 116 in respect of religion was voted down.

1993 – Federal Attorney-General Michael Duffy declared that the UN's 1981 *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* was 'an international instrument relating to human rights and freedoms for the purposes of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)'.

1998 – The national Human Rights and Equal Opportunity Commission

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1948 and 1949. He had previously served as Leader of the Opposition of the Australian Federal Parliament and as a High Court Justice ("Australia on the World Stage", *National Museum of Australia*, n.d., in *https://digital-classroom.nma.gov.au/defining-moments/founding-united-nations#:~:text=Evatt%20became%20the%20President%20of,Council%20from%201946%20to%201949*).

recommended that Australia enact a *Religious Freedom Act* but the recommendation was ignored by the federal government.

2004 – The Australian Capital Territory passed the *Human Rights Act* (ACT), but without the strong objective limitation provisions in the *ICCPR*.

2006 – The State of Victoria passed the *Charter of Human Rights and Responsibilities Act 2006* (Vic) but again without the strong objective limitation provisions in the *ICCPR*.

2008 – The federal government established a National Rights Consultation under the chairmanship of Father Frank Brennan but two years later rejected most of the Brennan Committee's 31 recommendations including the enactment of a Human Rights Act on the basis that it would be 'divisive'.

2019 – The State of Queensland passed the *Human Rights Act 2019* (Qld) but again without the strong objective limitation provisions in the *ICCPR*.

2022 – The federal government proposed but then scrapped a Religious Discrimination Act that would have operated nationally.

Politicians remain unwilling to commit to religious freedom in domestic legislation.

For the purposes of this essay, it is not necessary to detail each of these faltering and unsuccessful steps to protect religious freedom in Australia. Suffice to say that party politics has seen every human rights initiative stall. Though the Labor party has taken every initiative listed at a state and federal level save for the last in 2022, they have not been able to pass any of the federal legislation proposed despite having a parliamentary majority in the lower House of Representatives in every case. And none of the legislation stalled only because the federal governments concerned did not have a majority in the upper house (Senate) and could not secure cross-bench support by negotiating amendments to their proposed legislation. As my summary note above about 2008 events says, that promising proposal stalled because of internal party division. That is also what happened in 2022 when the centre-right Liberal Party government of Scott Morrison tried a course which had seen federal race and sex discrimination laws successfully passed in 1975 and 1984 respectively. Instead of attempting to create comprehensive human rights legislation that covered every outstanding topic, he chose a segmented approach and tried to convince the nation that religious freedom was the only large human right need that had not yet been protected federally. But that legislation failed when five members of his own party crossed the floor and voted against the bill in the lower House of Parliament so that it was not worth taking it further and negotiating amendments in the upper house before an imminent federal election. And though the successful party at that following election promised to

resolve the impasse and pass that legislation with amendments, their failure to obtain national support for a constitutional change to improve the position of the country's First Nations Peoples, appears to have robbed them of the courage to tackle another controversial subject that might see them lose the next federal election.

LGBTI issues are the current reason why Australia has not legislated protection for religious freedom.

The underlying reason why the 2022 effort to formally protect religious freedom failed was a fear that generous protection of religious freedom would undermine, and even reverse rights secured for gay and lesbian Australians in the successful plebiscite which preceded the legalisation of same-sex marriage in 2017. But there has always been a reason not to vote for formal protection of religious freedom. The failures in the 1970s and 1980s when human rights seemed ascendant internationally, appear to continue the pre-federation Australian view that formal protection of human rights is unnecessary because Australia is a such a benign and safe place for minorities anyway. There has also been enduring concern that legislating rights would shift the responsibility for protecting individuals and minorities away from state and federal parliaments to unelected judges. And there may be some justification for those concerns since some of our intermediate courts of appeal have wilfully disregarded religious freedom precedents in common law when interpreting modern statutes intended to protect gay minorities even when the legislature included exemptions for individual religious believers and religious institutions in those anti-discrimination statutes.[30]

Minorities and especially Islamic women continue to experience vilification.

The result is that while Australia has its share of bigots who harass and even vilify minority religious believers especially if they make themselves obvious by wearing head-scarves, the current silent majority of Australian voters deplore such conduct as a form of depravity but are not sure how to protect religious minorities. That uncertainty is the greater since majority Australia does not want to over-protect religious believers so that they could use their sincere religious beliefs as a justification for preaching against gay, lesbian and transgender lifestyles. And that conundrum is not unique to Australia. Though it seems clear in Western nations that freedom of expression including

[30] See for example, *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615.

religious expression that falls short of inciting violence must be protected by law, our changing conceptions of harm are putting first generation freedom of expression under pressure. Whereas it was clear in the 18th and 19th centuries as Thomas Jefferson opined that we only need laws that protect against physical and economic harm (that which breaks my leg or picks my pocket),[31] the West has discovered psychological and dignitarian harm and have not yet worked out how that should be balanced against the freedom of expression set out in the *UDHR*.

4. Conclusion

Australia is a safe country despite the lack of protection for religious freedom.

Australia is a comparatively safe place to live, even if you belong to a religious minority that wears clothing that manifests your religious belief. That safety is partly the product of the fact that only 10% of the world's population lives in the southern hemisphere and only two countries in the world have the naval capacity to invade a country so far away.

Australia has a track record of apathy towards the protection of minorities.

But that safety has produced an apathy about formal protection for religious freedom because the new minorities which do suffer have not yet found a voice sufficient to press their claim. While I have said that Australia is a comparatively safe place to live, it has not really ever been completely safe for minorities. Gay murders were rife in Sydney in the 1970s and 1980s and were not followed up by New South Wales Police until after 2017 when the legalisation of same-sex marriage made all those unsolved murders embarrassing to enforcement authorities which pretend even-handedness. Muslim women traveling alone or in small groups on trains all over the country do not feel safe. But Australia's generous immigration policies mean that they are a growing minority who are developing a voice. When they find their voice, perhaps they will finally carry the day and see religious freedom and anti-discrimination legislated into federal law. The declining Christian population has not been able to achieve that and the pressing needs of Australia's mino-

[31] Jefferson coined this phrase during the debates that led to the passage of the US State of Virginia's which disestablished the Church of England in that state as part of a plan to better protect the beliefs of all individuals in the state (*Notes on the State of Virginia*, *Query VII "Religion"*, in *https://tjrs.monticello.org/letter/2260*).

rity First Nations People have only resonated sufficiently to generate legal and constitutional change in one decade (the 1960s) since the nation was first colonised by Europeans in 1788.

Australia could learn from the protection of religious freedom in Italy and Europe generally.

Italians will smile at those dates. They all post-date the wars that surrounded the religious reformation in Europe in the 16th and 17th centuries and which were resolved by a series of treaties whose spirit Australia inherited from England. Perhaps we just need a good civil war to focus us on the need for religious freedom protection in our *Constitution*.