HOW WELL IS RELIGIOUS FREEDOM PROTECTED UNDER A BILL OF RIGHTS? REFLECTIONS FROM NEW ZEALAND

REX TAUATI AHDAR*

I INTRODUCTION

The New Zealand Bill of Rights Act 1990 ('NZBORA') is approaching its twentieth anniversary. This article seeks to draw some lessons from the last two decades. Australia has been grappling with the potential introduction of a national Charter or Bill of Rights.[1] The Attorney-General Robert McClelland on 21 April 2010 announced the Government will not introduce a national Charter: 'The enactment of human rights should be done in a way that unites, rather than divides our community', he said.[2] Instead, the Government will invest some $12m in education initiatives to promote greater understanding of human rights and establish a Parliamentary Joint Committee on Human Rights. All bills introduced will be vetted to ensure their compatibility with Australia's international human rights obligations. Complying legislation would be issued with a statement of compatibility.[3]

Despite the view of former NSW premier, Bob Carr, that the issue is 'off the agenda in Australia for at least 30 years' that seems highly unlikely, even for an observer from this side of the Tasman. First, the Government announced there will be a review of the changes introduced in 2010 in 2014.[4] Second, the broad constituency of human rights groups, and other proponents, of a charter of rights are not likely to go away. Disappointed supporters of a national charter were unbowed. For example, Human Rights Commissioner Catherine Branson stated she hoped the question would be re-opened in 2014: 'It is very much on the agenda—it is not off the agenda at all'.[5] The 2010 initiatives were, she insisted, merely 'a stepping stone' to a charter emerging after the 2014 review.[6] For Professor Frank Brennan, who chaired the 2009 National Human Rights Consultation Committee, a positive report on the Victorian Charter of Rights in the 2011 review of that state's rights instrument would give impetus for a Commonwealth Act to be re-considered in the 2014 review.[7]

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* Professor, Faculty of Law, University of Otago. This article is a revised version of a paper presented at the *Cultural and Religious Freedom under a Bill of Rights* conference, 14 August 2009, Canberra, ACT. I am indebted to Nicholas Aroney for his valuable comments on an earlier draft.

1. *National Human Rights Consultation Report*, Canberra: Commonwealth of Australia, 2009 (the 'Brennan Committee', named after its chairman, Prof Frank Brennan). See generally, Bede Harris, 'The Bill of Rights Debate in Australia—A Study in Constitutional Disengagement' (2009) 2 *Journal of Politics and Law* 2.
2. S Dunkerley, 'Govt rejects formal human rights charter', *Sydney Morning Herald*, 21 April 2010.
3. Attorney-General's Department, 'Australia's Human Rights framework', 21 April 2010: available at <http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_ TheAustralianHumanRightsFramework> at 29th November 2010.
4. J Kelly, 'All new Australian parliament legislation must pass human rights test, Robert McClelland announces', *The Australian*, 21 April 2010.
5. Chris Merritt, 'Rejected charter still on the agenda, says Branson', *The Australian,* 23 April 2010.
6. Chris Merritt, 'Charter's champion forced to hold his tongue', *The Australian*, 23 April 2010.
7. Frank Brennan, 'A charter of rights is divisive? The vast majority think not', *The Age*, 23 April 2010.

It is fair to say that the pros and cons of a charter of rights will continue to be actively debated. Accordingly, it might be useful for Australians to consider how one significant right, the right of religious freedom, has fared under New Zealand's Bill of Rights. This right received considerable attention in the recent Australian debate: the potential erosion of religious rights, if a charter should be introduced, featured prominently in the opponents' (ultimately successful) case against a charter.[8]

Part II of this article examines the genesis of the NZBORA and tightens the focus by recounting the opposition in New Zealand by one major and particularly vociferous opponent to it, conservative religionists. It is no coincidence—given their broadly similar cultural and religious topography—that Australian conservative Christian voices also feature prominently in the opposition to a proposed Bill of Rights. In his comprehensive analysis, Professor Patrick Parkinson, notes:

> The divisions about a Charter of Rights were seen in all parts of the community. There is … one quite prominent sector of Australian society in which opposition to a Charter has been rather more evident than support for it. That is in the Churches. ... Submissions to the NHRC [National Human Rights Consultation] that are critical of a Charter, apart from the Australian Christian Lobby, include the Presbyterian Church of Australia, the Baptist Union of Australia, the Anglican Diocese of Sydney, the Life, Marriage and Family Centre of the Catholic Archdiocese of Sydney, and the Ambrose Centre for Religious Liberties (a body which has an advisory council that includes senior figures from a number of different faiths). ... While the Catholic Bishops collectively did not take a stand either way, Cardinal George Pell, the Church's most prominent leader, has been an outspoken critic of a Charter.[9]

What were (and, in contemporary Australian political discourse, are[10]) their particular concerns? Part III considers what has happened since the NZBORA came into force and comments upon the relatively meagre number of religious freedom cases that have been decided post-1990. Part IV offers some conclusions and speculations. In effect, the article endeavours to answer three broad questions: What was the concern? What transpired? What are the lessons?

II The Genesis: What was Eating Hone and Temepara Smith?[11]

The first thing to note is that the Act is not (nor is any proposed Charter for Australia envisaged to be) a 'strong' entrenched, supreme-law type Bill of Rights like the American one or the Canadian Charter of Rights and Freedoms. It is an interpretative or statutory Bill of Rights that requires the courts to interpret ordinary legislation

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8 'It's over: Mr Rudd gets it right on a bill of rights', *The Australian*, 26 April 2010 ('Many Christian leaders feared a restriction of religious rights and practices…'); Parkinson, see below n 9.

9 'Christian Concerns with the Charter of Rights', (paper presented at the *Cultural and Religious Freedom under a Bill of Rights* conference, 14 August 2009, Canberra, ACT). A revised version of this paper is to appear in the (2010) 15(2) *Australian Journal of Human Rights*. On religious opposition, see for example, Nicola Bercolvic, 'Churches unite over human rights charter', *The Australian*, 23 October 2009: available at <http://www.theaustralian.com.au/business/legal-affairs/clergy-unite-over-human-rights-charter/story-e6frg97x-1225790219862> at 29th November 2010. As with New Zealand, liberal Christians in Australia—the Uniting Church, for instance—support the Charter: see Parkinson, 3.

10 See Parkinson, ibid, for a full account.

11 With apologies to the 1993 film, starring Johnny Depp, Leonardo Dicaprio et al, *What's Eating Gilbert Grape?*

consistently with the NZBORA.[12] The NZBORA expressly states that New Zealand courts do not have the power to strike down legislation that infringes the rights set out therein.[13] In the view of two leading New Zealand constitutional law academics: 'The decision not to pass a supreme law bill of rights was the right one in 1990, and it is the right one today'.[14]

The Fourth Labour Government, led by David Lange, in its 1985 'White Paper' floated an entrenched Bill of Rights, one substantially modelled on the Canadian Charter of Rights and Freedoms 1982 and the International Covenant on Civil and Political Rights 1966.[15] The White Paper proposal attracted much criticism from a diverse range of groups, including some religious ones. Whilst the Christian community was divided on the issue—as it is on most contemporary controversies (such as abortion, euthanasia, same-sex unions, corporal punishment of children)—conservative Christians were adamantly opposed to it.[16] For the purposes of our discussion, let us call our ordinary, but socially-aware, Kiwi conservative Christians, 'Hone and Temepara Smith'. The term 'conservative Christian' denotes a Christian who shares several interrelated characteristics and convictions, in brief: deference to authority (whether that be the Bible (typically but not invariably read literally) or the Church); moral and ethical absolutism (in that there are universally applicable and timeless standards of right and wrong), restorationist tendencies (insofar as modern society must be renewed to reflect a more Christian conception of nationhood), and; opposition to the prevailing (permissive and degenerating) ethos or *zeitgeist* of contemporary culture.[17]

While the opponents of the Bill were many and varied (including, for instance, the New Zealand Law Society), Sir Geoffrey Palmer, the principal architect of the White Paper, later singled out conservative Christians for special opprobrium: '[e]xtensive submissions from fundamentalist Christian groups did not help' the cause, he said.[18] In the Parliamentary debates some Government members pilloried Hone and Temepara Smith, and their *whanau* (extended family), as 'the looney Right'.[19]

The concerns raised by many conservative Christian concerns coincided with those raised by others lodging submissions upon the Bill. Hone and Temepara also harboured, however, some distinctive misgivings.

A *Transfer of Power to an Unsympathetic Judiciary*

The principal reason for opposition to the Bill of Rights proposal from the entirety of the submissions was the transfer of power from the elected Parliamentary

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12 Section 6.

13 Section 4.

14 Grant Huscroft and Paul Rishworth, '"You Say You Want a Revolution": Bills of Rights in the Age of Human Rights' in David Dyzenhaus et al (eds), *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (2009) ch 7 at 125.

15 *A Bill of Rights for New Zealand: A White Paper*, AJHR 1985, A6 ('White Paper').

16 For a comprehensive analysis of the conservative Christian response to the White Paper, see Rex Ahdar, *Worlds Colliding: Conservative Christians and the Law* (2001) ch 5.

17 For a fuller explanation, detailing the necessary qualifications and exceptions to this broad-brush essentialist depiction of ethnically-diverse religionists that occupy a range of theological, denominational, political and other positions, see Ahdar, ibid, ch 2.

18 Geoffrey Palmer and Matthew Palmer, *Bridled Power: New Zealand Government under MMP* (1997) ch 15, 268.

19 See, for example. the Hon Bill Jeffries, Minister of Justice: 'Much of the opposition to the Bill was led by the looney Right; it does not have any merit' (1989) 502 *New Zealand Parliamentary Debates* 13044.

representatives to the unelected judiciary.[20] The grant of wide-ranging power to determine social and political matters to a select few (ie, judges) and the resulting politicization of the judiciary were concerns for conservative Christians too. But there was a special fear expressed by Hone and Temepara here. They doubted that judges had any sympathy for the Christian worldview. The Reformed Churches of New Zealand argued:

> It is clear that the Bill of Rights will involve the courts in determining matters of social policy ... If we may posit for the moment that there is a liberal humanist world-and-life-view, and a traditional-conservative world-and-life-view it is reasonable to expect that the Cabinet and Parliament, insofar as it has jurisdiction, will appoint judges that reflect the dominant social consensus of the Government of the Day. This is exactly the situation in the United States.[21]

B *Secular Humanistic Foundation*

Many conservative Christians (numbering some 25 submissions) were dismayed that there was no explicit acknowledgement of God as the source of rights, as in the Canadian Charter and many other national constitutional instruments. For Hone and Temepara, New Zealand still was a 'Christian nation'; they sought to thwart any further erosion of the *de facto* or cultural Christian establishment (as I have called it) —a situation where public policy and law generally and implicitly reflects Christian values and principles, notwithstanding the lack of any official, *de jure* acknowledgment of Christianity as the state religion.[22]

The Reformed Churches' submission again provided the fullest theological critique:

> [W]e believe that the Bill fails because it does not acknowledge Almighty God as the Source and Bestower of human rights. We believe that as soon as fundamental rights are decreed from an immanent source, immanent in creation, the work of interpretation, administering, applying, or defining those laws must be given to some institution or body which will hold awesome powers ... This means that any fundamental law to protect freedoms and rights, which is grounded in the creation, will inevitably remove freedoms and take away rights, for it will concentrate infallible power in one or some governmental institutions. They will function as the supreme authority, and will have absolutist prerogatives over the community.[23]

This was 'a true irony'[24] given that one of the avowed aims of the Bill of Rights was to restrain governmental power.[25] For them, the only real check upon tyranny was

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[20] See *Interim Report of the Justice and Law Reform Select Committee: Inquiry into the White Paper — A Bill of Rights for New Zealand*, 9 July 1987, AJHR 1987, 1.8A, 8-9 ('Interim Report'). The Prime Minister, Geoffrey Palmer, acknowledged this in his Introduction speech to the New Zealand Bill of Rights Bill: (1989) 502 *New Zealand Parliamentary Debate* 13038.

[21] White Paper Submission No 62, 4. (These unpublished public submissions are on file with the author).

[22] See, Rex Ahdar, 'A Christian State?' (1998-1999) 13 *Journal of Law and Religion* 453.

[23] White Paper Submission No 62, 5. On the Reformed view that human authority in all its forms is divinely delegated authority, see, for example, Nicholas Wolterstorff, 'Abraham Kuyper' in John Witte Jr and Frank S Alexander (eds), *The Teachings of Modern Christianity on Law, Politics and Human Nature*, vol 1 (2006) ch 10, especially 310-17; Aad van Egmond, 'Calvinist Thought and Human Rights' in Abdullahi An-Na'im et al (eds), *Human Rights and Religious Values: An Uneasy Relationship?* (1995) ch 14.

[24] White Paper Submission No 62, 5.

[25] See White Paper, see above n 15, 5 and para 4.19.

the divine one: 'Only by acknowledging Almighty God, to whom all human courts are subject, can effective limits be placed upon courts and parliaments'.[26]

Some noted that there was a conspicuous absence in the NZ Bill of the theistic acknowledgement found in the Canadian Charter, the model for the Bill. (The Charter Preamble begins: 'Whereas Canada is founded upon principles that recognize the supremacy of God and the Rule of Law'). The lack of reference to the Deity in the White Paper stood in stark contrast to such a reference in the ill-fated NZ Bill of Rights 1963, a generation earlier.[27]

The Select Committee's response to the Preamble issue was to say that theistic or Christian reference would be unfair to non-Christians: 'In our view it would be inconsistent with Articles 6 and 8 [which eventually became sections 13 and 15 respectively of the NZBORA] to acknowledge the supremacy of God. These two articles would protect the beliefs and practices of those who reject the Christian God'.[28] To the Committee, exclusion of reference to God was neutral; to Hone and Temepara, it was a rejection of the traditional theocentric foundation of New Zealand's cultural Christian establishment and its substitution with a humanist one.

C *A Downgrading of Christianity*

The corollary of a failure to give God His due in the Bill was the relegation of Christianity to mere equality with all other religions. The Mount Maunganui Baptist Church, for example, decried the fact that 'not only does the Bill ignore Christian values but gives equal pre-eminence to values which may be totally foreign to our society. To be extreme, the values of a Satanic cult or mind-bending group are given equal status to those of a Christian group'.[29]

Not only would Christianity be placed on an even par with other religions, some submissions argued that certain religions—conservative or traditional ones especially—would not even receive that. Religions challenging the supreme values inherent in the Bill of Rights would, they predicted, fare poorly.

D *Disestablishment Ramifications*

The Coalition of Concerned Citizens was concerned that the religious freedom provisions of the proposed Bill of Rights might be given an anti-establishment reading. This might seem odd, for the Bill contained no express anti-establishment provision—such as the opening clause in the First Amendment of the US Constitution (which stipulates that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"). The decision not to include an anti-establishment provision in the Bill was a deliberate one. The White Paper explained:

> That provision [the First Amendment] was designed to prevent the creation of a state or official religion. That does not appear to be a real question to address in New Zealand. The American provision moreover has been used to deny state aid to religious schools—a practice long followed in New Zealand—and even voluntary prayers or bible readings in schools. The Covenant [International Covenant on Civil

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26 White Paper Submission No 62, 5.

27 The Preamble began, 'Whereas the people of New Zealand uphold principles that acknowledge the supremacy of God'. The 1963 Bill is reproduced in Tim McBride, *New Zealand Civil Rights Handbook* (1980) 593-599.

28 Interim Report, see above n 20, 24.

29 White Paper Submission No 266W, 2.

> and Political Rights 1966] and the Canadian Charter contain no such provision. Accordingly it has not been included in the above text.[30]

Some White Paper submissions were highly critical of the absence of a non-establishment clause. Two academic lawyers argued that, while the question of a state religion was not a contentious question at the present time, it might become one in the future and was it "not the very purpose of the Bill of Rights to attempt to foresee and prevent future abuses?". They suggested the insertion of an explicit unambiguous provision worded: "There shall be no official State religion in New Zealand." Without such a provision they considered religious freedom was not really protected.[31] The Auckland Ethnic Council, New Zealand Jewish Council, Society for the Protection of Public Education and the New Zealand Rationalist Association shared this view.[32]

In its Interim Report two years later, the Select Committee reaffirmed the view expressed in the White Paper that the establishment of a State religion did not loom as a "real question" adding, somewhat curtly, that inclusion of an anti-establishment provision would be "inappropriate." Further, there was no need either for an express recognition that freedom from religion was protected since the Bill did "not give any greater protection to persons holding a religious belief than it gives to those who do not."[33]

Interestingly, the submission of the subcommittee of the Auckland District Law Society predicted that the breadth of the language of the religious liberty provisions in the draft Bill meant that 'an establishment of religion type approach was quite probable'.[34]

The judgment of the Canadian Supreme Court in *R v Big M Drug Mart Ltd*[35] (published soon after the release of the White Paper) was cited by the subcommittee as an example of the 'havoc' that could be wreaked upon New Zealand's trading hours legislation were an anti-establishment reading to be given to the religious liberty provisions. Concerns about possible challenges (on the same basis) to the tax deductibility of contributions to churches and religious charities were also expressed.[36]

Canadian case law on the religious freedom provision in the Charter (s 2(a)) — which is worded solely in terms of free exercise and contains no express anti-establishment prohibition — has interpreted that provision to proscribe governmental establishment of religion as well as restrictions upon the expression of religion.[37] In short, freedom *of* religion includes freedom *from* religion. In *Big M*, the Supreme Court observed:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination. But the concept means more than that. Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction

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30 White Paper, see above n 15, 81.

31 Their submission was published in book form: Jerome B Elkind and Anthony Shaw, *A Standard for Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand* (1986) 51-52.

32 Interim Report, see above n 20, 143 and 45.

33 Ibid 45-46.

34 Ibid 152.

35 (1985) 18 DLR (4th) 321.

36 Interim Report, see above n 20, 152.

37 See, for example, Margaret H Ogilvie, 'Between liberté and egalité: Religion and the state in Canada' in Peter Radan et al (eds), *Law and Religion: God, the State and the Common Law* (2005) ch 6.

> he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free ...
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> Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.[38]

The passage adopts an expansive notion of 'coercion', a concept that, in the Supreme Court's view, embraces subtle, indirect efforts to prescribe religious and other behaviour. In *Big M*, the Court held that a law prohibiting Sunday trading worked 'a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the [Lord's Day] Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians'.[39] Non-Christians—whether Jews, agnostics, atheists or Muslims—were not required or compelled to observe the Christian Sabbath in the sense that they were compelled to attend Church or pray that day. But they were required to 'remember the Lord's day of the Christians and keep it holy' insofar as they were 'prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal'.[40] If one is precluded from doing an everyday activity (working, shopping, playing sport) to preserve the religious sensibilities of others, a form of coercion is arguably occurring. One is being indirectly forced to observe a religious practice; a practice that may directly offend one's own conscience.[41] The 'arm of the State'[42] ought not to do this.

Early Canadian Charter experience thus provided some basis to the Coalition's anxiety that an anti-establishment interpretation, moreover one that secularized the public sphere, might be given to the Bill's religious liberty provisions.

The Reformed Churches predicted that 'almost certain[ly] all references to the Lord, and to the institutionalizing of Christianity in our national life would be removed'.[43] The National Anthem, Speaker's Prayer and other instances of what Americans dub 'ceremonial deism' would be eradicated. Perhaps, 'it could even get down to local Governments being forbidden to take part in Christmas festivities or put up nativity scenes, as has happened in the United States'.[44]

'Establishment', however, is an elastic, highly contestable term,[45] and the way a particular nation's prohibition upon 'establishments' of religion is interpreted, and hence its actual cultural impact, may vary widely.

In Australia, the more than century-old presence of an anti-establishment prohibition has not given rise to a widespread secularization of the public sphere. Section 116 of the Constitution provides that: "The Commonwealth shall not make any law for

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38 (1985) 18 DLR (4th) 321, 353-354 per Dickson J.
39 Ibid 354.
40 Ibid.
41 Sunday closing trading laws can, of course, be justified on non-religious grounds such as the pragmatic need for regular periods of rest and the social utility of the creation of space for family life and collective leisure pursuits.
42 Ibid.
43 White Paper Submission No 62, 10.
44 Ibid.
45 On the meaning of 'establishment' of religion, see Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (2005) 75-84.

establishing any religion…" The Establishment Clause, as this part of the section has been dubbed, has had a negligible effect upon religious practice in Australia.[46] Certainly, its impact has been nothing like the sustained secularizing effect that its American First Amendment counterpart (upon which section 116 was, in part, modelled[47]) has had. First, section 116 places no restriction upon the States when it comes to legislative measures regarding religious matters and it is only a limitation upon 'the Commonwealth', or Federal Parliament, in this respect.[48] Second, the High Court in the leading, indeed only, case on the anti-establishment provision to reach it, *Attorney-General of Victoria, ex rel Black v Commonwealth (*the *DOGS Case)*,[49] gave the clause a narrow reading. The Establishment Clause prevents the Federal Legislature from purposefully creating a national church or religion. It does not, as the appellants, the Defence of Government Schools ('DOGS') organization contended, preclude the Federal Government from passing legislation providing for financial assistance to be given to non-governmental religious schools. Mason J explained:

> The first clause in the section forbids the establishment or recognition (and by this term I would include a branch of a religion or church) as a national institution. … To constitute 'establishment' of a 'religion' the concession to one church of favours, titles and advantages must be of so special a kind that it enables us to say that by virtue of the concession the religion has become established as a national institution, as, for example, by becoming the official religion of the State.[50]

An expansive reading was expressly rejected: section 116 'cannot readily be viewed as the repository of some broad statement of principle concerning the separation of church and state, from which may be distilled the detailed consequences of such separation'.[51] Further, 'The separationist view of establishment … [did] not sit well with the form of s. 116, addressed as it [was] only to the Commonwealth Parliament'.[52] Murphy J dissented, charging that the majority's narrow reading was tantamount to interpreting section 116 as a mere 'clause in a tenancy agreement'[53] and 'ma[de] a mockery of s.116'.[54] For him, a narrow reading 'would deny that s. 116 [was] a guarantee of freedom from religion as well as of religion'.[55] Murphy J's was a lone voice however.

III What Transpired

Following the widespread opposition to a Bill of Rights having the force of supreme law, Sir Geoffrey Palmer, by now Prime Minister, was forced to set his sights lower. An interpretative Bill of Rights, having the status of an ordinary statute, was the result.

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46 See generally, Reid Mortensen, 'The Unfinished Experiment: A Report on Religious Freedom in Australia' (2007) 21 *Emory International Law Review* 167, 170, 173-175; Tony Blackshield, 'Religion and Australian Constitutional Law' in Radan, see above n 37, ch 4, 85-86 and 98-101.

47 See, Murphy J in the *DOGS Case* (1981) 146 CLR 559, 621; Mortensen, ibid, 169.

48 See, Wilson J in the *DOGS Case*, ibid 652.

49 (1981) 146 CLR 559.

50 Ibid 612. See similarly Barwick CJ, ibid 582; Gibbs J, ibid 597 and 604. Aickin J, ibid 635, agreed with Gibbs and Mason JJ.

51 Stephen J, ibid 609.

52 Wilson J, ibid 654.

53 Ibid 623.

54 Ibid 633.

55 Ibid 625.

With the notion of a supreme law abandoned, most conservative Christians (including Hone and Temepara) lost interest. Fears of an unsympathetic judicial elite instigating humanistic social engineering had dissipated. Few Christian individuals or organizations made submissions on the diluted Bill that was now proposed. The Seventh-Day Adventist Church alluded in its submission to the danger of the Bill being easily altered to become entrenched by later Parliaments.[56] In parliamentary debate, conservative Christian MP, Graeme Lee emphasized this point: 'It will just be a matter of time until the Bill will move from being ordinary law—albeit *de facto* supreme law—to being the bench-mark for all New Zealand law: the original objective'.[57]

In the last 19 years, the religious freedom provisions of the Act have seldom been mentioned or invoked, nor have they excited much controversy—either in or outside legal circles. As Paul Rishworth observed in an important recent article: 'there has been remarkably little religious freedom litigation in New Zealand'[58].

The explanation for this is, as Professor Rishworth notes, multifaceted: the BORA is not a supreme law and thus winning plaintiffs cannot succeed in scuttling infringing legislation; the absence of strong, well-organized religious (or secular) pressure groups; a less litigious culture and a sense that litigation would be unproductive; and a more tolerant, live-and-let-live atmosphere coupled with a 'prevailing egalitarianism' amongst New Zealanders.[59] On the last point, the Human Rights Commission in its 2004 human rights 'report card' observed:

> The Commission's complaints data, the Action Plan consultation and other research reveals *widespread acknowledgement of, and appreciation for, the high level of religious freedom and tolerance generally experienced in New Zealand.* Of 2,559 complaints received by the Human Rights Commission in 2002–2003, only 105 (4.1 percent) claimed discrimination on the basis of religious or ethical belief and, of those, 33 were outside jurisdiction. A further 47 were discontinued either by the complainant or by the Commission. Of the remaining 33, 14 have been resolved.[60]

In its 2010 update, the Human Rights Commission noted that New Zealand was 'generally tolerant of religious diversity'[61] borne out to the extent that '[o]f 1405 complaints of discrimination received by [it] in 2008-09, only 66 (4.7 per cent) claimed discrimination on the basis of religious or ethical belief'.[62]

This fairly 'benign' state of affairs may not continue and the NZBORA may yet prove to be more frequently utilized and have more 'bite' than it has to date. I will return to this in Part IV.

New Zealand's religious freedom jurisprudence, to cite Professor Rishworth again, 'is found principally in the record of the legislative and executive branches, and has not been exclusively, or indeed hardly at all, the province of the judiciary'.[63] The core of religious liberty is located not in flowing rhetoric emanating from high-profile court

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56 Seventh-Day Adventist Church, Submission No 5W.

57 (1990) 510 NZPD 3471. Richard Northey, in the third reading debate, dismissed this 'Trojan horse' thesis: (1990) 510 *New Zealand Parliamentary Debates* 3763.

58 Paul Rishworth, 'The Religion Clauses of the New Zealand Bill of Rights' [2007] *New Zealand Law Review* 631, 632.

59 Ibid 633, 636.

60 'The Right to Freedom of Religion and Belief', *Human Rights in New Zealand Today* (HRC, September 2004) ch 9 (emphasis added).

61 Human Rights Commission, *Freedom of Religion and Belief: Draft for Discussion*, 19 March 2010, 11: available at <http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/19-Mar-2010_10-28-25_Status_Report_Freedom_of_Religion_and_Belief_1_.pdf> at 29th November 2010.

62 Ibid, 8.

63 Rishworth, see above n 58, 634.

cases, but 'the harsh particularities of legislation and practice in various discrete fields'.[64] Historically, the preservation of religious freedom has been primarily overseen and undertaken by the Legislature and Executive,[65] and this continues to be the pattern post-1990.

In the Bill of Rights era we continue to see legislative 'accommodation' made for religious practice. Prior to 1990, Parliament had carved out exceptions for religionists who might otherwise be caught by the application of the general law of the land. For example, medical personnel were granted a conscientious exemption by Parliament from participation in abortion and sterilization procedures and religious employers were permitted to deny access to union officials to their workplaces.[66] After 1990 the same approach continues. For instance, New Zealand anti-discrimination laws contain carefully crafted exemptions excepting religious employers and institutions from the usual prohibitions on sex and religious discrimination in employment, training, education and so on.[67]

The prior parliamentary scrutiny of bills is, as noted at the outset of this article, to be a feature of the 2010 changes to the Australian human rights regime. The prior vetting of bills in New Zealand has yet to detect any provisions of pending legislation that appear to infringe the protections for religious freedom in the NZBORA. There has yet to be an instance where the Attorney-General, pursuant to his or her obligation under s 7 of the NZBORA, has found any potential contravention of religious liberty.[68] It may be, as Grant Huscroft contends, that the main significance of the s 7 duty is its salutary impact on the policy development and legislative drafting processes.[69] So, for example, by the time the Coroners Bill 2004 was introduced, it already, as the Attorney-General's report recorded, 'recognize[d] and accommodate[d] religious and cultural beliefs' in terms of its 'procedures for viewing, touching or remaining near the body'[70], and thus any potential violation of religious liberty was averted.

So what of the cases that dealt with the NZBORA's religious freedom provisions? These provisions are, in brief, the right to freedom of conscience, thought, religion and belief,[71] the right to manifest one's religious beliefs in worship, observance, practice and so on,[72] and the right of religious minorities to enjoy their religion.[73]

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64 Ibid 649.

65 Ibid.

66 See respectively, *Contraception, Sterilisation and Abortion Act 1977*, s 46, and the *Employment Relations Act 2000*, ss 23-24.

67 Religious institutions are allowed to discriminate on the basis of sex or religion when appointing persons to positions of leadership: *Human Rights Act*, s 28(2). Other religious exemptions are found, for instance, in s 27(2)(domestic employment) and s 39(1)(qualifying bodies).

68 For the most recent reports on the consistency of pending legislation with s 15 of the NZBORA (the right to manifest one's religious beliefs), see the NZ Ministry of Justice website: available at <http://www.justice.govt.nz/policy-and-consultation/legislation/bill-of-rights/@@view_by_ section#section-15> at 29th November 2010.

69 Grant Huscroft, 'The Attorney-General's Reporting Duty' in Paul Rishworth et al, *The New Zealand Bill of Rights* (2003) ch 6 at 213.

70 See NZ Ministry of Justice, Attorney-General, Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990 (ATT114/1299): available at <http://www.justice.govt.nz/policy-and-consultation/legislation/bill-of-rights/coroners-bill> at 29th November 2010. This particular provision is now s 25 of the *Coroners Act 2006*.

71 Section 13 states: 'Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference'.

72 Section 15 provides: 'Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private'.

To reiterate, there have been relatively few cases. I do not propose to systematically go through them all.[74] In summary, we have had cases on such disparate matters as:

- parental refusals to allow potentially life-saving medical treatment to be administered to their children based on the parents' religious beliefs. The Jehovah's Witness parents' refusal to permit life-saving blood transfusions for their three-year-old child was over-ridden by doctors with the courts' approval;[75]
- the longstanding ban on shop trading at Easter weekend. The Good Friday shop trading ban survived the attempt by a Wanaka bookshop to secure a 'declaration of inconsistency' (a pronouncement that the NZBORA has been contravened) from the court;[76]
- the wearing of a burqa by a Muslim witness in an insurance case. The devout Afghani woman was required to unveil in court, but only before the judge, counsel and female court staff;[77]
- an exorcism that resulted in the death of the unfortunate church member. The Korean Pentecostal pastor was not able to hold up the shield of religious faith in defence of a manslaughter conviction for a disastrously botched exorcism;[78]
- a resident who sought to justify a large painted spotlit swastika on the wall of his house on religious grounds. The bigoted urban dweller's Nazi symbols were removed pursuant to an abatement notice ordered by the Wellington City Council despite his spurious quasi-religious objections;[79]
- parents of minority religions whose faith is raised as a negative factor in child custody and access disputes. Family court judges have tried not to be swayed by embattled spouses of Jehovah's Witnesses, Exclusive Brethren and other believers playing the 'religion card' in custody and access battles;[80]
- a Rastafarian who invoked religious freedom in the face of a marijuana charge. The Rastafarian's religious liberty plea in response to his conviction for cannabis cultivation and supply fell on deaf ears;[81]
- an erstwhile leader of a 'New Age' religious community who complained that the government did nothing to prevent the community's dissolution

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[73] Section 20 reads: 'A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practice the religion, or use the language, of that minority'.

[74] For analysis and commentary, at least up to the mid-2000s, see Rishworth et al, see above n 69, ch 11; Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (2005) ch 14.

[75] *Re J (An Infant): Director-General of Social Welfare v B and B* [1996] 2 NZLR 134 (CA). See also *Auckland District Health Board v AZ and BZ*, HC Auckland, Civ 2007-4-4-2260, 27 April 2007, Baragwanath J; *Waikato District Health Board v L*, HC Hamilton, Civ 2008-419-1312, 23 Sept 2008, Stevens J.

[76] *Department of Labour v Books and Toys (Wanaka) Ltd* (2005) 7 HRNZ 931 (DC).

[77] *Police v Razamjoo* [2005] DCR 408 (DC). See further, David Griffiths, 'Pluralism and the Law: New Zealand Accommodates the Burqa' (2006) 11 *Otago Law Review* 281; Erich Kolig, 'New Zealand Muslims: The Perimeters of Multiculturalism and its Legal Instruments' (2005) 20 *New Zealand Sociology* 73.

[78] *R v Lee* [2006] 3 NZLR 42 (CA).

[79] *Zdrahal v Wellington City Council* [1995] 1 NZLR 700 (HC). See Bede Harris, 'Viewpoint Neutrality and Freedom of Expression in New Zealand' (1996) 8 *Otago Law Review* 515.

[80] See, Rex Ahdar, 'Religion in Custody and Access: The New Zealand Experience' (1996) 17 *New Zealand University Law Review* 113.

[81] *R v Anderson,* Court of Appeal, CA27/04, 23 June 2004.

following the jailing of its founder and other leaders (for child molestation). The state was held to have no positive duty to ensure the survival of an embattled faith community;[82]

- an offender who wished to be excused attendance at the periodic detention induction program run on his Sabbath day. The Seventh-Day Adventist offender was still required to complete the court-directed periodic detention induction program on his day of rest, namely, Saturday;[83]
- a church official who granted false charitable donations receipts to enable parishioners to claim a tax rebate. The Tongan Anglican Mission Church official's optimistic appeal to religious and cultural matters to excuse his tax fraud was to no avail.[84]

The outcome of the cases has been rather predictable. I submit that all these outcomes were just as likely without a Bill of Rights. The statutory right of religious freedom was not determinative of the specific final result in these decisions and one would be hard pressed to say that the right was decisive to, or even played a significant part in, the conclusions reached. In most of the cases, the religious freedom arguments were a mere makeweight and were treated as such by the court—as evidenced by the cursory analysis and discussion of the meaning and scope of the Act's religious freedom provisions. As Rishworth observes:

> One particular feature of the New Zealand landscape has been the relatively low-level resolution of many rights controversies in the religion field. Instead of culture-changing legal precedents, we tend to get ad hoc and unreasoned, but generally satisfactory settlements. A debate about school prayer or religion classes in school … might flare in the newspapers and on television for a few days, but it is informally resolved (or fades away altogether) with no necessary determination of how such issues should be resolved for the future.[85]

In those decisions where the religious liberty plea was more central to the case, the courts have not taken a very sympathetic or generous stance to the meaning or breadth of the right of religious freedom.

Take, *Re J*, for example, a case concerning devout Jehovah's Witness parents who refused to permit a blood transfusion for their three-year-old child suffering from a severe and potentially life-threatening nosebleed. The Court of Appeal said that the particular right of religious freedom at issue ought to be defined at the outset to exclude certain kinds of conduct (an approach known in constitutional law parlance as 'definitional balancing').[86] This means that the state is not required to justify limits upon the right, but rather, the right is limited by the state (the court) under the guise of defining the right. In *Re J* it meant that the Jehovah's Witness parents' right to determine their child's medical treatment in accordance with their faith was defined to exclude any exercise of the parental rights of religious upbringing and medical decision-making that endangered the child's health or life. The other, and in my opinion, better approach

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82 *Mendelssohn v AG* [1999] 2 NZLR 268, 273 (CA).

83 *Feau v Department of Social Welfare* (1995) 2 HRNZ 528 (HC).

84 *Tahaafe v CIR*, High Court Auckland, CRI 2009-404-102, 10 July 2009, Chisholm J.

85 'Human Rights and the Reconstruction of the Moral High Ground' in Rick Bigwood (ed), *Public Interest Litigation: New Zealand Experience in International Perspective* (2006) 115, 124-125.

86 [1996] 2 NZLR 134, 145-146.

(called 'ad hoc balancing')[87] would be initially to define the right broadly and then require the state to justify its restriction. This approach ensures the state carries the onus of establishing that a fundamental civil right really warrants restriction rather than, with definitional balancing, the state not being put to the task of discharging the onus by virtue of a court's initial defining away of the disputed scope of the right. In the present case, ad hoc balancing would translate into saying that parents have a broad right to determine their child's medical treatment (including the right to refuse the administration of blood transfusions), but the state may veto this if it discharges its onus of establishing that the overriding of parental consent was fully justified here. On the facts of *Re J* the different approaches did not make any material difference to the outcome, but the choice of methodology might well do so in other instances.

In *Mendelssohn v Attorney-General*[88] the plaintiff, Mendelssohn, a senior member of a small and highly controversial 'New Age' religious community, Centrepoint, argued that the Attorney-General had been negligent in failing to protect the group's religious liberty. Centrepoint had been structured in the form of a trust. It experienced considerable disruption following the successful prosecution of its leader Herbert (Bert) Potter in 1992 for indecently assaulting minors living in the community. In 1995 Mendelssohn wrote to the Attorney-General seeking action to restore the operation of the Trust to its proper purposes. The Attorney-General declined to do so. Quite the opposite: he ordered an independent inquiry into the affairs of the Trust that ultimately resulted in the Public Trustee being substituted for the existing trustees.[89] Mendelssohn viewed the Attorney-General's conduct as in breach of what Mendelssohn asserted was a positive duty to take steps to protect his, and other Centrepoint followers', religious freedom. The Court of Appeal rejected his claim. The plaintiff had misunderstood the nature of the right to religious freedom contained in various provisions of the NZBORA: 'The short answer to [Mr Mendelssohn's] submission is that in their essence those provisions do not impose positive duties on the state, at least in any sense relevant to this case'.[90]

In *Director of Human Rights Proceedings v Catholic Church of New Zealand*,[91] the High Court had to decide whether the Roman Catholic Church was caught by the Privacy Act 1993's disclosure regime. A woman had complained after the Church had refused her request for personal information pertaining to the annulment of her marriage by the Catholic Tribunal. The Church contended that compelled release of personal information would impede the institution's religious freedom: the future adjudication of annulment and divorce proceedings would be hampered if sensitive confidential statements supplied by others (such as an estranged spouse) were circulated more widely. The Court, however, could not see how the Church's right of religious liberty under section 15 of the Act was "threatened in any way"[92] by the Privacy Act's disclosure requirements.

Perhaps the only case where the right to religious freedom had any 'traction' was *R v Lee*, the case involving the Korean pastor's disastrous exorcism. There, the Court of Appeal recognized that the right to manifest religious belief in section 15 of the NZBORA included the right to conduct exorcisms (and consent to undergo the same) and

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87 Ahdar and Leigh, see above n 45, 184; *R v Oakes* [1986] 1 SCR 103; *Multani v Commission Scolaire Marguerite-Bourgeoys,* 2006 SCC 6; [2006] 1 SCR 256 at [43]: Sidney Peck, 'An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms' (1987) 25 *Osgoode Hall Law Journal* 1; Andrew Butler, 'Limiting Rights' (2002) 33 *Victoria University of Wellington Law* 537, 541-544.

88 [1999] 2 NZLR 268 (CA).

89 The Court of Appeal dismissed a challenge by Mendelssohn to this appointment: *Mendelssohn v Centrepoint Community Growth Trust* [1999] 2 NZLR 88.

90 [1999] 2 NZLR 268, [14](italics in original).

91 [2008] 3 NZLR 216 (HC).

92 Ibid [68] per Cooper J.

rejected the argument that only 'mainstream' methods of performing exorcisms were included within the right.[93]

There is one trend that might appear to negate my argument. An increasingly significant sector of New Zealand society, Maoridom, has fared better in the Bill of Rights era than before. Not so long ago government and legal recognition of Maori religious and spiritual concerns was unthinkable; now it is virtually *de rigeur*.[94] Here, however, we must be alert not to confuse correlation with causation. The state recognition of Maori religious interests began *prior* to the BORA and it can hardly be said that the passing of the Act has been the principal catalyst for Maori spirituality's 'come back'. Rather, it has ridden on the coat-tails of the broader cultural renaissance of, and political solicitude towards *Maoritanga* (the Maori culture, customs, language and the Maori 'way' in general) that began in the 1980s. Hone and Temepara's cousins, Rangi and Ngaire, are much happier these days that their firm traditional religious beliefs in *taniwha* (spiritual guardians or monsters), *mauri* (life force), *kaitiakitanga* (spiritual guardianship), *tohunga* (faith healers /priests), *waahi tapu* (sacred sites) and the like, are taken seriously by civil tribunals in environmental, bioethical and other decision-making contexts.

IV THE LESSONS

New Zealanders' enjoyment of the right to religious freedom has fared fairly well prior to the NZBORA, and continues to do so. However, it is possible that the relatively calm religious landscape and the paucity of religious freedom cases might not continue. There are several reasons why this might be so.[95]

First, there is the increase in 'rights consciousness'. Second, there is the growth in non-Christian faiths, an expansion driven by recent immigration. Not all these believers will assimilate and 'do in Rome as the Romans do'. It is not unreasonable to expect a burgeoning number of conflicts between them and the law. After all, the New Zealand legal system—inherited from Christian Victorian England—was not formed with polygamous-minded Muslims or dagger-carrying Sikhs in mind. Third, the law continues to penetrate deeply into the private sphere: the re-design of church buildings to meet contemporary liturgical needs clashes with preservation of historic places legislation, a religious body's policy to ordain only heterosexual clergy clashes with human rights norms that mandate no discrimination by training or licensing bodies based on a candidate's sexual orientation; Hone and Temepara's desire to physically discipline their three children clashes with children's rights laws, and so on. Fourth, New Zealand society and the governing elite are becoming more secular. Consequently, situations where conflict may arise between the state and religious groups, especially traditionalist or conservative ones, are increasing. Believers such as Hone and Temepara, who belong to the Pentecostal Destiny Church (perhaps the most disliked and vilified religious body

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93 [2006] 3 NZLR 42, [326]-[330] and [345]. The Court quashed Pastor Lee's conviction for manslaughter and ordered a new trial on the basis the High Court had erred in not allowing the defence of consent to go to the jury.

94 See, for example, *Resource Management Act 1991*, ss 6-8; *Friends and Community of Ngawha Inc v Minister of Corrections* [2002] NZRMA 402 (HC). See further, Rex Ahdar, 'Indigenous Spiritual Concerns and the Secular State: Some New Zealand Developments' (2003) 23 *Oxford Journal of Legal Studies* 611; Fiona Wright, 'Law, Religion and Tikanga Maori' (2007) *5 New Zealand Journal of Public and International Law* 261.

95 Rishworth, see above 58, 633, and also his earlier essay: Paul Rishworth, 'Coming Conflicts over Freedom of Religion" in Grant Huscroft and Paul Rishworth (eds), *Rights and Freedoms* (1995) ch 6.

in modern New Zealand) are the type of religionists whose practice of their faith is coming under closer state scrutiny.[96] The last point merits greater explanation.

New Zealanders are becoming a more secular lot. Each successive census reveals an increase in those who indicate that they have 'no religion'. The latest 2006 Census recorded some 1.297m New Zealanders (32.2 per cent) who identified themselves as squarely in the non-religious fold.[97]

Furthermore, the cultural sway of organized religion is waning. The decreasing numbers of adherents formally affiliated to churches leads one to anticipate (other things being equal) a corresponding decline in their social and political influence. Thus, opposition to the abolition to the residual public symbols and rituals of Christianity is likely to be less incisive in 2009 than in 1989, or certainly in 1969.

For example, there was minimal fuss when the then Prime Minister refused to allow the saying of grace at the Commonwealth Heads of Government banquet attended by Queen Elizabeth II in 2002.[98] Admittedly, there was an the outcry by Christians (and Muslims) over the screening in 2006 of an episode of *South Park*, the American satirical television cartoon show, which showed a statue of the Virgin Mary menstruating over the Pope. The then Prime Minister, Helen Clark (a self-acknowledged agnostic) denounced the screening of the episode as 'quite revolting'. However, the Broadcasting Standards Authority found no violation of the TV Broadcasting Code's standards of taste and decency.[99]

Finally, the disestablishment potential of the Act has yet to be realized. The freedom *from* religion interpretation has seldom exerted itself, at least in the courts. The pressures just mentioned could yet see the NZBORA have a similar secularizing impact to the Canadian Charter. In the view of a leading church-state academic, Professor Margaret Ogilvie, 'the courts have "protected" religious freedom by erasure of religion from public institutions, public spaces and the public law. The first twenty years of Charter religious jurisprudence is the story of the use of the Charter to remove Christianity from its legally privileged status in Canada'.[100] In Britain, the much briefer experience of a bill of rights has seen a growth in legal challenges to the privileged status of Christianity in that nation[101] and increasingly strident complaints that Christians are

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96 See 'Protesters hold up Destiny Church march', *New Zealand Herald*, 7 March 2005.

97 Specifically, they ticked the box marked 'No religion'. See Statistics New Zealand, 'Religious Affiliation', 2006 Census. For a lively discussion see Caroline Courtney, 'Religion: Who needs it?', *North and South* (April 2007) 67. But there are still high levels of belief about life after death, heaven, reincarnation, astrology, fortune tellers, etc: 'Religion in New Zealand', ISSP Survey, Marketing Department, Massey University, March 2009, 2.

98 'Lack of grace leaves no trace', *Otago Daily Times*, 9 March 2002, A7. The Prime Minister, Helen Clark, defended this in these terms: 'There was no grace for the same reason as there is none now in New Zealand, because we're not only a society of many faiths, but we're also increasingly secular. In order to be inclusive, it seems to me to be better not to have one faith put first. We haven't had the grace at state banquets for the last two years'.

99 Broadcasting Standards Authority Decision No 2006-022 (26 June 2006). The High Court affirmed the BSA decision in an appeal launched by the NZ Catholic bishops: *Browne v CanWest TV Works Ltd* [2008] 1 NZLR 654 (HC). See further Rex Ahdar, 'The Right to Protection of Religious Feelings' (2008) 11 *Otago Law Review* 629.

100 Ogilvie, see above n 37,160.

101 See, for example, H Blake, 'Atheists launch bid to outlaw prayer at council meetings', *Daily Telegraph*, 4 May 2010. The National Secular Society has sought judicial review of the Bideford Town Council's opening council prayers on the ground they breach Article 9 of the Human Rights Act 1988, the religious freedom guarantee.

becoming last amongst equals in the clashes between religious rights and other human rights guaranteed in the Human Rights Act 1998.[102]

The warning signs in New Zealand are there. Thus, New Zealanders have witnessed:

- A dispute over a Corrections Department decision to rigidly uphold its alcohol ban and not allow communion wine to be given to prisoners;[103]
- A complaint about a Marlborough high school's refusal to let girls wear crosses around their neck (despite Maori symbols being allowed);[104]
- Questioning of the propriety of the Speaker of Parliament's Prayer;[105]
- Public agitation about the proposal to remove the large illuminated cross atop the municipal clocktower in Palmerston North—a debate that abated once the wind blew the cross down!;[106]
- A complaint about a voluntary, non-teacher-led, lunch-time evangelical Christian 'KidsKlub' at a Wellington primary school;[107]
- Human Rights Commission mediation between warring parents over the 52-year-old practice of saying the Lord's Prayer at an Auckland primary school's weekly assembly;[108]
- A Ministry of Education guidelines questioning of the continuance of the longstanding voluntary 'Bible in Schools' program and religious observances in state primary schools;[109]
- Successive private members' bills to abolish the Good Friday and Easter

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[102] See, for example, A Alderson, 'Church leaders head for showdown with top judges over bias against Christians', *Daily Telegraph*, 11 April 2010. The former Archbishop of Canterbury, Lord Carey, and other church leaders, criticised recent rulings of the courts—a Christian nurse who was apparently disciplined for refusing to remove her crucifix necklace, a Christian registrar disciplined for refusing to perform civil partnership ceremonies for same sex couples, and so on—that, in their view, reflect a 'disturbing' anti-religious trend. For further examples and analysis, see Christian Institute, *Marginalising Christians: Instances of Christians Being Sidelined in Modern Britain* (2009); Roger Trigg, *Free to Believe? Religious Freedom in a Liberal Society* (2010).

[103] Following the Minister of Corrections' intervention, the Department stated it would allow communion wine in prisons: see 'Government wants review of ban on communion wine', *New Zealand Herald*, 26 April 2007; 'Catholic Bishop praises Corrections Dept for reversing decision', *The Tablet* (Otago), 17 June 2007, 6.

[104] 'Marlborough Girls school board stands by dress code', *New Zealand Herald*, 18 February 2004: Butler and Butler, see above n 74, 421.

[105] Letter from Matt Robson, Progressive Party MP, to Jonathan Hunt, Speaker of the New Zealand House of Representatives (May 6, 2003): quoted in Allan Davidson, 'Chaplain to the Nation or Prophet at the Gate? The Role of the Church in New Zealand Society' in John Stenhouse (ed), *Christianity, Modernity and Culture* (2005) 312, 314.

[106] Patrick Goodenough, 'City riled by dispute over cross', *Crosswalk.com*: available at <http://www.crosswalk.com/1222304/> at 29th November 2010.

[107] Stewart Dye, 'School Split over Religion Club Ban', *New Zealand Herald*, 10 June 2005; 'School gives way on lunchtime Bible study', *Dominion Post*, 7 July 2005. See further, Rex Ahdar, 'Reflections on the Path of Religion-State Relations in New Zealand' [2006] *Brigham Young University Law Review* 619, 639-641.

[108] 'School in trouble over Lord's Prayer', *Otago Daily Times*, 19 December 2005; 'Prayers for school to decide'(editorial), *New Zealand Herald*, 22 December 2005; Paul Rishworth, 'Religious Issues in State Schools' in John Hannan et al, *Education Law* (NZ Law Society Seminar, May-June 2006) 87-114.

[109] 'Guidelines on religion in schools stun some', *Otago Daily Times*, 25 August 2006; Rex Ahdar, 'Review better than rows over religion in school', *Otago Daily Times*, 1 September 2006.

Sunday retailing bans.[110]

Some of the disputes that are currently resolved by a fortuitous mixture of quiet, behind the scenes compromise by the state—or tactful retreat by the religionists (or atheists) concerned—may instead, in the future, go to court. Admittedly, New Zealand does not have the equivalents to the United State's renowned rights pugilists such as the ACLU (American Civil Liberties Union) or the Rutherford Institute, or the United Kingdom's Christian Institute, and awareness of one's civil rights is hardly second-nature.

The picture just painted may be misleading. There may not be any great increase in religious liberty controversies and attendant litigation, and the disestablishment potential of the NZBORA may not be realized. Nonetheless, if Hone and Temepara were to ask, 'Do you think our ability to live out our faith is likely to get easier or more difficult?', a New Zealander fully versed in church and state matters would be slow to respond, 'there is no cause for concern' in respect of both the growth in litigation and its likely erosion of longstanding Christian observances and practices.

Are there lessons for Australia? The five reasons just traversed suggesting that there will be an increase in the number of religious controversies, and consequently increased litigation, occurring in New Zealand, would seem to hold for Australia too. Rights consciousness is just as strong in Australia.[111] There is even greater religious pluralism, driven by Asian immigration there, than in New Zealand.[112] The Australian law of the land is just as invasive and its regulatory reach into the private realm is just as deep. Australians too are becoming a more secular people, although not as rapidly as New Zealanders.[113] There is no reason why the same secularizing effects of a Bill of Rights Act ought not to be manifest in Australia too. In one respect though, there may a distinction. The influence of organized religion may not have waned as much in Australia as it has in New Zealand. After all, the sinking of the Charter was in part attributable to

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[110] See for example, the Shop Trading Hours (Easter Trading Local Exemption) Bill 2004 (No 168-1), sponsored by Doug Wollerton MP; the Easter Sunday Shop Trading Amendment Bill 2006 (No 42-2), sponsored by Jacqui Dean MP; and the Shop Trading Hours 1990 Repeal (Easter Sunday Local Choice) Amendment Bill 2009 (No 104-1), sponsored by Todd McClay MP. Waitaki MP Jacqui Dean is preparing to take another private members' Bill to Parliament: 'Easter trading bill in offing', *Otago Daily Times*, 19 January 2010.

[111] See, for example, David Kinley, 'Human Rights Fundamentalisms' (2007) 29 *Sydney Law Review* 545.

[112] The 2006 Australian Census figures for Buddhism (2.1 per cent), Islam (1.7 per cent) and Hinduism (0.7 per cent) are higher than the 2006 New Zealand Census figures for the same three faiths (1.3, 0.9 and 1.6 per cent respectively). In Australia, the fastest growing religions during the intercensal period between 2001 and 2006 were: Hinduism by 55.1 per cent, Islam by 20.9 per cent, Buddhism by 17 per cent, and Judaism by 6 per cent. Christianity (63.9 per cent) was the only religion to show negative growth, with the number of followers falling in the same period by 0.6 per cent: Australian Bureau of Statistics. In New Zealand, the intercensal decline in Christianity was 5 per cent: from 60.6 per cent (in 2001) to 55.6 per cent (in 2006). There was a similar growth to Australia's in this period of Islam, Hinduism and Buddhism in New Zealand. For Australia, see the Australian Bureau of Statistics, Religious Affiliation: available at <http://www.abs.gov.au/ausstats/ABS@.nsf/0/636F496B2B943F12CA2573 D200109DA9?opendocument> at 29th November 2010. For New Zealand see Statistics New Zealand, Religious Affiliation: available at <http://search.stats.govt.nz/search?p=KK&srid=S2%2d5&lbc=statsnz&ts=custom&pw=religious%20affiliation&uid=673559976&isort=score&w=religious%20affiliation%202006&rk=1> at 29th November 2010.

[113] The 2006 Australian Census records some 18.7 per cent professed to have 'no religion', an increase of 3.2 per cent since 2001. In New Zealand, those recording 'no religion' comprised 34.7 per cent in the 2006 Census, compared to 29.6 per cent in 2001.

the sustained critique of various (conservative) strands of contemporary Australian organized religion. Whether this matter alone is sufficient to offset the weight of the other factors is difficult to tell. In Britain, even the presence of an established church seems impotent to stop the secularizing and polarizing effects that the introduction of a Bill of Rights initiated. In the end, it might be that Australia has nothing to learn from the New Zealand experience, but the similarities—historical, cultural, religious and legal—between the two Tasman neighbours suggest otherwise.