



Religious 'toleration' in modern Australia: the tyranny of relativism

J.D. Heydon

The inaugural PM Glynn Lecture on
Religion, Law and Public Life 2017

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Preface

The PM Glynn Institute is the public policy think tank of Australian Catholic University. In 2017, the Institute established the PM Glynn Lecture on Religion, Law and Public Life to honour the contribution that Patrick McMahon Glynn made to our country, both as one of the Founding Fathers of the Commonwealth, and as a prominent writer, lawyer and parliamentarian.

The lecture invites an eminent person to address an important question at the intersection of religion, public life, and the law with a view to significantly enhancing the quality of discussion of important matters of public policy. The Institute was privileged to have the inaugural PM Glynn Lecture delivered by the Honourable Dyson Heydon AC QC. Glynn's own convictions about the importance of religion, law and public life powerfully informed the contribution he made in many areas, and as a distinguished jurist and scholar Mr Heydon is particularly well-placed to reflect on the importance of these three critical dimensions of our life in common.

Mr Heydon's lecture, "Religious 'toleration' in modern Australia: the tyranny of relativism", was delivered to a distinguished audience in Adelaide on 17 October 2017. It will provide the beginnings of many conversations about the place of religion in Australian society and the challenges that particular developments in our culture and politics pose now and for the future. The conversation will continue at the PM Glynn Institute as well, with a round-table discussion devoted to Mr Heydon's lecture, and a book bringing together the lecture and various responses to it for publication in 2018. The Institute is also pleased to make this very fine lecture available in this booklet.

Dr Michael Casey

Director

PM Glynn Institute



The Hon Dyson Heydon AC QC

The Honourable John Dyson Heydon AC QC served as the forty-fourth Justice of the High Court of Australia from 2003 until 2013.

Mr Heydon was born on 1 March 1943 in Ottawa, Canada, to the Australian diplomat, Sir Peter Heydon CBE and Lady Muriel Naomi Heydon. He was educated in London, Rio de Janeiro and Wellington, before attending Sydney Church of England Grammar School and St Paul's College in the University of Sydney, from which he graduated in 1964 with a Bachelor of Arts degree with First Class Honours and the University Medal in History. Later that year, he proceeded to the University of Oxford, where he read for a second BA in law at Keble College, as the Rhodes Scholar for New South Wales, and shared the Martin Wronker Prize for the top First Class Honours degree in law in 1966. He then undertook the Bachelor of Civil Law degree and was awarded the Vinerian Scholarship for the highest First Class degree in that course in 1967.

From 1967 to 1973, Mr Heydon was a fellow and tutor at Keble College, Oxford, during which time he also lectured on evidence and trusts at the Inns of Court School of Law. In 1969, he served as a visiting lecturer at the University of Ghana, before being appointed Professor of Law at the University of Sydney, at the age of twenty-nine. He taught and published on equity, evidence, commercial and company law, and restrictive trade practices, and served as Dean of the Sydney University Law School in 1978-79.

He was admitted to the New South Wales Bar in 1973 and was appointed Queen's Counsel in 1987. He practised at the Bar from 1979, as a member of the Eighth Floor of Selborne Chambers, until his appointment to the New South Wales Court of Appeal in 2000. He was sometime editor of each of the *Australian Law Reports*, the *New South Wales Law Reports*, and the *Australian Bar Review*, and was a member of the Bar Council for five years from 1982.

By Letters Patent issued on 13 March 2014, the Governor-General appointed him as a sole Royal Commissioner for the Royal Commission into Trade Union Governance and Corruption.

He is the author of numerous legal texts, including *The Restraint of Trade Doctrine* (1971), *Economic Torts* (1973), *Case Book on Evidence* (1975), *Cases and Materials on Equity* (1975), and *Heydon and Donald on Trade Practices Law* (1978), and the editor of editions of such seminal texts as *Cross on Evidence* (1970) and *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (2002).

He was named as a Companion of the Order of Australia in the Queen's Birthday Honours List for 2004, and awarded the degree of Doctor of Laws (*honoris causa*) by the University of Sydney in 2007.

Religious 'toleration' in modern Australia: the tyranny of relativism

Today, 17 October, is the feast day of St Ignatius – not the famous St Ignatius of Loyola, but the Bishop of Antioch. He is said to have been the first person to use the words 'catholic church' in writing as meaning the active church that is identical across all Christian congregations. One does, however, suspect that a close search of the New Testament would reveal cognate usages before his time. The career of St Ignatius was marked by a stress on the real humanity of Christ, and therefore on the actuality of the physical sufferings of Christ. He had an ardent desire for martyrdom as a means of sharing the Passion of Christ. His fame rests on seven letters he wrote after his arrest during a persecution of the church in Antioch. He wrote them as he travelled in chains under military escort to Rome. He reached Rome in about AD 110, as the non-politically correct are for the time being permitted to call that year. That was in the reign of that *beau idéal* of the so-called 'good' Emperors, the Emperor Trajan, successful soldier and promiscuous drunk. St Ignatius's desire for martyrdom was met when he was condemned to the wild beasts in the Roman arena. The career of St Ignatius of Antioch is not entirely irrelevant to what follows, but for the moment let us move to the happier subject of Patrick McMahon Glynn.

It is a great honour to have been invited, on this auspicious day, to deliver the inaugural Glynn Lecture, and to do so in his adopted home, Adelaide. He certainly deserves to be remembered in this way. I regret my inability to do justice to him. His life shows what a career lay open to Catholic talent both in nineteenth century Ireland under the Protestant Ascendancy and in the four decades on either side of 1900, as the Australian colonies moved to Federation and towards independence. If he met sectarian prejudice, it did not slow him down. The son of a small town shopkeeper passed from what is now Blackrock College, to Trinity College, Dublin, to the Middle Temple, to the Irish Bar, at the age of 25 to the Victorian Bar, to a brief period selling insurance and sewing machines, to practising law in South Australia. Then he entered political life, as an advocate of the once-popular but now forgotten views of Henry George – that there should be only one tax, a land tax. Taken as a whole, his career reveals him to be what might be called a radical conservative with socialist tinges, strongly influenced by his ardent Catholic faith.

In short, he was difficult to pigeonhole. In that career he supported female suffrage and suffrage reform generally, free trade, land nationalisation, the nationalisation of public utilities and other monopolies, Federation and Irish Home Rule. He supported the miners in their strike at Broken Hill in 1892. But his attractiveness to the Labor cause was doubtless diminished by his opposition to legislation restricting Chinese immigration to South Australia. He had great powers as a publicist and as an orator. He gained a great reputation for independence of thought, for culture, for learning and for rock-like integrity. He served several times in the South Australian Parliament. He served in the Federal Convention in 1897-98. He then served in the federal House of Representatives from 1901 to 1919. He also served three times as a Federal Minister. Well-informed opinion holds that if he had retained his seat after 1919, there might never have been a Bruce-Page government or a Bruce Prime Ministership, but rather a Glynn Prime Ministership. That is because, great statesman though Stanley Melbourne Bruce turned out to be, by the early 1920s he had much less experience than Glynn. But for present purposes let us remember the opening words of the Imperial Act which brought our Constitution into being:

Whereas the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown . . .

To Glynn is traditionally assigned the authorship of that reference to humble reliance on the blessing of Almighty God.

Those words reflected what the elite of the Federation generation saw as fundamental. They do not reflect what modern elites think. The public voices of modern elites are not humble. They conceive themselves to have entitlements and rights, not blessings. And they do not feel any gratitude to Almighty God for their entitlements and rights. This lecture centres on the desire of modern elites to exclude any role for religion in Australian public discussion – and perhaps any role for religion at all in any sphere, public or private.

Any statement or other conduct which modern elites do not like is instantly made the subject of a demand that there be an apology. Modern elites consider that what one does not condemn one must be taken to accept. Modern elites have failed to understand that that places them in a difficult position. Some little time ago a particular point of view was publicised with the words: “Burn churches, not gays”. The level of taste which is integral to this contribution can be gauged from the remembrance it summons up – surely inevitably and probably intentionally – of

the fact that the last organisation in the West with any power to burn places of worship was the Nazi regime, and the fact that that regime moved very quickly from burning Jewish synagogues in November 1938 to burning those who attended those synagogues from 1942 onwards – in their millions.

Let us look at a second charmless incident. More recently vandals daubed on the walls of a Baptist church the words “Crucify ‘No’ Voters”. The level of taste involved can be gauged from its deliberate and blasphemous allusion to a central element of Christian belief. This would not easily be seen by some elements in modern elites, who seem to waver between the contradictory contentions that Christ never existed, or that Christ was never crucified, or that the Roman soldiers who attempted the crucifixion behaved with such incompetence that Christ merely fell unconscious and never actually died on the Cross.

Does not the failure of modern elites to condemn these two examples of sub-human behaviour indicate an acceptance by the elites of their propriety and validity?

A related catchcry commonly now heard is “Why don’t religious people stop forcing their opinions on everyone else?” This call for what in Germany in the 1940s would have been called a compulsory inner emigration will be discussed later below.

These phenomena highlight an aspect of modern elites – the relativism of their beliefs and their conduct. It is all right for one element of public opinion to call for the physical destruction of places of worship and the death of those who worship in them. That is treated as merely routine, apparently fit to pass without comment. But it is not seen as all right for those who worship to state publicly the beliefs they hold, and to argue, whether on narrowly religious, or ethical or utilitarian grounds, for or against particular policy positions under general debate. It is all right for the elite to support a particular point of view, but intolerable for anyone else to oppose it. That is what modern elites call ‘tolerance’.

Until recently the approach of modern elites to religion was one of indifference. It is easy to understand how this came to be. The horrors of life in earlier times made it understandable that human beings were strongly attracted to seeking consolation in religious faith and in the hope of a better world after life in this world ended. We forget the extent to which some types of prosperity have become much more common in the West. And we forget how fast this has happened. A century ago the great Dutch historian J. H. Huizinga commenced his work *The Waning of the Middle Ages* as follows, in a chapter entitled “The Violent Tenor of Life”:

To the world when it was half a thousand years younger, the outlines of all things seemed more clearly marked than to us. The contrast between suffering and joy, between adversity and happiness,

appeared more striking. All experience had yet to the minds of men the directness and absoluteness of the pleasure and pain of child-life. Every event, every action, was still embodied in expressive and solemn forms, which raised them to the dignity of a ritual. For it was not merely the great facts of birth, marriage, and death which, by the sacredness of the sacrament, were raised to the rank of mysteries; incidents of less importance, like a journey, a task, a visit, were equally attended by a thousand formalities: benedictions, ceremonies, formulas.

Calamities and indigence were more afflicting than at present; it was more difficult to guard against them, and to find solace. Illness and health presented a more striking contrast; the cold and darkness of winter were more real evils. Honours and riches were relished with greater avidity and contrasted more vividly with surrounding misery. We, at the present day, can hardly understand the keenness with which a fur coat, a good fire on the hearth, a soft bed, a glass of wine, were formerly enjoyed.¹

In the century since Huizinga wrote those words, the contrast between the painful environment of past ages and the gluttonous and sensual milieu of the present has become far more marked. Now indifference based on rising wealth is insidiously damaging to religion. Prosperity has proved a graver foe than persecution. As the world we are in becomes more attractive, the less need is there for contemplating the possibility of some other more perfect world and the less adherence there is to a strict morality. Lord Acton said that “the moral law is written on the tablets of eternity”. Apart from laying down the moral law, religion asks two questions. What is the nature of humanity? What is the destiny of humanity? It tries to transcend the trivial and the worldly. It looks for windows into another world. It may not stress a tragic vision of life. But it does try to stress a serious vision of life. To those satisfied with the pleasures of this world, now so freely available, questioning and searching of these kinds is of no interest.

But members of modern elites are moving away from mere indifference. They are embracing a fanatical anti-clericalism. Some want to destroy faith itself. We know there have been recent persecutions in the Middle East of a kind and on a scale that have not been seen for centuries – rarely under the Ottomans until their treatment of the Armenians, not much under the states which succeeded the Ottoman Empire. Now, however, mass murders and threats of mass murder are disrupting and scattering communities which have lived peacefully in the Middle East for a very

1. J.H. Huizinga, *The Waning of the Middle Ages* (Penguin Books Ltd, transl. Ed. 1922), p. 1.

long time in harmony with their neighbours. We must hope that never happens in Australia. But something which, though less severe, is equally uncompromising is emerging in Australia. Among the elites is developing a hostility to religion which has not been seen in the West since the worst excesses of the French Revolution, or at least the vengeful Premiership of Émile Combes in the early 20th century. The hostility is demonstrated least against Hindus and Buddhists – for they are neither numerous nor highly visible. It is also not much demonstrated against Muslims, despite the threat and actuality of terrorist outrages, perhaps because the Muslim vote is the key to winning and losing parliamentary seats. It is beginning to be demonstrated against Jews. Their numbers are low, but those parts of the elites which respond to electoral hatred for the State of Israel are drifting back into an anti-Semitism which one had thought had been purged from Western life by the horrors of the Second World War and the persecution of Jews in communist eastern Europe and Russia after 1945. No allowance is made for the appalling dilemmas facing Israeli leaders, surrounded as they are by a sea of Muslim hate. And hostility is increasing markedly against Catholics. One of the aphorisms of the great parliamentary leader of the German Centre Party, Ludwig Windthorst, is becoming true again: “Anti-Catholicism is the anti-Semitism of the intellectuals”. But no Christian denomination seems to be exempt from the new de-Christianisation campaign.

Now it is evil to invite anti-religious violence. It is also evil to damage the property of religious institutions. To fail to denounce those evils is to associate oneself with them. The case for the elites is weakened not only by their association with those evils. It is also weakened by their failure to appeal to reason. There is among us here tonight the Reverend Peter Kurti, a licensed Anglican priest interested in the place of religion in Australian public life. He has recently written a remarkable book entitled *The Tyranny of Tolerance: Threats to Religious Liberty in Australia*. I owe a debt to it. For some of his themes underlie this address. In that book he argues that traditionally liberalism aimed to protect individuals against the encroaching power of the state. But this type of liberalism has been replaced. The new liberalism calls for the enervation of religious faith and religious practice. It sees faith as something which is at best an individual subjective profession of taste – a sort of hobby, harmless enough, but only if practised in private. Instead real tolerance extends only to those who are alleged to be victims of discrimination. He says:

In truth, however, this tolerance is not ‘open-mindedness’. It is a form of moralistic relativism concerned with elevating the rights and interests of any who are perceived to be victims of discriminatory or marginalising behaviour.

Tolerance in the name of relativism has, indeed, become its own form of intolerance. We are commanded to respect all difference and anyone who disagrees can expect to be shouted down, silenced or, often, branded a racist. Everyone must be 'tolerant'.²

The modern elites are tyrants of tolerance. They say: "You must listen to what I am going to say. Then you must either praise my virtue or shut up. Because if you try to say you disagree and why, you deserve to be, and you will be, hounded out of all decent society." Thus the tyrants of tolerance pay lip-service, but only lip-service, to freedom of religion as a fundamental human right. Peter Kurti wants to defend freedom of religion. It can be destroyed by persecution in the manner of some Roman emperors or ISIS. It can be destroyed as well by the tactics of the tyrants of tolerance. Section 116 of the Constitution prevents the enactment of any Commonwealth law prohibiting the free exercise of religion. The tyrants of tolerance react to what religious speakers may say with orchestrated vilification, insults, derision, scorn, fake outrage and bullying mockery. That howling down can do as much to prevent the free exercise of religion as any law falling foul of section 116.

In short, modern elites do not demand tolerance. They demand unconditional surrender. They want absolute victory for an uncontested dogma which is unchallengeable – or at all events is not to be exposed to the risk of challenge. The modern elites call for their creeds to be tolerated. Then they call for them to be compulsory. Then they want them to be exclusive. One small saving grace is that the contents of these creeds, dogmatically and absolutely stated though they are, do seem to vary from time to time.

This authoritarian claim overlooks the roles of both courtesy and reason.

In almost every way the last five or six decades have seen a massive change in courtesy, civility and mutual respect. Seats are not given up to the pregnant, the elderly and the infirm on public transport. Travellers are not given immunity from noise made by other travellers. Citizens are not free from noise made by their neighbours. Passersby in suburban streets are tending not to greet each other with the politeness of former times. Public violence and drunkenness is more common. Triviality and loutishness prevail in commercial life, and at all levels of public life from parliamentary processes to community debate.

But there is more wrong with the approach of the elites than discourtesy. Their approach disables them from – makes them incapable of – presenting their point of view, for what it is worth, properly. To shout is not to argue. To censor is not to reason. To bawl is not to engage in persuasion.

2. Peter Kurti, *The Tyranny of Tolerance: Threats to Religious Liberty in Australia* (Connor Court Publishing, 2017), p. 6.

There is a form of persuasion associated with the eighth Duke of Devonshire. So far as he is known now at all, he is best known as the Marquis of Hartington, under which name he sat in the House of Commons for 37 years until 1893. He had the unique distinction of being offered the Prime Ministership on three occasions, in 1880, 1886 and 1887, and each time refusing. The announcement in 1886 of Gladstone's plans to give home rule to Ireland caused the Duke to detach the Whigs from the right wing of the Liberal Party while Joseph Chamberlain led out the Unionist radicals from the left wing. As a much younger man the Duke had been the model for the leading character in Trollope's political novels, Plantagenet Palliser, Duke of Omnium. On 24 March 1908, he died with the words: "Well, the game is over, and I am not sorry." When the news reached the House of Commons that afternoon, the Prime Minister, Sir Henry Campbell-Bannerman, was ill and absent. He was a doomed man; he resigned ten days later, and within a month he too died. The duty of announcing the news of the Duke's death thus fell to Mr H. H. Asquith – then the Chancellor of the Exchequer, shortly to be Prime Minister. How was Mr Asquith to deal with the man whose fragmentation of the Liberal Party had kept it out of office for most of the previous twenty years? He paid him an elegant tribute – and a handsome one. He said that the Duke was "almost the last survivor of our heroic age". The Leader of the Opposition, Mr A. J. Balfour, the Prime Minister before Campbell-Bannerman, attempted to explain the source of the Duke's stature, in a speech which was in its day famous:

I think of all the great statesmen I have known the Duke of Devonshire was the most persuasive speaker; and he was persuasive because he never attempted to conceal the strength of the case against him. . . . What made the Duke of Devonshire persuasive to friends and foes alike was that when he came before the House of Commons or any other Assembly, he told them the processes through which his own mind had gone in arriving at the conclusion at which he ultimately had arrived. Every man felt that this was no rhetorical device, but that he had shown in clear and unmistakable terms the very intimate processes by which he had arrived at the conclusion which he then honestly supported without fear or favour, without dread of criticism, without hope of applause. . . . In the Cabinet, in the House of Commons, in the House of Lords, on the public platform, wherever it was, every man said, 'Here is one addressing us who has done his best to master every aspect of this question, who has been driven by logic to arrive at certain conclusions, and who is disguising from us no argument on either side which either weighed with him or moved him

to come to the conclusion at which he has arrived. How can we hope to have a more clear-sighted or honest guide in the course we ought to pursue?' That was the secret of his great strength as an orator.

The point is that to expose and deal with the difficulties in one's case can be a passport to decisive intellectual success. It is not a technique employed by the elites. They will not concede any difficulty in their case. Or at least they will not concede any right in their opponents to expose any such difficulty.

Another curious feature of modern elites is this. They call themselves liberal and tolerant. Their 'liberalism' and 'tolerance' is the product of a long historical process. Modern liberalism in any genuine sense reveals several key characteristics – in a belief in individual liberty, in the moral equality of individuals, in a legal system based on equal treatment of like cases, and in a representative form of democratic government. In the West, modern liberalism also goes further, in calling for massive public expenditure – on education at all levels, on public health, and on support for the aged, the poor, those incapable of work and those unable to get it. Opinions may differ on what the precise mix of these latter characteristics ideally should be, but there is no real difference about the former key characteristics.

How did this modern ideal of liberalism arise? Out of the very religion which is now the most despised – Christianity. From the time Christ walked the earth in Galilee trends began which though at varying speeds and in different ways and subject to various setbacks developed the modern age. The process has been traced in a fine book written by Sir Larry Siedentop, a man who, like Peter Kurti, is an old friend of mine. So my praise for both of them must be discounted for that fact. Sir Larry Siedentop was brought up in the United States. But he has lived and taught in England for five decades. His book is *Inventing the Individual: The Origins of Western Liberalism*. He points out that before the Greek and Roman republics emerged, society was based on families run by patriarchs. The Greek republics were in effect tyrannies or oligarchies. Rome was originally run by kings, then by a republican oligarchy, then by emperors whose power in the first and last resort rested on military strength. In these societies so-called 'citizens' were few in number. In different ways women, younger sons, slaves, captives and foreigners could enjoy only debased and limited roles. Even a genius like Aristotle viewed slavery as inevitable: "Some are free men, and others slaves by nature."³ Thus natural inequality, and the natural superiority of the few over the many, were basic assumptions. The world was seen as dominated by many inscrutable deities and an uncontrollable and immutable fate.

3. Quoted in Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (Allen Lane, 2014), p. 118.

The advent of Christ revealed different values. He showed a concern for the ill, the socially marginal, the outsider, the destitute. He opposed self-righteousness and hypocrisy. He had no concern to associate with wealth, power or celebrity. His associates were humbler. Many of them were women. He saw little children as heirs to the Kingdom of Heaven. He encouraged a search for the beam in one's own eye before identifying the mote in someone else's. He encouraged his followers not merely to love their friends and neighbours, but also to forgive their enemies. He urged them not to meet violence with violence. The social teachings of Christ were reflected, for example, in the monastic tradition later. Thus in the fourth century St Basil of Caesarea said: "It is God's will that we should nourish the hungry, give the thirsty to drink, and clothe the naked."⁴ They live on in religious charities even to this very day. But above all Christ taught that all human beings were equal before God, and all could enter the kingdom of God.

His followers came to treat his life as a revolutionary and dramatic intervention of the divine into secular affairs. And they saw his role as going beyond the way his enemies saw him – as a rebel against unsympathetic religious leaders and Jewish puppets of Roman governors – to having universal significance for each individual human being. As Paul told the Galatians: "There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female; for you are all one in Christ Jesus."⁵ Paul advocated relying on conscience and good intentions and abandoning the ritual behaviour of the ancient world and the Jews, with its mechanical following of rules and immemorial customs. He urged the exercise of free choice in accepting the gift of grace attained through faith in Christ. Salvation was a matter of personal decision to be resolved between each individual and God. In that sense all were equal. Those equal in the eye of God came to be seen as equal in the eye of the law. For this reason Siedentop asks: "Was Paul the greatest revolutionary in human history?"⁶ And he states: "Through its emphasis on human equality, the New Testament stands out against the primary thrust of the ancient world, with its dominant assumptions of 'natural' inequality. Indeed the atmosphere of the New Testament is one of exhilarating detachment from the unthinking constraints of inherited social rules."⁷ So Tertullian said that Christ had done "one mighty deed . . . – to bring freedom to the human person."⁸ In due course this attracted hostility from the Roman Empire. The persecutions of some Roman Emperors – not just failures like Nero or military dictators like Trajan or desperate rulers like Decius and Valerian trying to save a collapsing state, but objects of modern veneration like the supposedly civilised Marcus Aurelius – assisted the spread of Christianity. As Tertullian also said, the blood of the martyrs was "the seed of the church."⁹ The process was perhaps aided, perhaps

5. Galatians 3:28.

6. Siedentop, *op. cit.*, p. 353.

7. *Ibid.*, p. 353.

8. *Ibid.*, p. 77.

hindered, by the gradual conversion of that somewhat flawed figure, the Emperor Constantine, with his unfortunate identification of church and state. The last battle was fought by the Emperor Julian, who tried to revive paganism, but whose dying words were “Thou hast triumphed, Galilean”. Yet even his goal was not to revive polytheistic paganism as it had been. Instead he wanted to create a new paganism with Christian influences, resting, like Christianity, on “the love of God and of fellow men”, and asserting “charity” as its vocation. He saw the spread of Christianity as resting on “their benevolence to strangers, their care for the graves of the dead and the pretended holiness of their lives”.¹⁰ Even the great Councils of the fourth and fifth centuries prefigured the modern liberal world, as they tried to thrash out fundamental questions in long debates, like a nineteenth century representative legislature.

Now the modern elites – the tyrants of tolerance – in seeking to marginalise or silence Christianity are not only rejecting the cultural tradition of Christianity. Not only are they rejecting a large part of the entire life and history of the nation – because Christianity is so integrated with the national life and history that to annihilate it is to destroy that national life, which can live only in memory. They are also rejecting that fundamental part of the Christian tradition which is the source of the modern world and of their own favoured position within it. They are doing it whether they realise it or not. To do that is to run a risk of returning at least in part to what the Christian tradition replaced. And what it replaced is rule by patriarchs, or aristocracies, or oligarchical castes, heavily based on slavery, involving the subjugation of women, captives and younger sons and not recognising the status of aliens. It is to drift towards the opposite of Christianity. Above all, the modern elites welcome tyranny. Why not? They are the tyrants of tolerance themselves, in tolerating only their mercurial views alone, even though those views change with the fickleness of fashion.

The Girondin leader Vergniaud said that the French Revolution, like Saturn, was devouring its own children. Like other Girondin leaders and many other revolutionary leaders from Danton and Robespierre down, he died under the guillotine. In Australia we see the reverse. The children of the Christian revolution, after denying that it was their father, are devouring the revolution.

Perhaps the last parts of the argument go too far. Members of modern elites would incredulously deny that their protected position owed anything to Christianity. But some of them would accept, perhaps, that that protected position owes something to classical secular liberalism. Liberalism endeavoured to create governmental structures which protected a private sphere of individual freedom. In that sphere, religious belief could survive. But some members of modern elites depart from their

9. *Ibid.*, p. 80.

10. *Ibid.*, p. 89.

own origins in secular liberalism. By preventing any public expression of religious thought through ridicule and bullying, they tend to cause religion to wither away even in the private sphere. What can have no public expression will eventually cease to have any private existence. Thus the elites seek to destroy their inheritance from secular liberalism.

Sometimes the stance of the elites is defended by contending that there is no element of religious discrimination or persecution involved in requiring or inducing those of religious faith not to proselytise, manifest it publicly, or employ it as a source for the discussion of public issues, so long as they are at liberty to practise their faith in private. A bench of the United States Court of Appeals for the Seventh Circuit (Flaum CJ, Posner and Williams JJ) has denied this. The opinion, written by Judge Posner, pointed out that refugees are entitled to claim asylum on the basis of religious persecution even if they can escape the notice of their persecutors by concealing their religion. The Court said:

Christians living in the Roman Empire before Constantine made Christianity the empire's official religion faced little risk of being thrown to the lions if they practiced their religion in secret; it doesn't follow that Rome did not persecute Christians . . . ¹¹

Another argument which might be advanced for the elites, though it does not appear to have been, is that silencing religious persons by forcing them entirely out of the public arena is not discrimination, because it is not contrary to the *Racial Discrimination Act 1975* (Cth). Section 9(1) of the Act provides:

It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

That contains no reference to religion. And in the highly controversial section 18C, paragraph (1)(b), selects as a requirement for unlawfulness the doing of an act “because of the race, colour or national or ethnic origin of [a] person or of some or all of . . . people in [a] group” – but not religion. If section 18C is to stay, why is religion not given the protection it affords? Perhaps this non-protection of religion is to be explained because the constitutional validity of section 9(1) probably can rest solely

11. *Muhur v Ashcroft*, 355 F 3d 958 at 961 (7th Cir, 2004).

on section 51(xxix) of the Constitution. That gives the Commonwealth power to make laws about 'external affairs'. That has been read as including treaties. As a result of once controversial but now generally accepted decisions of the High Court, a statute giving effect to a treaty is valid under section 51(xxix) even though no other head of legislative power supports it. The treaty on which the *Racial Discrimination Act* is based defines 'racial discrimination' as meaning "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life"¹². Again, there is no reference to religion. That may explain why the Act does not prevent religious discrimination.

It is true that section 351 of the *Fair Work Act 2009* (Cth) prohibits employers from taking adverse action against an employee on religious grounds, subject to exceptions for certain actions taken against staff members of religious institutions. Outside that field religious persons are left without protection, unless it is to be found in state law. However, in the *Anti-Discrimination Act 1977* (NSW), for example, there is no protection for religious activity as such.¹³ There are protections for the incitement of hatred on the ground of race in section 20C(1). 'Race' is defined as including "colour, nationality, descent and ethnic, ethno-religious or national origin". This leaves out religious origin other than "ethno-religious" origin. This entire issue of anti-religious discrimination and of protections against it may become important, of course, if the 'Yes' vote in the current plebiscite is in the majority.

So far as the exercise of state power by the legislature or the judiciary is concerned, it cannot be said yet to have threatened the interests of religious persons and their institutions as much as some of the elites would like. There are qualifications to that. One thinks of Archbishop Porteous. One thinks of the Victorian Court of Appeal's construction of some Victorian legislation.¹⁴ The most immediate threat is from the conduct of the elites using methods other than the force of law itself. But a threat to religious institutions may not stop there. It may eventually come from the law itself. If it does, it may begin a trend which is likely to extend to many other institutions whom the elites and the state which they tend to dominate come to dislike. That is why even those who are not members of religious institutions and have no particular sympathy for them ought to fear the current war on religious faith.¹⁵ But if the elites were able to proceed by force of law – whether by laws specifically directed against their religious enemy or by laws which have a damaging impact on that enemy unless protections are provided – some may think that the time for talking alone may have passed. Some may think that the time for resistance may have come. Some may see

12. *International Convention on the Elimination of All Forms of Racial Discrimination* (1965), article 1 (1).

13. However, section 56 does provide that nothing in the Act affects the ordination of priests, the training of priests, the appointment of other persons by religious bodies and other act or practice of a religious body that conforms to the doctrines of the religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

14. *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* (2014) 50 VR 256; [2014] VSCA 75.

15. Peter Mulherin and Simon P. Kennedy, "Archipelago or Landmass? Voluntary Associations, Civil Society and the Health of Liberal Democracy", *Policy* 33 (2) 2017, p. 40.

it as necessary to deliver sermons attacking unjust laws with sufficient power to threaten the life of governments, as Cardinal von Galen did against Nazi involuntary euthanasia, at the price of incarceration in a concentration camp. Some may see it as necessary to endure imprisonment and exile as Cardinal Mindszenty did for his stand against Communist oppression and expropriation in Hungary after 1945. Some may see it as necessary to endure imprisonment and expropriation, as thousands of priests and churches did for opposing Bismarck's anti-Catholic laws. Australian law now prevents any repetition of the fate of St Ignatius of Antioch. But perhaps once again some persecution – less brutal physically, but just as real – will be the seed of the church.

Let us return to the man honoured by this lecture. Had Glynn lived to see the days which a pessimist may consider to be coming, how would he have reacted to them? Probably with clear-headedness, but also with fire and passion.

PM Glynn Institute

The PM Glynn Institute was established by Australian Catholic University in 2016 to provide the Catholic community with a standing capacity to analyse public policy issues of concern not only to the Catholic Church and its services, but to the wider Australian community as well.

The PM Glynn Institute is named after Patrick McMahon Glynn (1855-1931). One of the founders of the Commonwealth of Australia, he contributed to public life as a barrister, a writer, and parliamentarian who served as a minister in three Federal governments.

The Institute's work is shaped by the proposition that understanding the contemporary world also means considering religion and the foundations of faith as important and enduring features of the social and political landscape, both in Australia and globally.

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RELIGIOUS 'TOLERATION'
IN MODERN AUSTRALIA:
THE TYRANNY OF
RELATIVISM

J. D. HEYDON

THE INAUGURAL
PM GLYNN LECTURE
ON RELIGION, LAW AND
PUBLIC LIFE

PM Glynn Institute
Australian Catholic University

2017

“... even those who
are not members
of religious
institutions and
have no particular
sympathy for them
ought to fear the
current war on
religious faith.”