Chapter 5

The Courts and the Marriage Debate

Mark Fowler

The national discussion on same sex marriage has recently turned to the implications for religious freedom.[1] In July 2015, Australian Human Rights Commissioner Tim Wilson claimed:

> The question of religious freedom has not been taken seriously. It is treated as an afterthought. We cannot allow a situation where the law is telling people they have to act against their conscience and beliefs.[2]

In this paper, I aim to consider various ramifications of the proposal that the *Marriage Act* 1961 (Cth) be amended to permit marriage to be between persons of the same sex across various areas of Australian law, including solemnisation and dissenting ministers within religious institutions, solemnisation and celebrants (adopting, for the purposes of illustration, Bill Shorten's proposed private member's legislation), anti-discrimination law and the supply of services, the charitable endorsement of religious institutions and government grants. I will also consider certain of the philosophical and historical threads unique to the Western tradition that I consider to be relevant, including the independence of the church from the state, freedom of speech, the development of the freedom of individual conscience and liberal autonomy.

Finally, I place the discussion within the philosophical discourse concerning the prevalence of the right over visions of the common good and consider whether Aristotelian theory may also make a contribution.

Solemnisation

Freedom to act in accordance with one's conscience (including as informed, or burdened, by religious conviction) is at the root of the post-Enlightenment vision of the modern liberal state. At the centre of this debate is the distinction between the holding of a belief privately and the right to manifest that belief in public through actions. In *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*,[3] the Chief Justice of the High Court of Australia, Sir John Latham, made clear that the protections to religious freedom contained in section 116 of the Constitution extend not only to belief, but also to manifestation of belief, saying, "the section goes far beyond protecting liberty of opinion. It protects also, acts done in pursuit of religious belief as part of a religion."[4] Here there is prospect that, to some degree, liberal autonomy and freedom of religion might find themselves common bedfellows.

In 2013, the High Court unanimously held that there was no constitutional impediment to Parliament legislating to provide for same sex marriage.[5] There is an argument that that aspect of the High Court's decision was *obiter dictum*, a matter to be addressed later. In those Western jurisdictions that have permitted same sex marriage, exemptions for religious ministers from the requirement to perform same sex weddings have generally been allowed. If these exemptions are given in recognition of principles of religious freedom and liberal autonomy, we may question the rationale for limiting any exemption solely to marriage celebrants in the employ of a religious

institution with whom they find consistency with their own convictions on the question of marriage.

The Shorten Proposal as an Illustration

It is helpful for the purposes of illustration to consider one of the current proposals for amending the definition of marriage. I adopt the *Marriage Amendment (Marriage Equality) Bill* 2015 (Cth) introduced by Bill Shorten as a private member's Bill (the "Shorten Bill").[6] Section 47 of the *Marriage Act* 1961 (Cth) provides:

> **Ministers of religion not bound to solemnise marriage etc.**
> Nothing in this Part:
> (a) imposes an obligation on an authorised celebrant, being a minister of religion, to solemnise any marriage; or
> (b) prevents such an authorised celebrant from making it a condition of his or her solemnising a marriage that:
> (i) longer notice of intention to marry than that required by this Act is given; or
> (ii) requirements additional to those provided by this Act are observed.
> Section 5 of the *Marriage Act* 1961 (Cth) defines "minister of religion" as follows:
> "minister of religion" means:
> (a) a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation; or
> (b) in relation to a religious body or a religious organisation in respect of which paragraph (a) is not applicable, a person nominated by:
> (i) The head, or the governing authority, in a State or Territory, of that body or organisation; or
> (ii) Such other person or authority acting on behalf of that body or organisation as is prescribed;
> to be an authorised celebrant for the purposes of this Act.

The Shorten Bill proposes to alter the definition of marriage at section 5 of the *Marriage Act* 1961 (Cth) to be "the union of two people to the exclusion of all others, voluntarily entered into for life." [7] The Bill leaves unaffected the existing exemption granted to "a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation."[8]

Objecting ministers within a religious body without a position on same sex marriage

A comparison with existing jurisdictions serves to illustrate certain concerns with such an approach. With regard to New Zealand, Ahdar has argued that the exemption granted to any "celebrant who is a minister of religion recognised by a religious body enumerated in Schedule 1" [9] fails to exempt those religious ministers "whose more heterogeneous denomination is divided on gay marriage who may not be able to point to any authoritative ruling, precept, custom or teaching that states that only heterosexual marriage is acceptable." [10]

Arguably, this same issue would apply to the Shorten Bill. A dissenting minister must be able to claim that they have authority to solemnise weddings in accordance with the "rites or customs of the body or organisation". Where, on a change of the legal definition of marriage to include same sex couples, the rites or customs are to be determined by canons which are read within the wider context of the legal system in which they are placed, references to "marriage"

within those canons could reasonably be read, in the absence of any official resolution to the contrary, to include same sex marriage. A minister who wished to decline the solemnisation of same sex weddings would then need to argue the absurd proposition that they hold "authority to solemnise marriages in accordance with the rites or customs of the body or organisation", but that they are under no obligation to perform a same sex wedding ceremony, even though their canons permit such a ceremony. As a result, it is entirely conceivable that those ministers who hold a traditional view of marriage within such a denomination may seek to have that view adopted by the denomination in order to enliven the benefit of the exemption, giving rise to the potential for divisive internal debate.

Dissenting ministers within a religious body supporting same sex marriage

Concern not only arises for those ministers whose institution has not reached a position on same sex marriage. In New Zealand, the tying of belief to the associated denomination has the consequence that any conservative minister serving within a religious institution that has permitted same sex marriages to be performed by clergy would not be protected by the exemption. For many, this may necessitate a change in denomination, with potential implications being contested congregational property rights and social upheaval for congregants.

As noted above, under the Shorten Bill a dissenting minister of religion within a religious body would need to satisfy the test that they be "a person recognised by a religious body or a religious organisation as having authority to solemnise marriages in accordance with the rites or customs of the body or organisation."[11] To rely on the exemption, a minister must accept the rites and customs of the organisation concerning the solemnisation of same sex marriage. For many traditional ministers within a religious body that permits same sex marriage, this may amount to an acceptance contrary to conscience. This would be the case regardless of whether the religious body's precepts require the altered doctrine to be accepted by the minister. The alternative then is to conclude that religious freedom protections should be based upon either (a) the rites or customs of the affiliated religious denomination, or (b) the genuine religious conviction of the individual. Whether a minister may perform a same sex marriage ceremony would then continue to be an internal matter for each religious body, but whether any denomination has permitted such would not concern the religious minister (at least for the purposes of the performance of wedding ceremonies), whose eligibility for the exemption would be defined against his or her own conviction.

Celebrants

Furthermore, in the United Kingdom and in New Zealand, and also under the Shorten Bill, religious celebrants, registrars or commissioners are not granted an exemption, despite the fact that such celebrants may have a religious conviction that would preclude them from solemnising a same sex marriage. The answer to this complaint in New Zealand (which answer is similar to that given in the United Kingdom) has been that independent celebrants, in contrast to ministers of religion, are appointed by the Government "to perform a public function, not to promote their own religious or personal beliefs" [12] and should therefore extend the policy of the state.

The case of Lillian Ladele, a registrar in the United Kingdom who objected to a requirement that she register civil partnerships, is salient to this discussion. In 2013 the European

Court of Human Rights (ECHR) held that the London Borough of Islington had not breached Ms Ladele's religious freedom rights by requiring that she register civil partnerships as an expression of its policy of protecting equal opportunities for persons of differing sexual orientation. Religious freedom is protected pursuant to Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention"), which provides:

> freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

The ECHR recognised that Ms Ladele's contention that she had been discriminated against on the basis of her religion was relevant to the anti-discrimination protection of Article 14, and that "the local authority's requirement . . . had a particularly detrimental impact on her because of her religious beliefs." [13] Notwithstanding this, the matter to be determined was "whether the policy pursued a legitimate aim and was proportionate." The ECHR held that the Convention allows state parties a "wide margin of appreciation" permitting states to reach their own determination as to what comprises a legitimate aim and what comprises the appropriate balance between competing rights, and in this case the determination by, first, the local authority, the UK Employment Appeal Tribunal and, then, the UK Court of Appeal, did not exceed that permissible margin. In their comment on the matter, given before it had reached the ECHR, Ahdar and Leigh observed: "It is hard to avoid the conclusion that the higher courts allowed an employer in effect to prioritize one stream of equality law (sexual orientation) over another (religion or belief) rather than to hold the two in balance."[14]

In light of the ECHR ruling, and as a means to preserve the religious freedom of registrars, David Burrowes, a Conservative member of Parliament, introduced an amendment during the second reading of the *Marriage (Same Sex Couples) Act* 2013 in the House of Commons which would have permitted registrars to refuse to solemnise same sex marriages where they had a conscientious objection based on a "sincerely-held religious or other belief." The amendment required that registration authorities ensured that "there is a sufficient number of relevant marriage registrars for its area to carry out the functions of relevant marriage registrars." The amendment was not pressed, with opponents arguing the same case as made in New Zealand, namely, that servants of the state cannot opt out of state policies. Such findings are not irrelevant to Australia, to the extent that Australian courts may have regard to the decisions of international bodies, courts and tribunals in their consideration of fundamental rights and freedoms.[15]

Judicial Treatment of Same Sex Marriage

Australia

As noted above, in 2013 the High Court of Australia unanimously held that there was no constitutional impediment to Parliament legislating to provide for same sex marriage,[16] avoiding the risk of the later accusations of judicial activism levelled by the minority justices on the Supreme Court of the United States on the basis that the decision removed the question over the legislating of same sex marriage from the democratic process (as further outlined below).

Although the substance of the criticisms outlined by the minority dissenting judges of the United States Supreme Court did not apply to the High Court's decision, the High Court has not escaped criticisms of judicial activism on other grounds. Anne Twomey has said the High Court ruling that there was no constitutional impediment to Parliament legislating to provide for same sex marriage was handed down "in an activist manner, going beyond the arguments initiated by the parties and what was necessary to decide the case and developing a new approach to constitutional interpretation." [17]

The Court held that, in order to determine whether the ACT law providing for same sex marriage was inconsistent with the Commonwealth Constitution and the *Marriage Act* 1961 (Cth), it was necessary to decide whether section 51(xxi) permits the Commonwealth Parliament to enact "a law with respect to same sex marriage because the ACT Act would probably operate concurrently with the Marriage Act if the federal Parliament had no power to make a national law providing for same sex marriage." [18] None of the Commonwealth, the ACT nor Australian Marriage Equality, as amicus curiae, argued that such a determination was necessary. Indeed, as Twomey has noted:

> It is hard to see how this could be the case, given that the court had earlier stated that the object of the ACT Act was to "provide for marriage equality for same sex couples not for some form of legally recognised relationship which is relevantly different from the relationship of marriage which the federal laws provide for and recognise" (at [3]). If this is so, then how could an ACT law establishing the status of "marriage" for same sex couples, operate concurrently with the Marriage Act 1961 (Cth), if both the Constitution and the Marriage Act defined marriage exclusively as unions of people of the opposite sex and the Commonwealth law covered the field of "marriage"?[19]

If Twomey's arguments are accepted, this may lead to the conclusion that the High Court's determination on the constitutional sanction of same sex marriage is *obiter dictum*, influential, however, non-binding. Parkinson and Aroney have maintained that, in making its decision without reference to the submissions of a contradictor on the point of whether the Commonwealth can enact a law with respect to same sex marriage, "it is at least arguable that the Court failed to adhere to the standards of legal reasoning that it justifiably expects of lower courts."[20] They provide a lengthy analysis of the consequences of the new definition of marriage and suggest alternative arguments contrary to the High Court's reasoning that may have been posed by a hypothetical contradictor on the basis of existing authority.

European Court of Human Rights

Notwithstanding the legalisation of same sex marriage within other jurisdictions, concerns have been expressed over attempts to remove even the existing limited legislated exemptions for religious ministers.[21] In the United Kingdom, it is illegal for a member of the Anglican clergy to solemnise a same sex marriage.[22] This prohibition is an offshoot of the status of the Anglican Church as the established church of England, and was enacted to reflect the doctrine of the Church at the time of enactment. A month after its introduction into law one couple declared their intention to take the Anglican Church to court to force it to perform their marriage within an Anglican parish.[23] They have indicated that, ultimately, the determination may be made by the ECHR.

It is difficult to anticipate the outcome if such an application were to proceed to the ECHR. In 2010, the ECHR upheld the application of the doctrine of the "margin of appreciation" to Austria's refusal to marry a same sex couple, finding that there was no right to same sex marriage under the European human rights charters. Interestingly, in doing so, the Court held:

> The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes.[24]

It appears, then, that the Court left open the option to recognise a right to same sex marriage when a majority of European states had enacted legislation for same sex marriage.[25] As the Court did not consider the interplay of the right to same sex marriage with the right to religious freedom, it is not known how it would respond to an application that the Anglican Church's inability to offer same sex marriages breached Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which Article protects the "enjoyment of the rights and freedoms set forth in [the] Convention . . . without discrimination."

United States

The concern with social change embarked upon by judicial fiat is that it has the potential to be deeply divisive, even more so where such change is made to a foundational historical social institution in respect of which deeply felt religious and personal convictions are held. These concerns were expressed by several justices of the United States Supreme Court in their dissenting opinions in *Obergefell v Hodges*.[26] In that decision, the five judge majority held that the United States Constitution grants same sex couples the right to marry, with the effect that any State that does not include same sex couples within their definition of marriage is acting unlawfully. They did so on four primary grounds: (1) "individual autonomy"; (2) that such "safeguards children and families"; (3) that marriage gives access to "an expanding list of governmental rights, benefits and responsibilities"; and (4) that the right to marry "supports a two-person union unlike any other in its importance to the committed individuals."

All the dissenting justices highlighted their concerns for American democracy. Justice Antonin Scalia went so far as to pronounce that "[a] system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy."[27] Justice Scalia remarked that "to allow the policy question of same sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a principle even more fundamental than no taxation without representation: no social transformation without representation."[28]

The Chief Justice of the Supreme Court, John Roberts, saw a parallel with the still contentious 1973 decision legalising abortion, writing:

> By deciding this question under the Constitution, the Court removes it from the realm of

> democratic decision. There will be consequences to shutting down the political process on an issue of such profound public significance. Closing debate tends to close minds. People denied a voice are less likely to accept the ruling of a court on an issue that does not seem to be the sort of thing courts usually decide. As a thoughtful commentator observed about another issue [abortion], "The political process was moving . . ., not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting. Heavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict."[29]

As a consequence of the Supreme Court's decision, each State will now need to give consideration to the scope of recognition given to the First Amendment's protection of religious freedom. As Chief Justice Roberts pointed out:

> Federal courts are blunt instruments when it comes to creating rights. They have constitutional power only to resolve concrete cases or controversies; they do not have the flexibility of legislatures to address concerns of parties not before the court or to anticipate problems that may arise from the exercise of a new right. Today's decision, for example, creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is – unlike the right imagined by the majority – actually spelled out in the Constitution. Amdt. 1.
> Respect for sincere religious conviction has led voters and legislators in every State that has adopted same-sex marriage democratically to include accommodations for religious practice. The majority's decision imposing same-sex marriage cannot, of course, create any such accommodations.[30]

Supply of Services and Discrimination Law

International experience to date

Chief Justice Roberts' comments lead us to consider the religious convictions of those various other individuals, in addition to celebrants, who may be called upon to supply services to same sex marriages. In these we might include caterers, photographers, musicians, florists, operators or hirers of reception halls, wedding planners or advisory services and operators of bridal or honeymoon suites. Our attention should also be directed to other service providers engaged in areas not directly related to a wedding ceremony, such as fertility treatment, student accommodation and marriage or relationship counselling, programs, courses and retreats.

Whilst we have argued that the sanctity of liberal autonomy is a central protection offered to the individual within the modern state, Michael Sandel warns that basing religious freedom on a voluntarist conception of the liberal ideal is not a strong foundation for religious freedom as "it confuses the pursuit of preferences with the exercise of duties and so forgets the special concern of religious liberty with the claims of conscientiously encumbered selves."[31] In his discussion of the Supreme Court's treatment of conscientious objection to military service, Sandel writes:

> The point of the exemption, according to the Court, is to prevent persons bound by moral duties they cannot renounce from having either to violate those duties or violate the law. This aim is consistent with Madison's and Jefferson's concern for the predicament of persons claimed by dictates of conscience they are not at liberty to choose. As the Court wrote, "the painful dilemma of the sincere conscientious objector arises precisely because

> he feels himself bound in conscience not to compromise his beliefs or affiliations."[32]

In his dissenting opinion, Chief Justice Roberts wrote:

> [h]ard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage – when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples…. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.[33]

The Supreme Court may soon have an opportunity to consider Chief Justice Roberts' concerns, with a Colorado baker who refused to supply a wedding cake to a same sex couple currently in the Colorado Court of Appeals. The same sex couple in that matter have flagged their intention to consider taking the matter to the Supreme Court if the baker's free speech assertions are upheld.[34]

A selection of existing disputes involving service providers within the United States serves to illustrate the propensity of the issue towards litigation:

1. In Washington State, Barronelle Stutzmann was successfully sued in the Benton County Superior Court for declining a request to provide flowers for a gay wedding.
2. In Vermont, Catholic innkeepers were sued after declining to host a wedding reception.
3. In New Mexico, a photographer was found guilty of unlawful discrimination and had costs awarded against her for declining to photograph a "commitment ceremony".[35]
4. In Illinois, the owners of a bed and breakfast face a lawsuit for refusing to host a civil union ceremony.

These concerns are not limited to the United States. In 2013 the Supreme Court of the United Kingdom ruled that the refusal to offer double bed accommodation to a same sex couple breached a regulation prohibiting discrimination on the grounds of sexual orientation.[36] In a decision that was subsequently overturned, a tribunal of the United Kingdom ruled that a Catholic adoption agency which had refused to place children with same sex couples breached the regulations governing adoption services.[37] It is to be noted that these religious freedom concerns extend not only to corporate providers or the operators of small businesses, but also to employees within businesses who are asked to facilitate the supply of services.

The question of the religious freedom rights of entities that operate in the commercial sphere is a key facet of this discussion. The issue concerns the weight accorded to rights of associational freedom, the value of pluralism in belief and expression within the market, and the permitted reach (and integrity) of religious conviction within our society. Noting the recent example of the Catholic Church's withdrawal from adoption services in Boston, the potential for market failure or distortions, and resulting delays in services arising from increased pressure on existing agencies may also be relevant. In the American context, Lupu and Tuttle have noted that "[i]f religious organizations withdraw as providers of such services, the social costs might be considerable. In non-profit markets for social services, we have little confidence that other providers will expand, or new providers will enter, to pick up the slack."[38]

The decision in 2014 of the US Supreme Court in *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al* ("*Hobby Lobby"* case) may signal a new approach to religious freedom in the commercial space in the United States, where the Court held that closely

held corporations can assert religious freedom rights, proclaiming "[f]urthering their religious freedom also 'furthers individual religious freedom' ."[39] There is reason to believe that these issues might also be particularly pertinent to Australia, where, for historical reasons, faith-based organisations have a particular predominance in the charitable services market.[40]

Prospects for Australia?

So what weight does Australian law place upon the exercise of religious freedom in the context of the supply of goods and services? All Australian jurisdictions that prevent discrimination have enacted provisions that endeavour to "balance" religious freedom with the right to freedom from discrimination. Foster, however, concludes that "the only major provision in anti-discrimination legislation designed to provide protection for religious freedom for general citizens (as opposed to religious organisations or 'professionals') is contained in the law of Victoria."[41] Even this provision has been construed very narrowly. The Victorian Court of Appeal, in 2014, ruled that a Christian Youth Camp had breached Victorian law by refusing to take a booking from a group of same sex attracted individuals.[42] Central to that decision was Justice Maxwell's determination that, owing to the commercial nature of the operations undertaken by Christian Youth Camps, it could not rely upon the exemption:

> The conduct in issue here was an act of refusal in the ordinary course of the conduct of a secular accommodation business. It is not, in my view, conduct of a kind which Parliament intended would attract the attention of s 75(2). Put simply, CYC has chosen voluntarily to enter the market for accommodation services, and participates in that market in an avowedly commercial way. In all relevant respects, CYC's activities are indistinguishable from those of the other participants in that market. In those circumstances, the fact that CYC was a religious body could not justify its being exempt from the prohibitions on discrimination to which all other such accommodation providers are subject. That step – of moving from the field of religious activity to the field of secular activity – has the consequence, in my opinion, that in relation to decisions made in the course of the secular undertaking, questions of doctrinal conformity and offence to religious sensitivities simply do not arise.[43]

The decision highlights the need to review the balancing provisions in both Commonwealth and State discrimination legislation to ensure sufficient protections are provided not only to religious institutions but also businesses and individuals. In the absence of such a review, and on the reasoning of the Court in *Christian Youth Camps v Cobaw*, the freedom of persons of religious conscience to refrain from the provision of services to same sex couples will not be recognised at law outside of Victoria, and even in Victoria that freedom is severely limited.

Writing on anti-discrimination law, albeit in the context of multiculturalism, Parkinson emphasises the importance of the religious freedom of minority communities to social cohesion:

> At the heart of the matter is whether majorities, as expressed through their parliamentary representatives, will allow to minorities the freedom to be different – the freedom to build their own communities through schools, charitable organisations and other groupings, and the freedom to uphold their own moral values. The freedom to discriminate between right and wrong, according to the precepts of the religion, is fundamental to the cohesiveness of religious communities . . . .

> Arguably, the health of a society depends upon the health of its mediating structures – those institutions or organisations which stand between the family and the state and which provide care and support for those in need. Participating in religious activities is one way in which people develop social networks . . . . A healthy multiculturalism allows minority communities the freedom to be different – the freedom to have different beliefs, the freedom to have different moral standards, the freedom to believe in absolute truths, the freedom to debate with others. On that freedom to be different and for different communities to have different values, the health of our society depends.[44]

Multiculturalism and pluralism within Australia have arguably taken on a unique local form, stemming in part from our continuing character as a society continually welcoming and seeking to integrate new migrant communities. For many members of these communities, their religious identity often assumes an important place in their own efforts towards integration. These factors add their own dynamics to the discussion, and also weight to the argument that religious freedom protections require heightened attention in Australia.

Charitable endorsements

I now wish to turn to consider the possible effect of legislating for same sex marriage on the existing regime for the endorsement of charitable institutions within Australia. The common law requires that charities conform to public policy.[45] This requirement has found various expressions across other common law jurisdictions.

United States

In *Obergefell v Hodges*,[46] Chief Justice Roberts in dissent stated that the tax exempt status of religious institutions in the United States that opposed same sex marriage "would be in question," based on the reasoning of the Court in *Bob Jones University v United States*.[47] In doing so, he referred to the following exchange between Justice Alito and the Solicitor General for the United States Department of Justice appearing as amicus curiae during the proceedings:

> JUSTICE ALITO: Well, in the Bob Jones case, the Court held that a college was not entitled to tax-exempt status if it opposed interracial marriage or interracial dating. So would the same apply to a university or a college if it opposed same-sex marriage?
> SOLICITOR GENERAL VERRILLI: You know, I -- I don't think I can answer that question without knowing more specifics, but it's certainly going to be an issue. I -- I don't deny that. I don't deny that, Justice Alito. It is -- it is going to be an issue.

In the *Bob Jones University* decision the Supreme Court held that a university that refused to enrol persons in an interracial marriage failed to meet the requirement under the Internal Revenue Code that "an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy" (basing such in part on the seminal House of Lords' decision in *Pemsel's case*)[48] and the requirement at common law that the "purpose of a charitable trust may not be illegal or violate established public policy."[49] Whilst there are distinctions in the law of charities between the United States and Australia, both jurisdictions have adopted the decision of the House of Lords in *Pemsel's case* and, *prima facie*, I cannot point to any distinction that is material to the question of whether an institution's position on same sex marriage would

be considered to be relevant to a determination of whether it continues to meet the test that charitable institutions conform with public policy.

New Zealand

In 2013 the New Zealand Charity Board deregistered Family First New Zealand, an entity established to promote a traditional view of marriage. One of the stated grounds, amongst others, for that deregistration was characterised by Justice Collins as follows: "Family First's perspective about the concept of a family did not have a self-evident benefit to the public. In this sense, the Charities Board said Family First's view about the role of families was 'controversial'. " In so ruling the Charities Board rejected Family First's arguments that New Zealand's international obligations and domestic law favoured its definition of the "natural family".

On 30 June 2015, the High Court of New Zealand upheld Family First's appeal and ordered the Charities Board to reconsider its decision. Justice Collins, however, clarified that in so doing he had not reached a determination on whether the activities of Family First were for the public benefit:

> [87] In this respect, I believe there is force to the submissions of Mr McKenzie QC, counsel for Family First. He argued that Family First's purposes of advocating its conception of the traditional family is analogous to organisations that have advocated for the "mental and moral improvement" of society.
> [88] In recognising the strength of Mr McKenzie's submission, I am not suggesting the Charities Board must accept Family First's purposes are for the benefit of the public when it reconsiders Family First's case.
> [89] I am saying, however, that the analogical analysis which the Charities Board must undertake should be informed by examining whether Family First's activities are objectively directed at promoting the moral improvement of society. This exercise should not be conflated with a subjective assessment of the merits of Family First's views. Members of the Charities Board may personally disagree with the views of Family First, but at the same time recognise there is a legitimate analogy between its role and those organisations that have been recognised as charities. Such an approach would be consistent with the obligation on members of the Charities Board to act with honesty, integrity and in good faith.[50]

The case concerns the separate requirement at law that a charity be for the public benefit, as opposed to the requirement that a charity's purposes conform to public policy, and illustrates the continuing uncertainty in relation to the question of whether an entity that holds a traditional view of marriage can fulfil the requirements imposed upon charities.

Canada

In *Everywoman's Health Centre Society (1988) v The Queen*, Decary JA stated the public policy test as requiring conformity to "definite and somehow officially declared and implemented public policy." [51] In *Canada Trust Co. v. Ontario Human Rights Commission* [52] a trust settled to provide scholarships to persons who were needy, white, of British parentage or nationality and Protestant was held to be contrary to public policy. Tarnopolsky JA based his decision on the principle that "public trusts which discriminate on the basis of distinctions that are contrary to public policy must now be void." [53] Robins JA agreed:

> To perpetrate a trust that imposes restrictive criteria on the basis of the discriminatory notions espoused in these recitals according to the terms specified by the settlor would not, in my opinion, be conducive to the public interest. The settlor's freedom to dispose of his property through the creation of a charitable trust fashioned along these lines must give way to current principles of public policy under which all races and religions are to be treated on a footing of equality and accorded equal regard and respect.[54]

It was perhaps this context which in 2005 led then Leader of the Opposition, Stephen Harper, to seek amendments to Bill C-38, which proposed the legalisation of same sex marriage. His position was that such amendments were necessary to ensure religious institutions will not have their charitable status revoked on the basis of their position on same sex marriage. Harper offered the following:

> Parliament can ensure that no religious body will have its charitable status challenged because of its beliefs or practices regarding them. Parliament could ensure that beliefs and practices regarding marriage will not affect the eligibility of a church, synagogue, temple or religious organization to receive federal funds, for example, federal funds for seniors' housing or for immigration projects run by a church. Parliament could ensure that the Canadian Human Rights Act or the Broadcasting Act are not interpreted in a way that would prevent the expression of religious beliefs regarding marriage.[55]

The proposed amendments concerning charitable status were not adopted by the then Government.

Australia

The common law requirement that a charity's purposes not be contrary to public policy was retained on the introduction of the *Charities Act* 2013 (Cth) by section 11(a).[56] That subsection provides:

> In this Act:
> disqualifying purpose means:
> (a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or
> Example: Public policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security.
> Note: Activities are not contrary to public policy merely because they are contrary to government policy.

For the purposes of the current analysis, a helpful place to start is the public information guidance on "Advocacy by Charities" [57] recently released by the Australian Charities and Not-for-profits Commission (ACNC). After restating the contents of section 11(a) it provides the following:

> Example – unlikely to be contrary to public policy
>
> A charity with a charitable purpose of promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia has a long-running campaign promoting a Bill of Rights as a way of achieving this purpose. This is contrary to government policy, but upholds public policy such as the rule of law and a constitutional

system of government. Therefore it is not an activity that demonstrates a disqualifying purpose.

An organisation that shows a pattern of engaging in or promoting activities that are contrary to public policy may demonstrate an unlawful purpose.

Example – likely to be contrary to public policy

A charity with the charitable purpose of advancing culture encourages new and emerging writers. In doing so, the charity regularly publishes material by new writers advocating anarchy and the end of democratic government. Such a pattern of conduct may demonstrate a purpose of promoting activities that are contrary to public policy.

Whilst the statements provided are reflective of the ACNC's position, the *Charities Act* 2013 (Cth), in so far as it purports to effect an enshrinement of the common law, requires the law to be interpreted against existing common law principles. Having analysed the foregoing Canadian cases, Dal Pont concludes that, at common law, "it is conceivable that associations that, pursuant to their objects, deny entry to persons in contravention of anti-discrimination legislation may forfeit charitable status on public policy grounds."[58] This proposition would be particularly pertinent to those religious charities that provide commercial services, akin to the plaintiff in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*,[59] previously analysed.

To demonstrate the salience of a charity's position on same sex marriage to charitable status, under the separate subheading of "unlawful activity," the ACNC guidance also contains the following statement:

Example – likely to be unlawful purposes

A charity that has a charitable purpose of advancing social or public welfare by providing aged care and accommodation routinely refuses to provide these services to same-sex couples. Such a refusal amounts to unlawful discrimination, and a regular pattern of this behaviour or activity may disclose a purpose of engaging in unlawful activities.

The relevance to the status of anti-discrimination law in the supply of services, as outlined above, is clear. Indeed, to adopt the Court's reasoning in Christian Youth Camps v Cobaw, the statutory exemption (as it then stood) for religious bodies will either not be available, or will be strictly limited, where they enter the commercial sphere.

In light of the foregoing, we conclude that there are sufficient reasons to consider that an Australian charity's position on the question of same sex marriage may be relevant to a determination of whether it meets the requirement of a charity at law. Similar concerns arise for the separate but equally important issue of Commonwealth grants (including to religious schools and faith-based service providers).[60]

The Independence of the Church, Freedom of Speech and Education

From this more concise legal analysis, let us now turn to consider some of the historical and philosophical dimensions of the discussion. We start with the historical principles of the independence of the church and its right to determine its own teachings. Both have made significant contributions to our modern conception of the rule of law, to constitutional checks on governmental power and to freedom of speech.

Various authors contend that the separation of church and state that arose during the early medieval period (following the reforms heralded by Pope Gregory VII's *Dictatus Papae* of 1075) was an early form of the checks and balances that limit absolute power and abuses against human dignity in the Western tradition, including the rule of law. As noted by Tierney, "[t]he very existence of two power structures competing for men's allegiance instead of only one compelling human obedience greatly enhanced the possibilities for human freedom." [61] In early church and natural law incitements to defy unjust laws, we see a linking between individual agency and accountability to a higher authority, grounded in the conception of free will.

One concern held by various religious authorities is the impact that legalisation of same sex marriage may have on their ability to teach a traditional view of marriage within schools.[62] A letter released to all parishioners by the Australian Catholic Bishops Conference in June 2015 provided the following comment:

> Parents in Canada and several European countries have been required to leave their children in sex-education classes that teach the goodness of homosexual activity and its equality with heterosexual marital activity; for example, David and Tanya Parker objected to their kindergarten son being taught about same-sex marriage after it was legalised by the Massachusetts Supreme Court, leading to David being handcuffed and arrested for trying to pull his son out of class for that lesson. They were told they had no right to do so.[63]

The eight hundredth anniversary of the Magna Carta recently garnered the attention of the nation, with the document being celebrated as a founding stone for our modern constitutional protections and freedoms. It is interesting to note that the first clause of the 1215 Magna Carta states, "*quod Anglicana ecclesia libera sit"* ("the English Church shall be free"). In its historical context, this clause was directed at preserving the Church's rights to determine appointments to bishoprics, and hence the right to determine doctrine independently. The analogy to modern day discrimination law was not lost on Chief Justice Roberts of the United States Supreme Court when, in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (2012), he observed:

> Controversy between church and state over religious offices is hardly new. In 1215, the issue was addressed in the very first clause of *Magna Carta*. There, King John agreed that "the English church shall be free, and shall have its rights undiminished and its liberties unimpaired." The King in particular accepted the "freedom of elections," a right "thought to be of the greatest necessity and importance to the English church." J. Holt, Magna Carta App. IV, p. 317, cl. 1 (1965).[64]

In that decision the US Supreme Court unanimously upheld the right of a religious school to determine appointments to its staff as a fundamental expression of the right to religious freedom. The ability to proclaim truth is central to the continuing survival of truth within the conscience of the members of a community. O'Donovan has observed that, "the conscience of the individual members of a community is a repository of the moral understanding which shaped it, and may serve to perpetuate it in a crisis of collapsing morale or institution." [65] Where a religious body operates an institution for the education of children, any removal of the ability to

determine and teach doctrine in accordance with its teaching would be a restriction on these historically hard won liberties, which arguably are characteristic of the Western legal tradition.

The history of the endeavours of the established church to enforce religious observance in the English tradition is well documented. Indeed, the modern (as opposed to medieval) conception of separation of church and state was adopted as an attempt to preserve the conscience of religious minorities against state efforts to enforce religious uniformity. Liberalism brought with it an allowance for individual and collective dissent that was not permitted under certain pre-Enlightenment societies, such as those gripped by the Inquisition.

To allow too close a relation between church and state is to risk the eventualities of the Inquisition, where the church lost sight of her role as respecter of individual conscience. The church, where it is too close to the state, as in a unitary structure, runs the risk of losing its own independent voice. Equally so, it is also in danger of succumbing to the temptation to use the secular arm to extend its spiritual mandates by force – witness for example the Tudor persecutions of Puritans and non-conformist minorities or the support of the Crown by the Clergy in pre-revolutionary France.

There is a stark danger in permitting the state to endorse the form of morality that its citizens are to hold. Instead, I consider that the state's preferred role is to create the space for varying religious frameworks and visions of the good life to present their versions of morality and allow for the individual to weigh and choose what they consider to be truth. Given this historical context, it would be a profound irony if the state were now to undermine these hard won protections by prohibiting religious institutions from collective free speech and freedom of association through attempts to enforce a state-endorsed uniformity on a religious minority. To overlook the contribution that these deep historical and philosophical themes have made to our collective freedom smacks of wilful historical amnesia and flies in the face of the centrality of modern liberties.

Freedom of Religion

I will now consider the interplay of a legislated same sex marriage with existing protections for religious freedom within Australia at two levels. Firstly, the restriction on laws of the Commonwealth imposed under section 116 of the Constitution of Australia. Secondly, the extent to which the common law protects religious freedom.

Section 116 of the Constitution of Australia

Mason ACJ and Brennan J summarised the centrality of the freedom of religion in *Church of the New Faith v Commissioner for Pay-Roll Tax*[66] where they held:

> Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.[67]

Despite such profound sentiments, the position is by no means clear that section 116 would give sufficient protections to religious objectors. Section 116 is a restriction on the legislative power of the Commonwealth and does not extend to the Australian States.

Compared to the United States (on whose First Amendment section 116 is based), there is a relative paucity of judicial treatment of this protection. In 1943 Latham CJ held, after conducting a survey of religious freedom cases in the United States prior to 1900, that section 116 is intended to operate as a limitation upon the legislative authority of Parliament and that the appropriate test would be whether a law is an "undue infringement on religion."[68] In making that determination, his Honour said that the purpose of legislation was to be considered as only one of the applicable factors when considering a purported breach of section 116.

In 1997, however, the High Court in *Kruger v Commonwealth (*the "Stolen Generations Case")[69] offered several variations of a "purposive" test for section 116, all of which required an examination of the purpose of relevant legislation to see if it had the purpose of impairing freedom of religion, rather than regard to the effect of legislation on the free exercise of religion (they differed on the question of whether it had to be *the* purpose or one of a number of purposes).

Would section 116 then operate to protect a person holding a conscientious objection to the provision of services to a same sex wedding? Unless the requirement to supply services could be said to be imposed by the Commonwealth, I consider it unlikely that section 116 would apply. Even if this could be substantiated, it would appear on existing authorities that the defendant would need to establish that the purpose of the legislation was to limit her religious freedom, this would require the Court to accept that the legislation permitting same sex marriage has as a purpose the limiting of religious freedom. There are therefore significant concerns regarding the ability of section 116 to protect the religious freedom of such a person.

Common law right of religious freedom?

It might also be asked to what extent is there is a common law protection for religious freedom? The weight of Australian authority has held that, to the extent such a protection exists, the doctrine of parliamentary sovereignty will permit Parliament to infringe upon such common law freedom, where there is a clear intention in legislation to do so. The Supreme Court of South Australia has held that there is no inalienable right to religious freedom at common law.[70] In a separate case involving the lawfulness of a Commission of Inquiry established to consider the "secret women's business" claims of Ngarrindjeri women and whether such were relevant to the construction of the Hindmarsh Island Bridge, Chief Justice Doyle held that: "I accept that freedom of religion is one of the fundamental freedoms which entitles Australians to call our society a free society. I accept that statutes are presumed not to intend to affect this freedom, although in the end the question is one of Parliamentary intention."[71]

On the basis of this case, Neil Foster concluded that:

> [I]t is unlikely that there is a common law freedom of religion principle. If there were, it would not operate as a constitutional constraint on law-making by parliaments, but it could function (as in the recent past the freedom of speech principle has functioned) as a "presumption" which would inform courts when interpreting legislation. The "principle of legality" means that a court, when reading an Act of Parliament, will assume unless there

> are clear words to the contrary that Parliament does not intend to infringe a fundamental common law right. So if it could be argued that "freedom of religion" is, or perhaps has now become, a fundamental common law right, as "the essence of a free society", then it may provide guidance for courts interpreting legislation.[72]

If it was thought that such is an insufficient protection, it might be noted that in the United States, responding to the concern that the Supreme Court had failed to protect religious freedom sufficiently in its 1990 determination, that "neutral generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."[73] Congress then introduced a legislative right to religious freedom in the *Religious Freedom Restoration Act* 1993 (RFRA).[74]

Right vs the Good

Finally, the debate over same sex marriage is often conducted in terms of rights, principally the right to equality (or to freedom from discrimination), the right to religious freedom and the rights of children to be reared by their biological parents. To that end, the discussion enlivens the philosophical debate over the preference to be given to rights as opposed to common visions of the good within a society. These eventualities lead us to give at least some consideration to philosophical approaches to the good life, and so we turn to the ancients.

Aristotle held that to be a good "X" is to excel at what it is to be a good "X". His teleological world-view is reflected in the following quotes from *Politics*: "What is most choiceworthy for each individual is always the highest it is possible for him to attain."[75] This ideal is to be realized by both the individual and by their community: "that way of life is best, both separately for each individual and in common for city-states, which is equipped with virtue."[76]

The fundamental importance of the individual's ability to act on their own reasoning towards the pursuit of their estimation of the virtuous life is a central feature of the Western tradition; as described by Lupu and Tuttle, "a proper respect for the freedom to define, for religious purposes, the content of a virtuous life is essential to a free society."[77] To preclude the citizenry from hearing a world-view that may inform their deliberations as to the vision of the good life strikes at this tenet of modern democracy. To preclude an individual from undertaking such actions as they consider necessary to attain to their own conception of excellence is also to strike at this teleological ideal. To preclude certain persons from that pursuit or to limit the options offered for their consideration of that enterprise is to undermine the virtue of society as a whole.

There is something to be celebrated in an "X" attaining to its unique expression of excellence. After visiting Seaworld recently, I was happy to declare to my slightly bemused wife that I was a converted Aristotelian. The joy of the world champion jet-ski riders performing their crowd-gasping acrobatics, and the seemingly tangible elation of the dolphins in performing their dynamic leaps were both acts in which the crowd were united in awe. Was I right to read in this a common recognition of the virtue of a creature attaining to its own form of excellence?

I know someone of means who recently semi-retired to run a small florist shop. If she happened to be a person of religious conviction, should she be precluded from enjoying her own unique form of excellence in bringing happiness to others by offering that form of beauty? The same might be said for the baker who carries a sense of the worthiness of their vocation and who

delights in the quality of their work, and the joy this brings to others. A fundamental role of governance in our society is to enable individuals to attain to their unique expression of the good, for the common benefit of the whole.

A further question is that of community cohesion. John Rawls summarised the essential issue at stake as follows: "the problem of political liberalism is: How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines?"[78] For him this is a problem for political justice, not a problem about the highest good. O'Donovan, however, emphasises the central challenge for all political authority where he said: "The task of any theory of authority is to explain how the good can and must present itself to us in this alienated and alienating form, and yet without ceasing to be our good, that to which our action is oriented."[79]

In a post-modern society whose deconstructionist tendencies assume self-interest as the sole motivator, the *a priori* assumption is that the churches are only endeavouring to maintain their privileged position, a vestige of a now forsaken Christendom. Any concept that the church may have an independent vision of the good for a society is not independently assessed. Human rights are, however, in danger of failing and becoming only an expression of power if one cannot embrace the substantive question of the good and what comprises human flourishing. It is this vision to which religious institutions purport, by their own terms, to make a contribution.

Conclusion

So, in conclusion, we have endeavoured to place the current discussion on the legislating of a right to same sex marriage within Australia within the context of international experience to date, and have drawn attention to various unique attributes of our Western tradition that are relevant. We have also noted the need to account for religious freedom and have raised concerns that the current state of Australian law (particularly anti-discrimination law) fails to protect the right of individuals and corporations to act on conscience. In discussing the independence of the church, freedom of speech and education we have argued that there are unique historical and philosophical currents within the Western tradition that were born in the contest between church and state. Included in these are the rule of law, freedom of speech, the sanctity of individual conscience and the independence of the church expressed through its ability to determine doctrine by control over appointments of staff. We must ensure that we do not overlook the historical lessons, contributions made and protections won to expressions of the sacred in our polity (both by individuals and institutions) within the current discussion over same sex marriage.

Bibliography

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

Anti Discrimination Act 1998 (Tas).

Bob Jones University v United States; Goldsboro Christian Schools Inc v United States 103 S. Ct. 2017 (1983) 461 U.S. 574, 76 L.Ed.2d 157.

Bull and another v Hall and another [2013] UKSC 73 (27 November 2013).

Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al, 573 U.S. (10th Cir, 2014).

Canada Trust Co. v Ontario Human Rights Commission (1990) 69 DLR (4th) 321.

Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales 2009 UKFTT 376 (GRC) (01 June 2009).

Charities Act 2013 (Cth).

Christian Youth Camps Ltd v Cobaw Community Health Services Ltd [2014] VSCA 75.

Church of the New Faith v Commissioner for Pay Roll Tax (1983) 57 ALJR 785.

City of Bourne v Flores 521 U.S. 507, 514 (1997).

Commissioner for Special Purposes of Income Tax v Pemsel [1891] AC 531.

The Commonwealth v Australian Capital Territory (2013) 250 CLR 441.

Elane Photography v Willock, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. Ct. Dec 16, 2009).

Employment Div., Dept of Human Resources of Ore v Smith 494 U.S. 872 (1990).

Everywoman's Health Centre Society (1988) v The Queen (1991) 92 DTC 6001.

Grace Bible Church Inc v Reedman (1984) 36 SASR 376.

Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission (2012) 565 U.S.

Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia [2014] FCAFC 26 (19 March 2014).

Kruger v The Commonwealth of Australia (1997) 190 CLR 1.

Marriage Act 1955 (NZ).

Marriage Act 1961 (Cth).

Marriage Amendment (Marriage Equality) Bill 2015.

Obergefell v Hodges, U.S. LEXIS 4250 (6th Cir, 2015).

R (Williamson and Others) v Secretary of State for Education and Employment [2002] EWCA Civ 1926.

Re Family First New Zealand [2015] NZHC 1493 [30 June 2015].

Religious Freedom Restoration Act 1993 42 U.S.C. S2000bb et seq.

Schalk and Kopf v Australia [2010] ECHR 1996.

Ahdar, Rex, "Solemnisation of Same-sex Marriage and Religious Freedom" (2014) 16(3) *Ecclesiastical Law Journal* 283.

Ahdar, Rex and Ian Leigh, *Religious Freedom in the Liberal State*, OUP, Oxford, 2nd ed, 2013.

Aroney, Nicholas and Patrick Parkinson, "The Territory of Marriage: Constitutional Law, Marriage Law and Family Policy in the ACT Same Sex Marriage Case" (2014) 28(2) *Australian Journal of Family Law* 160.

Bishops Commission for Family Youth and Life, "Don't Mess with Marriage: A Pastoral Letter from the Catholic Bishops of Australia to all Australians on the 'Same-Sex Marriage' Debate," Paper presented at the Australian Catholic Bishops Conference, Canberra, 2015.

Brennan, Frank, "The US Supreme Court's Gay Marriage Overreach", *Eureka Street.com.au* (Online), 2015 http://www.eurekastreet.com.au/article.aspx?aeid=45190#.Vd5Wzvmqqko. Commission, Australian Charities and Not-for-profits, *Advocacy by Charities* http://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/What_char_purp/ACNC/Reg/Advocacy.aspx.

Foster, Neil "Religious Freedom in Australia", Paper presented at the 2015 Asia Pacific JRCLS Conference, Sydney, 29-31 May 2015. For revised version, see "Religious Freedom and the Law in Australia", *Upholding the Australian Constitution*, vol 27, The Samuel Griffith Society, 2017, 77-143.

House of Representatives, "Departmental Report for the Government Administration Committee: Marriage (Definition of Marriage) Amendment Bill" (Ministry of Justice (NZ), 13 February 2013) http://www.parliament.nz/en-nz/pb/sc/documents/advice/50SCGA_ADV_00DBHOH_BILL11528_1_A318744/departmental-report-ministry-of-justice.

Judd, Stephen, Anne Robinson and Felicity Errington, *Driven by Purpose: Charities that Make the Difference*, Australia Hammond Press, 2nd ed, 2014.

Kelly, Paul, "The Same-Sex Marriage Debate and the Right to Religious Belief", *Opinion, The Australian* (Online), 2015 http://www.theaustralian.com.au/opinion/columnists/the-same-sex-marriage-debate-and-the-right-to-religious-belief/story-e6frg74x-1227437429587.

Lupu, Ira C and Robert W Tuttle, "Same-Sex Family Equality And Religious Freedom" (2010) 5(2) *Northwestern Journal of Law and Social Policy* 274.

O'Donovan, Oliver, *The Desire of the Nations, Rediscovering the Roots of Political Theology*, Cambridge University Press, 1996.

O'Neill, Brendan, "The New Dark Ages, Where the Perfectly Normal are Branded Bigots", *Opinion, The Australian* (Online), 19 August 2015 http://ww.w.theaustralian.com.au/opinion/columnists/the-new-dark-ages-where-the-perfectly-normal-are-branded-bigots/story-fnhulnf5-1227488996781.

Osborn, Katy, "Colorado Baker Appeals Ruling Over Same-Sex Wedding Cake", *Time Magazine* (Online), 7 July 2015 http://time.com/3948644/marriage-equality-wedding-cake/

Parkinson, Patrick, "Religious vilification, anti-discrimination laws and religious minorities in Australia: The freedom to be different" (2007) 81 *Australian Law Journal*.

Rawls, John, *Political Liberalism*, Columbia University Press, 1993.

Sandel, Michael J, "Religious Liberty-Freedom of Conscience or Freedom of Choice?" (1989) 597(3) *Utah Law Review*.

The Yorkshire Post, "Catholic Adoption Society Wins Ruling on Gay Parents", *The Yorkshire Post* (Online), 17 March 2010 http://www.yorkshirepost.co.uk/news/main-topics/local-stories/catholic-adoption-society-wins-ruling-on-gay-parents-1-2567726.

Tierney, Brian, *The Crisis of Church and State 1050-1300*, University of Toronto Press, 1988.

Twomey, Anne, "Same-Sex Marriage and Constitutional Interpretation" (2014) 88(9) *Australian Law Journal* 613.

Walker, Peter, "Gay dads' Barrie and Tony Drewitt-Barlow to take church marriage fight to Europe", *Essex Chronicle* (Online), 26 March 2014 http://www.essexchronicle.co.uk/Danbury-gay-dads-Tony-Barrie-Drewitt-Barlow/story-20854368-detail/story.html.

Wilson, Tim "Equality for all Couples Won't Destroy Society", *Opinion, The Australian* (Online), 2011, <http://www.theaustralian.com.au/opinion/equality-for-all-couples-wont-destroy-society/story-e6frg6zo-1226099617082>.

Endnotes

1. See, for example, Tim Wilson, "Equality for all Couples Won't Destroy Society", *Opinion, The Australian* (Online), 2011 http://www.theaustralian.com.au/opinion/equality-for-all-couples-wont-destroy-society/story-e6frg6zo-1226099617082>; Brendan O'Neill, "The New Dark Ages, Where the Perfectly Normal are Branded Bigots", *Opinion, The Australian* (Online), 19 August 2015 http://www.theaustralian.com.au/opinion/columnists/the-new-dark-ages-where-the-perfectly-normal-are-branded-bigots/story-fnhulnf5-1227488996781; Paul Kelly, "The Same-Sex Marriage Debate and the Right to Religious Belief", *Opinion, The Australian* (Online), 2015http://www.theaustralian.com.au/opinion/columnists/the-same-sex-marriage-debate-and-the-right-to-religious-belief/story-e6frg74x-1227437429587; Frank Brennan, "The US Supreme Court's Gay Marriage Overreach" *Eureka Street.com.au* (Online), 2015 http://www.eurekastreet.com.au/article.aspx?aeid=45190#.Vd5Wzvmqqko.

2. Wilson, above n 1.

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

4. Ibid., 124 [5] (Latham CJ). See also *Employment Div., Dept. of Human Resources of Ore v Smith* 494 U.S. 872 (1990), 877 cited in *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al,* 573 U.S. (10th Cir, 2014) where the United States Supreme Court expressed similar sentiments that the "exercise of religion" involves "not only belief and profession but the performance of (or abstention from) physical acts" that are "engaged in for religious reasons".

5. *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

6. *No., 2015 Marriage Amendment (Marriage Equality)* Bill 2015 (Cth).

7. Ibid., Sch 1, item 1.

8. *Marriage Act* 1961 (Cth) s 5.

9. *Marriage Act* 1955 (NZ).

10. Rex Ahdar, "Solemnisation of Same-sex Marriage and Religious Freedom" (2014) 16(3) *Ecclesiastical Law Journal* 283, 286.

11. *Marriage Act* 1961 (Cth) s 5.

12. Ahdar, above n 11, 285 citing House of Representatives, "Departmental Report for the Government Administration Committee: Marriage (Definition of Marriage) Amendment Bill" (Ministry of Justice (NZ), 13 February 2013) <http://www.parliament.nz/en-nz/pb/sc/documents/advice/50SCGA_ADV_00DBHOH_BILL11528_1_A318744/departmental-report-ministry-of-justice> [50].

13. *R(Williamson and Others) v Secretary of State for Education and Employment* [2002] EWCA Civ 1926, 37.

14. Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State*, OUP Oxford, 2nd ed., 2013, 10, 356.

15. See for example, *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75 and *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] FCAFC 26 (19 March 2014).

16. *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441.

17. Anne Twomey, "Same-Sex Marriage and Constitutional Interpretation" (2014) 88(9) *Australian Law Journal* 613, 613.

18. Above n 17, 454.

19. Above n 18, 613-4.

20. Nicholas Aroney and Patrick Parkinson, "The Territory of Marriage: Constitutional Law, Marriage Law and Family Policy in the ACT Same Sex Marriage Case" (2014) 28(2) *Australian Journal of Family Law* 160.

21. Ahdar, above n 11, provides a comprehensive analysis of the United Kingdom, Canada and New Zealand.

22. Ahdar, above n 11, s 1(4).

23. Peter Walker, "Gay dads' Barrie and Tony Drewitt-Barlow to take church marriage fight to

Europe", *Essex Chronicle* (Online), 26 March 2014 <http://www.essexchronicle.co.uk/Danbury-gay-dads-Tony-Barrie-Drewitt-Barlow/story-20854368-detail/story.html>.

24. *Schalk and Kopf v Austria* [2010] ECHR 1996, 105.

25. Ibid.

26. *Obergefell v Hodges,* U.S. LEXIS 4250 (6th Cir, 2015).

27. Ibid., 99.

28. *Obergefell v Hodges,* U.S. LEXIS 4250 (6th Cir, 2015) 101.

29. Ibid., 89-90.

30. *Obergefell v Hodges,* U.S. LEXIS 4250 (6th Cir, 2015) 90.

31. Michael J Sandel, "Religious Liberty- Freedom of Conscience or Freedom of Choice?" (1989) 597(3) *Utah Law Review* , 614-615.

32. Ibid., 614.

33. *Obergefell v Hodges,* U.S. LEXIS 4250 (6th Cir, 2015) 92.

34. Katy Osborn, "Colorado Baker Appeals Ruling Over Same-Sex Wedding Cake", *Time Magazine* (Online), 7 July 2015 <http://time.com/3948644/marriage-equality-wedding-cake/>.

35. See *Elane Photography v. Willock*, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. Ct. Dec. 16, 2009).

36. *Bull and another v Hall and another* [2013] UKSC 73 (27 November 2013).

37. *Catholic Care (Diocese of Leeds) v The Charity Commission for England and Wales 2009* UKFTT 376 (GRC) (01 June 2009) available at http://www.charity.tribunals.gov.uk/decisions.htm. An English judge later reversed and remanded this decision. See *The Yorkshire Post*, "Catholic Adoption Society Wins Ruling on Gay Parents", *The Yorkshire Post* (Online), 17 March 2010 <http://www.yorkshirepost.co.uk/news/main-topics/local-stories/catholic-adoption-society-wins-ruling-on-gay-parents-1-2567726>.

38. Ira C Lupu and Robert W Tuttle, "Same-Sex Family Equality And Religious Freedom" (2010) 5(2) *Northwestern Journal of Law and Social Policy* 274, 298.

39. *Burwell, Secretary of Health and Human Services et al v Hobby Lobby Stores Inc et al,* 573 U.S. (10th Cir, 2014) Hobby Lobby 21.

40. Stephen Judd, Anne Robinson and Felicity Errington, *Driven by Purpose: Charities that Make the Difference* (Australia Hammond Press, 2nd ed, 2014).

41. A more limited exception exists in Tasmania: *Anti-Discrimination Act* 1998 (Tas) s 52(d).

42. *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75.

43. Ibid., 269.

44. Patrick Parkinson, "Religious vilification, anti-discrimination laws and religious minorities in Australia: The freedom to be different" (2007) 81 *Australian Law Journal* 964-5.

45. *Everywoman's Health Centre Society (1988) v The Queen* (1991) 92 DTC 6001 at 6008 per Decary JA, Federal Court of Appeal.

46. *Obergefell v Hodges,* U.S. LEXIS 4250 (6th Cir, 2015).

47. *Bob Jones University v United States; Goldsboro Christian Schools Inc v United States* 103 S. Ct. 2017 (1983) 461 U.S. 574, 76 L.Ed.2d 157.

48. *Commissioner for Special Purposes of Income Tax v Pemsel* [1891] AC 531.

49. *Bob Jones University v United States; Goldsboro Christian Schools Inc v United States* 103 S. Ct. 2017 (1983) 461 U.S. 574, 76 L.Ed.2d 157, 574.

50. *Re Family First New Zealand* [2015] NZHC 1493 [30 June 2015], 87-89 (Collins J).

51. *Everywoman's Health Centre Society (1988) v The Queen* (1991) 92 DTC 6001, 6008 (Federal Court of Appeal).

52. *Canada Trust Co. v Ontario Human Rights Commission* (1990) 69 DLR (4th) 321.

53. Ibid., 352-3.

54. Ibid., 345.

55. Ahdar, above n 11, 289 citing 38th Parliament, 1st Session, HC Deb, 1605, 15 February 2005.

56. *Charities Act* 2013 (Cth) s 11(a).

57. Available at Australian Charities and Not-for-profits Commission, *Advocacy by Charities* <http://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/What_char_purp/ACNC/Reg/Advocacy.aspx>.

58. Gino Dal Pont, *Charity Law in Australia and New Zealand,* Oxford University Press, 1999, 33.

59. *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] VSCA 75.

60. The Commonwealth Grants Rules and Guidelines made by the Minister under s 105C of the *Public Governance, Performance and Accountability Act* 2013 (Cth) would need to be considered in that context.

61. Brian Tierney, *The Crisis of Church and State 1050-1300*, University of Toronto Press, 1988,

1-2, 12.

62. Bishops Commission for Family Youth and Life, "Don't Mess with Marriage: A Pastoral Letter from the Catholic Bishops of Australia to all Australians on the 'Same-Sex Marriage' Debate" (Paper presented at the Australian Catholic Bishops Conference, Canberra, 2015).

63. Ibid.

64. *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission* (2012) 565 U.S. ___.

65. Oliver O'Donovan, *The Desire of the Nations, Rediscovering the Roots of Political Theology*, Cambridge University Press, 1996, 80.

66. *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 57 ALJR 785.

67. Ibid., 787.

68. *Adelaide Company of Jehovah's Witnesses v The Commonwealth* (1943) 67 CLR 116 [10] (Latham CJ).

69. *Kruger v The Commonwealth of Australia* (1997) 190 CLR 1.

70. *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376.

71. *Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens* (1995) 64 SASR 551, 552.

72. Neil Foster, "Religious Freedom and the Law in Australia", *Upholding the Australian Constitution*, Vol 27, The Samuel Griffith Society, 2017, 118.

73. *Employment Div., Dept. of Human Resources of Ore v Smith* 494 U.S. 872 (1990). Quote from *City of Bourne v Flores* 521 U.S. 507, 514 (1997) .

74. *Religious Freedom Restoration Act 1993* 42 U.S.C. §2000bb et seq.

75. Pol. VII.14.1333a29–30; cf. EN X.7.1177b33–4.

76. Pol. VII.1.1323b40–1324a1.

77. Lupu and Tuttle, above n 39, 306.

78. John Rawls, *Political Liberalism*, Columbia University Press, 1993, xxvi-xxvii.

79. O'Donovan, above n 67, 31.