

## Religion, Law and Social Stability in Australia

I urge then, first of all that petitions, prayers, intercessions and thanksgiving should be offered for everyone, for kings and others in authority, so that we may be able to live peaceful and quiet lives with all devotion and propriety.<sup>1</sup>

This paper considers religion, religious tolerance and the law and their importance in maintaining social stability in Australia. In order to address that question, the paper will very briefly consider the influence of religion in the foundation and development of Australia before considering the place of religion in contemporary Australian society. With this background, the paper will then consider the extent to which religion and the law find themselves in conflict in Australia before expressing some views on the implication of those conflicts for Australia's social stability.

In many ways, contemporary Australia appears to be a model of religious tolerance. The European colonisation of Australia began in 1788 as the result of a decision by the English parliament to establish a new penal colony. When New South Wales was first colonised Governor Phillip took a particularly sectarian oath of office as governor by swearing "allegiance to the King and to the protestant succession, whilst repudiating Romish beliefs in the transubstantiation of the Eucharist."<sup>2</sup> Subsequent early governors took an oath of office which also included these words. Although a significant number of the convicts transported to the new colony were both Irish and Catholic, despite many very polite requests, it was 28 years before the Colonial Office in Britain allowed official Catholic chaplains into the colony and it was only after 1820 that Catholic convicts were no longer often forced to attend Anglican services.<sup>3</sup> Given that background it is remarkable, in many respects, that when the colonies federated only 80 years later the new Australian Commonwealth's *Constitution* specifically eschewed an establishment religion<sup>4</sup> The overt sectarianism which was prevalent, most obviously in employment practices, in the 1950s, 1960s and 1970s has really disappeared<sup>5</sup> and it is difficult to imagine that very basic religious freedom to worship within a person's own faith tradition would be impinged in Australia.

A comprehensive demographic study of more than 230 countries and territories conducted by the Pew Research Center's Forum on Religion & Public Life in 2010 estimated that there were then 5.8 billion religiously affiliated adults and children around the world which represented 84% of the 2010 world population of 6.9 billion. On these figures worldwide, more than eight-in-ten people identified with a religious group.<sup>6</sup> Statistical evidence

---

<sup>1</sup> 1 Tim 2:1-2 New Jerusalem Bible (NJB). Unless otherwise specified all references to scripture in this paper will be to the NJB.

<sup>2</sup> Roy Williams, *Post God Nation? How religion fell off the radar in Australia – and what might be done to get it back on.* (ABC Books, 2015) 28

<sup>3</sup> Ibid 29

<sup>4</sup> *Australian Constitution* s116

<sup>5</sup> This is a major change. As Roy Williams writes in *In God They Trust*, (Bible Society, 2013 ) 20 "[U]ntil the 1970s sectarianism was rife, and Catholics were a mistrusted minority. To be labelled a "tyke" or a "mick" or a "papist" was often a barrier to advancement in the professions, and in some government departments as well."

<sup>6</sup> Pew Forum, "The Global Religious Landscape", December 18, 2012

<http://www.pewforum.org/2012/12/18/global-religious-landscape-exec/>

supports the view that religion is growing and will continue to grow globally such that it is projected that about 9-in-10 people will be affiliated with religion in 2030 compared with 8-in-10 in 1970, according to the World Religion Database.<sup>7</sup> At the same time human mobility is at historically high levels and so religious minorities are very common in most parts of the world. This presents many societies with the challenge of how seriously to take the protection of religious liberty.

Whilst the religious landscape of Australia is a constantly evolving one, Australia certainly has deep historical Christian roots<sup>8</sup> and a very substantial majority of Australians continue to identify themselves with religious traditions when asked. From the first census in 1911, the majority of Australians have identified as Christians.<sup>9</sup> Whilst this affiliation has been declining from 96% in 1911 to 61% in 2011 the Christian faith traditions continue to be dominant in Australia although the numbers of adherents of other faiths and of 'No Religion' have been increasing. Between 2001 and 2011 the proportion of the Australian population identifying with a Christian faith tradition fell from 68% in 2001 to 61% in 2011 and this trend was also evident in the two most commonly reported denominations: Catholicism and Anglicanism. In 2001, 27% of the population reported an affiliation to Catholicism and this had fallen to 25% of the population in 2011. The decline was slightly larger for Anglicans falling from 21% of the Australian population in 2001 to 17% in 2011. Whilst these large denominations experienced falls, some of the smaller Christian denominations increased over this period. In particular the number of Pentecostals increased by one-fifth from 1.0% of the population in 2001 to 1.1% in 2011. Between 2001 and 2011, the number of people reporting a faith tradition other than-Christianity increased markedly, from around 0.9 million to 1.5 million, that represented a growth from 4.9% in 2001 to 7.2% of the total Australian population in 2011. Buddhism was the most popular (2.5% of the population) followed by Islam (2.2%) and Hinduism (1.3%). The greatest growth was in, Hinduism (growing by 189% in the decade from 2001 to 275,500, followed by Islam (growing by 69% in the same period to 476,300) and Buddhism (which grew by 48% to 529,000 people). The numbers of 'No Religion' respondents also increased substantially, from 15% of the population in 2001 to 22% in 2011. The growth was strongest among the young, with 28% of those aged 15-34 reporting no religious affiliation. Over half of the overseas-born population (56%) reported a Christian denomination with Catholicism (24%) and Anglicanism (12%) being the most popular. Nineteen percent of those Australians born overseas-born reported non-Christian religions with Buddhism (6.8%), Islam (5.4%) and Hinduism (4.3%) being the most common and reflecting the increasing number of migrants from non-European backgrounds. The overseas born population reported 'No religion' (20%)

---

<sup>7</sup> Brian Grim, "If Policy Makers Cared About Data, They'd Care About Freedom of Religion or Belief" 29 September 2014 <http://berkeleycenter.georgetown.edu/cornerstone/if-policy-makers-cared-about-data-they-d-care-about-freedom-of-religion-or-belief-forb>

<sup>8</sup> A detailed examination of the influence of Christianity is well beyond this short paper but a good survey can be found in Williams n2 above 1-141

<sup>9</sup> Australian Bureau of Statistics report "2071.0 - Reflecting a Nation: Stories from the 2011 Census, 2012–2013" <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013>

at a slightly lower level than did the Australian population as a whole (22%).<sup>10</sup> The fact that Australia continues to welcome about 190,000 migrants each year under the official Migration Programme, that immigration levels can change and that there are, of course, no religious tests for immigrant means that the attitudes of a not insubstantial percentage of the population cannot be predicted and change each year.

Whilst Australia is often described as being in a “post-Christian” era,<sup>11</sup> it is quite clear that a very substantial proportion of the Australian population continue to consider themselves to be Christians and that Australia continues to grow in religious diversity. To a visitor to Australia, in 2015, many outward signs would suggest a strong respect for religious freedom: there is Federal and State government funding for religious schools, there are two national Catholic universities (The University of Notre Dame Australia and the Australian Catholic University), churches and other places of worship are prominent in cities, suburbs and towns and are generally well maintained and there are many hospitals, charities, retirement homes, clubs and other institutions operated by religious organisations which are an everyday feature of Australian life. Religious people do not face threats to their life and property as they do in Iraq or Syria or many other places in the world.<sup>12</sup> Outward appearances can prove quite deceptive and the views of those of religious faith and particularly those of the author’s faith tradition, Catholicism, are subject to regular attack often because of their faith. The former High Court judge and leading Australian intellectual, the Honourable Dyson Heydon AC QC, has made the following observation:

Until about the 1960s Australian society was marked by sectarianism. It took several forms. For example, particularly in country towns, Catholics were derisively referred to in non-Catholic circles; perhaps the opposite position also prevailed. Professional firms were to some extent organised along sectarian lines: Catholic firms employed Catholics and no-one else, Presbyterian firms employed Presbyterians and no-one else, and Catholics were not easily employable in other non-Catholic firms. In due course, all that changed. There had been very few Catholic judges in New South Wales before the McGirr Government came into office in 1941; since then there have been many, including the great Sir Cyril Walsh. But now there may be a new anti-Catholic movement, particularly among the intellectuals, if that is the correct word for journalists. To adapt Windhorst’s aphorism,<sup>13</sup> anti-Catholicism in Australia now might be called the racism of the intellectuals.<sup>14</sup>

---

<sup>10</sup> *ibid*

<sup>11</sup> See Williams n2 above 1-3

<sup>12</sup> Matt Wade “Few women, lots of private school Catholics” *The Sydney Morning Herald* 21-22 September, 2013 4

<sup>13</sup> “[One of the founders of the German Catholic Centre Party Ludwig] Windhorst described anti-Catholicism as the anti-Semitism of the intellectuals – that is, just as the masses were viciously and unthinkingly anti-Semitic, the intellectuals, the likes of Virchow and others, were viciously and unthinkingly anti-Catholic.”. Hon Dyson Heydon AC QC, “German Catholics Against the State: Ludwig Windhorst and Cardinal von Galen” Michael O’Dea Lecture delivered at The University of Notre Dame Australia, School of Law, Sydney Annual Prize Giving

The phenomena that Mr Heydon describes is not unique to Australia but it seems to be far stronger in Australia than even the United States. What Richard Dawkins might describe as the “moral zeitgeist” of mainstream Australia is characterised by a general apathy and ignorance of basic religious concepts and values and an antipathy towards many traditional Catholic and Christian values. The success of books by “New Atheists”, such as Dawkins, in Australia demonstrates that fact. Australia’s popular media is often openly antagonistic to Christianity and to Catholicism and Catholic moral and ethical values in particular<sup>15</sup> and there is an ever diminishing emphasis in teaching<sup>16</sup> about religion<sup>17</sup> and on equipping people to make sound moral choices.<sup>18</sup> Whilst in Australia, Christians are certainly free to worship at home and in their Churches, without fear of attack or fear for their physical safety there is a misconception by many in the media and in education that this is all that religious freedom entails. This approach disregards entirely the moral duty of Christians not only to live morally but to evangelise and to act.<sup>19</sup> Christians have a moral duty not to allow God to disappear from the marketplace of ideas.<sup>20</sup>

---

Ceremony, 4 September, 2013 4 [http://www.nd.edu.au/\\_data/assets/pdf\\_file/0008/120788/Michael-ODEa-Oration-Lecture.pdf](http://www.nd.edu.au/_data/assets/pdf_file/0008/120788/Michael-ODEa-Oration-Lecture.pdf)

<sup>14</sup>ibid 15-16

<sup>15</sup> For example the *Sydney Morning Herald* and *Sun Herald* feature weekly columns from the militant atheist Peter Fitzsimons who regularly includes ant-Christian and ant-Catholic diatribes in his columns. Another example is the *Sun Herald*'s weekly column promisingly titled “Moral Maze” written by Leslie Cannold which presses that author’s moral viewpoint e.g. her October 9, 2011 piece which vigorously criticized (current Australian Prime Minister) Tony Abbott for his orthodox Catholic position on moral issues such as euthanasia, gay marriage and abortion simply assuming without argument that those positions were unreasonable and objectively false in her concluding paragraph “Voting for Tony Abbott will deliver a man whose Catholic orthodoxy extends to a belief that this orthodoxy is reasonable and objectively correct and can be fairly imposed on the rest.” (Leslie Cannold “Moral Maze Don’t be fooled – it’s still zealot Tony underneath” *The Sun-Herald* Sunday 9 October, 2011 2). In doing so she joined Dr Susan Mitchell who in her recent book *Tony Abbott: A Man’s Man* argues that Mr Abbott would impose Catholic conservative values on the country as he has an “innate and deeply embedded sexism and misogyny.” The fact that Mr Abbott at least appears to accept that there is popular support for these views is evident from the fact that on 21 October 2011 Mr Abbott reportedly told the *Sydney Morning Herald* that “he would not turn back the clock on abortion laws (Katherine Murphy “Abbott vows not to wind back abortion” *Sydney Morning Herald* Friday 21 October, 2011 4).

<sup>16</sup> The University of Notre Dame Australia excepted as may be other Australian religious tertiary institutions

<sup>17</sup> with most Catholic schools to really ground let alone inspire children in their faith which at least in New South Wales in part results from the curriculum of the optional 2 Unit HSC Studies of Religion course taken in the final years of senior school which involves consideration of multiple religious faiths.

<sup>18</sup> Although in New South Wales public school ethics classes have been introduced these are run at the same time as scripture classes and run specifically on the basis that there are no right or wrong answers to the moral conundrums considered. Being run at the same time as scripture classes the approach of these ethics classes presumably will not be challenged by the contribution of committed Christian children with different approaches to morality. As will become evident in the course of this paper approaches to morality which are not founded on the Christian God can at best be rudimentary.

<sup>19</sup> Mark 16:15, Matthew 28:19-20, 1 Timothy 6:12, James 2:14-18 and in a specifically Catholic context Catechism of the Catholic Church (CCC) [904]-[905] and see Pope Benedict XVI *Porta Fidei* Apostolic Letter for the Induction of the Year of Faith [http://www.vatican.va/holy\\_father/benedict\\_xvi/motu\\_proprio/documents/11\\_October\\_2011\\_10](http://www.vatican.va/holy_father/benedict_xvi/motu_proprio/documents/11_October_2011_10) “A Christian may never think of belief as a private act. Faith is choosing to stand with the Lord so as to live with him. This “standing with him” points towards an understanding of the reasons for

Many in Australian society, particularly in the media, express concern whenever Christians speak on moral matters. This is because Australian society, like most of the modern West, approaches morality largely by reference to individual freedom<sup>21</sup> and rights,<sup>22</sup> scientism,<sup>23</sup> subjectivism, pragmatism and relativism<sup>24</sup>. References to absolute moral truths of the

---

believing. Faith, precisely because it is a free act, also demands social responsibility for what one believes. The Church on the day of Pentecost demonstrates with utter clarity this public dimension of believing and proclaiming one's faith fearlessly to every person. It is the gift of the Holy Spirit that makes us fit for mission and strengthens our witness, making it frank and courageous";

<sup>20</sup> See e.g. Pope Benedict XVI *Porta Fidei* n17 above [3]

<sup>21</sup> As Margaret Somerville puts it "In the West, we live in an era of intense individualism. This prevailing attitude has been described as "individualism gone wild" because it often excludes any sense of community. Many arguments that favour the availability of, and especially unrestricted access to, reproductive technologies, genetic technology, and euthanasia are based on claims of respect for individual rights. Advocates believe that these claims are essentially matters of personal morality and they involve only, or at least primarily individuals....I propose that this view is mistaken, because these issues are of at least equal importance to society – especially with respect to the formation and maintenance of values and symbols, and to the societal paradigm based on them." (Margaret Somerville, *Death Talk*, (McGill-Queen's University Press, 2001) 4) such as "the *right* to choose" to refer to an asserted right of a woman to abort her unborn child," the *right* to die" in support of and justification for voluntary euthanasia, "the *right* of gays to marry" and even a young person's "*right* to express their sexuality." (see Carolyn Moynihan "I'm sorry I did not wait" *Mercatornet* 19 October 2011 [http://www.mercatornet.com/articles/view/im\\_sorry\\_i\\_did\\_not\\_wait](http://www.mercatornet.com/articles/view/im_sorry_i_did_not_wait)). Structuring arguments by reference to alleged *rights* or by reference to discrimination sounds persuasive but the terminology is commonly formulated well before any such *rights* are recognised (unlike the rarely mentioned but well recognized fundamental human right of freedom of religion e.g. under by Article 18 of *the Universal Declaration of Human Rights*). This approach involves a concentration on short term individualism rather than even utilitarian justification and ignores or lambasts as Christian overhang the historically accepted approach to such issues. Whilst we know that abortion was specifically identified as immoral in Christianity from at least the time of the Didache [see Austen Ivereigh, *How To Defend The Faith without raising Your Voice* (Our Sunday Visitor, 2012) 93, euthanasia and suicide have been considered immoral in Judeo-Christian morality from Mosaic times and marriage has (until only very recently in some parts of the world) been recognised as something which can occur only between men and women. When morality on such issues has been accepted for more than 2000 years it is difficult to identify the basis on which people in the modern West think they know better particularly when their position can be generally accepted without resorting to any logical or coherent argument (e.g. see n 23 below). On this issue in relation to euthanasia see *Legalizing Euthanasia: Why Now?* Somerville, M. Chapter 6 105-118

<sup>23</sup> There is a tendency to give weight to the views of scientists simply because they are scientists. For example, although Richard Dawkins is not a theologian or ethicist his writings in those areas are given an aura of authority because he is a scientist. In this position he describes atheists, like himself, as *brights* or in other words wise people in contrast to those who believe in any divinity and most particular the Christian God. In his remarkably popular apologia for atheism *The God Delusion*, Dawkins argues that we can work out for ourselves what right and wrong is and that that determination is to be found in the *moral zeitgeist* or general feeling of people. That gives no indication of the content of morality, no grounding for identifying right from wrong and is ultimately an argument for majority rule. Majority rule as a standard means that infanticide was moral in ancient Rome, genocide was moral in Nazi Germany and infidelity, prostitution, pornography, adultery, abortion and euthanasia are moral in parts of the West today. The fact that a book with arguments like that could sell in such large numbers really proves the point made above about diminishing emphasis in most education on equipping people to make moral choices. As Romanus Cessario notes "the mutual agreement of the governed...does not alone suffice for establishing the moral good." *Introduction to Moral Theology* (The Catholic University of America Press, 2001) 163. In contrast Christian moral theology does not depend on statistics ( see discussion in Cessario 18-19) nor does it depend on egoism or utilitarianism (again Cessario 40 )

<sup>24</sup> Pope Benedict XVI in a meeting with council members of the Central Committee for German Catholics in a speech reported by the Vatican Information Service as "Seek New Paths of Evangelisation for Church and Society" on 24 September 2011. He went on to say: "And we observe that this relativism exerts more and

biblical truths are an anathema to a subjectivist approach to morality.<sup>25</sup> Even utilitarianism can be swamped by appeals to rights. For example the very successful pro-choice lobby and its political supporters concentrate on the *right* to choose but ignore entirely any right of any unborn child to be born.<sup>26</sup>

For many Australians, State laws have become a de facto morality.<sup>27</sup> Whilst, at least where laws do not require active participation in immoral acts,<sup>28</sup> it might be said that laws leave citizens free to act morally and in accordance with their consciences even if they allow acts which are immoral to occur, as noted above, a feature of modern Australian society is the fact that law by default is considered by many as the source of morality. Changes in legislation, judicial or prosecutorial practice can present strong temptations for people to engage even in acts which were generally considered immoral by previous generations. General acceptance of conduct which was generally recognised as immoral by previous generations can quickly follow. It is only necessary to mention divorce, contraception, homosexuality, drug use, abortion, in vitro fertilisation and euthanasia to recognise this trend. It becomes particularly evident with medical issues when they become readily and particularly when that availability is confidential (even in some cases even services provided to children are kept confidential from their parents so, for example, children go through the trauma of abortion or access contraception without their parent's knowledge or ability to assist or provide guidance) with State funding. Unlike the United States, where issues such as abortion and contraception are regularly discussed in the popular media and it is very common to hear favourable references to God and to Jesus Christ, our Lord, by athletes and

---

more influence on human relationships and on society. ... Many no longer seem capable of any form of self-denial or of making a sacrifice for others. Even the altruistic commitment to the common good, in the social and cultural sphere or on behalf of the needy, is in decline. Others are now quite incapable of committing themselves unreservedly to a single partner". "We see that in our affluent western world much is lacking. Many people lack experience of God's goodness." [visnews\\_entxts@mlists.vatican.va](mailto:visnews_entxts@mlists.vatican.va). In an Australian context see the discussion in Williams n2 above 250-274

<sup>25</sup> As Pope Benedict XVI observed in the speech (ibid) "We live at a time that is broadly characterised by a subliminal relativism that penetrates every area of life...Sometimes this relativism becomes aggressive, when it opposes those who claim to know where the truth or meaning of life is to be found."

<sup>26</sup> as an example during the US Presidential campaign in 2008 Barack Obama was asked at what point "a baby gets human rights" and replied "answering that question...with specificity Is above my pay grade" or in other words not something that impacted on his pro-choice views (quoted in Dr John James "Letter from the President What 'pay grade' do you need?" *Right to Life News* September/October 2011 1)), the detrimental consequences of abortion on women (see e.g. Anonymous "Abortion poses a moderate to highly increased risk of mental health problems." *all life matters* The Official Journal of Right to Life Association (NSW) Inc Spring 2011 2) and on populations (most Western societies now have birthrates which are inadequate to produce sufficient people to support the welfare systems and in particularly the ever growing demands of the elderly for healthcare and other services. Many Asian countries face a growing disparity between male and female populations as female babies face a far greater risk of abortion. (E.G.Austin "Sex-selective abortion Looking out for baby girls" *The Economist* 28 June 2011 <<http://www.economist.com/blogs/democracyinamerica>>)

<sup>27</sup> Despite the fact that as Cessario (above n21 163) notes "...it is clear that jurists and legislators are not always guided by objective truth."

<sup>28</sup> which is not always the case: see discussion of the Victorian *Abortion Law Reform Act*, the Tasmanian *Reproductive Health (Acceptance to Termination) Bill* 2013 and other Australian legislation below.



performing artists, it is very rare indeed to hear debate or discussion on moral issues in the mainstream media in Australia.<sup>29</sup>

The willingness to speak up when something is wrong and to “tell it like it is” have been referred to as traditional Australian values.<sup>30</sup> It is difficult to argue that those values remain prevalent in Australian society. Any fair observer of Australian society would recognise that there is a form of creeping conformity in Australia – whether it is in business, the media or in a social setting<sup>31</sup> - in which it is really considered quite unacceptable to promote or justify a position on any issue by reference to religious values. At the same time, there are well organised and focussed special interest groups who are very skilled in their use of the media and in lobbying politicians to promote the recognition of new rights and the restriction of the free exercise of existing rights through legislation and developments in the common law.<sup>32</sup> As John Allen Jr has observed:

[There are] much many much more dramatic and much more harrowing threats to religious freedom in other parts of the world. In places like the US and Australia, a threat to your religious freedom means that you might get sued. In a growing number of other places in this world of ours, a threat to your religious freedom means that you might get shot.<sup>33</sup>

Whilst the challenges to the free exercise of the religious faith in Australia are not the terrible persecution that Christians and other religious adherents are experiencing in many other parts of the world the legal protection of religious freedom is actually very tenuous in Australia and it is a right which is frequently curtailed in Australia without any fuss or fanfare. The threat to religious freedom is often in the nature of what DA Carson describes as “[t]he intolerance of tolerance.”<sup>34</sup> If there is a competition between the right to religious freedom and other newly identified rights it is very rare for the right to religious freedom to survive. If this trend is not recognised and staunch the gradual and, at times almost imperceptible, gradual erosion of religious freedom and the growth of what some describe as “the intolerance of tolerance” will inevitably continue until religious freedom is a but a distant memory.

---

<sup>29</sup> In the US, TV and print media regularly run stories on abortion, politicians very openly discuss their position on the issue and law reform and public opinion are moving against the availability of abortion on demand. In Australia, abortion is a topic which is only ever very rarely discussed and now former but then Prime Minister Julia Gillard’s reference to it during her “blue-tie” speech delivered a speech at the launch of *Women for Gillard*, in Sydney on 11 June 2014 was notable because it was such a rare event – a Prime Minister openly mentioning abortion. A copy of the transcript of that speech is available at <http://australianpolitics.com/2013/06/11/women-for-gillard-speech.html>

<sup>30</sup> George Cardinal Pell referred to them in this way and expressed the hope that that remains an Australian traits at an unpublished speech given to the Sydney Catholic Business Network at the Sheraton on the Park Hotel in Sydney on 16 August 2013.

<sup>31</sup> but the author is pleased note not at the University of Notre Dame Australia

<sup>32</sup> For a powerful explanation of the power of the media and the ability of special interest groups to effect change albeit in a US context see Dr. Bernard Nathanson “Confession of an ex-abortionist” <http://www.aboutabortions.com/Confess.html>

<sup>33</sup> John Allen Jr quoted by Sharyn McCowen “Cardinal is a ‘prophet of religious freedom’ *The Catholic Weekly* vol 72, no 4691 22 September 2013, 1-2

<sup>34</sup> DA Carson, *The Intolerance of Tolerance* (William B Eerdman, 2012). For a discussion of this phenomenon in an Australian context see Steve Morrison, *Born This Way* (Matthias Media 2015)16-22

With the background, this paper will now turn to consider some examples of the role of the law – whether enacted by Parliament or a consequence of Court rulings – has impacted on religious freedom in Australia. To understand this it is necessary to understand that Australia is a Federation and that as a Federation of former British colonies Australia is part of the common law tradition. The Federation was established by an Act passed by the British Parliament which contained the *Australian Constitution*. As a Federation of States, each of which has its own written *Constitution*, Australia’s legislators include the Commonwealth or Federal Parliament and State and Territory Parliaments. The paper will now consider as an example some aspects of the laws relating to abortion in the states of Victoria, New South Wales (NSW) and Tasmania, the decision of the Victorian Court of Appeal in *Christian Youth Camps*<sup>35</sup> and the recent referral of the Catholic Archbishop of Hobart, Archbishop Julian Porteus to the Tasmanian Anti-Discrimination Commission.

Over the last few decades most States and territories in Australia have enacted legislation to liberalise access to or to decriminalise abortion and abortion procedures are federally funded. The State of Victoria passed the *Abortion Law Reform Act* in 2008 which requires medical practitioners in Victoria, with a conscientious objection to abortion, to refer patients seeking that procedure to another medical practitioner who does not share that objection. In this way the law seeks to compel doctors with a conscientious objection to abortion to be complicit in that procedure. Some years ago disciplinary proceedings were brought against, Dr Mark Hobart, in Victoria for refusing to refer a couple seeking to terminate their pregnancy on sex-selection grounds to a doctor who he knew did not share his objection.<sup>36</sup> The Sex Party has proposed legislation to establish exclusion zones in Victoria around abortion clinics and other locations providing advice, mediation and treatment in relation to reproductive health. In early September 2015 the Victorian government announced that it would support this legislation. The draft legislation makes it illegal to “interfere with” a footpath within 150 metres of an abortion clinic and to communicate in a manner which may be seen or heard by a person accessed abortion clinics or other reproductive health services. In this way conversations, prayers, providing leaflets or advertising which can be seen or heard from a clinic will be criminalised.<sup>37</sup>

In New South Wales (NSW) whilst the *Crimes Act, 1900* has not been legislatively amended and so continues, on its face to, prohibit the unlawful procuring of an abortion, the word

---

<sup>35</sup> *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* [2014] VSCA 75 (16 April 2014). The High Court of Australia (Australia’s highest Court) subsequently refused an application for special leave to appeal.

<sup>36</sup> <http://catchthefire.com.au/2013/11/doctor-refused-to-refer-couple-for-sex-selective-abortion-faces-possible-loss-of-his-license/>

<sup>37</sup> Monica Doumit “It’s OK to pray, but not in Victoria” *The Catholic Weekly* Vol 73 No 4792 13 September 2015, 11. Similar exclusion zones have also been proposed in the Australian Capital Territory. See Morgan Begg, “Exclusion zone proposals show fundamental misunderstanding of freedom” 2 April 2015 *Freedom of speech* <http://freedomwatch.ipa.org.au/tag/exclusion-zones/>. In NSW the *Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2015*, if enacted, would also: “establish exclusion zones in order to prohibit certain behaviour near premises at which abortions are performed.”



“unlawful” has been interpreted by the Courts and subsequently enforced by the police in such a way that NSW has virtual abortion on demand.<sup>38</sup> Whilst in NSW there have been no legislative provisions enacted to veto doctors’ freedom of conscience rights, in July 2014 the NSW Ministry of Health issued a new *Policy Directive Pregnancy – Framework for Terminations in New South Wales Public Health Organisations*<sup>39</sup> which replicates the Victorian position in NSW. Compliance with this Policy is mandatory for NSW Health and a condition of subsidy for public health organisations. This abandonment of the conscientious objection protections for doctors in NSW did not involve any new legislation. There was no need for it be discussed or amended by the NSW Parliament because the change in Policy was effected by a statutory health corporation, NSW Kids and Families. A Greens Member of the NSW Legislative Council, gave notice on 15 May 2015 of her intention to introduce into the NSW Legislative Council the *Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2015*. According to the Notice of Motion the proposed Act would “to specify a ground of unsatisfactory professional conduct by a medical practitioner with respect to abortion.”

In the State of Tasmania exclusion zones, such as those proposed in Victoria, NSW and the ACT already make it a criminal offence to protest or engage in a range of other proscribed activities within a 150 metre radius of an abortion clinic.<sup>40</sup> During the Tasmanian elections last year a lone protester, Graeme Preston, was arrested for peacefully protesting outside an abortion clinic in Hobart. Whilst those charges were subsequently dropped Mr Preston and a number of other people are currently awaiting trial in Tasmania for other alleged breaches of exclusion zones.<sup>41</sup>

In 2014 the Victorian Supreme Court, Court of Appeal decision involving Christian Youth Camps. In this case a company owned and operated by the Christian Brethren was found to have engaged in unlawful discrimination by very politely declining a booking by a group promoting views on sexual morality to young people which were contrary to those of that faith tradition.<sup>42</sup> Whilst Australia has not enacted same sex marriage legislation and current indications are that that issue will be put to a popular vote by way of plebiscite or referendum at some future time, none of the draft legislation which has been prepared has provided religious freedom exceptions other than very narrow exceptions for Churches and religious celebrants. It seems likely that should same sex marriage become law in Australia at some future time, the various Federal, State and territory anti-discrimination provisions would give rise to similar sorts of issues as those which have arisen in the United States where Christian service providers - florists, cake makers, photographers, property owners - have been prosecuted for unlawful discrimination where they have refused to supply services to same sex weddings where they felt that to do so would have been contrary to their faith and to God. Already in Tasmania on Tuesday 29 September 2015, the Archbishop of Hobart, Archbishop Julian Porteus has been reported to Tasmania’s Anti-Discrimination

---

<sup>38</sup> The key decisions were *R v Wald* (1971) 3 NSWDCR 25 and *CES v Superclinics Australia Pty Ltd* (1995) 38 NSWLR 47

<sup>39</sup> [http://www.health.nsw.gov.au/policies/pd/2014/pdf/PD2014\\_022.pdf](http://www.health.nsw.gov.au/policies/pd/2014/pdf/PD2014_022.pdf)

<sup>40</sup> *Reproductive (Acceptance to Terminations) Act 2014* (Tas) s 9

<sup>41</sup> Edith Bevin “Anti-abortion campaigner Graeme Preston arrested again for protesting outside clinic” *ABC News*, 14 April 2015 <http://www.abc.net.au/news/2015-04-14/anti-abortion-campaigner-graeme-preston-arrested/6392214>

<sup>42</sup> See n33 above.

Commission for circulating a booklet called “Don’t Mess with Marriage” to the parents of students at Catholic Schools. The Commission has six weeks to consider whether or not the complaint identifies a potential breach of the Tasmanian *Anti-Discrimination Act*.<sup>43</sup>

With that background, this paper will now consider the implications of this approach to religious tolerance which assumes that certain aspects of a person, such as sexual orientation, are to be given State sanction in excess of religious faith. An unexpressed assumption favouring this approach may be an assumption that sexual orientation is not variable but religious belief is simply a matter of upbringing or choice. Again in this short paper is not possible to grapple with the causality of sexual orientation or whether it is a fixed or variable aspect of each individual.<sup>44</sup> Whatever the correct scientific position on those matters the assumption that religious belief is somehow of lesser value and more easily altered ought to be subjected to more critical review. In her 1917 work *Spontaneous Activity in Education*, Maria Montessori, relays a number of accounts of children brought up without any exposure to any form of religion experiencing God and identifying God as the creator of all things.<sup>45</sup> For many Christians baptism is a sacrament. In the Catholic faith tradition, baptism most commonly occurs in early infancy and not cleanses the baptized person of original sin but makes that person “a new creature,” an adopted son of God, a “partaker of the divine nature”, a “member of Christ and co-heir with him and a temple of the Holy Spirit”, a member of the Body of Christ and a member of the Church.<sup>46</sup> As the Catholic Catechism explains, for adherents of that faith tradition “the person baptised is configured to Christ. Baptism seals the Christian with the indelible spiritual mark (character) of his belonging to Christ. No sin can erase this mark even if sin prevents baptism from bearing the fruits of salvation.”<sup>47</sup> The consequence for the baptised person are permanent, the person is changed forever by baptism and for a baptised Catholic these characteristics are not flexible, optional extras that can be or which society should seek to force a believer to compromise.

Since religious belief is such an integral part of a person, a religious person can only flourish when they are freely able to worship and live their faith. As Laycock and Berg argue:

[C]ommitted religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. For religious believers, the conduct at issue is to live and act consistently with the demands of the Being that they believe made us all and holds the whole world together.<sup>48</sup>

No religious believer can change his understanding of divine command by any act of will...Religious beliefs can change over time...But these things do not change

---

<sup>43</sup> See Dennis Shanahan, “Anti-discrimination test looms over church’s marriage booklet” *The Australian* 30 September, 2013 *The Nation* 3.

<sup>44</sup> For a discussion in an Australian context see Morrison n32 above 42-58

<sup>45</sup> Maria Montessori, *Spontaneous Activity in Education*, (Frederick A Stokes Company, 1917) 352-355 [http://www.gutenberg.org/files/24727/24727-h/24727-h.htm#Page\\_351](http://www.gutenberg.org/files/24727/24727-h/24727-h.htm#Page_351)

<sup>46</sup> CCC [1263],[1265] and [1267].

<sup>47</sup> CCC [1272].

<sup>48</sup> Douglas Laycock and Thomas Berg “Same-Sex Marriage and Religious Liberty” 99 *Virginia Law Review* [2013] 1 3.

because government says they must, or because the individual decides they should ... [T]he religious believer cannot change God's mind.<sup>49</sup>

It is obvious that nations like the United States, Canada and Australia have benefitted greatly from the failure of other nations to afford religious freedom to their citizens such that, to their great loss, religious minorities have emigrated to those nations of the New World to their great benefit. Micklethwait and Wooldridge have analysed the reasons for the persistence of religious belief in the United States and, in this context, they particularly emphasise the basic works of everyday charity that churches and believers carry out throughout the United States as a standard part of life.<sup>50</sup> In an Australian context the Catholic Archbishop of Sydney, Archbishop Anthony Fisher has observed that:

The [Catholic] Church in Australia now has over 10,000 hospital beds, 20,000 aged care places, 700,000 school desks, and assists countless people through parishes, CatholicCare and St Vincent de Paul. Five and a half million Catholics, in 1300 parishes and every walk of life, contribute in myriad ways to our nation. Democracies, economies and societies don't just happen; they depend upon a complex of ideals, priorities and institutions and in this country these are largely a Judeo-Christian inheritance, however under-appreciated that often is.<sup>51</sup>

Whilst Archbishop Fisher there singled out some particular contributions of the Catholic Church followers of many other faith traditions have made and continue to make their own, many and unique contributions to the wellbeing of the nation and its people. Those examples suggest that religious freedom is not only a good thing for individuals but it is a good thing for nations.

Whilst this paper has identified some of the manifest contributions of religion to Australian society the picture painted of the future of religious tolerance in Australia in this paper may be disheartening. The review of the contemporary legal and social landscape of Australia supports the view expressed by Dyson Heydon that "there may be a new anti-Catholic movement, particularly among the intellectuals" and that "anti-Catholicism in Australia now might be called the racism of the intellectuals."<sup>52</sup> Beyond that it may be fair to say that anti-Christianity and anti-religious belief "might be called the racism of the intellectual" However it is worth picking up Mr Heydon's speech again from the point at which he made that rather bleak assessment. He continued:

This new anti-Catholicism may backfire as much as Bismarck's Kulturkampf. It is intolerant. It is hypocritical. It fails to recognise the extraordinary contribution of Australian Catholicism to education, to charitable relief, to

---

<sup>49</sup> Ibid 4.

<sup>50</sup> John Micklethwait and Adrian Wooldridge *God is Back How The Global Rise of Faith is Changing the World* (Allen Lane 2009)

<sup>51</sup> Anthony Fisher, Catholic Archbishop of Sydney, Archbishop, homily delivered at his installation mass on Wednesday 12 November 2014 <http://www.xt3.com/library/view.php?id=17926>

<sup>52</sup> Ibid 15-16

the running of hospitals, to social progress of all kinds, and indeed to the life of the nation as a whole. The new anti-Catholicism may cause suffering, but it is suffering which may unify Catholics. It may bring other elements of society in behind Catholics, for its programme is more than anti-Catholic.<sup>53</sup>

Heydon is correct to identify the benefits that Catholicism has brought to this country and to identify the prospects of that antagonism towards religion but to that faith in particular as a potential mobilising force for Catholics and other elements of society.

This paper very briefly considered the influence of religion in the foundation and development of Australia before considering the place of religion in contemporary Australian society. The paper then considered some examples of the extent to which religion and the law find themselves in conflict in contemporary Australia. The paper supports the view that religious impulses are inherent, that religion remains an important element in the lives of the great majority of Australians, that religion continues to make a major contribution to Australian society and that religion and religious tolerance is an important element of Australia's social stability. Ultimately this author agrees with the conclusion reached by Roy Williams in his 2015 book *Post God nation?*

Perhaps I am a dreamer. But religion is at a crossroads in this country. Certainly, if Christianity is to survive as a significant force, let alone to flourish again, those who care must act, and act soon; otherwise, the label 'Post-God nation' will become increasingly apt.<sup>54</sup>

Professor Michael Quinlan  
Dean  
School of Law, Sydney  
The University of Notre Dame Australia  
The Feast of the Exaltation of the Holy Cross  
14 September 2015

---

<sup>53</sup> Heydon n13 above 16

<sup>54</sup> Williams n2 above 299