

Freedom of Religion or Belief: Creating the constitutional space for other fundamental freedoms: 14th - 16th February 2018¹

“Protection of Religious Freedom under Australia’s Amended Marriage Law: Constitutional and Other Issues”

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This paper addresses issues surrounding the protection of religious freedom in Australia following the change of Australian law to recognize same sex marriage, and discusses both legislative and Constitutional issues raised by the change.

As is well known, Australia has now joined those other (mainly Western, developed) countries which recognise same-sex marriage.³ The law of Australia on this topic was, following a popular vote in a “postal survey”, officially changed on the commencement of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) on 9 December 2017.

The title of the amending legislation seemed to promise that careful attention would be paid the topic of “religious freedoms”; but as it turns out, the protections formally provided were fairly minimal. The purpose of this paper is to survey those protections which were provided, and to consider some Constitutional issues relating both to the amendments and to religious freedom protections. Suggestions are made as to the need for further protections.

Adoption of same sex marriage raises religious freedom issues because the move effectively amounts to a change in a nation’s “public morality”, and takes a stance on the issue of what kind of sexual activity is legitimate which is in sharp opposition to the views taken by main-stream religions for many years. Representatives of those religions have long been involved in solemnising marriages; questions now arise as to whether they will be required to solemnise same sex unions. Similar issues arise for believers involved as small businesses in the “wedding industry”. At a broader level, the change means that many religious groups are now opposed to the wider societal consensus on the question of sexual morality, and questions are raised as to whether they will still be able to play a role in the public life of the community.

It is worth noting that many of these matters are issues which would have come up even if the Australian public had not voted to change the definition of marriage to include same sex couples. Religious groups have been “out of step” with the broader Western culture’s views on sex and marriage for some decades.⁴ But the formal step of Parliamentary approval of sexual

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³ Some 25 nations recognise same sex marriage, either throughout their territories or in substantial parts of them, according to the latest update on “Wikipedia” (consulted on 18 Jan, 2018): see https://en.wikipedia.org/wiki/Same-sex_marriage.

⁴ Of course, to be “out of step” with a popular modern trend does not automatically mean to be wrong! C S Lewis captured this brilliantly in *The Voyage of the Dawn Treader* where Prince Caspian responds to a local governor objecting to his abolition of the slave trade: “But that would be putting the clock back,” gasped the Governor. “Have you no idea of progress, of development?” “I have seen them both in an egg,” said Caspian. “We call it Going Bad in Narnia...” (chapter 4)

activity officially disapproved by most mainstream religious teachings brings these issues into sharp focus.

Protection of religious freedom in Australia

As was noted by the Interim Report of a Parliamentary Committee currently examining the matter,⁵

legal protection of religious freedom in Australia is limited. Australia is unusual among modern Western democracies in that it lacks a codified bill or charter of rights. While a culture of religious freedom has thrived, and the common law has respected religious freedom to a large extent, the legislative framework to ensure this continues is vulnerable. (at viii)

In broad terms, religious freedom is legally protected in Australia through s 116 of the Commonwealth Constitution, some specific Charters in two jurisdictions, and the operation of discrimination laws in the various jurisdictions (either explicitly making discrimination on the basis of religious belief unlawful, or by inclusion of “exemptions” or “balancing clauses” allowing religious belief to operate in ways that would otherwise be proscribed by those laws.)⁶

In particular, s 116 as a Constitutional protection of religious freedom is not very strong, at least as it has so far been interpreted in the courts. It provides:

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

It seems clear that the ban on “prohibiting the free exercise of any religion” is only applicable to the Commonwealth Parliament, leaving State Parliaments able to do so if they choose.⁷ In addition, a number of the (fairly few) cases that have considered the meaning of the “free exercise” clause of s 116 have suggested that it would only be breached by laws the main and obvious purpose of which was to prohibit free exercise. (I have argued elsewhere that this view is too narrow, and that comments in the primary authority on the provision, *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, suggest that the test should be whether there is “undue” impairment of free exercise through the operation of the law.⁸ But the question is by no means clear.)

Constitutional issues around recognition of same-sex marriage

Before turning to the question of religious freedom protection following enactment of same sex marriage, I think it is worth putting on record that there are still some doubts as to whether the Commonwealth Parliament has the constitutional power to enact the law in the first place.

⁵ *Legal Foundations of Religious Freedom in Australia*, Joint Standing Committee on Foreign Affairs, Defence and Trade (Nov 2017) (“*Legal Foundations*”)

⁶ For a more detailed overview see Neil J Foster. “Religious Freedom in Australia overview- 2017 update” (June, 2017) at: http://works.bepress.com/neil_foster/112/. See also the *Legal Foundations* Interim Report, noted above at n 5.

⁷ Arguably, however, s 116 would prevent subordinate legislatures set up in the Territories from unduly impairing free exercise, on the basis that ultimately their law-making powers derive from an Act of the Commonwealth Parliament. See the Foster paper at n 6 above, pp 8-9 for discussion of the question whether s 116 applies to laws made under s 122 of the Constitution, and concluding, by analogy with the decision in *Wurridjal v Commonwealth* (2009) 237 CLR 309, that it will probably be held to do so.

⁸ Above, Foster, n 6, at pp 3-6.

Those who follow these issues will immediately respond that the High Court of Australia in *The Commonwealth v Australian Capital Territory* [2013] HCA 55, (2013) 250 CLR 441 (the *ACT Same Sex Marriage case*) has ruled that the power in s 51(xxii) to legislate on “marriage” includes the power to allow same sex unions to be regarded as “marriages”. But I would like, with respect, to suggest that comments of the judges to this effect were *obiter dicta*, which cannot be regarded as a binding part of the reasons for the decision. In any event, it is clear that these comments were made in a case where there was no proper contradictor, and the Court did not have the benefit of any lower court consideration of the matter. At the very least the Court should, I think, do us the courtesy of reconsidering the matter after a carefully reasoned debate on the issue.

The background to the decision was the attempt to pass same-sex marriage legislation in the ACT. The *Marriage Equality (Same Sex) Act 2013* (ACT) passed the Legislative Assembly on 22 Oct 2013. The key provision was s 6, which said that the Act applied “in relation to all marriages between 2 adults that are not marriages within the meaning of the *Marriage Act 1961* (Cwth) solemnised, or intended to be solemnised, in the ACT”. It then went on to replicate in some detail the other provisions of the *Marriage Act 1961*, only in relation to its own version of “marriages”. Clearly its purpose was to recognise same sex marriage in the Territory.

The Federal Government then challenged this legislation in the High Court, and it was held to be invalid.

In a unanimous decision of a bench of 6 Justices⁹ the Court declared the legislation invalid as contrary to the *Marriage Act 1961*, which was clearly intended to be the uniform law governing marriage in Australia. The mechanism for the invalidity was not s 109 of the Constitution (which only deals with legislation of the States), but s 28 of the *Australian Capital Territory (Self-Government) Act 1988* (Cth). This provides that legislation enacted by the ACT “has no effect to the extent that it is inconsistent with”, among others things, an Act of the Federal Parliament. In this case the Court took the view that, just as s 109 may override State law where the Commonwealth Parliament has “covered the field”, here s 28 operated to invalidate a Territory law where the Commonwealth law

[I]s a complete statement of the law governing a particular relation or thing. (at para [52])

In rejecting a claim that the Territory law could operate as a law relating to “same sex marriage”, in parallel with the main *Marriage Act 1961*, the Court said:

[56]... The federal Parliament has not made a law *permitting* same sex marriage. But the absence of a provision *permitting* same sex marriage does not mean that the Territory legislature may make such a provision. It does not mean that a Territory law permitting same sex marriage can operate concurrently with the federal law. The question of concurrent operation depends¹⁰ upon the proper construction of the relevant laws. In particular, there cannot be concurrent operation of the federal and Territory laws if, on its true construction, the *Marriage Act* is to be read as providing that the only form of marriage permitted shall be a marriage formed or recognised in accordance with that Act.

[57] **The *Marriage Act* regulates the creation and recognition of the legal status of marriage throughout Australia.** The Act's definition of marriage sets the bounds of that legal status *within* the topic of juristic classification with which the Act deals. Read as a whole, the *Marriage Act*, at least in the form in which it now stands, makes the provisions which it does about marriage as a comprehensive and exhaustive statement of the law with respect to the creation and recognition of the

⁹ Justice Gageler did not sit, having announced at the beginning of the hearing that he was recusing himself because he had advised the Commonwealth on similar issues when employed as Solicitor-General before joining the Court.

¹⁰ *Momcilovic* (2011) 245 CLR 1 at 112 [245], 115-116 [258]-[261].

legal status of marriage. Why otherwise was the *Marriage Act* amended, as it was in 2004,¹¹ by introducing a definition of marriage in the form which now appears, except for the purpose of demonstrating that the federal law on marriage was to be complete and exhaustive? (**emphasis added**)

So, Territories, and pretty clearly States as well, could not “go it alone” on the question of same sex marriage.

However, supporters of same sex marriage took some encouragement from the fact that, in another part of its decision, the High Court very directly took a step further and addressed the width of the “marriage” power under the Constitution, and ruled that the power would be wide enough to allow the Commonwealth Parliament, if it chose to do so, so enact a law allowing same sex marriage. It seems to me, with respect, that the decision to address this matter was unwise, unnecessary and in fact incorrect.

It is very odd, for a start, that the Court chose to address the issue of the breadth of the *Federal* marriage power, when the precise issue at stake was the validity of the *ACT* law. In fact, as the Court itself notes, there was no “contradictor” (ie, no lawyer arguing against the proposition) for this highly controversial issue, all the parties involved conceding that the Federal Parliament did have such a power. For such a wide-ranging decision with massive policy implications, it seems (to put it mildly) unwise for the Court to proceed without at least having the benefit of a carefully thought-through submission putting the opposing point of view.

The Court justifies its decision to address the issue (indeed, interestingly to spend the whole first half of the judgment addressing the issue before it even reaches the *ACT* law) on the basis that it is only by defining the scope of the Federal marriage power, that it can determine the effect of the *ACT* legislation. They say this:

[9] This Court must decide whether s 51(xxi) permits the federal Parliament to make a law with respect to same sex marriage because the *ACT* would probably operate concurrently with the *Marriage Act* if the federal Parliament had no power to make a national law¹² providing for same sex marriage. If the federal Parliament did not have power to make a national law with respect to same sex marriage, the *ACT* would provide for a kind of union which the federal Parliament could not legislate to establish. By contrast, if the federal Parliament can make a national law providing for same sex marriage, and has provided that the *only* form of marriage shall be between a man and a woman, the two laws cannot operate concurrently.

With the greatest of respect to the Court, this is wrong. It is not necessary for the Federal Parliament to have power to enact a particular law, for it to be able to prevent a State from passing a law on the general topic. To approach the matter by a somewhat far-fetched analogy, suppose that the *ACT* had decided to pass legislation saying that someone would be deemed to be “bankrupt” (another topic of Federal power dealing with a legal “status”, and a topic of existing Federal law) if they had red hair. Would it be necessary to find that the Federal bankruptcy power included a power to impose the status of bankruptcy on someone on the basis of hair colour, for the *ACT* law to be invalid? The proposition is absurd. So long as a Federal law deals exhaustively with a particular status, then any State or Territory law purporting to set up the status on grounds that are either inconsistent with, or not just dealt with, in the Federal law, can easily be seen to be invalid.

It seems that the Court’s logic here can only operate if it is assumed that in the Federation *some legislature* must have the power to enact a law on same sex marriage. But

¹¹ [Marriage Amendment Act 2004](#) (Cth), s 3, Sched 1, item 1.

¹² In the sense of a law "of general application throughout the whole of the Commonwealth and its territories": *Spratt v Hermes* (1965) 114 CLR 226 at 278 per Windeyer J; [1965] HCA 66. See also *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 221-222 per Gaudron J; [1992] HCA 45.

that is not a necessary assumption. It may be that under present Constitutional arrangements *no* legislature in Australia has the power to confer the status “marriage” on a same sex couple. (Just as, to return to the above example, it does not seem absurd that no Australian Parliament could choose to declare people bankrupt on the criterion of hair colour.) The solution to this problem (if it is seen to be a problem) is to adopt the authorised method provided for amendment of the Constitution, a referendum under s 128. In that case the people of Australia would have a clear opportunity to have their say.¹³ But until that happens, it could be argued that no Parliament can set up “same sex marriage”.

The High Court, though, having entered upon the question, then answered it in a very clear way, holding that the Federal Parliament *would* clearly have the power to enact a law allowing for same sex marriage – see eg the repetition of the proposition in paras [2] and [38] of the judgment. But they readily concede that in 1900 it would not have been accepted that “marriage” as a topic of power included same-sex relationships. How, then, do they justify their view?

In effect, the debate is around the question of how a head of constitutional power is to be defined. It seems to be accepted that any head of power will have a “core” meaning, which is unchanging, and a “penumbral” area at the outer limits where elements of the definition of the concept may change over time. At [20] the Court quotes the judgment of Higgins J in the *Union Label Case* (1908) 6 CLR 469 at 610, where his Honour drew a distinction between the “centre” and the “circumference” of a power.¹⁴

But how is the line to be drawn, which separates “centre” from “circumference”? At what point does an attempt to alter a “central” feature of the legal topic mean that the law is no longer on that topic? This is a question that the High Court seems not to explicitly address. The Court points out how different elements of the law relating to marriage have changed over the years. Obvious matters such as the length of notice or the formalities of a ceremony would be accepted by all as variable. But the fundamental elements of marriage have long been accepted, flowing from *Hyde v Hyde and Woodmansee*,¹⁵ to include

- A relationship between only two people (monogamy);
- Those people being one man and one woman;
- The relationship being exclusive;
- The relationship being voluntary (so that the parties must have freely chosen to enter it, and presumably must have at least a minimal capacity to understand what they are doing);
- The relationship lasting (in theory at least) for life.

But, the court notes, over time some of these elements have been accepted as not essential. In particular, the court says that polygamy is a relationship that today may be recognised as a “marriage”. A key passage is the following:

¹³ It is interesting (see *Hollingsworth v Perry*, 570 US __, 2013 WL 3196927, No 12-144 (26 June 2013)) that a referendum on the issue in California (often thought to be one of the most “liberal” of States in the US) led to a majority of voters choosing to affirm the historical understanding of marriage as between a man and a woman. In the end the result of this referendum, despite being accepted as a valid result by the California Supreme Court, was over-turned by a single Federal judge in California, and his decision was upheld because the California Attorney-General refused to defend the law in Federal courts, and the US Supreme Court found that no-one else had standing to defend the law. More recently, of course, the Australian voluntary “postal survey” on the issue resulted in a majority of those who responded (61.6%) supporting same sex marriage. Despite the impressive participation rate of 79.5%, the result was still that only 49% of eligible Australians voted “Yes”. This leaves the outcome of a compulsory referendum, if it had been held, still in some doubt.

¹⁴ While Higgins J was in dissent in that decision, his view has more recently been accepted as the better view in *Grain Pool of WA v The Commonwealth* (2000) 202 CLR 479.

¹⁵ (1866) LR 1 P and D 130, at p 133.

[32] Second, statements made in cases like *Hyde v Hyde*, suggesting that a potentially polygamous marriage could never be recognised in English law, were later qualified by both judge-made law and statute to the point where in both England and Australia the law now recognises polygamous marriages for many purposes¹⁶.

[33] Once it is accepted that "marriage" can include polygamous marriages, it becomes evident that the juristic concept of "marriage" cannot be confined to a union having the characteristics described in *Hyde v Hyde* and other nineteenth century cases. Rather, "marriage" is to be understood in s 51(xxi) of the Constitution as referring to **a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.** (emphasis added)

The highlighted words in para [33] seem to represent the High Court's "core" meaning of marriage.¹⁷ And of course if this is adopted, then there is no reason to exclude same sex persons. But it has to be asked: where did the Court derive this definition? Yes, it includes some of the essentials noted in *Hyde* and other decisions (consensual, intended to endure). But the plain fact is that the Court does not offer a detailed justification of its decision to pick and choose certain characteristics, and to leave others out. In fact, it seems that the task of arriving at a definition of the word "marriage" which addresses its "core" cannot really be undertaken without a much more wide-ranging review of the history and sociology of marriage across the Western world. The definition adopted by the court, it should be noted, focuses entirely on the interests of the *parties* to the marriage (it refers to their "mutual" rights and obligations.) Yet all the classic discussion on marriage going back into the history of the West notes that one essential purpose of a marriage is the production and nurture of *children* of the marriage.¹⁸

Indeed, it can plausibly be argued that the support of children is the main reason that society is justified in giving special status to the decision of two persons to have sex and live together. Why should the government be interested at all in the personal relationships of individuals? Because, many argue, a natural and common result of sexual intercourse is children, who are vulnerable and whom society cares for by establishing a system that is designed to encourage their biological parents to care for them, and each other.¹⁹

This of course is only one perspective. But it is a perspective that receives no attention from the High Court in deciding itself to undertake, with no opposing views being presented, a redefinition of the core aspects of a fundamental social structure.

The High Court quotes regularly, as indeed it should, from the decision of Windeyer J in the earlier decision of *Attorney-General (Vict) v The Commonwealth* (1962) 107 CLR 529

¹⁶ See, for example, *Family Law Act* 1975, s 6. As to judge-made law generally and some English statute law, see *Dicey and Morris on the Conflict of Laws*, 10th ed (1980), vol 1 at 308-328 and the discussion by Lord Maugham LC of the nineteenth century cases in *The Sinha Peerage Claim* [1946] 1 All ER 348n at 348-349.

¹⁷ See also the concluding words of para [42] for a similar phrasing: "a legal status deriving from the agreement of natural persons to form an enduring personal union which can be dissolved only in accordance with law and which entails legal consequences for mutual support".

¹⁸ It ought to go without saying, but I will say it anyway, that to say that a major purpose of the institution of marriage is the production and protection of children, is not to say that a marriage which by design or necessity is childless is not a "real" marriage. It is simply to say that in a large proportion of marriages, children arrive and are nurtured, and that this has always been accepted as a key purpose of the institution.

¹⁹ It may also be noted that the institution of marriage has also long been seen as protecting the interests of women in particular, against the tendency of men to seek short-term pleasure in sexual encounters and then move on. The institution and associated social and legal incentives provided a reason for men to remain in long-term relationships, particularly with the mother of their children. For a devastating critique of the impact of recent sexual mores, especially on women, see M Regnerus, *Cheap Sex: The Transformation of Men, Marriage, and Monogamy* (New York: OUP, 2017).

(usually known as the *Marriage Act case*). His Honour was well known as one of Australia's leading legal historians. But in that case he says:

And, I am inclined to think, the Commonwealth power would extend to matters concerning the support and care of children, duties that are commonly considered to be **inherent in the institution of matrimony**. (at 580, emphasis added)

Here the presence of children in the relationship is assumed to be “inherent” in a relationship labeled “marriage”. Indeed, his Honour goes on (580-581):

The procreation and upbringing of children is set down in the Prayer Book first among the causes for which matrimony was ordained. If an authority of a different kind be preferred, Voltaire's *Dictionnaire Philosophique* (1764), in the article on canon law, said: *Le mariage dans l'ordre civil est une union legitime de l'homme et de la femme, pour avoir des enfants, pour les clever, et pour leur assurer les droits des proprietes, l'autorite de la loi*. And Puffendorf said that “the natural and regular end of marriage is the obtaining of children whom we may, with certainty, call our own”: *Law of Nature & Nations* vi, I, 15.

In other words, all the historical sources refer not only to men and women, but also to the production of children as a chief end of the institution. It seems hard to imagine that Windeyer J or any historical writer on the topic would have been prepared to call a relationship which from its very nature precluded the “obtaining of children” who are biologically related to both parties, as a “marriage” at all.²⁰

These are the sort of arguments that *could* be made, then, that despite the High Court's judgment and *obiter* comments, the Federal “marriage” power does not include a power to approve same sex “marriage”. In essence, the thrust of the argument is that introduction of such an institution would be so radical a change to the institution of marriage as understood in the Constitution, that it does not fall within the use of the term in s 51(xxi).

Frank Brennan, for example, outlines an argument of this sort.²¹ While s 51(xxi) authorises laws on “marriage”, Brennan notes that in the past the High Court has been clear that the Commonwealth cannot simply “redefine” a word and give itself legislative power. He notes the comments in *In the Marriage of Cormick* (1984) 156 CLR 170 per Gibbs CJ at 177:

It would be a fundamental misconception of the operation of the Constitution to suppose that the Parliament itself could effectively declare that particular facts are sufficient to bring about the necessary connexion with a head of legislative power so as to justify an exercise of that power. It is for the courts, and not for the Parliament, to decide on the validity of legislation, and so it is for this Court to decide in the present case whether there is in truth a sufficient connexion between the institution of marriage and a law which treats as a child of the marriage a child who is not in fact the natural or adopted child of either party to the marriage, but who was, at a particular time, treated by the parties to the marriage as a member of their family and was, at that time, ordinarily a member of their household.

²⁰ Again, that the essential nature of the institution concerns situations where children are biologically related to both parties does not mean that marriages where children are adopted, or come into the family from previous relationships, or are born to a husband and wife through artificial reproduction techniques, are in some way “second-class”. These are valuable retrieval strategies that society has adopted where the primary institution does not work as intended. But they do not take away from the evidence noted about the primary purposes of the institution.

²¹ F Brennan, “Church-State Concerns about Same Sex Marriage and the Failure to Accord Same Sex Couples their Due”, in C Parker & G Preece (eds) *Theology and Law: Partners or Protagonists?* (Adelaide: ATF Press, 2005) 83-111 (also part of a journal series, *Interface*, (2005) vol 8/1).

In that case this meant that a law deeming a child who was living with a couple to be a “child of the marriage” was held to be beyond power. Brennan J in the same case commented at 182:

The scope of the marriage power conferred by [s.51\(xxi\)](#) of the [Constitution](#) is to be determined by reference to what falls within the conception of marriage in the [Constitution](#), not by reference to what the Parliament deems to be, or to be within, that conception. ... The power does not support a law which so regulates the incidents of marriage as to impair the essence of marriage: per Windeyer J., *Attorney-General (Vict.) v. The Commonwealth* [\[1962\] HCA 37; \(1962\) 107 CLR 529](#), at p 580.

True, previous comments can be found from some respected judicial figures that the Commonwealth would have the power to enact a law on this topic. A comment by Nicholson J (writing extra judicially) quotes McHugh J’s *obiter* comment in *Re Wakim; Ex parte McNally* [\[1999\] HCA 27; \(1999\) 198 CLR 511](#), 553:

The level of abstraction for some terms of the [Constitution](#) is, however, much harder to identify than that of those set out above. Thus in 1901 ‘marriage’ was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages, although arguably marriage now means, or in the near future may mean, a voluntary union for life between two *people* to the exclusion of others (emphasis in original).

But given that there are such strongly opposing views from Australia’s most respected judges and commentators, it is passing strange that the High Court here ignores these different perspectives.

Professor Anne Twomey, one of Australia’s foremost Constitutional scholars, makes some similar points.²² She notes how odd it is that the Court goes out of its way to rule on the breadth of the marriage power: “the appropriateness of doing so where there was no contradictor to advance the contrary arguments, especially in a case that was rushed both in hearing and in judgment, remains questionable” (at 613).

She notes that since the ACT was clearly intending to set up a form of “marriage”, then *whatever* the scope of the Federal power “how could an ACT law establishing the status of “marriage” for same sex couples, operate concurrently with the *Marriage Act 1961 (Cth)*”? (at 613-614) (That is, she also doubts whether the comments on same sex marriage were necessary for resolution of the case.) She refers to the High Court’s move from acknowledging that polygamy could be regarded as “marriage”, to its new definition in para [33], and calls it a “leap of logic” (at 614).

In particular, she queries the odd comment in para [22] which seems to say that marriage is a “topic of juristic classification” which includes “laws of a kind ‘generally considered, for comparative law and private international law, as being the subjects of a country’s marriage laws’”. As she notes, why should Australia subject itself to the definitions of other countries? Does this include countries where child marriages are allowed, or forced marriage? Where marriage may be terminated only at the unfettered will of the husband? “What makes some of these characteristics immutable and others not?” (at 614-614)

And Twomey notes that the idea of marriage being a “topic of juristic classification” is unusual; when used by Windeyer J in the *Marriage Act case*, it was simply a way of saying that historically the concept had moved from the ecclesiastical courts into the common law

²² Twomey, A “Same-Sex Marriage and Constitutional Interpretation” (2014) 88 *Aust Law Jnl* 613-616.

courts. But there seems to have been no intention in that decision to identify the concept of marriage by reference to the laws used in other countries.²³

Twomey makes the telling point near the end of her article that, since, when looked at on a global scale, by far the vast majority of other nations do *not* recognise same sex marriage, then this “international” criterion is not going to assist the proponents of change unless they can identify some “subset” of countries for comparison.

There are similar, and other, compelling criticisms of the High Court’s decision offered by Parkinson and Aroney in another comment.²⁴

It is to be hoped that should the High Court ever have to reconsider the Constitutional validity of such a law, it will appreciate that the considerations noted here mean that the matter needs to at least be approached in the light of submissions that may be made from the opposing side, and not preclude discussion on the basis of what was said in *obiter dicta* in a decision where the matter did not need to be resolved at the time.²⁵

Given that the legislation is in place, however, its impact on religious freedom needs to be considered.

Marriage Ceremony Issues

One immediate question is whether ministers of religion, who have long been authorised to celebrate marriages under Australian law, will be obliged to celebrate same sex marriages. This is one of the areas where the legislation is fairly clear; the answer is, No. Amended s 47(3) of the *Marriage Act 1961* (“MA”) provides that “despite anything in this Part” a minister of religion may decline to solemnise a same sex marriage on the basis of the “doctrines, tenets or beliefs” of their religion, or if doing so would cause “injury to the religious susceptibilities of adherents of” that religion, or indeed if their own private religious beliefs would prevent them from doing so.

Challenge to the refusal of a minister of religion to solemnise a same-sex marriage might be brought under discrimination law (as arguably, though there is still some room for debate on the point, the decision could be said to be based on the “sexual orientation” of the parties.) The Commonwealth *Sex Discrimination Act 1984*, which prohibits sexual orientation discrimination, has also been amended, so that s 40(2A) of that Act now means that no discrimination action can be brought against ministers of religion under that Act in relation to a decision of this sort. There is in theory the possibility of an action being brought under State and Territory discrimination laws, but in my view s 109 of the Constitution gives priority to the Commonwealth law here, and such actions would probably not be successful.²⁶

²³ It has to be said that the *pragmatic* reason for adopting this somewhat odd category is clear, in the context of a decision that is aiming to approve same sex marriage as a concept. For of course the laws of a number of other common law jurisdictions have been changed recently to recognise same sex marriage. But as a criterion on its own it is hard to justify.

²⁴ See P Parkinson, and N Aroney, “The Territory of Marriage: Constitutional Law, Marriage Law and Family Policy in the ACT Same Sex Marriage Case” (May 9, 2014). University of Queensland TC Beirne School of Law Research Paper No. 14-20. Available at SSRN: <http://ssrn.com/abstract=2435016> or <http://dx.doi.org/10.2139/ssrn.2435016>; now also published in (2014) 28 *Australian Journal of Family Law* 160-192. See also the comment by B Maley “Reflections on a same-sex marriage plebiscite” (2016) 32/1 *Policy: A Journal of Public Policy and Ideas* 30-32.

²⁵ Note that the High Court did refer in passing to the *ACT Same Sex Marriage case* in its decision allowing the postal survey to proceed: see *Wilkie v The Commonwealth; Australian Marriage Equality Ltd v Cormann* [2017] HCA 40 (28 September 2017) at [4]: “The Court made clear in *The Commonwealth v Australian Capital Territory* that s 51(xxi) of the [Constitution](#) is capable of supporting a law defining marriage to include the union of two persons of the same sex (footnote omitted).” But this passing reference does no more than acknowledge the previous comments, and does not resolve the issues noted above.

²⁶ For more detailed justification for this view, see my paper “Protecting Religious Freedom in Australia Through Legislative Balancing Clauses” available at: http://works.bepress.com/neil_foster/111/, esp pp 23-26.

What about the right of other, “civil”, celebrants to decline to celebrate a same sex marriage, including not only “private” celebrants but also Government registry officers? The amendments have set up a complex set of rules, the gist of which is as follows:

- Purely “civil” celebrants (those who are not ministers of religion) who were registered as “marriage celebrants” prior to 9 Dec 2017, can opt within 90 days (ie prior to 9 March 2018) to be recorded on the Register of Marriage Celebrants as “religious marriage celebrants” where, because of their religious beliefs, they wish to be so identified (ie they wish to be able to legally decline to solemnise same sex weddings, which religious marriage celebrants may do under new s 47A of the Act.)
- However, where that request has not been made in time, or where someone who is not a minister of religion applies to become a marriage celebrant after 9 Dec 2017, they will not receive the protection of the legislation, and might be sued under discrimination laws if they decline to solemnise a same-sex wedding on the grounds of the sexual orientation of the parties.
- Nor will State and Territory registry officers who may have a conscientious religious objection to same sex marriage, be able to decline to solemnise such weddings.

The lack of religious freedom protection for civil celebrants and for registry officials is a serious flaw in the legislation. Religious freedom, the right to act in accordance with one’s deepest commitments about life and its meaning, is a significant matter that is recognised as such in all major human rights charters. It applies not only to “clergy” but also to individual believers. Public servants do not leave their religious freedom rights at home when entering the service. Requiring some believers to choose between their faith and their jobs, especially when the services being provided will be easily available from someone else, undermines the human rights of those believers.²⁷

Can religious organisations who offer their premises for weddings decline to offer them for such ceremonies? This is the final area where some religious freedom protection is provided by the new law. Under s 47B “bodies established for religious purposes,” may refuse to “make a facility available, or to provide goods or services” for a same sex wedding, if the refusal is based on their religious beliefs.

However, there is no such protection provided for individual businesses involved in the “wedding industry” who may want to decline to offer their artistic support for services for same sex ceremonies. Those opposed to such protection argue that provisions allowing such a refusal would be a “license to discriminate”. They are wrong. What is being objected to, is support for the *message* of the ceremony (ie the “celebration” of a same sex relationship), and the demand that artistic talents be devoted to such celebration.²⁸ These are matters that are currently being

²⁷ For well-known cases involving public servants whose jobs and indeed liberty were put at risk by politely declining to support same sex unions, see the case of Lillian Ladele, discussed in *Eweida and ors v United Kingdom* [2013] ECHR 37, and the experience of Kentucky registrar Kim Davis, discussed in my post “Jail time for Kentucky County Clerk” (Sept 5, 2015) <https://lawandreligionaustralia.blog/2015/09/05/jail-time-for-kentucky-county-clerk/>.

²⁸ The word “celebration” here can have its ordinary meaning of rejoicing over something, and its more technical meaning of “presiding over a wedding service”. The *Oxford English Dictionary* tells us that the transitive verb “celebrate” can mean either “1.b...perform publicly (a religious or formal ceremony, such as a marriage or funeral)” or “3.b... To mark one's happiness or satisfaction with (a significant event or circumstance, esp. a milestone reached or success achieved), typically with a social gathering or enjoyable activity.” The two words seems connected, and both seem relevant in this context. The difference seems to be primarily that the verb in the first sense is performed by the “celebrant”, whereas in the second sense it can be said that all of those who assist in, and attend, the ceremony are “celebrating” the event.

litigated at the highest judicial level in the United States and in the UK. In *Craig v. Masterpiece Cakeshop, Inc.*, 2016 WL 1645027 (Colo Apr 25, 2016) a cake-maker in Colorado was found to have breached discrimination laws by declining to provide a wedding cake for a same-sex wedding; an appeal to the US Supreme Court was heard on Dec 7, 2017 and the decision on the appeal is pending. In *Lee v McArthur & Ors* [2016] NICA 39 (the *Ashers Bakery case*) a Northern Ireland court upheld a penalty imposed on Christian bakers for declining to provide, not a wedding cake, but a cake bearing a slogan supporting same-sex marriage. An appeal to the UK Supreme Court will be heard in April/May 2018.

Other issues arising from Same Sex marriage

There are a number of other issues which arise, not flowing directly from the ceremony as such, but from the fundamental message concerning the acceptance of homosexual activity evidenced by this new law. While of course, as a matter of social norms, homosexual activity has long been regarded as acceptable in Western society, formal legal equation of such activity with heterosexual marriage seems to mark a new stage in societal approval. As a result, we may expect increased challenge to the view held by religious groups that such activity is contrary to God's purposes for humanity, and an increased sense that this is such a totally unacceptable stance that the holders of the position ought to be penalised.

One issue will be whether religious schools will be able to continue to teach their pupils the views of their religious traditions about marriage. Under the current law, religious schools are generally able to teach the views of their religion without much restriction, with the unfortunate exception of Tasmania (noted below).

One relevant legal challenge may come from laws that prohibit "vilification" on the basis of sexuality. In NSW, for example, there is a prohibition on "homosexual vilification" in s 49ZT of the *Anti-Discrimination Act 1977* ("ADA"), which could in theory provide a ground for complaint about a religious school teaching the Bible's view that homosexuality is a sin. Of course, to breach the provision one would have to "incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons", which a sensible presentation of Biblical views would not do.

But if it were interpreted as such, the NSW law itself already contains "balancing clauses" designed to protect religious freedom. There is a defence under ADA s 49ZT(2)(c) for material "done reasonably and in good faith for ... religious instruction". There is also a defence under s 56(d) of the ADA which covers actions done by religious organisations on the basis of their religious beliefs. Most other jurisdictions where this sort of "vilification" is unlawful have similar balancing clauses.

However, in Tasmania there is a controversial provision making it unlawful to merely "offend" someone on the basis of their sexual orientation, in s 17 of the *Anti-Discrimination Act 1998* (Tas). The most general defence provision under that Act, s 55, does not apply to "religious purposes". Under this law the Roman Catholic Archbishop Julian Porteous was sued for distributing a leaflet outlining the Roman Catholic view of marriage to pupils in Roman Catholic schools.²⁹ While the action did not ultimately proceed, there is little in the Tasmanian law that would prevent such an action being brought again.

Despite attempts by some to deal with this matter in the Parliament during the passage of the marriage amendments, the final legislation contained no protection in this area.³⁰ In

²⁹ For comment see my post "First they came for the Catholics..." (Nov 13, 2015) <https://lawandreligionaustralia.blog/2015/11/13/first-they-came-for-the-catholics/> .

³⁰ These issues, among others, are under consideration by the Religious Freedom Review currently being conducted by a committee chaired by the Hon Philip Ruddock, and due to report by 31 March 2018; see <https://pmc.gov.au/domestic-policy/religious-freedom-review> .

theory, the Tasmanian legislation could even be invoked against someone in another State or Territory who was seen to be in breach (for example, the Tasmanian tribunal in the Porteous litigation authorised service of documents on Roman Catholic bishops around the country.) A recent decision of the NSW Court of Appeal has cast serious doubt on the jurisdiction of tribunals to order penalties against those resident in other jurisdictions,³¹ and an appeal in this matter is currently being considered by the High Court.³² Even if the legislation is confined in operation to Tasmania, however, it is an undue restriction on religious freedom of speech. Indeed, it is arguable that it may even be invalid as infringing the implied freedom of political communication under the Constitution.³³

There is a broader question whether there will be further pressure on those who think that same sex marriage is a bad idea, to not be able to put forward their views in public under these “vilification” or similar laws. Will Christians, for example, be able to present the Bible’s teaching that homosexuality is wrong in a public forum? Or even in their own church services?

The current defences under such laws in most States allow teaching in church, but there would be more uncertainty if views were presented at a public forum outside a church meeting. Still (outside Tasmania) there do seem to be general protections which will be adequate in this area at the moment. However, there may be pressure for “law reform” in this area.

A more general question is whether a person may be sacked from their job because they express a view opposed to same sex marriage. This actually happened to a contractor in the ACT during the same sex marriage “postal survey”.³⁴ Protecting someone from dismissal because of religiously motivated comments of this sort is arguably a matter that should be dealt with under a general law prohibiting unjustified discrimination on the basis of religion. While some individual States and Territories have such laws, there is no law of this sort at the Commonwealth level. Enactment of such a law ought to be an important option discussed by the Ruddock Committee in its current enquiry.³⁵ It is worth stressing that, if such a law is passed, it ought to protect *individuals* and not just religious organisations. It is a defect of most Australian discrimination laws at the moment that “balancing clauses” protecting religious freedom are almost all designed to protect corporate religious freedom, not individuals.³⁶

Another important question is whether financial support currently offered to religious organisations who provide important services to the community, will be conditioned on support for same sex marriage. This has become a significant issue overseas, where some Christian groups have had their funding revoked or been forced to close after not accepting the legitimacy of same-sex relationships.³⁷ Again, this is not dealt with under the amending legislation and may be the subject of future litigation.

³¹ See *Burns v Corbett*; *Gaynor v Burns* [2017] NSWCA 3.

³² See *Burns v Corbett & Ors*; *Burns v Gaynor & Ors*; *Attorney General for NSW v Burns & Ors*; *Attorney General for NSW v Burns & Ors*; *State of NSW v Burns & Ors* [2017] HCATrans 249 (6 December 2017).

³³ See the recent decision in *Brown v Tasmania* [2017] HCA 43 (18 October 2017), where this implied freedom was held to invalidate other Tasmanian legislation prohibiting political protests near workplaces.

³⁴ See “Contractor dismissed due to views on same sex marriage” (Sep 20, 2017)

<https://lawandreligionaustralia.blog/2017/09/20/contractor-dismissed-due-to-views-on-same-sex-marriage/>.

³⁵ See above, n 30.

³⁶ See discussion in the paper mentioned above in n 26.

³⁷ In the US, Roman Catholic adoption agencies in Boston, San Francisco, Washington DC, and Illinois have been forced to close on the basis that they will not place children with same sex couples- see

<http://www.usccb.org/issues-and-action/religious-liberty/discrimination-against-catholic-adoption-services.cfm>.

In New Zealand the Christian lobby group “Family First” has been subject to two attempts by the Charities Board to have its charitable status removed, on the basis that its policies (including opposition to same sex marriage) “cannot be determined to be for the public benefit”; the second decision is now under review by the courts, after a court ruling that the earlier attempt was invalid- see

<https://www.familyfirst.org.nz/2017/09/family-first-blocks-deregistration-by-charities-board/>.

Finally, in this brief overview, since the change in the marriage law there seems to be increased pressure to remove “balancing clauses” in discrimination legislation which allow Christian groups not to employ someone whose views are opposed to Biblical teaching on this issue. Recent comments refer to the supposed incongruity of someone being “married to their same sex partner on Sunday, and sacked on Monday”.³⁸ Of course, there is nothing inherently incongruous about this at all. No-one would imagine that “joined the Liberal Party on Sunday, sacked from working for the Labour Party on Monday” was in any way odd. Where an organisation exists to live out particular fundamental commitments, someone who chooses to act contrary to those fundamental commitments should not expect to keep working for them. Balancing clauses of this sort have been present in Australian law ever since discrimination laws have been in operation, and are designed to strike a balance between the rights of religious freedom (an essential part of which is the right of a religious group to operate in accordance with its faith commitments), and rights not to be the subject of discrimination on irrelevant grounds.³⁹

Some options for religious freedom protection

If, as suggested above, religious freedom protections need to be fine-tuned following the re-definition of marriage, how should this be done? In broad terms, it seems that the options include:

- increased protections being provided by way of further amendment of the *Marriage Act* 1961;
- enactment of stand-alone legislation dealing with the specific issues raised by the marriage amendments;
- enactment of broader protection for religious freedom in general, which might include
 - addition of “religious belief and practice” as a ground of unlawful discrimination under Federal law (analogously to the way that race, sex, disability and age are protected at the moment, and relying on international human rights instruments);
 - enactment of a broader “religious freedom act”, also based on those international instruments, which would pick up not only issues relating to marriage but also a range of other such matters.

These are no doubt matters which will be considered in more detail by the Ruddock Religious Freedom Review. It may be of some interest, however, to note one option that has been adopted in the United States.

Following the decision of a 5-4 majority of the US Supreme Court in *Obergefell v Hodges*, 135 S Ct 2584 (2015) finding a constitutional “right to same sex marriage”, a number of States were concerned about the religious freedom impact of the new right. In particular, the State of Mississippi enacted legislation, HB 1523, the *Protecting Freedom of Conscience from Government Discrimination Act* (2016), designed to deal with these matters.⁴⁰

HB 1523 defines in s 2 a specific set of “sincerely held religious beliefs or moral convictions” which the legislation protects. These are:

- (a) Marriage is or should be recognized as the union of one man and one woman;
- (b) Sexual relations are properly reserved to such a marriage; and

³⁸ See this video from Prof Paula Gerber from Monash University: <https://youtu.be/eIJxgcginHs> .

³⁹ For further comments on this area, see my blog post “Religious groups and employment of staff” (Dec 20, 2017) at <https://lawandreligionaustralia.blog/2017/12/20/religious-groups-and-employment-of-staff/> .

⁴⁰ See <http://billstatus.ls.state.ms.us/documents/2016/pdf/HB/1500-1599/HB1523SG.pdf> .

(c) Male (man) or female (woman) refer to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth.

(The third conviction, while not directly related to the same sex marriage issues we have been considering, is indeed a conviction commonly held on religious grounds by many mainstream religious groups, and raises similar religious freedom issues to those which may also need consideration in Australia.)

The *PFCGD Act* s 3 then goes on to provide that “the state government shall not take any discriminatory action against a religious organization” in circumstances connected to these beliefs. The impact of the legislation is neatly summarized in the decision of the 5th Circuit of the US Federal Court of Appeals in *Barber v Bryant* 860 F.3d 345 (2017):

Those who act in accordance with those beliefs are protected from discriminatory action by the state in the form of adverse tax, benefit, and employment decisions, the imposition of fines, and the denial of occupational licenses. HB 1523 § 4. The statute creates a private right of action for individuals to address any violations of HB 1523 by state officials and permits its use as a defense in private suits over conduct covered by the statute. HB 1523 § 5.

Section 3 defines the set of circumstances in which adverse state action is restricted. Religious organizations are protected when they make decisions regarding employment, housing, the placement of children in foster or adoptive homes, or the solemnization of a marriage based on a belief listed in Section 2. HB 1523 § 3(1)–(2). Parents are protected if they decide to raise their foster or adoptive children in accordance with a belief listed in Section 2. HB 1523 § 3(3). Doctors and mental health counselors cannot be compelled to provide services in contravention of a sincerely held Section 2 belief, provided it does not interfere with “visitation, recognition of a designated representative for health care decision-making, or emergency medical treatment necessary to cure an illness or injury as required by law.” HB 1523 § 3(4). Businesses that offer wedding-related services are protected if they decline to provide them on the basis of a Section 2 belief. HB 1523 § 3(5).

Section 3 also protects any entity that establishes sex-specific standards for facilities such as locker rooms or restrooms. HB 1523 § 3(6). The state cannot take adverse employment action against a state employee for Section 2-related speech as long as his “speech or expressive conduct is consistent with the time, place, manner and frequency of any other expression of a religious, political, or moral belief or conviction allowed....” HB 1523 § 3(7). Finally, county clerks and state judges cannot be compelled to license or celebrate marriages that are inconsistent with a sincerely held Section 2 belief, provided that the official gives prior notice and “any legally valid marriage is not impeded or delayed as a result of any recusal.” HB 1523 § 3(8).⁴¹

This long list of areas where parties are protected from state action not only includes administrative decisions made by government officials, but also includes actions brought by private individuals in reliance on state or local law.⁴² I suggest that these are issues which also ought to be considered in detail in Australia in considering the impact of changes to the marriage laws.

It is interesting to note that in the decision in *Barber* just quoted, the US Federal Court of Appeals (5th circuit) declined to hear a challenge to the legislation brought by groups supporting same sex marriage, on the basis that none of the complainants had established “standing”. The standing rules require that a party be able to demonstrate that they have suffered, are about to suffer, a clear “injury”, “an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not

⁴¹ *Barber v. Bryant*, 860 F.3d 345, 351 (5th Cir. 2017), cert. denied, No. 17-547, 2018 WL 311355 (U.S. Jan. 8, 2018), and cert. denied sub nom. *Campaign for S. Equal. v. Bryant*, No. 17-642, 2018 WL 311384 (U.S. Jan. 8, 2018).

⁴² See s 9(2)(d), which spells out that “state government” includes “any private party or third party suing under or enforcing a law, ordinance, rule or regulation of the state or political subdivision of the state”.

conjectural or hypothetical”.⁴³ None of the parties concerned had actually been denied a service or subjected to a detriment by anyone relying on the legislation, and hence the court refused to hear the challenges brought to the law under the Establishment Clause and the Equal Protection Clause of the 14th Amendment. Any “stigmatic” injury caused by the existence of the legislation was not sufficiently “concrete and particularized” to allow a challenge.

On 8 Jan 2018, the US Supreme Court denied *certiorari* in the proceedings; ie refused to hear an appeal from the decision. This of course does not establish that the decision of the 5th Circuit was correct, but it does indicate that a majority of the Court did not see it as an urgent issue that needed resolution.

Provision of these sort of protections for religious freedom in the context of change to the marriage law is an important task. During the Australian debate on the amendments, a Bill sponsored by Senator Patterson was put forward with a number of similar proposed protections.⁴⁴ The Bill was rejected by the majority of those voting, often on the basis that making the change to the law was the first priority, and that protection of religious freedoms could be addressed at a later stage. With respect, that later stage has now arrived. It is to be hoped that in its considerations the Ruddock Committee will recommend that clear protections be provided in this area (as well as in other areas where religious freedom needs to be protected in Australia.)

Conclusion

Australia, like many other Western countries, is a “diverse” society, providing home to those from a wide range of ethnic, political and religious backgrounds. We celebrate “diversity”. Our country ought to do so, but such diversity must include recognition that, as well as differences in ethnic origin and sexuality, for example, there are many diverse views on moral and religious matters.

A person’s religious views are not simply random preferences for one type of religious meeting or another. They represent a whole “world-view”, a view about the meaning of life and the purposes of the universe. A religious person will often believe that they have, not only a preference for a specific view, but a *duty* to follow and live by views about morality and life which are consistent with those laid down by their God.

Hence the importance of religious freedom to individuals who take their religion seriously. Defending the right of people to live in accordance with their fundamental beliefs has been an important theme of Western societies generally, and international human rights instruments in particular.

While there has been a shift in the “public morality” of Australia on the topic of marriage, there is no need to pretend that everyone in Australia agrees with that, or to seek to impose an artificial uniformity of belief on the topic on those whose religion tells them that this is not good. The perceived benefits of same sex marriage can be enjoyed by those in support of it, while recognising that there are differences of opinion which remain. A mature and tolerant society will, it is to be hoped, allow space for respectful disagreement on this issue and for believers to live in accordance with their fundamental convictions.

⁴³ *Barber v. Bryant*, 860 F.3d 345, 352 (5th Cir. 2017), cert. denied, No. 17-547, 2018 WL 311355 (U.S. Jan. 8, 2018), and cert. denied sub nom. Campaign for S. Equal. v. Bryant, No. 17-642, 2018 WL 311384 (U.S. Jan. 8, 2018).

⁴⁴ See an overview of the Patterson Bill, and some comments, in my post ‘Protecting religious freedom after “Yes”’ (Nov 14, 2017) <https://lawandreligionaustralia.blog/2017/11/14/protecting-religious-freedom-after-yes/>.