Same Sex Marriage: Implications for Christian Health Professionals

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1. Introduction

I'd like to thank Catherine and Andrea for inviting me along tonight to discuss some of the legal implications for Christian health professionals of the introduction of same sex marriage in Australia. I think it is especially generous of medico's to have a lawyer come into the room and even to offer them supper!

I teach law at Newcastle Law School and have done so for about 23 years. Lately they have let me teach a course on "Law and Religion" to upper level law students, and this is one of the areas I am developing in teaching and research. You may also know that I run a blog on this topic.[2] So I have done a bit of thinking about same sex marriage, which raises a number of law and religion issues (for reasons I will outline shortly). I should say that my own position is that same sex marriage was not a good legislative development, but of course I recognise that not all Christians agree, and I accept that some may support it for a range of reasons. But I hope that even if you personally think it was a good idea, you will see why it raises a number of important religious freedom issues for many other Christian health professionals, and tonight may equip you to understand the issues and to respond to the challenges, either for yourself or others, with godly wisdom.

I don't need to say this, but I am not an expert in the medical issues! I ask your pardon in advance if I use the wrong terminology or have misunderstood some medical terminology or practice, and I am very happy for you to ask questions at the end or offer corrections where needed!

What I want to say tonight is structured in this way: I will provide a brief update on the legal position of same sex marriage in Australia; I will then review legal protections in Australia for religious freedom (some of which will be relevant for issues other than marriage); and then I will aim to offer some comments on how same sex marriage may raise difficulties for health professionals. I will aim to leave plenty of time at the end for you to tell me where I have missed problems that you are aware of, or to ask questions generally.

2. Background- Same Sex Marriage in Australia

So, where are we up to with same sex marriage in Australia? Most of you will know we have had a lengthy debate and legislative process about this for the last few years, and I won't rehearse any of that for the moment.

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. As I will note, this leaves some problems for those Christian believers who are convinced that the Bible's teaching is that homosexual behaviour is sinful. (There are

[1] Newcastle Law School, NSW; of course, this paper represents my own views and not those of my employer.
[2] See https://lawandreligionaustralia.blog .
[3] Some 25 nations recognise same sex marriage, either throughout their territories or in substantial parts of them, according to the latest update on that reliable academic source (!) "Wikipedia" (consulted on 8 April, 2018): see https://en.wikipedia.org/wiki/Same-sex_marriage .

various passages that one could point to, but perhaps the most persuasive and clear are the three main passages in the New Testament, *Romans* 1:26-32, *1 Corinthians* 6:9-10, and *1 Timothy* 1:10.)

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.

There are obvious issues for clergy and those involved in solemnising marriages. Representatives of religions have long been involved in conducting weddings; 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".[4]

At a broader level, though, 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.[5] But the formal step of Parliamentary approval of sexual activity officially disapproved by most mainstream religious teachings brings these issues into sharp focus.

3. Religious Freedom and its legal protection in Australia

There are some laws protecting the right of religious persons to live out the commitments of their faith in their lives. But these laws are very patchy and not very strong in Australia.

As was noted by the Interim Report of a Parliamentary Committee currently examining the matter,[6]

> 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.)[7]

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[4] I deal with those issues in a paper which can be downloaded at https://works.bepress.com/neil_foster/114/ .

[5] 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)

[6] *Legal Foundations of Religious Freedom in Australia*, Joint Standing Committee on Foreign Affairs, Defence and Trade (Nov 2017) ("*Legal Foundations"*), available at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Freedomofreligion/Interim_Report .

[7] 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 6. There is also an excellent overview of religious freedom issues in Australia in the submission of Freedom for Faith to the current Ruddock Review on Religious Freedom: see *Protecting Diversity: Towards a Better Legal Framework for Religious Freedom in Australia* (Jan 2018), a paper prepared by Prof Patrick

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.[8] 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.[9] But the question is by no means clear.)

The other avenue through which religious freedom is protected is through discrimination laws, in two different ways.

First, some laws around Australia forbid discriminating against someone on the basis of their religion. But laws doing this are not found everywhere, and in particular there is no general prohibition of religious discrimination in NSW.[10] You would be entitled, for example, when advertising for a new staff member for your practice, to specify that the person should be an active Christian believer, and you would not be breaching NSW law. On the other hand, someone engaging staff would also be entitled, as the law now stands, to say that they would not employ a Christian! Thankfully the general social norms of our community (and, I have to say, ignorance of the law!) means that this does not happen very often.

The second way that discrimination laws protect religious freedom is by allowing, in some cases, an exemption from the operation of the law where religious beliefs are involved. I prefer to call these provisions "balancing clauses" rather than exemptions, as the purpose of such laws is to allow the balancing of religious freedom rights with other rights not to be discriminated against.[11] Perhaps the most obvious example is that laws forbidding sex discrimination, all have provisions allowing religious groups which have classically only ordained men as clergy to do so and not be in breach of the law.

In NSW there is a general balancing clause of this sort, in s 56 of the *Anti-Discrimination Act* 1977:

Parkinson AM of Sydney University, available at https://www.dropbox.com/s/wvxb516r6u5s92f/Freedom%20for%20Faith%20submission%20to%20Ruddock%20Review.pdf?dl=0 .

[8] 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 7 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.

[9] Above, Foster, n 6, at pp 3-6.

[10] There is a limited provision under the *Fair Work Act* 2009 (Cth), Commonwealth law which applies to all States and Territories, in s 772(1)(f) which makes it unlawful to fire someone on the grounds of their religion. But this is in a little-used part of the Act and obtaining remedies under the provision are difficult.

[11] For more detail on these, see N Foster "Freedom of Religion and Balancing Clauses in Discrimination Legislation" (2016) 5 *Oxford Journal of Law and Religion* 385-430, and my more recent paper examining the detail of various State and Territory laws of this sort: "Protecting Religious Freedom in Australia Through Legislative Balancing Clauses"; paper presented at *Freedom 17: Religious Freedom in a Secular Age?* (Freedom for Faith; 14 June, 2017; Canberra, ACT) available at: http://works.bepress.com/neil_foster/111/.

> **Religious bodies**
> 56. Nothing in this Act affects:
> (a) the ordination or appointment of priests, ministers of religion or members of any religious order,
> (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,
> (c) the appointment of any other person in any capacity by a body established to propagate religion, or
> (d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

However, as with most other such laws around Australia, this clause only applies to "religious bodies" or a "body established to propagate religion". It might be applicable in the medical context to a Catholic or other religious hospital, however. As far as I am aware there is no direct authority as to whether a religious hospital could be said to be a "body established to propagate religion". But I have to say that there is a case from Queensland which is not very promising on this point.

The case of *Walsh v St Vincent de Paul Society Queensland (No 2)* [2008] QADT 32 raised an issue of discrimination on the basis of religion. Here a lady who was in charge of a local St Vincent de Paul branch was told that she had to step down as she was not a Roman Catholic. There was an attempt to apply the provision of the Queensland legislation which allowed a "religious body" to be exempt from the Act in terms of appointment of priests and ministers, training of such, and appointment of people to carry out "religious observances".[12]

In the end the Tribunal found that the provision did not apply because the St Vincent de Paul Society was not a "religious body"! This somewhat surprising conclusion was expressed as follows:

> [76] On my reading of the constitution documents, the **Society is not a religious body**. It is a Society of lay faithful, closely associated with the Catholic Church, and one of its objectives (perhaps its primary objective) is a spiritual one, involving members bearing witness to Christ by helping others on a personal basis and in doing so endeavouring to bring grace to those they help and earn grace themselves for their common salvation. That is not enough, in my opinion, to make the Society a religious body within the meaning of the exemption contained in sub-sections 109 (a), (b) or (c).
> [77] Likewise, and despite the particulars which have been provided of the functions of the president relied upon, and the religious observances and practices said to be relevant, it does not seem to me that the fact that a conference president performs some functions (such as leading prayers) and has some duties (among a long list of duties), some with spiritual aspects and some with practical aspects, means that what happens at conference meetings, or what the president does in the discharge of his or her duties, involves "religious observance or practice". (emphasis added)

While most people would see "Vinnies" as providing services to the poor rather than religious services, it does seem a bit odd that an organisation which can be described as it is in para [76] is not "religious".[13]

For those medical professionals who do not work for a church organization, then there is really no direct protection under s 56.

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[12] The relevant provision was s 109 of the Qld ADA.

13 This decision seems similar to, and perhaps something of a precursor to, the later decision in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014), where CYC were held not to be "a body established for religious purposes" under s 75 of the *Equal Opportunity Act* 1995 (Vic). For comment see Neil J. Foster (2014) "Christian Youth Camp liable for declining booking from homosexual support group" at: http://works.bepress.com/neil_foster/78 .

4. Religious Freedom implications for health professionals

Let's see how some of these principles might play out in health practices, in relation to same sex marriage.

a. Public statements by professional bodies

One worth mentioning, simply because we have seen what happened, is the context of public statements that are made by professional bodies. During the debates around the "postal survey" on same sex marriage, a number of peak professional bodies issued ringing endorsements for a change of the law. This was done by the NSW Law Society and the NSW Bar Association, and myself and a number of other Christian lawyers issued a formal press release expressing our disagreement with this view, and disappointment that the statement purported to be on behalf of all lawyers in NSW, when it most certainly was not.[14] In fact, not because of our statement, but because of some other threatened legal action by Robin Speed from the "Rule of Law Institute", the Law Society later issued a clarification confirming that the views it had expressed did not represent the views of all their members.[15]

Most of you will be aware that a similar statement in support of same sex marriage was made by the AMA in May 2017. There was then what I regard as an excellent response prepared by a group of doctors who disagreed, in a careful medical argument: see **WHY THE AMA SHOULD RETRACT ITS STATEMENT ON 'MARRIAGE EQUALITY'** at https://critiqueama.wordpress.com (published on Aug 5, 2017) . For whatever reasons, the AMA did not retract its comments, which many people would also have seen as representing universal support for same sex marriage by Australian doctors.

While the NSW Law Society seems to have been susceptible to pressure by a group of its members, the national peak medical body seems to have felt it did not need to respond to the objectors from within its ranks.[16]

There seems to be little legal recourse for those members of the AMA who objected to its published stance on the issue. However, the events do raise another question. Did those who objected, by simply citing medical evidence showing that there were some studies showing that children of same sex couple did have worse outcomes in a number of areas, themselves break the law by "vilifying" homosexual persons?

b. Statements expressing disapproval of same sex marriage

This is the second major area I want to mention. The law of NSW does make it unlawful to "vilify" someone on the basis of their sexual orientation.

This prohibition on "homosexual vilification" is contained in s 49ZT of the *Anti-Discrimination Act* 1977 ("ADA"), which could in theory provide a ground for complaint about a view conveying a criticism of the institution of same sex marriage on medical grounds, or indeed a comment noting the Bible's view that homosexuality is a sin.

Homosexual vilification unlawful

[14] The statement was picked up reported by *The Australian* newspaper; you can see a summary of the events and a copy of the statement (issued under the "umbrella" of the "Wilberforce Foundation") at https://lawandreligionaustralia.blog/2017/09/01/press-release-of-the-wilberforce-foundation-full-text/ .

[15] See "Law Society backs down in same-sex marriage row" (5 Oct 2017) https://www.smh.com.au/national/nsw/law-society-backs-down-in-samesex-marriage-row-20171005-gyv09f.html .

[16] For a review of the issue, generally supportive of the AMA and dismissing the objectors, see http://medicalrepublic.com.au/marriage-equality-doctors-opinions-count/10973 (11 Sept 2017).

> 49ZT (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group.
> (2) Nothing in this section renders unlawful:
> (a) a fair report of a public act referred to in subsection (1), or
> (b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the *Defamation Act 2005* or otherwise) in proceedings for defamation, or
> (c) a public act, done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

The first thing to note is that the provision requires a "public act", defined in s 49ZS. While not entirely clear, the intention seems to be that this would not cover a private conversation with a patient or a couple of patients. It is aimed at more widely published material- a public speech, or a newsletter, or a sign on a wall in a surgery, say.

It also requires a reasonably serious level of speech. The comment would have to "incite hatred towards, serious contempt for, or severe ridicule of" homosexual persons. Hence it seems to me pretty clear that a calm and reasoned discussion of Biblical views, or a rational presentation of medical evidence, should not be caught. Having said that, with the temperature rising in this area, it might be possible that a court could hold that "contempt", for example, was expressed by stating that God's judgement would come on sinners, and that homosexual sex was a sin.[17]

Note, however, that the defences applicable here are fairly wide. It would seem likely, for example, that those who put forward the critique of the AMA position would have a defence against a claim under this provision in s 49ZT(2)(c), that the comments were "done reasonably and in good faith, for academic… scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter". The local GP who preaches in church occasionally, or leads a Bible study in the CMDFA, and presents the Bible's view on the issue, should be able to rely on the "religious instruction" defence.

I have to issue one warning, though I hope it won't be necessary soon. While the law of NSW contains fairly reasonable limits on this type of provision, the same cannot be said about the law of Tasmania. There is a controversial provision in that State 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.[18] While the action did not ultimately proceed, there is little in the current Tasmanian law that would prevent such an action being brought again.

Could the publication of a piece of medical research reporting negative consequences of homosexual behaviour, be punished under this provision? At the moment it seems it might, in Tasmania. But what is even more concerning is that there have been some cases where someone from one State has sued the resident of another State, for breaching the complainant's home state laws on sexual orientation vilification! (In the Archbishop Porteous litigation, documents

[17] This of course seems to be the issue in recent controversy sparked by comments of football player Israel Folau on Twitter: see "Qantas may review Wallabies sponsorship over Israel Folau's views on homosexuality" https://www.theaustralian.com.au/sport/rugby-union/qantas-disappointment-at-israel-folau-comments-on-homosexuality/news-story/d0410217fbc5a6daaac5ace32336b7e0 (April 6, 2018).
[18] 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/ .

were sent around at one stage by the Tribunal there to Roman Catholic bishops all over the country!)

A decision of the NSW Court of Appeal last year found that these sorts of actions were unlawful- that a resident of one State could not sue a resident of another State in a local tribunal.[19] This case has now gone on appeal to the High Court of Australia, as it involves the inter-State jurisdiction of tribunals generally, not just in the discrimination area.[20] I hope (with some reason, I think) that the High Court will agree with the NSW Court of Appeal on this issue. It will then be up to the States to decide whether they want to allow such inter-State actions to be litigated in courts as opposed to tribunals, but even if they go down that path I think the matters will be better handled by courts.[21]

Another question worth considering 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".[22] 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. As noted, while some individual States and Territories have such laws, there is no law of this sort at the Commonwealth level, or in NSW. Enactment of such a law ought to be an important option discussed by the Ruddock Committee in its current enquiry.

Another important question that may arise 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.[23] Again, this is not dealt with under the amending legislation and may be the subject of future litigation. It may affect health professionals who work for religious organisations who want to adhere to a Biblical view of marriage.

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[19] See my blog post "Australian inter-State vilification orders overturned" https://lawandreligionaustralia.blog/2017/02/04/australian-inter-state-vilification-orders-overturned/ (Feb 4, 2017).

[20] 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), a very "high powered" appeal argument on which went for 2 days and involved the Commonwealth and State Attorneys-General. Judgment has not been handed down yet.

[21] The NSW Parliament has now enacted provisions allowing a matter which would be in the "diversity" jurisdiction (here this over-used adjective has nothing to do with discrimination law, but refers to the fact that the litigants reside in different States) to be heard in a court instead of a tribunal- see Part 3A of the *Civil and Administrative Tribunal Act* 2013, which commenced on 1 Dec 2017. Whether these provisions will be needed or not depends on the outcome of the *Burns* litigation noted above.

[22] 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/ .

[23] 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/ .

c. Treatments that would usually only be provided for married couples?

It seems to me that the introduction of same sex marriage, a form of marriage that many Christians regard as contrary to God's will, raises a few issues for medical practitioners. Most of these issues arise because a practitioner may be asked to facilitate or support behaviour which they regard as sinful.

It is perhaps worth spending some time on this question of facilitating or supporting. All professionals, of course, will be asked to provide services to sinners, since we know that all people (ourselves included) are sinners! But in particular professionals are often asked to provide services to people who themselves are actively engaged in sinful activities. A doctor may be asked to provide medical care to someone who was injured because they had been the instigator of a violent assault. (Lawyers of course face this issue all the time, as for many the sole characteristic their clients share is that they are likely lawbreakers!)

By patching up someone who is a criminal a health practitioner is not condoning or assisting that person's violent behaviour, even if one's experience of life suggests that the person being treated is likely to go out and do that again. But it does seem to be a different situation if a professional is asked to themselves actively assist in behaviour which is clearly sinful. Most Christians would see a clear example here in providing assistance for the conduct of an abortion, in many (if not all) circumstances.

In this area, then, are there situations where your provision of health services would be arguably contributing to what you regard as sinful behaviour? In particular, it seems to me that the issue arises when a health practitioner is asked to provide a medical service which will directly assist activity that should only take place between a married couple, so that to some extent the provision of this service amounts to an affirmation that the relationship between these clients is morally identical to the relationship between a married couple.

These issues will usually arise, then, in relation to sexual activity between the parties to a relationship. Now let me remind you that I agreed up front that not all Christians will have the same views about these matters. Some may judge that the philosophy of "harm minimisation" means that even if the behaviour in question is sinful, the consequences of not providing a service are so bad that this is a "lesser of two evils" choice. But I think there are some practitioners who would say that they ought not to be involved in provision of such a service.

Let's take the example of contraception. It is, to say the very least, a plausible reading of the Bible to say that it teaches that sex should only take place in the context of a marriage between a man and a woman. How should a health professional respond if asked to provide a service that will allow sex to take place more easily between an unmarried couple, or a same sex couple? (I am not here addressing the question, on which of course Protestants and Roman Catholics have traditionally differed, as to whether contraception itself is always immoral, even in a marriage. But of course, that would be another example where a Roman Catholic GP may face the issue.)

To be perfectly frank, I have no idea how most Christian health professionals deal with this issue in relation to an unmarried heterosexual, "de facto", couple. But I would have thought that at least some might come to the view that they should not assist in providing contraception here, as they know that the very aim of the requested service is to allow the patient, or patients, to engage in sinful sexual activity.

We can then broaden this issue out to a request to provide assisted reproduction techniques to produce a child. A Christian health professional may be willing to provide some of these techniques to a married heterosexual couple, but because they regard a same sex couple as not married in the Biblical sense, may be unwilling to assist such a couple in this area. (Assisting a same sex couple to "have" a child, of course, will mostly require the use of at least

some genetic material from outside the couple, and for men will involve issues of surrogacy which raise many moral and legal issues we don't have time to discuss here.)[24]

Or suppose a same sex married couple comes to a Christian health professional and asks for help to improve their sex life?

Suppose in one of those examples offered, the Christian practitioner politely says: "I'm sorry, because of my religious beliefs I am unable to provide that service to you". What are the legal consequences?

The first question is as to what the ground of the decision was. Suppose a practitioner who has regularly refused to provide contraception to any patients who are not married. In fact, it has to be said that such a ground of decision has been unlawful under most discrimination laws, before the same sex marriage amendments. The *Sex Discrimination Act* 1984 (Cth) makes it unlawful to discriminate against someone on the grounds of "marital status" in the provision of "services": see s 6 (defining "marital status" discrimination), and s 22:

> **22 Goods, services and facilities**
>
> (1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding:
>
> (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person;
>
> (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
>
> (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

While there is a "balancing clause" under the SDA, s 37, as will be seen it only applies to religious organisations, not to individual believers:

> **37 Religious bodies**
>
> (1) Nothing in Division 1 or 2 affects:
>
> (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
>
> (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
>
> (c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
>
> (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.
>
> (2) Paragraph (1)(d) does not apply to an act or practice of a body established for religious purposes if:
>
> (a) the act or practice is connected with the provision, by the body, of Commonwealth-funded aged care; and
>
> (b) the act or practice is not connected with the employment of persons to provide that aged care.

[24] Some of these, and many other, issues are addressed from an ethical perspective in the excellent book by Dr Megan Best, *Fearfully and Wonderfully Made: Ethics and the beginning of human life* (Matthias Media, 2012).

But now a practitioner who declines to provide contraception services to a couple who are "same sex married", will *also* be committing unlawful discrimination under s 22 based on that couple's "sexual orientation".

The same logic would seem to apply to a decision not to assist in provision of assisted reproduction services, or sexual counselling, where these services would have been provided to a heterosexual married couple.

One example may be mentioned which started in the UK, and ended up in appeal in Europe, although the law there is slightly different (and in fact provides *broader* protections than the law of Australia does.) The decision in *Eweida and others v The United Kingdom* [2013] ECHR 37 involved four separate UK cases involving people who had been penalised in the workplace for their faith commitments. One of the cases involved Mr Macfarlane, a Christian who had taken a job as a "sex counsellor". He was dismissed after doubts were raised about his willingness to counsel same sex partners. While the European Court of Human Rights (ECtHR) correctly accepted that there had been a *prima facie* burden on his rights of religious freedom under art 9 of the European Convention on Human Rights, the court held that this burden was effectively justified by the interests of the State in promoting "non-discriminatory" workplace practices.

Mr Macfarlane's case was always going to be hard to justify, as it seems he had taken on the role knowing that counselling of same sex couples might be involved. (One might also ask questions about a person seeking to live by Biblical standards being engaged in counselling heterosexual unmarried couples in this area.) But it does illustrate that the law may in some cases penalise Christian professionals for deciding not to be involved in certain procedures on moral grounds.

Another illustration, though not from medical practice, can be found in an early decision under the NSW *Anti-Discrimination Act* 1977 in *Burke v Tralaggan,*[25] which held that a Christian couple who refused to allow an unmarried couple to rent a flat they owned, on moral grounds, had unlawfully discriminated on the ground of "marital status" under s 48 of the Act.[26]

There may be pragmatic reasons why there are not many of these cases so far against health professionals. One may be that prior to the same sex marriage legislation it was at least regard as a possible moral stance for someone to take, that they would not be involved in supporting a same sex relationship. But it may be that there will now be increased pressure in these areas in the future.

One response that is sometimes suggested in the area of service provisions, is that in most cases it will be possible to avoid being involved for scheduling or other reasons. "I'm too busy" or "we don't have facilities" or something of the sort might be used. But I see, as I'm sure most of you also do, major problems with that as an option. Lying is not a moral option except in the most extreme cases. In any case, if there is inconsistency of treatment of patients it may well become apparent, especially in these days where almost everything is shared on social media!

Of course, most people would not want a medical professional involved in their case, if that person had indicated that they would not support the outcome for moral reasons. But we have to be aware that there are some people who will be so offended by any suggestion that their relationship is not approved by everyone in society, that litigation may be an option. If it becomes an issue for you, there is an organisation in Australia now which is willing to defend religious freedom cases, and it may be necessary to contact them to see if a negotiated solution may be reached, or if in the worst-case scenario, it gets to litigation.[27]

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[25] [1986] EOC 92-161.

[26] For comment on the decision at the time, see G Moens, "The Action-Belief Dichotomy and Freedom of Religion" (1989) 12 *Sydney Law Review* 195-217.

[27] See the Human Rights Law Alliance, https://www.hrla.org.au .

5. Concluding remarks

This paper has been focussed on the specific issue of implications for health professionals of the same sex marriage changes. There is of course much more that can be said about challenges to the religious freedom of health professionals in other areas, most particularly around beginning of life (abortion) and end of life (euthanasia) areas, but those are topics for other occasions. For example, the Freedom for Faith submission noted previously refers to the case of a doctor who was penalised by his local professional body for declining to be involved in an abortion which he judged to be requested on "sex selection" grounds.[28] There are other examples which will have to be wrestled with in the coming years, especially as we see a renewed push for "assisted dying" (ie suicide) laws.

The future may also hold more pressures. Since the change in the marriage law there seems to be increased pressure to remove "balancing clauses" in discrimination legislation which allow Christian groups (such as religious hospitals, for example) 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".[29] 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.[30]

What we have seen is that Australia provides some protection for religious freedom, particularly for organisations, but by no means adequate protection for individuals whose conscience may not allow them to support some procedures supporting same sex marriages. I and many others have made submissions to the Ruddock Panel, which is currently inquiring into the state of religious freedom protection in Australia in light of discrimination laws.[31] That Panel has received over 16,000 submissions, and its reporting deadline has been extended to 18 May 2018.[32] It would be good to see the Panel produce a report which recognises the serious nature of these issues, and makes recommendations for improved religious freedom protections.

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

[28] Freedom for Faith, above, n 7, at 37.
[29] See this video from Prof Paula Gerber from Monash University: https://youtu.be/elJxgcginHs .
[30] 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/ .
[31] See note 7 above for the excellent Freedom for Faith submission. A copy of my submission can be downloaded from my blog at https://lawandreligionaustralia.blog/2018/02/05/submission-to-religious-freedom-review/ (Feb 5, 2018).
[32] See https://www.pmc.gov.au/domestic-policy/religious-freedom-review .

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.

In the meantime, those involved in the health professions as Christians will, I have no doubt, continue to serve their patients to the best of their ability, while seeking to remain true to the convictions about reality and human flourishing spelled out in the Word of God which motivates them to serve. If a thoughtless application of "non-discrimination" principles leads to Christian medical professionals deciding that they can no longer operate under Australian law in these areas in good conscience, that will be a disaster for the Australian community at large. Hopefully sensible recognition of the freedom of believers to live in accordance with their religious commitments will avoid that outcome.