

## CHRISTIANITY AND THE LAW: TRIAL SEPARATION OR ACRIMONIOUS DIVORCE?

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### ABSTRACT

*This article considers the relationship between Christianity and the law in Australia beginning with the arrival of the First Fleet and the declaration of the Swan River Colony. It examines in some detail the influence of the Western legal tradition and of Christianity on the jurisprudence relating to one elemental aspect of Western society: marriage. It considers the make-up of contemporary Australia, contemporary attitudes to religion and the relationship between law and religion in Australia. The article concludes that the once close relationship between law and religion may be better described today not as a trial separation but as an acrimonious divorce. The article argues that conflict between Christianity and the law is increasing to the extent that there is a need for law reform to provide greater protection of religious freedom.*

*At the time this article was written the legislative protection of religious freedom remained in a state of flux. Following the redefinition of marriage on 15 November 2018, a review into religious freedom, the Ruddock Review, has taken place but this review has not been publicly released. Instead, the initial leaks of its recommendations to the press have been selective, mischievous and manipulative. Despite the evidence presented in this article of a need for a more adequate legislative framework for the protection of religious freedom, the response to the recommendations of the Ruddock Review to date can only cause scepticism as to the likelihood that any such framework is likely to be introduced in this country in the near future.*

Blessed are you when people abuse you and persecute you and speak all kinds of calumny against you falsely on my account. Rejoice and be glad, for your reward will be great in heaven; this is how they persecuted the prophets before you.<sup>1</sup>

There is no doubting the Christian roots of Australia's common law and legal system. Despite that history, in contemporary Australia, an observation that a particular law is consistent with or that it has been derived from Christian morality is more likely to be raised as a source of complaint and derision by persons seeking to change the law than recognised as a grounds for maintaining a traditional position. This article considers the relationship between Christianity and the law in Australia. The article argues that the relationship between Christianity and the law in Australia is under severe strain such that the relationship may be better described as an acrimonious divorce rather than a trial separation. The article argues that conflict between Christianity and the law is increasing to the extent that there is a need for law reform to provide greater protection of religious freedom.

The colonies of Australia were established within a context of the Western legal tradition which was steeped in Christianity. Although the majority of the new arrivals to each colony were, from the beginning, from a Christian faith tradition each colony comprised residents from a range of faith and cultural traditions. This article considers the changing relationship between Christianity and the law in Australia and focuses particularly on New South Wales where the British established their first settlement and Western Australia. Like the other territories and states of Australia, the Western Australia of today continues to comprise many religious, customary and faith traditions with Christianity declining both by population<sup>2</sup> and by influence measures. The article recognises the early symmetry between Christianity and the law in Australia in many areas of morality and behaviour. This was a consequence of the historical dominance of the Christian faith among the population in the colonies and historically in England from which Australia inherited the Western legal tradition, the common law and the compendium of English legislation which they brought with them. The article argues that after a period of trial separation Christianity and the law are now facing an acrimonious divorce. It argues that as a consequence of this divorce and given the benefits

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<sup>1</sup> Matthew 5:11-12 New Jerusalem Bible ('NJB'). Unless otherwise specified all references to scripture in this paper will be to the NJB.

<sup>2</sup> The traditions, customs and beliefs of Australia's Aboriginal and Torres Strait Islander peoples warrant particular mention and consideration but that is beyond the scope of this paper.

which Australian society has and continues to derive from Christianity, greater legal protections are now needed for religious freedom.

Part I of this article examines the relationship between Christianity and the law at the time of the arrival of the First Fleet and the declaration of the Swan River Colony which was later to become Western Australia. Part II considers the influence of the Western legal tradition and of Christianity on the jurisprudence relating to an elemental aspect of Western society marriage. Part III considers the make-up of contemporary Australia and contemporary attitudes to religion, with a particular emphasis on the position in Western Australia. Part IV considers the relationship between law and religion in Australia – and in particular in Western Australia today. Part V of the article argues that, given the state of the relationship between law and religion today, there is now a need for greater protection of religious freedom in law.

#### I THE CHRISTIAN ROOTS OF THE COMMON LAW AND THE LEGAL SYSTEM

The European colonisation of Australia began in 1788 as the result of a decision by the English parliament to establish a new penal colony. New South Wales joined the British Empire and inherited the Western legal tradition as it had developed in a Britain. When New South Wales was first colonised the oath of office taken by Governor Phillip was sectarian. Whilst he swore allegiance to the King he also swore allegiance ‘to the protestant succession, whilst repudiating Romish beliefs in the transubstantiation of the Eucharist.’<sup>3</sup> Subsequent early governors also took an oath of office which included these words. The new colony paid Church of England clergy and allocated substantial Crown land exclusively for Anglican churches and schools.<sup>4</sup> Although a significant number of Irish and Catholics were among the convicts transported to New South Wales, it was 28 years before the Colonial Office in Britain allowed official Catholic chaplains into the colony despite many years of polite entreaties. Up until 1820 Catholic convicts were often forced to attend Anglican services.<sup>5</sup> In theory, the common law and English laws in place at the time of colonisation were received by the colony, as far as they were applicable.<sup>6</sup> However the new colony was essentially ‘an

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<sup>3</sup> Roy Williams, *Post God Nation? How religion fell off the radar in Australia – and what might be done to get it back on* (ABC Books, 2015) 28.

<sup>4</sup> Rowan Strong, ‘Church and State in Western Australia: Implementing New Imperial Paradigms in the Swan River Colony, 1827-1857’ (2010) 63(3) *Journal of Ecclesiastical History* 517, 520.

<sup>5</sup> Williams, *Post God Nation?*, above n 3, 29.

<sup>6</sup> Patrick Parkinson, *Tradition and Change in Australian Law* (Lawbook, 5<sup>th</sup> ed, 2013) 150 [5.110].

open prison<sup>7</sup> and a prison under military rule.<sup>8</sup> In 1828, s 24 of the *Australian Courts Act 1828* (Imp) made it clear that all of the laws of England as at 28 July 1828 would apply in New South Wales and Van Diemen's Land in so far as they were applicable.<sup>9</sup> The next year, on the western side of Australia, Lieutenant-Governor James Stirling RN proclaimed the Swan River Colony. The Swan River Colony also inherited the Western legal tradition as it had developed in Britain and its common law. Specifically, the Swan River Colony inherited English laws in place as at 1 June 1829 so far as they were applicable.<sup>10</sup>

In the Western legal tradition, law is autonomous, exercises a central role, and enjoys moral authority.<sup>11</sup> Whilst the seeds of these traditions were planted in the Greco-Roman world the tradition inherited in Australia had grown in the soil of Christianity.<sup>12</sup> In the Western legal tradition law is separately identifiable from custom, morality, religion or politics. This is not to say that law cannot reflect or be influenced by these things but to recognise that, even where laws coincide with religious prescriptions or proscriptions, the law is enforced in its own right and according to its own rules and norms not as a matter of religious obligation but of civic duty.<sup>13</sup> In a society with an almost uniform understanding of morality – such as a morality founded on a Christian religious tradition or on Christian religious traditions – there may be very substantial overlap and uniformity between the civic law and religious morality. The two can nevertheless be separately understood and studied – one in law schools and the other in schools of theology, for example. They also impose separate obligations: one may impose temporal obligations and punishments and the other spiritual or eschatological. In the Western legal tradition and increasingly so law is the central means of governing life and society.<sup>14</sup> In this tradition, social control and social change are achieved by the law.<sup>15</sup> This is because of the third aspect of this tradition which is fidelity to the law because of its moral authority.<sup>16</sup> In the Western legal tradition, law commands a high level of respect because of its status as law. People tend to obey laws simply because they are laws and they do so

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<sup>7</sup> Ibid 139 [5.70].

<sup>8</sup> Ibid 150 [5.110].

<sup>9</sup> Ibid.

<sup>10</sup> Alex C Castles, 'The Reception and Status of English Law in Australia' (1963) *Adelaide Law Review* 1, 2-3.

<sup>11</sup> Parkinson, above n 6, 23 [2.20].

<sup>12</sup> Harold J Berman, *Law and Revolution The formation of the Western Legal Tradition* (Harvard University Press, 1983) 558, Harold J Berman, *Law and Revolution II The Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard University Press, 2003) 201-382, Augusto Zimmermann, *Christian Foundations of the Common Law, Volume I: England* (Connor Court, 2018).

<sup>13</sup> Parkinson, above n 6, 24 [2.30].

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid 28 [2.60].

habitually and independently of their own feelings about the law rather than from regular and conscious fear of sanction.<sup>17</sup> This tradition arose in a Christian context as Parkinson explains:

The close relationship between law and theology in the formation of the western legal tradition, the belief in law as ultimately given by God and the idea that there were natural laws which governed human relations meant that law was imbued with a certain aura of sacredness. The close relationship between law and faith meant that law was believed in; for law, in Caesar's kingdom, was an aspect of the will of God.<sup>18</sup>

Where there is a basic general agreement on moral questions and where the majority of a population follows faiths within the Christian traditions, the civil law is likely to largely reflect the moral principles of Christianity and so the Western legal traditions of centrality, moral authority and fidelity to the law make a degree of rational and logical sense. The colonists also brought the related 'rule of law' with them. This requires not just the citizens but the government to act according to the law and 'the principle of equality before the law.'<sup>19</sup> Like the Western legal tradition of which it really forms a part as Williams explains 'the rule of law is quintessentially a product of Judeo-Christianity.'<sup>20</sup>

The Empire of which the new colonies formed part had developed in a close relationship with the state Church of England for two hundred years.<sup>21</sup> The Christian influence on the common law and the laws of England pre-dated the Reformation and the foundation of the Church of England. The influence of Christianity on the Western legal tradition has been so deep that Parkinson has observed that 'Christianity was to the formation of the Western legal tradition as the womb is to human life.'<sup>22</sup> The relationship between Christianity and the laws of England was described in 1676 Lord Chief Justice Sir Matthew Hale in this way: 'Christianity is parcel of the laws of England.'<sup>23</sup> Williams observes that this understanding 'was repeated by many English and American jurists until the early twentieth century.'<sup>24</sup> In the second half of the eighteenth century Edmund Burke was part of a revival of an

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid 64 [2.90].

<sup>19</sup> Parkinson, above n 6, 120 [4.700].

<sup>20</sup> Williams, *Post God Nation?*, above n 3, 36.

<sup>21</sup> Strong, 'Church and State in Western Australia Implementing New Imperial Paradigms in the Swan River Colony, 1827-1857', above n 4, 517, 519.

<sup>22</sup> Parkinson, above n 6, 29 [2.70]; see also Williams, *Post God Nation?*, above n 3, 38-39, 77-81, 87-91.

<sup>23</sup> *Rex v Taylor* (1676) 1 Vent 293 as quoted by Roy Williams, *God Actually* (ABC Books, 2008) 273.

<sup>24</sup> Williams, above n 23, 273.

understanding of the inseparability of the state and the Church of England. As he wrote in 1792:

[I]n a Christian commonwealth the Church and the State are one and the same thing, being integral parts of the same whole ... Religion is so far, in my opinion, from being out of the province or the duty of a Christian magistrate, that it is, and it ought to be not only his care, but the principal thing in his care: because it is one of the great bonds of human society, and its object the supreme good, the ultimate end and object of man himself.<sup>25</sup>

On a similar theme in 1815 John Bowles, a High Church of England apologist, observed that:

The constitution of this country is composed of two distinct establishments, the one civil, the other ecclesiastical, which are so closely woven together, that the destruction of either must prove fatal to both.<sup>26</sup>

This connection between the state and religion can be seen in Stirling's instructions from the Colonial Office which included support of religion, that is the religion of the Church of England,<sup>27</sup> in the new Swan River Colony.<sup>28</sup>

You will bear in mind, that, in all locations of Territory, a due proportion must be reserved for the Crown, as well as for them maintenance of the Clergy, support of Establishments for the purposes of Religion, and the Education of youth, concerning which objects more particulars will be transmitted to you hereafter.<sup>29</sup>

The *Australian Courts Act 1828* (Imp) was passed and the Swan River Colony established during a key era in the relationship between the State and the Church of England in Britain. The imperial hegemony of the Church of England started to unravel in the 1830s. With Catholic emancipation, the passing of the *Reform Bill* in 1832 and the abolition of the *Test and Corporations Act*, Protestant dissenters and Catholics could vote and enter parliament Britain moved toward a professed policy of State neutrality towards churches.<sup>30</sup> In 1836 New

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<sup>25</sup> Edmund Burke as quoted in Rowan Strong, 'The Reverend John Wollaston and Colonial Christianity in Western Australia, 1840-1863' (2001) 25(3) *The Journal of Religious History* 261, 273.

<sup>26</sup> John Bowles as quoted in Strong: *ibid* 261, 273

<sup>27</sup> Strong, 'Church and State in Western Australia Implementing New Imperial Paradigms in the Swan River Colony, 1827-1857', above n 4, 517, 521.

<sup>28</sup> *Ibid* 517, 521.

<sup>29</sup> Lieutenant-Governor James Stirling's instructions, 30 Dec 1828 as quoted in Strong, 'Church and State in Western Australia', above n 4 517, 521.

<sup>30</sup> Strong, 'Church and State in Western Australia Implementing New Imperial Paradigms in the Swan River Colony, 1827-1857', above n 4, 517, 519, 522; Strong, 'The Reverend John Wollaston and Colonial Christianity in Western Australia, 1840-1863', above n 25, 261, 274.

South Wales passed a Church Act which provided government funding not only to Anglican but also to Presbyterian and Catholic clergy and churches.<sup>31</sup> In 1840 the Legislative Council of the Swan River Colony followed suit and passed similar legislation.<sup>32</sup>

Like the rest of Australia, Western Australia was from the time it was founded as a colony of the British Empire a predominantly Christian colony but it was nevertheless a multi-faith, multi-cultural and pluralist society.<sup>33</sup> Whether complaints about deliberate favouritism<sup>34</sup> were fair or not<sup>35</sup> until state aid to religion ended<sup>36</sup> the Church of England received the great majority of financial support from the governments of the colonies of New South Wales and the Swan River because the funding arrangements were tied to the number of adherents and Anglicans were the largest populations in both colonies' populations.<sup>37</sup> Whatever the government's position in the colony and in Britain, the residents of the new colonies brought centuries of religious and theological antagonisms<sup>38</sup> and sectarianism with them as part of their cultural inheritance along with their shared Western legal tradition, the common law as it had developed in England and its Empire and their shared Christianity. Whilst some had different understanding of certain passages of scripture the Christian colonists had a shared belief in such matters as: the existence of God,<sup>39</sup> God's creation of the universe and of man and woman in the image of God,<sup>40</sup> God's institution of monogamous, heterosexual marriage,<sup>41</sup> the Decalogue,<sup>42</sup> God entering the world in the form of a human person, Jesus

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<sup>31</sup> Strong, 'Church and State in Western Australia: Implementing New Imperial Paradigms in the Swan River Colony, 1827-1857', above n 4, 517, 520.

<sup>32</sup> 'An Act to promote the building of Churches & Chapels and to contribute towards the Maintenance of Ministers of Religion in Western Australia': see *ibid*, 517, 525.

<sup>33</sup> Salvado records that just 19 years after Lieutenant-Governor Stirling's arrival in the small non-indigenous population of the colony of 4,622 persons, 83.6 per cent of the population identified with a Christian denomination. The population consisted of 3,063 Anglicans (67 per cent), 337 Catholics (7.3 per cent), 276 Methodists (6 per cent) and 187 Independent Protestants (4 per cent) and 759 'Chinese and others unspecified' (16 per cent) Dom Rosendi Salvado, *The Salvado Memoirs* (E J Stormon SJ trans and ed, Benedictine Community of New Norcia, 2007) 7. It is likely that this category included people who considered themselves Christians but who were not affiliated with one of the traditions included in the poll given the results of the first national census in 1911.

<sup>34</sup> Strong, 'Church and State in Western Australia Implementing New Imperial Paradigms in the Swan River Colony, 1827-1857', above n 4, 517, 526.

<sup>35</sup> There is debate among academics as to the extent to which the Church of England enjoyed favoured status in the fledgling Swan River Colony: see *ibid* 517, 522-523.

<sup>36</sup> Which it did in NSW in 1863: *ibid* 517, 520.

<sup>37</sup> *Ibid* 517, 520, 525.

<sup>38</sup> Rowan Strong, 'The Colonial Religion of the Anglican Clergy: Western Australia 1830 to c 1870' (2014) 38(1) *Journal of Religious History* 91, 109-110; Lesley J Borowitzka, 'The Reverend Dr Louis Giustiniani and Anglican Conflict in the Swan River Colony, Western Australia 1836-1838' (2011) 35(3) *Journal of Religious History* 352, 361.

<sup>39</sup> Gen 1.

<sup>40</sup> Gen 1.

<sup>41</sup> Gen 2:24, Matthew 19:1-12.

Christ,<sup>43</sup> the Golden Rule,<sup>44</sup> that there were moral standards of behaviour set by God including proscriptions of suicide<sup>45</sup> and elective abortion<sup>46</sup> and that eternal judgment was a reality.<sup>47</sup> Like the Western legal tradition the common law was saturated with the Judeo-Christian worldview. As Robert Pasley has observed:

The fundamental conceptions of equality before the law, of the accountability of the ruler to God and the law, of civil rights and liberties, of the individual's responsibility for his own acts, of mens rea, of the sanctity of promises, in fact the whole structure and content of our constitutional, civil and criminal law are all received from the Judeo-Christian tradition and can only be fully understood by one who has studied and mastered that tradition.<sup>48</sup>

With that general background given the contemporary significance of the meaning of marriage in Australia, Part II of the article considers the influence of the Western legal tradition and Christianity in the laws relating to marriage at the foundation of the antipodean colonies and at the time of the reception of English laws.

## II MARRIAGE IN THE WESTERN LEGAL TRADITION

Heterosexual, monogamous relationships have long been recognised as marriage in the Western legal tradition.<sup>49</sup> This form of marriage existed well before Christianity in Ancient Greece and Ancient Rome and other pre-Judeo-Christian civilisations and it has existed in societies which are not and never have been Christian.<sup>50</sup> In the Western legal tradition state interest in regulating, preferencing, and recognising as marriages only heterosexual,

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<sup>42</sup> Exodus 20 and see Matthew 19:16-19 'And now a man came to him and asked, "Master, what good deed must I do to possess eternal life?" Jesus said to him, "Why do you ask me about what is good? There is one alone who is good. But if you wish to enter into life, keep the commandments." He said, "Which ones?" Jesus replied, "These: You shall not kill. You shall not commit adultery. You shall not steal. You shall not give false witness. Honour your father and your mother. You shall love your neighbour as yourself."

<sup>43</sup> John 1, Matthew 1, Luke 1, 2.

<sup>44</sup> Matthew 7:12; see also Luke 6:31.

<sup>45</sup> Williams, *Post God Nation?*, above n 3, 39.

<sup>46</sup> Barbara Brookes, *Abortion In England 1900-1967* (Routledge, 1988) 24.

<sup>47</sup> Williams, *Post God Nation?*, above n 3, 79.

<sup>48</sup> Robert S Pasley, 'The Position of the Law school in the University' (1966) 52 *Catholic University Law Review* 34, 50-51. For a more detailed discussion of the Christian roots of the common law see Berman, *Law and Revolution*, above n 12, 201-382, and Zimmermann, above n 12.

<sup>49</sup> See Stephanie Coontz, *Marriage, a History: How Love and Conquered Marriage* (Penguin, 2005) 78; Marilyn Yalom, *A History of the Wife* (Perennial, 2002) 25-44; Garfield Barwick, 'The Commonwealth Marriage Act 1961' (1961) 3 *Melbourne University Law Review* 277, 278; *Reference re: Section 293 of the Criminal Code of Canada* [2011] BCSC 1588 [150], [152] - [157], [158], [162]-[163], [187].

<sup>50</sup> See *Brinkley v Attorney-General* (1890) 15 PD 76, 79 ('*Brinkley v Attorney General*'); Coontz, above n 49, 78; Yalom, above n 49, 25-44. Ancient Greece and Ancient Rome and the Empire of Japan are three examples.

monogamous relationships has a lengthy pedigree.<sup>51</sup> For Aristotle, reason dictated that marriage and family were foundational to society and they required state protection. He examined the natural order and from this he identified the essential nature of creatures and their purpose or end. This led him to derive ethical norms which would facilitate the achievement of these purposes or ends. For Aristotle this approach was not limited to lesser species but it could and should also be applied to human beings. For him it was legitimate to reason from the observed nature of humanity to formulate moral precepts. These moral standards would facilitate humanity achieving its true nature and fulfilling its destiny as human beings. In this teleological conception of law humanity was created for a purpose and human beings existed to fulfil their essential nature. Aristotle saw that human beings were naturally inclined to live in a civic environment. He concluded from this that family and the state are both communities established by nature in order to provide for the needs of life and for human life to continue.<sup>52</sup> For Aristotle, then, reason dictated that laws must be developed to uphold the family unit and the creation and operation of the city state in order to sustain community and needs of humanity. As he said:

In the first place, there must be a union of those who cannot exist without each other; namely of male and female, that the race may continue (and this is a union which is formed, not of choice but because, in common with other animals and with plants, mankind have a natural desire to leave behind an image of themselves).<sup>53</sup>

Similarly Ulpian writing in Rome in 3 AD recognised the foundational role of marriage in his definition of natural law as:

that which all animals have been taught by nature ... From it comes the union of man and woman called by us matrimony, and therewith the procreation and rearing of children.<sup>54</sup>

The Western legal tradition had natural law philosophical explanations for preferring monogamous, heterosexual marriages. It was not simply those philosophical foundations but also the essential survival of the state which saw the development of state laws preferring heterosexual, monogamous relationships as marriages by the state. The state needed citizens to defend itself and marriage provided a structure in which children could be effectively

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<sup>51</sup> See Coontz, above n 49, 78; Yalom, above n 49, 25-44; Barwick, above n 49, 278; *Reference re: Section 293 of the Criminal Code of Canada* [2011] BCSC 1588 [150], [152] - [157], [158], [162]-[163], [187].

<sup>52</sup> See discussion in Parkinson, above n 6, 40 [2.150].

<sup>53</sup> Aristotle, *The Politics*, Book I as quoted in Parkinson, above n 6, 40 [2.150].

<sup>54</sup> *Justinian's Digest*, Book I §1 1 as quoted in Parkinson, above n 6, 39 [2.150].

raised by their parents. Yalom argues that it was Roman respect for heterosexual, monogamy and its approach particularly through succession law of favouring married couples and their legitimately borne offspring – in the interests of the state – rather than Judeo-Christian respect for marriage, in that form, which saw heterosexual, monogamous marriage permeate the Empire.<sup>55</sup>

When the British arrived in Sydney, marriage was governed in England by Lord Hardwicke's *Marriage Act* of 1753.<sup>56</sup> This Act unequivocally preferenced Anglicanism for it mandated that all English marriages must be celebrated by an Anglican Minister according to the rites of the Church of England in a church or public chapel before two witnesses following the publication of marriage banns.<sup>57</sup> Unless a special license was granted by the Archbishop of Canterbury any marriage solemnised in some other way, was not only void, it was a felony. Similarly without first obtaining a licence to dispense with the publication of marriage banns it was a felony to celebrate a marriage without their publication. Acting contrary to these requirements was no trivial matter because a conviction of one of these felonies attracted a penalty of transportation to America for 14 years.<sup>58</sup> The reality of the multi-faith and multi-racial population of the new colony in Sydney necessitated a more ecumenical approach and Lord Hardwicke's Act was never law in New South Wales. Instead the Governor and Council of New South Wales enacted the 1834 Ordinance which confirmed the recognition by the colony of the validity of marriages between one man and one woman if solemnised in accordance with the rites not only of the Church of England but also by priests of the Catholic Church or by ministers of the Church of Scotland.<sup>59</sup> The next year Lord Brougham delivered a judgment in the House of Lords, which confirmed that marriage under the common law meant Christian marriage, that is, marriage between one man and one woman to the exclusion of others. Christianity was so much a part of the law that the Lords did not ground their position, for example, on the natural law<sup>60</sup> or in the state's interest in children being born and reared by their biological parents. To do so would have resulted in unnecessary verbiage: the judges and their readers all knew perfectly well what Christian

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<sup>55</sup> Yalom, above n 49, 44.

<sup>56</sup> (UK) 26 Geo 2, c 33; see discussion in Barwick, above n 49, 277, 279; *Attorney General (Vic) v The Commonwealth* (1962) 107 CLR 529, 578-580.

<sup>57</sup> Barwick, above n 49, 280.

<sup>58</sup> Barwick, above n 49, 279-280.

<sup>59</sup> Barwick, above n 49, 280.

<sup>60</sup> See eg John Finnis, 'Law, Morality and "Sexual orientation"' (1994) 69 *Notre Dame Law Review* 1049, 1066, 'Marriage: A Basic and Exigent Good' (2008) 91(3-4) *The Monist* 388, and *Natural Law and Natural Rights* 81-84 as quoted in Sam Blay, 'The Nature of International Law' in *Public International Law: An Australian Perspective* (Oxford University Press, 2<sup>nd</sup> ed, 2005) 14.

marriage was and why it existed. Lord Broughton stated that Christianity alone explained why marriage under the common law was between one man and one woman. In doing so with these observations he set the tone for future English cases on the meaning of marriage:

If indeed there go two things under one and the same name in different countries – if that which is called marriage is of a different nature in each – there may be some room for holding that we are to consider the thing to which the parties have bound themselves, according to its legal acceptance in the country where the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that *we regard it as a wholly different thing, a wholly different status*, from Turkish or other marriages among infidel nations, because we clearly never should recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorise and validate. This cannot be put upon any rational ground except our holding that the infidel marriage to be something different from the Christian and our also holding Christian marriage to be the same everywhere.<sup>61</sup>

This simple characterisation of marriages between one man and one woman to the exclusion of others by reference to the expression ‘Christian marriage’ was replicated in many subsequent decisions. In 1866 the Judge Ordinary observed that some countries recognised polygamous marriages as ‘marriages’ and used terms such as wife and husband for those in such relationships but that the same words had different meanings when used in those contexts to their meaning when used in England.<sup>62</sup> As he observed:

What then is the nature of this institution [of marriage] as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If [marriage] be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of others.<sup>63</sup>

Similarly in 1880 Lush LJ wrote that:

[T]here is no analogy whatever between the union of a man and a woman in a country where polygamy is allowed, and the union of a man and a woman in a Christian country. Marriage in the contemplation of every Christian community is the union of a man and one woman to the

<sup>61</sup> *Warrender v Warrender* (1835) 2 Cl & F 488[531]-[532] (emphasis added).

<sup>62</sup> *Hyde v Hyde* (1866) LR 1 P & D 130, 133-134.

<sup>63</sup> *Hyde v Hyde* (1866) LR 1 P & D 130, 133.

exclusion of all others. No such provision is made, no such relation is created, in a country where polygamy is allowed, and if one of the numerous wives of a Mohammedan was to come to this country and marry in this country, she could not be indicted for bigamy, because our laws do not recognise as marriage a marriage solemnised in that country, a union falsely called marriage, as a marriage to be recognised in our Christian country.<sup>64</sup>

Writing in 1888 Stirling J echoed those earlier judgments when he opined that:

[A] union formed between a man and a woman in a foreign country, although it may there bear the name of marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the laws of England unless it be formed on the same basis as marriages throughout Christendom, and be its essence “the voluntary union for life of one man and one woman to the exclusion of others.”<sup>65</sup>

In 1890 the President of the Probate Division in England recognised that, in these earlier decisions, the phrase ‘Christian marriage’ had been used as a sort of shorthand but again did not find it necessary to include any rational or reasoned justification of marriage in England having that meaning. As he observed:

The principle which has been laid down by those cases is that a marriage which is not that of one man and one woman to the exclusion of all others, though it may pass by the name of a marriage is not the status which the English law contemplates when dealing with the subject of marriage.<sup>66</sup>

[T]hroughout the judgments that have been given on this subject, the phrases “Christian marriage”, “marriage in Christendom,” or some equivalent phrase, has been used, that has only been for convenience to express the idea. But the idea which was to be expressed was this, that the only marriage recognised in Christian countries and in Christendom is the marriage of the exclusive kind that I have mentioned ...<sup>67</sup>

Again it is important to recognise that writing in the context of England in the 19<sup>th</sup> century it was simply not necessary for the judges to reach back to Aristotle or Ulpian or to the Greco-Roman foundations of marriage or to explain – even in passing – the centrality of marriage to the state because all of that meaning was encapsulated in the phrases which were used. This was so whether the precise phrase was ‘Christian marriage’, ‘marriage in Christendom’, or

<sup>64</sup> *Harvey v Farnie* (1880) 6 PD 35, 53.

<sup>65</sup> *Bethell v Hildyard* (1888) 38 Ch D 220, 234.

<sup>66</sup> *Brinkley v Attorney General* (1890) XV PD 78, 79-80.

<sup>67</sup> *Ibid* 80.

something similar. As the various Australian colonies were established, each passed its own marriage laws providing for state recognition of marriages between one man and one woman and legislating permissible degrees of consanguinity and marriage ages.<sup>68</sup> Again these colonies were overwhelmingly populated by Christians and by Europeans from the Western legal tradition. No colonies recognised polygamous marriages, marriages between two persons of the same sex or customary marriages of Australia's Aboriginal peoples and bigamy has always been a criminal offence.<sup>69</sup> As the article will explain in Part IV the lack of jurisprudential development of an expressed reasoned and rational foundation for the 'idea' of marriage in these cases meant that, more than a hundred years later, when Christianity was no longer recognised, without question, as being 'parcel of the laws'<sup>70</sup> the definition of marriage contained in those decisions was ripe for criticism and rejection.

### III THE RELIGIOUS MAKE-UP OF CONTEMPORARY AUSTRALIA AND CONTEMPORARY ATTITUDES TO RELIGION

When the Australian colonies federated in 1901 the people of the participating colonies encapsulated the Western legal tradition of the supremacy of the law in Clause 5 of the new *Australian Constitution*.<sup>71</sup> They also included a preamble which recognised that the colonies joined together in the new Commonwealth 'humbly relying on the blessing of Almighty God.'<sup>72</sup> At the same time, recognising that whilst almost the entire population was Christian they did not all subscribe to one Christian tradition, the *Australian Constitution* proscribed the creation of an establishment religion, eschewed religious tests for public servants and prohibited the imposition of religious observances. The *Australian Constitution* also precluded the Commonwealth government from making laws 'for prohibiting the free exercise of any religion.'<sup>73</sup>

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<sup>68</sup> Barwick, above n 49, 283-286.

<sup>69</sup> As to recognition of indigenous cultural marriages see *R v Neddy Monkey* (1861) 1 Wyatt & Webb 40, 41; *R v Cobby* (1883) 4 LR (NSW) 355, 356; and *R v Byrne* (1867) 6 LR (NSW) 302; see Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [237].

<sup>70</sup> *Rex v Taylor* (1676) 1 Vent 293 as quoted by Williams, *God Actually*, above n 22, 272.

<sup>71</sup> 'This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State.'

<sup>72</sup> *Australian Constitution* Preamble. For a description of how those words came to be included see Williams, *Post God Nation?*, above n 3, 137-140.

<sup>73</sup> *Australian Constitution* s 116.

Since statistics have been collected the majority of Australians have identified as Christians.<sup>74</sup> There has however been a downward trend in the percentage of Australians who identify as Christian. When the first census was taken in 1911, 96 per cent of Australians self-identified as Christian. In the most recent census in 2016, this had fallen to 52.1 per cent.<sup>75</sup> In Western Australia in the last census less than half the population (49.8 per cent) identified as Christian which was more the 2 percentage points below the national average. There also appears to be a trend away from religious belief. The numbers of ‘No Religion’<sup>76</sup> have been increasing<sup>77</sup> from 0.8 per cent of the Australian population in 1966 to 30.1 per cent in 2016.<sup>78</sup> Since 2011, when 32.5 per cent of Western Australians selected the ‘No religion’ category in the census, this category has been the most population selection for Western Australians<sup>79</sup> as it has been in 4 of Australia’s other states and territories.<sup>80</sup> In the last census 33 per cent of Western Australians identified with ‘No Religion’ which is close to 3 percentage points above the average for the nation (30.1 per cent).<sup>81</sup> The fact that the growth in the ‘No Religion’ category has been strongest among the young, with 28 per cent of those aged 15-34 reporting no religious affiliation in 2011 rising to 39 per cent in 2016 suggests that this move away from religion is likely to continue.<sup>82</sup> There are a number of other indicators which support this view. Among teenagers and those in their twenties only 31 per cent report belief in God<sup>83</sup> and only 39.4 per cent of Australians in the 18 to 34 age bracket identify as Christian.<sup>84</sup> Regular church attendance has also been in decline<sup>85</sup> falling to 15 per cent in 2011 from 36 per cent in 1972. Whilst these demographic changes have been taking place Australia has witnessed an increasing ignorance and antagonism towards Christianity.

<sup>74</sup> Australian Bureau of Statistics, *2011.0 - Reflecting a Nation: Stories from the 2011 Census, 2012–2013* (21 June 2012) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2011.0main+features902012-2013>>.

<sup>75</sup> Australian Bureau of Statistics, *2016 Census: religion* (27 June 2017) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/7E65A144540551D7CA258148000E2B85?OpenDocument>>.

<sup>76</sup> It should be noted that ‘No Religion’ does not necessarily equate to having no religious beliefs or faith/ the phrase is equivalent to secular beliefs and other spiritual beliefs: Australian Bureau of Statistics, *2011.0 – Census of Population and Housing: reflecting Australia – Stories from the Census, 2016: Religion in Australia*. (28 June 2016) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2011.0~2016~Main%20Features~Religion%20Article~80>>.

<sup>77</sup> Australian Bureau of Statistics, *2016 Census: religion*, above n 75.

<sup>78</sup> Ibid.

<sup>79</sup> Australian Bureau of Statistics, *2016 Census QuickStats: Western Australia* <[http://www.censusdata.abs.gov.au/census\\_services/getproduct/census/2016/quickstat/5?opendocument](http://www.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/5?opendocument)>.

<sup>80</sup> McCrindle Research Pty Ltd, ‘Faith, Belief & Churchgoing in Australia’ *Social Analysis* (24 March 2016) <<http://mccrindle.com.au/the-mccrindle-blog/faith-belief-and-churchgoing-in-australia>>.

<sup>81</sup> Australian Bureau of Statistics, *2011.0 – Census of Population and Housing: reflecting Australia – Stories from the Census, 2016: Religion in Australia*, above n 74.

<sup>82</sup> Australian Bureau of Statistics, *2016 Census: religion*, above n 75.

<sup>83</sup> McCrindle Research Pty Ltd, ‘Faith, Belief & Churchgoing in Australia’, above n 80.

<sup>84</sup> Australian Bureau of Statistics, *2011.0 – Census of Population and Housing: reflecting Australia – Stories from the Census, 2016: Religion in Australia*, above n 74.

<sup>85</sup> McCrindle Research Pty Ltd, ‘Faith, Belief & Churchgoing in Australia’, above n 80.

A *Growing religious illiteracy and antagonism towards Christianity*

Religious illiteracy has been described as ‘a dangerous reality’.<sup>86</sup> If so it is a dangerous reality in contemporary Australia where Christianity is both poorly understood and considered negatively by many Australians. A significant number of Australians<sup>87</sup> (8 per cent) do not know any Christians and almost 18 per cent know nothing about the Christian Church in Australia.<sup>88</sup> More than a quarter of Australians (26 per cent) have a negative view of Christianity.<sup>89</sup> Seven per cent of Australians are passionately opposed to Christianity and 6 per cent of Australians have strong reservations about it.<sup>90</sup> Many Australians associate Christians with negative stereotypes. Some non-Christian Australians consider Christians to be judgmental and greedy, that their beliefs are outdated and that they impose their beliefs on others<sup>91</sup> and a significant number of Australians, who do know Christians, associate them with negative characteristics.<sup>92</sup> These include being judgmental,<sup>93</sup> opinionated,<sup>94</sup> hypocritical,<sup>95</sup> intolerant,<sup>96</sup> insensitive,<sup>97</sup> and rude.<sup>98</sup> David Hempton puts the situation in this way:

We live in a world, indeed in a nation [here speaking of the US] where religious ideas have been taken up by out-of-tune instruments, and many in the West, especially under the age of thirty, now believe the melody itself is detestable.<sup>99</sup>

Much of Australia’s popular media is openly antagonistic to Christianity.<sup>100</sup> For example, media personality Andrew Denton has called on religious people to withdraw from debate about euthanasia referring to Catholic businessmen and politicians who oppose legalising

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<sup>86</sup> David N Hempton, ‘Christianity and Human Flourishing: The Roles of law and Politics’ (2017) 12 *Journal of Law & Religion* 1, 54.

<sup>87</sup> McCrindle Research Pty Ltd, *Faith And Belief in Australia* (McCrindle Research Pty Ltd, 2017) 35.

<sup>88</sup> *Ibid* 10.

<sup>89</sup> *Ibid* 9.

<sup>90</sup> *Ibid* 31.

<sup>91</sup> McCrindle Research Pty Ltd, *Faith And Belief in Australia*, above n 87, 30.

<sup>92</sup> *Ibid* 35.

<sup>93</sup> 20 per cent: *ibid*.

<sup>94</sup> 18 per cent: *ibid*.

<sup>95</sup> 17 per cent: *ibid*.

<sup>96</sup> 12 per cent: *ibid*.

<sup>97</sup> 5 per cent: *ibid*.

<sup>98</sup> 4 per cent: *ibid*.

<sup>99</sup> Hempton, above n 86, 58.

<sup>100</sup> For example the *Sydney Morning Herald* and *Sun Herald* feature weekly columns from the militant atheist Peter Fitzsimons who regularly includes anti-Christian and ant-Catholic diatribes in his columns. See for example Peter Fitzsimons, ‘Folau’s thoughtless comments are an anathema to the greatest of rugby’s values’, *The Sydney Morning Herald*, 7-8 April 2018, 51.

euthanasia as a ‘Subterranean Catholic force’.<sup>101</sup> It is also common in the popular media to seek to undermine rational arguments if they are presented by persons of faith. For example, in an episode of the ABC television program Q&A dealing with euthanasia<sup>102</sup> the moderator Tony Jones asked only the panellist from a Catholic university Professor Margaret Somerville if she was ‘a religious person’.<sup>103</sup> Whilst in Australia, Christians are certainly free to worship at home and in their churches, without fear of attack or fear for their physical safety there is a misconception by many in the media and in education that this is all that religious freedom entails. This approach disregards entirely the moral duty of Christians not only to live morally but to evangelise and to act.<sup>104</sup>

### B *Relativism, individualism, the rule of law, and equality*

The large majority<sup>105</sup> of Australians who voted for change in the 2017 postal poll which asked whether the law should change to permit same-sex marriage indicates that the majority of the Australian population now reject the traditional Christian and common law understanding of marriage. The support for change was particularly strong in Western Australia<sup>106</sup> where no federal electorate voted for the status quo.<sup>107</sup> As Pope Benedict XVI observed in 2011:

<sup>101</sup> Michael Edwards, ‘Andrew Denton lashes out at “subterranean Catholic force” blocking voluntary euthanasia laws’, *ABC News* (online), 10 August 2016 <<http://www.abc.net.au/news/2016-08-10/denton-blames-catholic-force-blocking-voluntary-euthanasia/7718152>>; Staff writers, ‘Andrew Denton trying to exclude Catholic voices from euthanasia debate’ *The Catholic Weekly* (online), 17 August 2016 <<https://www.catholicweekly.com.au/andrew-denton-trying-to-exclude-catholic-voices-from-euthanasia-debate/>>.

<sup>102</sup> Which featured journalist Nikki Gemmell, ALP Federal parliamentarian Penny Wong, the Federal Minister for Communications, Mitch Fifield parliamentarian singer/songwriter Billy Bragg, bio-ethicist Professor Margaret Somerville from The University of Notre Dame Australia.

<sup>103</sup> ABC Q&A program, *Assad, Assisted Suicide and Satire: Transcript Extract* (10 April 2017) <<https://dwdnsw.org.au/wp-content/uploads/2017/06/transcript-QandA-100417-section-on-voluntary-euthanasia.pdf>> 10.

<sup>104</sup> Mark 16:15, Matthew 28:19-20, 1 Timothy 6:12, James 2:14-18 and in a specifically Catholic context *Catechism of the Catholic Church* [904]-[905] and see Pope Benedict XVI, *Porta Fidei: Apostolic Letter for the Induction of the Year of Faith* (11 October 2011) <[<sup>105</sup> 61.6 per cent: Australian Bureau of Statistics, \*1800.0 Australian Marriage Law Postal Survey, 2017 Results for Western Australia\* \(15 November 2017\) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1800.0~2017~Main%20Features~Western%20Australia~13>>.](http://www.vatican.va/holy_father/benedict_xvi/motu_proprio/documents/11_October_2011> [10]: ‘A Christian may never think of belief as a private act. Faith is choosing to stand with the Lord so as to live with him. This “standing with him” points towards an understanding of the reasons for believing. Faith, precisely because it is a free act, also demands social responsibility for what one believes. The Church on the day of Pentecost demonstrates with utter clarity this public dimension of believing and proclaiming one’s faith fearlessly to every person. It is the gift of the Holy Spirit that makes us fit for mission and strengthens our witness, making it frank and courageous.’</a></p>
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<sup>106</sup> 63.7 per cent: *ibid.*

<sup>107</sup> *Ibid.*

We live at a time that is broadly characterised by a subliminal relativism that penetrates every area of life ... Sometimes this relativism becomes aggressive, when it opposes those who claim to know where the truth or meaning of life is to be found. And we observe that this relativism exerts more and more influence on human relationships and on society ... Many no longer seem capable of any form of self-denial or of making a sacrifice for others. Even the altruistic commitment to the common good, in the social and cultural sphere or on behalf of the needy, is in decline. Others are now quite incapable of committing themselves unreservedly to a single partner. We see that in our affluent western world much is lacking. Many people lack experience of God's goodness.<sup>108</sup>

Speaking of the individualism of our time Somerville has observed:

In the West, we live in an era of intense individualism. This prevailing attitude has been described as “individualism gone wild” because it often excludes any sense of community. Many arguments that favour the availability of, and especially unrestricted access to, reproductive technologies, genetic technology, and euthanasia are based on claims of respect for individual rights. Advocates believe that these claims are essentially matters of personal morality and they involve only, or at least primarily individuals ...<sup>109</sup>

The ‘rule of law’ itself gives no firm foundation for moral positions or legislative reform because the extent to which it demands ‘equality’ is itself in contention. Conservatives tend to argue that the rule of law means that everyone is equal before the law. In other words, conservatives are likely to argue that the rule guarantees independent courts and the application of the law to politicians and citizens equally. This is not the same thing as using the term ‘rule of law’ to demand differential treatment of citizens with differing characteristics with the professed intention of achieving some other often unexpressed form of ‘equality’. The term ‘equality’ depends for its meaning on usage in a context. As the Chief Justice of New South Wales, the Honourable Tom Bathurst SC observed in his Opening of Law Term speech of 2018:

The difficulty with the rule of law as a criterion for intervention is that it is far from being an objective and uncontested concept. Indeed, its authority is invoked in support of both sides of the ideological divide. While conservatives tend to rely on thinner, procedural conceptions of

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<sup>108</sup> Pope Benedict XVI in a meeting with council members of the Central Committee for German Catholics in a speech reported by the Vatican Information Service as *Seek New Paths of Evangelisation for Church and Society* (24 September 2011) <[visnews\\_entxts@mlists.vatican.va](mailto:visnews_entxts@mlists.vatican.va)>. In an Australian context see the discussion in Williams, *Post God Nation?* above n 3, 250-274.

<sup>109</sup> Margaret Somerville, *Death Talk* (McGill-Queen’s University Press, 2001) 4.

the rule of law, progressives argue that procedural compliance alone is insufficient and that a conception of the rule of law unaccompanied by values of substantive equality is better labelled 'rule by law'.<sup>110</sup>

As Lester has observed:

One key principle of the idea of equality is that although human beings are different in innumerable respects, our common humanity requires that we are all treated equally on merit. That means that for every difference in treatment, there must be good and relevant reasons.<sup>111</sup>

In order to consider what amounts to good and relevant reasons for differential treatment it is necessary to understand the context and whether or not there are principles and human rights at play in addition to or in competition with claims for 'equality'. Some might argue that some things, such as men and woman, marriage between one man and one woman and marriage between two persons of the same sex, actually are different in objective reality and that treating different things as if they are the same is not achieving 'equality'. Some purport to rely upon the rule of law for demands for what is called 'substantive equality' – or real equality such as changes to promote the interests of special interest groups or to seek to remedy past injustices by providing affirmative action or other remedial action.<sup>112</sup> These may be very laudable objectives and they may well be worth arguing for but they are not necessary for compliance with 'the rule of law'.

#### IV THE RELATIONSHIP BETWEEN LAW AND RELIGION IN AUSTRALIA – AND IN PARTICULAR IN WESTERN AUSTRALIA – TODAY

Berman observed in the early 1980s that:

The law is becoming more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity. Thus the historical soil of the Western legal tradition is being washed away in the twentieth century and the tradition itself is threatened with collapse.<sup>113</sup>

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<sup>110</sup> Tom Bathurst, 'Opening of Law Term Dinner: The Place of Lawyers in Politics', 31 January 2018 <[http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Bathurst\\_20180131.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2018%20Speeches/Bathurst_20180131.pdf)> [57]; see also Roger Trigg, *Equality, Freedom & Religion* (Oxford University Press, 2012) 3-4.

<sup>111</sup> Anthony Lester, *Five Ideas To Fight For* (OneWorld, 2016) 52.

<sup>112</sup> The NSW Bar Association, *In Brief* (online), 19 August 2017 <[http://inbrief.nswbar.asn.au/posts/4df95d7a2fb43495d59665ad0621ee85/attachment/SSM\\_media\\_release.pdf](http://inbrief.nswbar.asn.au/posts/4df95d7a2fb43495d59665ad0621ee85/attachment/SSM_media_release.pdf)>.

<sup>113</sup> Berman, *Law and Revolution*, above n 12, 39.

This Part of the article confirms the reality of Berman's observation in contemporary Australia and considers several examples of contemporary laws which compel Christians to act against their religious beliefs or which preclude them from so doing. These examples relate to marriage between persons of the same sex and abortion. Before doing so it is necessary to consider the adequacy of the free exercise of religion protections afforded by s 116 of the *Australian Constitution* mentioned in Part III. As interpreted by the High Court to date, s 116 has no application to state laws. Whilst there have been few s 116 cases which have considered the free exercise protection to date, in the cases which have occurred, the High Court has focused its attention on the stated purpose of the relevant law rather than considering its real effect or result on the religious liberty of the complainants. As a result, to date, the High Court has given the free exercise guarantee a very narrow scope of operation rather than interpreting s 116 to give substantive protection to individuals facing legislative impediments to fully living their faith.<sup>114</sup>

### A Marriage

The High Court in 2013, the Australian people through a postal poll in 2017 and the Australian parliament through legislation passed in 2017 have effected changes to the meaning of marriage. The full impact of these changes on Australian society is a matter beyond the scope of this article, but one predictable impact will be the intersection of the new understandings of marriage with anti-discrimination law. As discussed in Part II, in the 19<sup>th</sup> century, Christianity was such an elemental and pervasion component of British society that the law generally reflected that reality. As a consequence, cases concerning marriage in that century simply used expressions such as 'Christian marriage' as a sufficient and complete

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<sup>114</sup> It is necessary only to consider one example: *Krygger v Williams* (1912) 15 CLR 366. In this case the High Court rejected the argument of a Jehovah's Witness that s 116 ought be interpreted to exempt him from having to attend military training when his religious beliefs precluded him from so doing. The fact that the Commonwealth has remedied this failure by enacting conscientious objection provisions in ss 61A, 61CA-61CZE of the *Defence Act 1903* (Cth) did not alter the fact that s 116 proved inadequate to provide relief essential to preserve the religious liberty of Mr Krygger, see George Williams, Sean Brennan and Andrew Lynch, *Australian Constitutional Law and Theory* (Federation Press, 2018) [27.96]-[27.104]; George Williams, 'Australian laws fall short when it comes to protecting religious liberty', *Sydney Morning Herald* (online), 20 November 2017 <<https://www.smh.com.au/opinion/australian-laws-fall-short-when-it-comes-to-protecting-religious-liberty-20171120-gzoqm3.html>>; Neil Foster, 'Religious Freedom in Australia' (Paper presented at 2015 Asia Pacific JRCLS Conference, The University of Notre Dame Australia Sydney, 29-31 May 2015, 2-12 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2887798](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2887798)>; Frank Brennan, M A Casey and Greg Craven, *Chalice of Liberty* (Kapunda Press, 2018) 78. Some argue that the High Court ought to interpret s 116 to more adequately protect religious freedom in Australia: see eg Alex Deagon, 'Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage' (2017) 20 *International Trade & Business Law Review* 239. An analysis of those arguments is beyond the scope of this article.

description of that institution. Those cases must be read within their historical context. As discussed in Part II, the expression ‘Christian marriage’ encapsulated a foundational element of Western society. It was an institution with a deep, rich history and meaning which went unexpressed in those cases because it was simply assumed (and actually present) knowledge. In a society in which Christianity was not so ubiquitous the Courts would have, of necessity, provided reasoning for the state’s understanding of marriage. When this question arose in the High Court in the 1970s in *Russell v Russell*,<sup>115</sup> Jacobs J provided more than the shorthand explanation adopted by the 19<sup>th</sup> century cases. In that case he explained why marriage and divorce were included in the *Australian Constitution* where they are found in ss 51(xxi) and (xxii) respectively. As Jacobs J observed:

Paragraphs (xxi) and (xxii) of s 51 [of the *Australian Constitution*] are the only subject matters of Commonwealth power which are not related to what may be broadly described as public economic or financial subjects but which are related to what are commonly thought of as private or personal rights.<sup>116</sup>

The fact that the *Australian Constitution* included these two heads of power demonstrates that marriage was not considered by the nation’s Founding Fathers as an exercise of personal autonomy which was a personal or private matter. Marriage and divorce were considered to be matters of such importance, to the new Federation, that the Founding Fathers provided for the Commonwealth to have power to pass laws governing them. Jacobs J explained why these powers were included in the *Australian Constitution* in *Russell v Russell* in this way:

The reason for their inclusion to me appears to be twofold. First, although marriage and the dissolution thereof are in many ways a personal matter for the parties, *social history tells us that the state has always regarded them as matters of public concern*. Secondly, and perhaps more important, the need was recognised for a uniformity in legislation on these subject matters throughout the Commonwealth. In a single community throughout which intercourse was to be absolutely free provision was required whereby there could be uniformity in the laws governing the relationship of marriage and the consequences of the relationship as well as the dissolution thereof. Differences between the States in the laws governing the status and the relationship of married persons could be socially divisive to the harm of the new community which was being created.<sup>117</sup>

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<sup>115</sup> (1976) 134 CLR 495.

<sup>116</sup> Ibid 546 (Jacobs J).

<sup>117</sup> Ibid 546 (Jacobs J) (emphasis added).

As Jacobs J explained, the new nation was interested in marriage for the same reason that states have always had and continued to have an interest in state regulation and recognition of monogamous, heterosexual relationships as marriages: the creation of families and the raising of children:

[M]arriage as a social intuition which the law clothes with rights and duties attaching to the parties thereto is primarily an institution of the family. It is true that marriage can be regarded as a social relationship for the mutual society, help and comfort of the spouses but it cannot be simply so regarded. *The primary reason for its evolution as a social institution, at least in Western society, is in order that children begotten of the husband and born of the wife will be recognised by society as the family of that husband and wife.*<sup>118</sup>

A lot more could be said about the history and meaning of marriage in the Western legal tradition than is set out in *Russell v Russell*, but it does partially explain the substantive reasoning for the state's interest in 'Christian marriage' absent in those seminal 19<sup>th</sup> century cases. Justice Jacobs' explanation for the Commonwealth's interest in marriage was consistent with the natural law and the philosophical and historic underpinning of what the common law referred to as 'Christian marriage'.

Justice Jacobs' observations in *Russell v Russell* and the deep and rich historical and philosophical natural law underpinning for the state's interest in and preference for 'Christian marriage' were not referred to by the High Court when it came to consider the meaning of marriage in the *Australian Constitution* in 2013. Instead, the High Court considered the 19<sup>th</sup> century cases references to 'Christian marriage' not as a shorthand reference to thousands of years of Western tradition but instead as an absence of any reasoning at all. By 2013, when Christianity was no longer universally understood, the real meaning of 'Christian marriage' was lost on the High Court. It reimagined the meaning of marriage as used in the *Australian Constitution* in the case striking down the *Marriage Equality (Same Sex) Act 2013* (ACT) as inconsistent with the *Marriage Act 1961* (Cth). In 2013 the High Court stated that:

[T]he nineteenth century use of terms of approval, like "marriages throughout Christendom" or marriages according to the law of "Christian states", or terms of disapproval, like "marriages among infidel nations" served only to obscure circularity of reasoning. Each was a term which

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<sup>118</sup> Ibid 548 (Jacobs J) (emphasis added).

sought to mask the adoption of a premise which begged the question of what “marriage” means.<sup>119</sup>

In describing the phrases used in the 19<sup>th</sup> century marriage cases as obscuring ‘circularity of reasoning’ the High Court missed the depth of philosophical and historical meaning conveyed by those shorthand expressions which were simply a ‘convenient way of expressing the idea’ to use the expression used in *Brinkley v Attorney General*. As a consequence, the High Court departed substantially from ‘Christian marriage’ in giving the term ‘marriage’ as used in the *Australian Constitution* this meaning:

‘[M]arriage’ 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 ...<sup>120</sup>

As Anne Twomey has observed, in doing so, the High Court included its own formulation of essential components of its redefinition of marriage: it must be consensual, it must be between natural persons albeit of indeterminate number, it must be ‘intended to endure’ and it must not be terminable at the will of the parties but only ‘in accordance with law’.<sup>121</sup> The High Court provided no explanation as to why the particular features that it preserved in its definition of marriage ought to be mandatory for a relationship to be within the legislative powers of the Commonwealth in relation to ‘marriage’. Nor did the High Court adequately explain why others, particularly those which had been hitherto an enduring feature of ‘marriage’ as it has always been understood within the Western legal tradition, were jettisoned. In reaching its conclusion the High Court departed from its own logic. At the same time as the High Court rejected the term ‘marriage’ as having a fixed meaning it created its own new fixed meaning of the term.

To support its view, that marriage had never had a fixed meaning but was a ‘juristic concept’, the High Court referred to divorce and to the reality of polygamous and same sex marriages in some overseas countries.<sup>122</sup> With respect to the Court, the reality of polygamy in other countries was not a new development by any means. It had been recognised and addressed

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<sup>119</sup> *The Commonwealth v ACT* (2013) 250 CLR 441, 462 [36].

<sup>120</sup> *Ibid* 461 [33].

<sup>121</sup> Anne Twomey, ‘Constitutional Law’ (2014) 88 ALJ 613.

<sup>122</sup> *The Commonwealth v ACT* (2013) 250 CLR 441, 462 [35], [37].

specifically as a fact in many of the key English cases which had explained that the words marriage, wife and husband when used in different jurisdictions need not bear the same meaning as their meaning in the English common law. This had been expressly observed as early as 1835 by Lord Broughton in *Warrender v Warrender*,<sup>123</sup> in a passage set out in Part II, where he referred to polygamous marriages as having a ‘wholly different *status*’ to marriages as understood by the common law ...’<sup>124</sup> Here, Lord Broughton differentiated between marriage, as that term was used and understood in England, from what might be considered to constitute marriage elsewhere. Given this understanding of the reality that the same term was used in different places to mean different things, the recognition of the fact of international polygamy did not warrant the High Court’s departure from the previously understood meaning marriage as requiring monogamy. Due to this departure the High Court also failed to recognise the logic of the reasoning of the historic cases on marriage as meaning different things in different places, as also applying to new forms of state recognised relationships such as same sex marriages in foreign nations. In Australia the term ‘marriage’ had always been limited to monogamous and opposite sex relationships formalised by particular forms of religious and State accredited ceremonies. It was equally false reasoning for the High Court to look to the approach taken in some countries overseas to consider the term ‘marriage’ as a term which could encompass same sex relationships and then to apply that meaning to the term as used in the *Australian Constitution* as it would have been for the 19<sup>th</sup> century courts to have interpreted the term ‘marriage’ in England to include polygamy. Similarly the High Court’s use of divorce as a key foundation for its view that that marriage had never had a fixed meaning in Australia ignored the fact that divorce was sufficiently recognised as a reality in Australia at the time of Federation for it to have been included as a separate and specific head of power in the *Australian Constitution*.<sup>125</sup>

In reaching its own finding of an understanding of marriage not found in earlier jurisprudence or legislation, the High Court failed to recognise the reality of fixed attributes of marriage as understood within the Western legal tradition: long-standing natural law and Christian conceptions of marriage as between only one man and one woman. It is perhaps not surprising that the High Court failed to grasp these fundamental and consistently found attributes of marriage within the Western tradition because the principle 19<sup>th</sup> century cases

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<sup>123</sup> (1835) 2 Cl & F 488.

<sup>124</sup> *Warrender v Warrender* (1835) 2 Cl & F 488 [531] and repeated in *Bethell v Hildyard* (1888) 38 Ch D 220, 234.

<sup>125</sup> *Australian Constitution* s 51(xxii).

which it referred to were all written within a mindset in which Christianity was considered to be ‘parcel of the laws of England’<sup>126</sup> where reference to ‘Christian marriage’ in that context was a sufficient explanation in and of itself. Had the High Court adopted the same approach in 2013 it would, no doubt, have been condemned for so doing. In the result, by its redefinition of marriage the High Court found that the Commonwealth had Constitutional power to legislate to redefine the ‘juristic concept’ of marriage within the broad parameters that it developed should it choose so to do. By denuding the term, marriage of its historic meaning without re-examining and explaining what must be a new foundation for state interest in the concept, the High Court set the scene for the lack of consideration and debate of the state’s interest in marriage which ensued once the nation headed to a postal poll. The power granted to the Commonwealth by the High Court’s redefinition of marriage was used by the Commonwealth parliament to redefine marriage following the results of the 2017 postal poll.<sup>127</sup> As a matter of Australian law, marriage is no longer what the common law described as ‘Christian marriage’. Instead the state now defines marriage in Australia to mean ‘the union of 2 people to the exclusion of all others, voluntarily entered into for life’.<sup>128</sup> The state now requires civil celebrants at all Australian civil marriages to use the following words or words to the same effect ‘Marriage, according to law in Australia, is the union of 2 people to the exclusion of all others, voluntarily entered into for life’<sup>129</sup> and it is to educate about this new state understanding of marriage that the Commonwealth may now offer grants.<sup>130</sup>

### B *Redefining marriage and anti-discrimination law*

After marriage was redefined in jurisdictions such as the United States and the United Kingdom, issues arose as a consequence of pre-existing anti-discrimination laws being applied to religious believers seeking to continue to live their lives in accordance with their religious faith. Conflicts have arisen involving service providers, property owners and civil servants who assert that their Christian faith precludes their participation in a same sex marriage. Some Christians have asserted that their religious beliefs prevented them, for example, from renting their property,<sup>131</sup> providing floral arrangements,<sup>132</sup> designing and

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<sup>126</sup> *Rex v Taylor* (1676) 1 Vent 293.

<sup>127</sup> *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

<sup>128</sup> *Marriage Act 1961* (Cth) s 5.

<sup>129</sup> *Ibid* s 46(1).

<sup>130</sup> *Ibid* Pt 1A.

<sup>131</sup> *New York State Division of Human Rights on the Complaint of Melisa McCarthy and Jennifer McCarthy (Complainant) v Liberty Ridge Farm LLC, Cynthia Gifford and Robert Gifford (Respondent)* (Case numbers 10157952 and 10157963).

producing wedding cakes,<sup>133</sup> using photographic and artistic skills<sup>134</sup> in connection with a same sex wedding ceremony or taking steps to authorise or record such a relationship as a civil servant.<sup>135</sup> These sorts of problems have arisen because as Lester has observed '[r]econciling equality and religious freedom is particularly difficult.'<sup>136</sup> The difficulty which arises is that '[r]eligious beliefs are often at odds with other concepts of equality.'<sup>137</sup> In Lester's view '[i]n a plural democratic society, cultural differences should be accorded equality of respect unless they are abusive or oppressive. What to one group is praiseworthy to another may seem anti-social.'<sup>138</sup> After identifying the fact that anti-discrimination laws in the United Kingdom do not make provision for religious believers in the sorts of circumstances mentioned above Lester observes that:

Some traditional followers of the three Abrahamic religions – Judaism, Christianity and Islam – feel undervalued and even persecuted when their objections to gay marriage are rejected.<sup>139</sup>

In describing the consequences for religious believers as feeling 'undervalued and even persecuted' Lester diminishes the true impact that religious believers in these situation can face if they do not conform and compromise their beliefs. In addition to the fines, penalties and requirements to attend education programs anti-discrimination laws of this kind hurt more than 'feelings' when they preclude those religious believers impacted by them by acting consistently with a characteristic of their personhood which is integral to their flourishing as a person: their religious faith. As Laycock and Berg have observed:

[C]ommitted religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. For religious believers, the conduct at issue is to live and act consistently with the demands of the Being that they believe made us all and holds the whole world together.<sup>140</sup>

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<sup>132</sup> *State of Washington v Arlene's Flowers Inc*, Supreme Court of the State of Washington 91615-2.

<sup>133</sup> *Charlie Craig and David Mullins v Masterpiece Cakeshop, Inc* Colorado Court of Appeals No. 14CA1351.

<sup>134</sup> *Elane Photography LLC v Vanessa Willock*, Supreme Court of the State of New Mexico, Docket No. 33,687.

<sup>135</sup> Lester, above n 111, 57.

<sup>136</sup> *Ibid* 56; see also Trigg, above n 110, 4-7.

<sup>137</sup> Lester, above n 111, 57.

<sup>138</sup> *Ibid* 56.

<sup>139</sup> *Ibid* 57.

<sup>140</sup> Douglas Laycock and Thomas Berg, 'Same-Sex Marriage and Religious Liberty' (2013) 99 *Virginia Law Review* 3.

No religious believer can change his understanding of divine command by any act of will ... Religious beliefs can change over time ... But these things do not change because government says they must, or because the individual decides they should ... [T]he religious believer cannot change God's mind.<sup>141</sup>

The conflict between religious freedom and the law which is posed by anti-discrimination law is more than a matter of 'feelings'. Examples of the reality of conflict between religious freedom and pre-existing anti-discrimination law overseas were known but not taken into account in any legislative changes by the Commonwealth parliament when it amended the definition of marriage in 2017. As a result, Commonwealth, State and Territory anti-discrimination laws which were all drafted before such a redefinition of marriage was contemplated let alone enacted into law, continue unchanged. The fact that the definition of marriage has changed however means that those who continue to subscribe to an understanding of marriage consistent with 'Christian marriage' as it had been understood in the common law – whether for religious or conscientious grounds – may find themselves in breach of anti-discrimination law. Even prior to the redefinition of marriage in Australia Christians with traditional views on sexual morality and marriage have found themselves in conflict with such laws. For example, three years prior to the redefinition of marriage in Australia, in 2014 the Victorian Court of Appeal found that a company owned by the Christian Brethren had engaged in unlawful discrimination. The unlawful conduct occurred when the company declined to accept a booking by a group providing education to young people which promoted views on sexual morality of same sex sexual activity in conflict with those held by the Christian Brethren faith tradition. The politeness of the conversation and the religious reasons provided for the declination of the booking did not protect the company from a finding of unlawful conduct.<sup>142</sup> More specifically, in relation to religious teaching on marriage, in 2013 the Catholic Archbishop of Hobart, Archbishop Julian Porteous was referred to the Tasmanian Anti-Discrimination Commission. The alleged breach of Tasmanian law occurred when the Archbishop arranged for the distribution of a booklet explaining the Catholic Church's teaching on marriage in Catholic parishes and to the parents of students attending Catholic Schools. Whilst it might be argued that an essential role of an Archbishop is to teach the faithful on such matters the Commission found that the

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<sup>141</sup> Ibid 4.

<sup>142</sup> *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* [2014] VSCA 75.

complainant had identified a potential breach of the *Anti-Discrimination Act 1998* (Tas).<sup>143</sup> As a consequence the Archbishop was obliged to engage in mediation of the claim with the complainant. Whilst when mediation failed to resolve the dispute the complainant dropped the case had that not occurred the Archbishop would have faced litigation. In these two examples the present limits on religious freedom in Australia are evident. The risk of exposure to complaint and to litigation is a current threat to religious freedom in Australia.

The redefinition of marriage introduces an understanding of marriage which was not the law when service providers, property owners and civil servants started their businesses, chose or commenced their careers. Religious believers would have entered their trades and occupations without any inkling or expectation that their choices may bring them into conflict with the state or with other citizens who do not share their religious or conscientious beliefs about marriage. The redefinition of marriage has created prospects of conflict between religious faith and the law which had not previously existed. In Australia, people who refuse to participate in a same sex marriage in the sorts of circumstances as those which have occurred overseas may be found to be acting in breach of Commonwealth, State or Territory anti-discrimination laws. Commonwealth anti-discrimination law proscribes discrimination on the ground which include sex, sexual orientation, gender identify, intersex status and marital or relationship status and extend to refusing to provide goods or services<sup>144</sup> or accommodation.<sup>145</sup> The exemptions for ‘a body established for religious purposes’ under Commonwealth law are unlikely to protect individual religious believers or businesses.<sup>146</sup> Similar laws exist in Western Australia.<sup>147</sup>

### C Abortion

Whilst Western Australia protects the freedom of conscience and religion of health practitioners in relation to the provision of elective abortion,<sup>148</sup> such protections are not uniform across Australia. In the Northern Territory, Queensland and in Victoria health

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<sup>143</sup> See Dennis Shanahan, ‘Anti-discrimination test looms over church’s marriage booklet’ *The Australian* (online), 30 September 2015 < <https://www.theaustralian.com.au/national-affairs/antidiscrimination-test-over-catholic-churchs-marriage-booklet/news-story/ea8aaee464a1a65c32db6552117fad5f>>.

<sup>144</sup> *Sex Discrimination Act 1984* (Cth) s 22.

<sup>145</sup> *Ibid* s 23.

<sup>146</sup> *Ibid* s 37.

<sup>147</sup> *Equal Opportunity Act 1984* (WA) s 20.

<sup>148</sup> *Health Act 1911* (WA) s 334(2) (‘No person, hospital, health institution, other institution or service is under a duty, whether by contract or by statutory or other legal requirement, to participate in the performance of any abortion’).

professionals who have a conscientious objection to abortion, must refer patients seeking an abortion to another health professional who has no such objection.<sup>149</sup> These laws act to force health professionals who have a conscientious – often religious – objection to abortion to facilitate the termination of a pregnancy. This legislation applies very broadly and is not limited, for example, to gynaecologists or maternity specialists. One example of the impact of these laws is demonstrative. In Victoria a general practitioner, Dr Mark Hobart, endured disciplinary proceedings as a result of his failure to comply with the law by referring a couple seeking an abortion on sex-selection grounds.<sup>150</sup> In NSW whilst there is no legislative override of conscience the NSW Ministry of Health (‘NSW Health’) has largely replicated the legislative position in the Northern Territory, Queensland and Victoria in a policy.<sup>151</sup> As this Policy is only mandatory for NSW Health and a condition of subsidy for public health organisations it does not apply to every health professional in NSW.

An increasing number of Australian States and Territories – although not Western Australia as yet – have created specific criminal offences prohibiting protesting and a wide range of other activities in the vicinity of an abortion clinic.<sup>152</sup> Since the introduction of such legislation there have been successful prosecutions in Tasmania<sup>153</sup> and Victoria<sup>154</sup> and an unsuccessful prosecution under the ACT legislation.<sup>155</sup> In Tasmania, Graham Preston and Mr and Mrs Stallard were arrested and successfully prosecuted for breach of an exclusion zone. The religious motivations of Mr Preston and his co-accused were matters of evidence and judicial comment in the case because the *Tasmanian Constitution* contains protections for

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<sup>149</sup> *Abortion Law Reform Act 2008* (Vic), *Pregnancy Law Reform Act 2017* (NT), *Termination of Pregnancy Act 2018* (Qld).

<sup>150</sup> Andrew Smith, *Doctors refused to refer couple for sex selection abortion faces possible loss of his licence* (7 October 2013) Catch The Fire Ministries <<http://catchthefire.com.au/2013/11/doctor-refused-to-refer-couple-for-sex-selective-abortion-faces-possible-loss-of-his-license/>>.

<sup>151</sup> NSW Health, *Policy Directive Pregnancy – Framework for Terminations in New South Wales Public Health Organisations* (2 July 2014) <[http://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2014\\_022.pdf](http://www1.health.nsw.gov.au/pds/ActivePDSDocuments/PD2014_022.pdf)>.

<sup>152</sup> *Reproductive (Acceptance to Terminations) Act 2014* (Tas) s 9, *The Public Health and Wellbeing Act of Victoria 2008* (Vic) s 185A, *Health Act 1993* (ACT) ss 85-87, *Pregnancy Law Reform Act 2017* (NT), *Public Health Amendment (Safe Access To Reproductive Health Clinics) Act 2018* (NSW) and the *Termination of Pregnancy Act 2018* (Qld). Such legislation has been proposed but not, as yet, enacted in Western Australia – see The Greens, ‘Safe Zone Call For Abortion Clinics’, 15 February 2017 <<https://greens.org.au/news/wa/safe-zone-call-abortion-clinics/>>.

<sup>153</sup> Edith Bevin ‘Anti-abortion campaigner Graeme Preston arrested again for protesting outside clinic’, *ABC News* (online), 15 April 2015 <<http://www.abc.net.au/news/2015-04-14/anti-abortion-campaigner-graeme-preston-arrested/6392214>>.

<sup>154</sup> *Alyce Edwards v Kathleen Clubb* [2017] MCV (23 December 2017).

<sup>155</sup> *Bluett v Popplewell* [2018] ACTMC 2.

religious freedom.<sup>156</sup> The Magistrate summed up the motivations of two of the accused in this way:

[Mr Preston] has been a Christian since he was 14 and he believes that human life has been created in the image of God uniquely and that human life is of absolute importance as referred to in the Scriptures. That God knows us even when we are growing in our mother's womb and in particular he believes in the incarnation of Jesus as God coming into the world born in his mother's womb and that that validates human life at every stage. Mr Preston explained that the Bible teaches people to care for one another and in particular to help those who are most vulnerable or defenceless. He considers that a child in the womb would be probably the most vulnerable category of human beings and that they are completely defenceless. He believes that it is right and necessary that people come to the aid of those who are vulnerable and defenceless which includes unborn children.<sup>157</sup>

Essentially as I understood Mrs Stallard's evidence she regards herself as a practicing Christian, and as part of her Christian beliefs she believes that every life is sacred, that an unborn life does not have a voice, and that as part of her Christian beliefs she needs to stand up for people without a voice which led her to protest with Mr Preston.<sup>158</sup>

Whilst the religious motivations of the defendants were evident, the evidence did not establish that they prevented anyone from accessing the relevant clinic, or that they threatened, intimidated, badgered, harangued or attacked anyone, they were convicted.<sup>159</sup> The defendants' arguments that the legislation offended the implied freedom of political communication were also rejected by the Magistrate.<sup>160</sup>

In Victoria, Mrs Kathy Clubb was arrested and successfully prosecuted under the Victorian legislation. Mrs Clubb had entered an 'exclusion zone' around an abortion clinic and provided a pamphlet to and spoken with a couple entering an abortion clinic. The arresting officer noted that the protesters 'were law abiding people' and that he 'didn't want them coming before the Courts.'<sup>161</sup> The Victorian legislation, among other things, precludes any

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<sup>156</sup> *Constitution Act 1934* (Tas) s 46(1) 'Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen. (2) No person shall be subject to any disability, or be required to take any oath on account of his religion or religious belief and no religious test shall be imposed in respect of the appointment to or holding of any public office.'

<sup>157</sup> *Police v Preston and Stallard* [2016] TASMC (27 July 2016) [58].

<sup>158</sup> *Ibid* [65].

<sup>159</sup> *Ibid* [58]-[59], [64]-[65].

<sup>160</sup> *Ibid* [54].

<sup>161</sup> *Alyce Edwards v Kathleen Clubb* (2017) MCV (23 December 2017) 2.

communication ‘in relation to abortions’ which is ‘reasonably likely to cause distress or anxiety.’<sup>162</sup> The Magistrate adopted the definition of ‘distress’ contained in the *Australian Concise Oxford Dictionary* which is ‘[a]nguish, suffering, pain, agony, ache, affliction, torment, torture, discomfort, heartache.’<sup>163</sup> Whilst the couple made no complaint and did not give evidence at the trial as to what Mrs Clubb said to them, there was no evidence of the content of the pamphlet she gave them and ‘no evidence of duress or violence of any kind’,<sup>164</sup> the Magistrate found that Mrs Clubb’s interaction with ‘the couple entering the Clinic was reasonably likely to cause the couple, at the least, discomfort.’<sup>165</sup> The Court rejected a defence grounded on the implied freedom of political communication on the basis that abortion was a ‘health’ rather than a ‘political’ issue.<sup>166</sup> The High Court heard appeals from the Tasmanian and Victorian decisions on the implied freedom of political freedom issue in a joint hearing in October 2018. The judgment has been reserved and is likely to be handed down in the first half of 2019.

In the ACT case, the prosecution failed to establish a breach of the ACT legislation by three Christians silently praying within the relevant exclusion zone. Two of the men prayed silently whilst they walked outside the office building in which an abortion clinic operated. The Magistrate was most concerned by the Christian who sat down on a bench and silently prayed the rosary.<sup>167</sup> In this case a defence relying on the implied freedom of political communication was again unsuccessful.<sup>168</sup> The defendants succeeded in the case as the Court found that they were involved in a protest by silently praying in a manner which attracted no attention to them. After careful consideration the Magistrate made this finding despite one man having rosary beads with him.<sup>169</sup> The judgment leaves open the possibility that acts of private prayer if sufficiently visible to others might be considered to offend the legislation. The conclusions of the Court warrant attention as they demonstrate the Pythonesque nature of the inquiry a Court is required to undertake in applying this legislation to prayers:

The defendants contend they were simply engaged in individual private prayer, which was not evident to others, and they therefore were not involved in a protest, by any means.

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<sup>162</sup> *The Public Health and Wellbeing Act of Victoria 2008* (Vic) s185B(i)(b).

<sup>163</sup> *Alyce Edwards v Kathleen Clubb* (2017) MCV (23 December 2017) 3.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid* 6-9.

<sup>167</sup> *Bluett v Popplewell* [2018] ACTMC 2 (9 March 2018) [85].

<sup>168</sup> *Ibid* [43].

<sup>169</sup> *Ibid* [85].

In this matter I am assisted by video evidence depicting the conduct of each defendant on the day in question. Mr Popplewell and Mr Mellor are depicted walking among the pedestrian traffic on the footpath outside the building. They are not obviously carrying any symbols. No religious or political paraphernalia are seen in their possession. They appear to be moving innocuously among the light pedestrian traffic. In fact both men, at times, walk past uniform police, who are questioning Mr Clancy, and those police officers do not look up towards those two defendants. The evidence was that both men were walking silently.

Mr Clancy is seen initially walking among the pedestrian traffic before sitting down on a bench adjacent to the building. He has something in his hands, consistent with rosary beads. Evidence was provided by Detective Sergeant Grant Bluett that Mr Clancy was seated with his head bowed and with rosary beads in his hands. While the video briefly depicts Mr Clancy with his head bowed, for the most part he is seated, with his head in a neutral position and looking to his front without engaging those who walk past. I find Mr Clancy sat with rosary beads in his hands, but not with his head continuously bowed.

When I consider all the evidence, and in particular the video evidence that I have described, two features stand out to me in relation to the appearance and movements of these three defendants when outside the building on the day in question. There is the presence of the normal and the absence of the abnormal. They simply do not stand out as participating in any extraordinary activity. They do not even gather. I make these observations cognisant of their previous involvement in prayer vigils and their admitted views about abortion.

I accept they were each engaged in silent prayer, and that such prayer involved no component of expression, communication or message to those around them. The only reservation I have in that regard, arises from the presence of the rosary beads in the hands of Mr Clancy. However, the presence of those rosary beads, without any other symbolic display or gesture, leaves me with a significant doubt about whether there was any expression, communication or message by Mr Clancy.

Accordingly I find that each defendant was not engaged in protest, by any means.<sup>170</sup>

State and Territory exclusion zone legislation operates to restrict the ability of religious believers to act in accordance with their seriously held beliefs and so to exercise their religious freedom. Rather than respecting the rights of religious believers to live their faith such legislation prefers a person's ability to enter an abortion facility without seeing or

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<sup>170</sup> Ibid [80]-[82], [84]-[86].

hearing a protest or engaging in any communication which might cause discomfort – potentially even if that be by way of observable silent prayer.

#### V THE NEED FOR GREATER PROTECTION OF RELIGIOUS FREEDOM IN LAW

This article has shown the close relationship between Christianity and the law – particularly in relation to marriage – at the time of the arrival of the First Fleet and the declaration of the Swan River Colony. The Western legal tradition did not emerge from a vacuum. It is infused with the Christianity of those involved in the centuries of its development. The history of the Western legal tradition as inherited by Australia cannot be understood in isolation from Christian influences. This article has also described the great changes which have occurred since the foundation of the Australian colonies and nation in the make-up of Australia's population and in contemporary attitudes to religion. Finally, this article provided some examples of conflicts which currently exist between law and religion in Australia. The demographic trends, contemporary attitudes to Christianity in Australia and the examples provided indicate that Australia is in the process of endeavouring, at a very accelerated pace, to disentangle the law from its Christian roots. As the basic general agreement on moral questions which once existed, given the preponderance of Christianity among the population, breaks down, the rationale and logic of such central features of the Western legal tradition as the centrality of the law, the moral authority of the law, and fidelity to the law become questionable in themselves. Whether the law can be divorced from its Christian roots without, over time, jettisoning the nation's entire moral and ethical frame and the Western legal tradition which is its inheritance is something which is difficult to predict. In the meantime, law and religion are rapidly moving from a period of trial separation towards an acrimonious divorce. The failure of existing law to provide adequate protection to freedom of religion in the examples given in this article suggests a need for greater protection.