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Legal Pressure Points for Christians In 21st Century Australia

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Legal Pressure Points for Christians
In 21st Century Australia

Neil Foster¹

1. Introduction

What I want to do today is to give a general overview of some of the challenges facing Bible-believing Christians in Australia as we go forward into the 21st century. My overall conclusions are, I believe, not pessimistic- there are many features of our legal system which have the potential to provide continued protection for the ongoing proclamation of the gospel which seems to clearly lie behind Paul's injunction in 1 Timothy 2:1-4 for us to pray for "kings and all who are in high positions, that we may lead a peaceful and quiet life, godly and dignified in every way". For God our Saviour, of course, "desires all people to be saved and to come to the knowledge of the truth."

But I also want to be realistic, and to encourage you to stand firm for gospel principles when they are under challenge. For Paul did not say that God desires all Christians to live comfortable and stress-free lives! God's purposes to be glorified in the world may involve us bearing a cost, and we need to assess that cost realistically, and trust ourselves to our Creator who has all things in hand.

2. Where we have come from- shared ethical consensus

Let me start by reminding us of something we experience all the time but may not have consciously noticed. There was a time, within living memory of many of the people in this room, when, while the Christian faith was often denigrated and mocked, there was still a shared ethical consensus in our society which was based on that faith. At least up till the 1960's, it was generally agreed that marriage alone was the right context for sexual relations, for example. Even once the "sexual revolution" arrived, there was still a general feeling for some decades that while "living together" was an acceptable option for men and women, it was not ideal. Homosexual sex happened but was not really right. Of course we came to think that putting people in jail for it was not a good idea, but it was not really regarded as a viable alternative to heterosexual sex.

But sexual ethics are not all that ethics are about. The general consensus view on morality that has pervaded the West since the arrival of Christianity includes insights such as the immense value of human life; that the strong have an obligation to care for the weak; that generosity with resources is to be applauded; that pride is a bad thing, and humility is a virtue to be cultivated.

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We don't have time to go into the background here today, but it is well worth noting that this general ethical consensus is not just a random feature of Western society- it is a consensus that has its roots in the Christian world-view. There are some very good books that have come out in recent years addressing the roots of Western culture and morality in Christianity, and comparing the views on some of these matters with, for example, the prevailing view in the so-called civilised Graeco-Roman world which preceded Christianity. If you have a chance I recommend books by Rodney Stark and David Bentley Hart (2 of which are listed in the reading list for today.)

The very interesting book by Stark covers a number of factors that led to the popularity of Christianity in the Roman Empire, and notes how radically different it was in terms of its treatment of women, giving them far greater say in areas such as marriage and divorce. The Christian views making divorce harder, for example, were very much seen as favouring women, as opposed to the Roman system where a husband could very easily "dispose" of a wife whom he no longer favoured, for example.

There are many other examples in Stark's book: Christians, unlike Roman and Greek society, favoured caring for the weak and sick; opposed infanticide (the "exposure" and killing of baby girls in particular was at a shameful level in the Roman world) and opposed "abortion on demand" which was often demanded by lazy fathers.

In a recent online comment John Dickson, Director of the Centre for Public Christianity, noted this when he said:

As political philosopher and atheist Jürgen Habermas concedes, "Egalitarian universalism, from which sprang the ideas of freedom, human rights and democracy, is the direct heir to the Judaic ethic of justice and the Christian ethic of love. To this day, there is no alternative to it."²

Hart has a moving passage where he points out that the reason our society cares for the disabled, and the elderly, and those who apparently make little or no "economic" contribution, lies in our shared consensus based on the value of human beings, which has its origin in the Biblical view of man in the "image of God". But, he comments:

I cannot help but wonder, then, what remains behind when Christianity's power over culture recedes? How long can our gentler ethical prejudices—many of which seem to me to be melting away with fair rapidity—persist once the faith that gave them their rationale and meaning has withered away?... If, as I have argued in these pages, the "human" as we now understand it is the positive invention of Christianity, might it not be the case that a culture that has become truly post-Christian will also, ultimately, become posthuman.³

We don't have to wonder, do we? We see signs of our "post-Christian" culture becoming "post-human" in many areas.

² <http://www.abc.net.au/news/2014-01-17/dickson-parliament-prayer/5203930> , 17 Jan 2014.

³ Hart, at pp 215-216.

3. Revision of the ethical consensus- a Christian worldview not just “outdated” but positively evil

There are many examples, of course, where Christian morality has been under attack as “out-dated” and “old-fashioned” since the 1960’s. Biblical views on marriage being the only context for sex, and even on more controversial matters such as abortion and euthanasia, have long been ridiculed. But what is perhaps a newer development is this: that not only is Christianity seen as irrelevant and archaic (perhaps, to use the phrase from *Hitchhiker’s Guide to the Galaxy*, “Mostly Harmless”), now it is actually seen as dangerous and, in an extreme irony, “evil”.

Thus to suggest that someone may be mistaken about their religious views of the world- that they may in fact be wrong about God and, in accordance with millennia of orthodox Christian theology, destined for eternal judgement- is now not only foolish, it is “intolerant”. And of course of all the possible “sins” that society now recognises, “intolerance” is one of the worst.

Don Carson has done a brilliant job in recent years in exposing the fundamental contradictions in the current views on “tolerance”, which has changed its meaning in popular discourse from “I disagree with you but we can debate the matter politely”, to “all truth is relevant so you can’t say that your view is true without being intolerant”. (See his excellent book on the reading list.)

As a result we see that the legal system is responding to the “harm” caused by Christian behaviours- asserting that some people are right and others wrong; refusing to endorse unbiblical views of sexuality and marriage. There are a number of recent pressure points where this is apparent. One which we don’t have time to discuss in detail today is the startling situation where a Christian doctor who believes on Biblical (and indeed, on general scientific) grounds that abortion is the killing of a person, and so will not be involved in it except in extreme circumstances, faces the condemnation of society and his or her peers. The discourse that a woman has “the right to control her own body” is used to condemn any restriction at all on provision of abortion. In Victoria a doctor is legally obliged today to assist in the provision of an abortion by a formal professional referral, even though such a referral is not at all needed for the procedure to be carried out at a wide range of services which are freely accessible.⁴ But the very idea that a doctor might not want to be a part of the chain of events leading to the death of an unborn child has become so shocking to some in our society that it cannot be tolerated.

The intolerance of any possible alternative views on abortion can partly be seen in the recent internet outrage over Cory Bernardi’s book *The Conservative Revolution*. I haven’t yet read the book itself (though I have ordered it!), but as far as I can glean from the huffings and puffings online, on this issue it simply suggests that abortion should not be viewed as an issue of birth control, and that a woman does not have an unqualified right to terminate the life of a baby whenever she feels like it. These of course would have been views that were accepted by the majority of the Western World until 50 years ago. But today it is

⁴ See *Abortion Law Reform Act 2008* (Vic) s 8(1)(b).

not enough to disagree with these views- the person who has expressed them must be vilified and attacked.

Today, though, I want to focus on one of the most obvious pressure points- the question of homosexuality.

4. One obvious pressure point- law and “sexual orientation”

Homosexuality in general, of course, has always been present in human societies. But until recent years it was not regarded as an acceptable form of human sexual expression. Now, however, we have (as I’m sure everyone here is aware) moved to a situation where a decision to regularly engage in homosexual intercourse has moved in popular perception from a moral choice to a “lifestyle” choice, and then in much popular discourse to a fundamental part of a person’s human nature. The phrase that is often used in legal circles, and other circles now, is “sexual orientation”. A preference for sexual relations with a person of the same sex is now seen as an ineradicable part of a person’s very identity.

There is no time today to explore this phenomenon and its origins in any detail, nor to offer the critiques that need to be offered of what has become part of the “moral consensus” of Western society now. (Phillip and Tony Payne did a great job of that in a little book called *Pure Sex* published a few years ago.)

Part of that shift in popular perception has taken place through pop culture and the media, as part of an often conscious, sometimes unconscious, normalisation of same sex attraction. Winsome and attractive characters in sitcoms and dramas have been shown who are “gay” people and living a fulfilled life on that basis- or they would be if not for the officious interference of (often religious) “homophobes”. The word “homophobia”, of course, has nothing to do these days with a fear of anything, though I think it may have started in that way (based on a completely spurious but apparently persuasive story that many people, blokes in particular, secretly harboured “same sex attractions” for others but were afraid to admit it, and hence vented hatred on those who were openly homosexual.) Whatever the origins of the word, it now means something like “racist”- someone with an irrational hatred of homosexual persons, or someone determined to treat homosexuals badly simply because of their “sexual orientation”.

Let’s not get too hung up on the language, however. We have to accept that words change their meaning. What I want to consider are cases where this new acceptance of homosexuality as an “orientation” have legal implications, and to note some cases that have already come up where Christians may have to deal with this.

A final introductory comment, however. Notice that by using the phrase “sexual orientation” society and the law now assume that a person’s decision to have sex with someone of the same gender stems, not just from a passing fancy, but from a deep-rooted part of their very nature. The word “orientation” signals this. There is of course a long-standing debate about whether a predisposition to homosexual intercourse forms an immutable part of a person’s essential make-up, or not. Again, I don’t have time to go into this. But it should be noted that at the very least there is differing scientific evidence as to whether there is a “gene” for homosexuality or not. Indeed, some of those who most strongly deny that homosexuality is genetically determined are members of the gay lobby, who

want to assert very strongly that they were not “predetermined” to be this way, that it was a choice they freely made.

The other point that Christians want to make in this context is this: whether or not people are predisposed to homosexuality, we believe that all people are predisposed to rebellion against God. All of us since Adam have a fundamental “flaw” in our natures, which means that we are predisposed to do the wrong thing. Part of being human is that we do not, on all occasions, choose to give into our desires. Part of the transforming power of the gospel is that the Holy Spirit *changes* our underlying desires to be more like those of Jesus, and away from our sinful selves.

As a result the debate about whether there is a homosexual gene or not is not all that important. Even if it were true that some people are born predisposed to homosexual desires, that would not of itself be a reason for encouraging them to give in to those desires. Of course this argument is not very persuasive to many in our community, since we started in the 1960’s to accept the view in heterosexual relationships that one could trash a marriage because it was not “fulfilling”, or sleep with a partner because it “felt good”. But even the 60’s libertarians accepted that there was something wrong with a man who left his marriage simply because he gave in to a momentary heterosexual impulse.

An implication of the modern view, though, is that to attack someone’s sexual behaviour may be perceived as an attack on them as a person, because they define their identity by this form of sexual behaviour.

Let’s turn to some of the legal implications.

a. Discrimination on the basis of sexual orientation

We start with the law of discrimination.

Let me make it quite clear up front that I think it is wrong, and am happy for it to be legally wrong, for a person to be denied employment or accommodation or other social benefits simply because they choose to have sex with someone of the same gender, where that fact is irrelevant to the job or other benefit. If someone applies to be an accountant at a major firm, or to work behind the counter at McDonald’s, then it is wrong to turn them away because of their sexual behaviour. It is wrong, in general, because their sexual behaviour is *irrelevant* to the job.

That, of course, is what anti-discrimination law is supposed to be about—assisting people to enjoy the benefits of living in society without being penalised for their nature, or indeed for their choices, where that nature or those choices are not *relevant* to the enjoyment of the benefits. But the issue is always one of relevance. It will usually, for example, be irrelevant what skin colour a person has, for most jobs. But of course there may be some jobs where skin colour is relevant: applying to play Martin Luther King Jr in a movie of his life which is intended to be realistic, for example. And in those situations, where it is relevant, then to exclude an applicant for a job on the basis of race is not unlawful race discrimination. The law contains provisions balancing the rights of people not to be judged on skin colour, with the occasional situation where others have rights to ask for someone of a particular skin colour.

Anti-discrimination laws in Australia make it unlawful to make irrelevant decisions based on certain characteristics such as sex, race, age, disability and (among other things) “sexual orientation”. Actually you may be surprised to hear

that it was not generally contrary to **Federal** law to discriminate on the grounds of sexual orientation before 1 August 2013. On that date the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) commenced operation, amending the *Sex Discrimination Act 1984* (Cth). But we have had laws in **NSW** making discrimination on the basis of homosexuality unlawful for some years (Part 4C of the *Anti-Discrimination Act 1977* (NSW).)

In general the way these laws work is that they make it illegal to discriminate against someone by treating them “less favourably” than others in a similar situation (who did not have the protected characteristic) would be treated. Areas such as employment (hiring, firing, terms and conditions), education, and provision of services generally are mentioned in the Acts as areas where discrimination is unlawful.

However, in each of these pieces of legislation there are provisions that specify that certain behaviour, which would otherwise be discriminatory, is not unlawful, in specific circumstances. One area where this is spelled out is in relation to religious belief.

Sometimes these provisions are called “exemptions” or “exceptions” to the law. I don’t think this is helpful. When something is called an “exemption” it sounds like there is a special rule being carved out on the basis of some sort of unusual privilege. But the provisions making certain behaviour lawful in the discrimination laws, in the areas of religion and in other areas, are not “exemptions” in this sense. Each of them is designed to carry out the function that is always necessary in any law implementing “human rights”, of “balancing” one set of rights against another. So these provisions are best regarded as “balancing” provisions rather than “exemptions”.

Just to be clear, there are balancing provisions that balance out anti-discrimination rights with other rights in a range of areas, not just for religion. So, for example, in the sex discrimination area, s 30 of the Cth *SDA* 1984 provides that the general prohibition on sex discrimination does not apply where:

the duties of the position need to be performed by a person of the relevant sex to preserve decency or privacy because they involve the fitting of clothing for persons of that sex.

Here there is a need to balance the right to privacy, and feelings of modesty, with the right not to be discriminated against on the basis of sex.

The balancing provisions on the basis of religion are completely justified within a human rights framework, as the right to free exercise of religion is protected in a very clear way in international human rights instruments to which Australia is a party. Article 18 of the *International Covenant on Civil and Political Rights* (the ICCPR), for example, provides that

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or belief in worship, observance, practice and teaching.

While Australia’s accession to this Covenant does not of itself have binding legal effect until legislation based on the obligation is enacted by Parliament, the Covenant, and other generally accepted international legal norms, provide clear

justification for recognition of religious freedom by including “balancing provisions” into discrimination law.

In NSW, where there is a general prohibition on discrimination based on a person’s homosexuality in the *ADA* 1977, we also have provisions designed to balance out religious freedom. Section 56 of the Act provides:

56 Religious bodies

Nothing in this Act affects:

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order,
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,
- (c) the appointment of any other person in any capacity by a body established to propagate religion, or
- (d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

The reason a provision like this is needed is fairly obvious to Christians, though it seems not to be so to many secular commentators. While a person’s commitment to a lifestyle involving homosexual intercourse is irrelevant to many jobs in society, it is not irrelevant to involvement in an organisation that adopts the view that all sex outside marriage, heterosexual or homosexual, is contrary to God’s word and is wrong.

Again without detailing the arguments either way, I take it that is fairly clear that the Bible condemns homosexual intercourse as sinful and contrary to God’s purposes for humanity. The Old Testament passages to this effect are not irrelevant, but since the level of Biblical literacy among otherwise apparently intelligent secular commentators is so abysmal, it is better simply to refer to the New Testament. The main passages, of course, are Romans 1:26-27, 1 Corinthians 6:9 and 1 Tim 1:10. Jesus himself condemns sexual immorality generally, using a word which clearly includes homosexual activity as well as heterosexual sex outside marriage.

Since the Christian church purports to be subject to the teachings of the Bible, then it would clearly be inappropriate to require them to appoint as leaders or official representatives people who openly espouse sinful behaviour. It would be like, to take a football example, requiring the Roosters to employ an avid Knights supporter as a CEO, while maintaining his (entirely sensible, of course) support for the Knights!

Hence the first 3 of the 4 paragraphs of s 56 exempt decisions about the appointment of ministers and official leaders of churches. The two later paragraphs, however, including the third, extend the scope of the provision beyond “churches” as such to “bodies established to propagate religion”, which applies to para-church groups and others associated with Christianity.

So if a para-church group associated with the evangelical wing of a mainstream church, which arranges fostering of children in need of care, applies a policy that denies placement to “same sex couples”, you would think it fairly clear that s 56 applies to allow that policy to be implemented.

In NSW you would be correct to think s 56 applies, although the history of one case shows that it was not quite so clear as you might think. This is the case of *OV & OW v Members of the Board of the Wesley Mission Council*⁵.

The decision provides in my view a good example (or at least the final decision does) of what seems to be the effective operation of a “balancing clause” protecting religious freedom.

The case had a protracted history in the courts. The basis of the claim was that OW and OV, a same-sex couple, had applied to become foster carers for children in need, to the Wesley Mission, who provided such services. The Mission advised them that they were not eligible to be such under the Mission’s guidelines, which did not regard homosexual couples as suitable foster parents. The Mission relied on the traditional Christian view of marriage as the ideal environment for the raising of children. In turning down the application, they relied on s 56 of the *ADA*.

This provision was relevant, of course, because the *ADA* provides that it is unlawful to discriminate against a person on the basis of their sexuality, and it was conceded correctly by the Mission that unless s 56 applied, that they had done just that.

At first instance the Administrative Decisions Tribunal found both that there had been discrimination, and also that s 56 did **not** apply.⁶ A key part of their reasoning was that a preference for “traditional marriage” (ie “monogamous heterosexual partnership”) was not a “doctrine” of the Christian church as a whole. This was partly established by the leading of evidence from ministers from within the Uniting Church that there was disagreement among theologians on the point. (The Uniting Church is the “umbrella” body within which the Wesley Mission operates. However, the Wesley Mission represents what might be fairly called the “evangelical” or Biblically conservative wing of the church, and is not uncommonly at odds with the broader leadership of the church.)

This decision was set-aside on appeal to the Administrative Decisions Tribunal Appeal Panel, which held that the original Tribunal had misdirected itself by in effect requiring that a doctrine be uniformly accepted across the whole of “Christendom” before it could “count” for the purposes of s 56.⁷ This decision itself was appealed to the NSW Court of Appeal, which broadly affirmed the Appeal Panel’s ruling.⁸ The matter then came back to the Tribunal in the 2010 proceedings. The Tribunal there reviewed the evidence that had previously been presented by representatives of the Wesley Mission and concluded that the word “doctrine” was broad enough to encompass, not just “formal doctrinal pronouncements” such as the Nicene Creed, but effectively whatever was commonly taught or advocated by a body, and included “moral” as well as “religious” principles.⁹ The evidence of Rev Garner, who spoke of the doctrinal issues, was accepted as showing that the provision of foster care services by a

⁵ [2010] NSWADT 293 (10 Dec 2010).

⁶ See *OV and anor v QZ and anor (No 2)* [2008] NSWADT 115.

⁷ See *Members of the Board of the Wesley Mission Council v OV & OW (No 2)* [2009] NSWADTAP 57 (1 October 2009).

⁸ *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155.

⁹ *OV & OW* above n 5, at [32]-[33].

homosexual couple would be contrary to a fundamental commitment of the organisation to Biblical values. Hence the defence under s 56(d) was established.

In the course of discussing s 56(d), the Tribunal considered an argument that had been put forward by the applicants that any exemption under that provision would only operate in relation to so-called “pastoral” activities, or apparently “religious” activities like running church services. Hence, the argument ran, since the provision of foster-care placements was not a “pastoral” or “religious” activity, the exemption did not apply. The Tribunal ruled (relying on comments that had been made in the Court of Appeal) that this distinction could not be maintained. The exemption applied to all activities of the body that either conformed to the doctrines of the religion or were necessary to avoid the relevant injury- see para [30].

In this case Tribunal found both that the “first limb” of the defence was made out (ie that the refusal “conform[ed] to the doctrines of [the] religion”), and **also** that the “second limb” had been established (ie that not allowing homosexual foster carers was “necessary to avoid injury to the religious susceptibilities of the adherents of that religion”- this was established because in his affidavit Rev Garner had commented at para [62] that “this would make our provision of foster care services unacceptable to those who support the ethos of Wesley Mission”).

It should not be thought that the Tribunal was necessarily happy with this decision. The members of the Tribunal commented, for example, that the first limb of s 56(d) was “singularly undemanding”, because all it required was that an act be “in conformity” with a doctrine, not that to do otherwise would have been “in breach” of a doctrine. It suggested that this was a matter that Parliament may like to revisit.

Nevertheless, the Tribunal’s final decision does seem to be correct. It seems to me that the result reflects a reasonable balancing of the community’s interest in non-discrimination, and the interest in freedom of religion.

Unfortunately, the same cannot be said so far for the next case I want to mention. While this case comes from Victoria, it may have an impact in NSW and around Australia in the future, depending on what happens to it on appeal.¹⁰

The case is *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd & Rowe* [2010] VCAT 1613 (8 Oct 2010), and again involved a complaint of discrimination on the basis of sexuality. The complainant organisation, Cobaw, runs a project called WayOut that is designed to provide support and suicide prevention services to “same sex attracted young people”. The co-ordinator of the project approached CYC (a camping organisation connected with the Christian Brethren denomination) to inquire about making a booking at a Phillip Island campsite that was generally made available to community groups. Mr Rowe, to whom she spoke, informed her that the organisation would not be happy about making a booking for a group that encouraged a homosexual “lifestyle”, as he later put it.

There was some factual dispute about what was said in the telephone conversation. However, in the end the issues were fairly clear. There had been a refusal to proceed with a booking; the reason for the refusal was connected with

¹⁰ It was reported in the press that an appeal was being heard before the Victorian Court of Appeal on 20-21 February 2013. Despite almost a year having gone by, at the time of preparing this talk no decision on the appeal has yet been handed down.

the CYC's view of the philosophy of support for homosexuality as a valid expression of human sexuality; their opposition to this view was a result of what was seen by the CYC to be required by the Scriptures. Despite these things, the Tribunal (constituted by Judge Hampel of the Victorian County Court), ruled against the CYC, and ordered that they had unlawfully discriminated and should pay a fine of \$5000. The decision has gone on appeal to the Victorian Court of Appeal, but the outcome of the appeal is not known.¹¹

The legislative situation was slightly more complicated than that in the *OV* case from NSW discussed previously. The primary liability was under ss 42(1)(a) and (c), and s 49, of the *Equal Opportunity Act 1995* (Vic) ("*EO Act 1995*"). These provisions prohibited discrimination on certain grounds (among which were same sex sexual orientation, and personal association with persons of same sex sexual orientation), in the areas of "services", in "other detriments", and in accommodation.¹² But the Tribunal also had to take into account the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which in effect is a general "Bill of Rights" for Victoria. The *Charter* contains a general prohibition on discrimination, in s 8; importantly, it also contains a right to freedom of religion and religious practice in s 14, and a right to freedom of expression in s 15.

It is not possible to give a detailed account here of how Judge Hampel dealt with all the issues. But there are some disturbing features of the decision.

The *EO Act 1995* contained two exemptions based on religion. Section 75(2) provided:

- (2) Nothing in Part 3 applies to anything done by a body established for religious purposes that –
 - (a) conforms with the doctrines of the religion; or
 - (b) is necessary to avoid injury to the religious sensitivities of people of the religion.

And s 77 provided:

Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.

Why, then, were the CYC not allowed to rely on these exemptions? Essentially, to paint with a broad brush, because Judge Hampel decided to interpret any provision dealing with "discrimination" as broadly as possible in favour of the complainant, but any provision dealing with "freedom of religion" was to be construed as narrowly as possible, to give the least possible protection to religious views.¹³ This seems to have been partly driven by what I mentioned before, the tendency to call the balancing clauses "exemptions", as if the only

¹¹ See interlocutory proceedings in *Christian Youth Camps Ltd & Anor v Cobaw Community Health Services Ltd & Anor* [2011] VSCA 284 (21 September 2011), where an application that an appeal be dismissed because the notice of appeal was not filed within the very tight limits provided under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) was refused. As noted above, the substantive appeal has now been heard, but at the time of writing no judgment handed down.

¹² The previous legislation has now been replaced by the *Equal Opportunity Act 2010* (Vic), which contains provisions to similar effect, most of which came into operation on 1 August 2011.

¹³ See paras [217]-[221] of the judgment, concluding in [221] with the words: "A construction that advances the purposes or objects of the *EO Act* would favour a narrow, not broad, large or liberal interpretation of the exceptions".

“real” rights are non-discrimination rights, and others are just hanging around on the edges.

So the Judge ruled against the CYC, first on the basis that they were not “a body established for religious purposes”. This was done despite the clear evidence of the constitution of the group, the first object of which was “to conduct such camping conferences and similar facilities for the benefit of the community and in accordance with the fundamental beliefs and doctrines of the Christian Brethren”.¹⁴ Of the other 10 objects, 4 make explicit reference to Christianity or the Christian Brethren, and all are set in the context of the overall aim. Members of the CYC were required to subscribe to a statement of faith consistent with that of the Christian Brethren overall.

How, then, could it be concluded that this body was not “established for religious purposes”? Her Honour did refer to comments from the NSW Court of Appeal decision in *OV and OW* to the effect that a body would not be relevantly “established” for religious purposes simply because it had been historically so set up, if it no longer carried out any such purposes.¹⁵ However, with respect, this was a “red herring”. No witness said that the overall purposes of the CYC had changed since it was incorporated. Instead, Judge Hampel referred to the fact that “secular” camping activities were carried out on CYC sites, that there were websites advertising the camps which did not mention the organisation’s Christian affiliations very prominently, and that in general the CYC did not inquire into the sexual activities of campers who used the facilities.

Assuming that all those facts were true, it seems clear that none of them meant that CYC had somehow changed from a body set up for religious purposes, to some other sort of body. At the very least, the evidence showed that profits generated by the camps helped to fund the activities of the Christian Brethren denomination. Her Honour notes that some of the camps run at CYC centres *were* explicitly Christian camps.¹⁶ To say, as her Honour does, that there is no “religious content required as a condition of the provision of the camping facilities”, is a very long way from saying that the organisation had moved away from the aims set out in its constitution.

Some people might object to a religious group funding its core religious activities by offering services to the general community that are open to members of the public who simply wish to avail themselves of the services, the profits being used for the more general religious purposes. If so, presumably one would have to object to Salvation Army “Op Shops” being patronised by non-believers. But it seems, with respect to her Honour, to be a common feature of Australian society.

In the end, then, this seems to be an example of applying an unduly narrow interpretation to clauses dealing with religion. An organisation which offers the benefits of Christian care to the community as a whole, which declares itself to be aimed at producing Christian outcomes and which does in fact provide services for Christian camping, is said to not be a “body established for religious purposes”.

The technique of narrow interpretation continued to be applied in the judgment, in ways that can only be summarised here. In case her Honour should

¹⁴ See para [237] of the judgment.

¹⁵ At [239] in *Cobaw*, citing [2010] NSWCA 155.

¹⁶ At [247].

be wrong about the status of CYC, she went on to consider whether what they had done “conform[ed] with the doctrines of the religion”. While her Honour at least was influenced by the NSWCA decision in *OV* to say that the “Christian Brethren” could be considered as a separate “religion” for the purposes of this clause,¹⁷ when she came to decide what the content of the relevant “doctrines” were, she ended up effectively holding that all that could be considered in this area were pronouncements of “ecclesiastical authorities” similar to the Nicene Creed. The spectacle of a County Court Judge in Victoria having to decide what constitutes the core doctrines of Christianity should surely give some pause as to whether this is the way the legislation is meant to work.

What her Honour did, of course, was to accept the evidence of one scholar over the evidence of another. The Reverend Dr Rufus Black, clearly a representative of the “liberal” wing of Christendom, was accepted when he ruled out of the category of “doctrine”, beliefs about sexuality. The Rev Canon Dr Peter Adam, a highly regarded evangelical scholar, gave evidence that beliefs about sexuality were a core part of Christian doctrine. Judge Hampel not only accepted Dr Black’s testimony (on what grounds is not entirely clear), but accompanied her rejection of Dr Adam’s views with what amounted to a sustained and (with respect) completely unwarranted personal attack on Dr Adam’s integrity. In remarks that would arguably have been defamatory if not made under cover of judicial immunity, Judge Hampel questioned Dr Adam’s independence and impartiality, calling both “seriously compromised”.¹⁸ What serious breach of ethics and morality had led to this attack? Simply the fact that Judge Hampel believed that portions of his written evidence had been “influenced” by comments made by the solicitor for CYC. In addition at points he said things for the purpose of “supporting the stance of CYC”.

Perhaps to someone unfamiliar with litigation these may seem serious moral flaws. Judge Hampel is certainly not such a person. Her Honour would be well aware that expert witnesses, while of course under an obligation to tell the truth as they see it in their independent judgment, are regularly called by one side or another, *because* they agree with the views of one side or another. There was absolutely *no* suggestion that Dr Adam had lied, or that anything he put forward was not a view he in fact held. The fact that in the initial draft of a witness statement he did not address the issues that the legal advisors thought needed to be addressed, and that he was prepared to agree to redraft his statement accordingly, is completely unexceptionable. It is difficult to determine why Judge Hampel seems to have been so offended by his testimony.

To read Judge Hampel’s account of Dr Black’s testimony, for anyone remotely familiar with the extensive debates in the theological academy over almost all the issues that are glossed over, is, to be frank, painful. At one stage, for example, Dr Black is recorded as saying that the Brethren interpret scripture “literally”, and this “does not allow for an interpretation of the words based on their operation in a figurative or metaphorical way”.¹⁹ It almost beggars belief that this simplistic view is impliedly attributed to the former Principal of Ridley

¹⁷ At [259].

¹⁸ See paras [279]-[280].

¹⁹ At para [296].

Theological College.²⁰ Later we are told that Dr Adams and a group of lay witnesses “relied on a passage from Leviticus as the strongest source of the prohibition on homosexuality”. Without the transcript of the testimony one cannot be sure, but it would be very surprising indeed if Dr Adam said any such thing. The paragraph concludes with the classic argument employed by Biblically illiterate modern commentators who attack the Biblical view of homosexuality: you rely on Leviticus, but that book (and other parts of the Bible) requires the stoning of mediums, and the killing of adulterers. If the matter were not so serious, it would be laughable as an attempt at basic Biblical exegesis, where anyone who reads the New Testament will notice that Jesus and his apostles announce that many of the previous specific laws of Leviticus are no longer relevant under the “new covenant”.²¹

In the end we have the spectacle of Judge Hampel ruling as follows: that “beliefs about marriage, sexual relationships or homosexuality are not fundamental doctrines of the [Christian Brethren] religion”.²² This ruling was made in spite of the fact that the legislation does not use the word “fundamental”. A Judge who seems to have no real understanding of Christian doctrine and the history of the interpretation of the Bible has been forced to come to a theological judgment.

Her Honour then also went on to hold that even if a view that homosexuality was sinful could be regarded as a “doctrine” of the Christian Brethren, refusing to give the support of the CYC camping site to a group formed to promote the view that homosexuality was a normal and ordinary part of human identity, could not possibly be something that “conformed” to the doctrine. For Judge Hampel the by-now familiar “narrow” road of interpretation meant that this fairly general word must mean that the action was “required” or “obligatory” or “dictated” by the doctrine.²³ It may be recalled that the NSW Tribunal in the final *OV* hearing concluded that the word “conform” was a very “undemanding” standard, not being something “required” by doctrine. But Judge Hampel read the word much more tightly. The fact that no general enquiry was made of campers about their sexual activities was said to mean that the refusal of a booking in these cases was not “required” by doctrine.

A point that seems to have been ignored by the Tribunal is that there is a clear difference between a policy which makes no particular enquiry of campers about their proposed sexual activities, and the booking of a group which has been clearly established to lobby for a particular type of sexual activity which the CYC regards as contrary to the Bible. Suppose a Nazi support group asked for a booking? The mere fact that in the past no enquiries were made about the political affiliations of individual campers, surely should not prevent management concluding that it would be contrary to an expressed commitment to Christian values to provide the premises for those purposes? Yet the

²⁰ See Dr Adam’s scholarly monograph, *Hearing God’s Words: Exploring Biblical Spirituality* (IVP, 2004) where he comments at p 122 that “Old Testament religion was literal rather than spiritual”, in speaking about the way the Bible should be read, and denying a purely “literal” reading where this does not fit the author’s intention.

²¹ For clear changes to the Levitical “food laws”, for example, see *Mark* 7:18-19, *Acts* 10:9-16.

²² At [305].

²³ At [317].

difference between these situations was not addressed in any serious way in the judgment.²⁴

It is worth noting that in the Commonwealth law that now prohibits discrimination on the basis of sexual orientation, there is also a provision that balances out religious freedom to some extent. Section 37(1) of the *SDA 1984* provides:

Religious bodies

37 (1) Nothing in Division 1 or 2 affects:

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order;
- (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
- (c) the selection or appointment of persons to perform duties or [functions](#) for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
- (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Section 38 provides similar protection for schools and other “educational institutions” which are conducted in accordance with religion. However, in what may perhaps be a first step in “pushing back” the balancing provisions, the legislation explicitly refuses to apply the principle of s 37(1) to the specific case of aged care facilities, in an “exception to the exception” (or perhaps, consistent with my preferred terminology, I should call it a “rebalancing of the balancing provision”!)

SDA 1984 37(2) Paragraph (1)(d) does not apply to an act or practice of a body established for religious purposes if:

- (a) the act or practice is connected with the provision, by the body, of Commonwealth-funded aged care; and
- (b) the act or practice is not connected with the employment of persons to provide that aged care.

This small provision was the result of an interesting political process. The slightly odd thing is that, while in the debates it was all said to be about protecting the rights of same sex couples to share retirement accommodation, the provision itself is not restricted to concerns about this issue. As a result this defence intended to apply to sexual orientation issues has ended up applying to *all* sex discrimination questions.

You can see one account of the history behind the debate, and some reasons why religious groups opposed the amendment, in the paper by Pietsch on the reading list. The pressure to make sure that religious aged care providers do not discriminate against same sex couples seems to have been a part of the organised campaign to reduce “exemptions” given to religious bodies which has

²⁴ The point is *not* to equate those who favour same sex relationships with Nazis; it is simply to say that whether an organisation with a specific ethos, is allowed to decline to offer its services to an organisation with an opposing ethos, is surely an important question.

been under way for the last few years.²⁵ To be frank, I wonder whether it was seen that this was an easy “foot in the door” to a wider removal of exemptions. Religious providers have argued, with some cogency, that many older people who seek care from religious institutions expect that they will be moving into an environment where they and the providers have a range of shared values, which are not necessarily expected in the widely available secular aged care sector. Why, then, was it essential that older people in these institutions be required to accommodate the views of those who choose to act in ways that are clearly contrary to the religious teachings of their chosen aged care provider?

More than this, the way that the provision has been inserted means not only that aged care institutions will be required to accept same sex couples, it means that those who do not do so already (and to be honest, I am not sure what policies have previously been in place) will be required to accommodate unmarried *de facto* couples.²⁶

However, the “rebalanced balance” in s 37(2)(b) explicitly includes yet another “re-rebalancing” by exempting *employment* decisions. This means that religiously based aged care providers are allowed to continue to select staff who are in fundamental agreement with their mission, which is in my view a good thing. But of course it raises the question as to whether this will continue to operate.

So in the area of discrimination, then, we have seen that there are some protections provided to religious organisations for religious freedom, and sometimes they operate well (as in the *OV* case.) But sometimes they seem to be subject to a very strained interpretation by the courts, which may be hostile to religious freedom (as in the Tribunal decision in *Cobaw*.) And there will be an ongoing pressure from lobby groups, convinced that Christians are denying their rights to express their lifestyle choices in all areas, to shrink the legislative protections currently in place.

Perhaps it is also worth noting, before we leave the discrimination area, that in broad terms the balancing provisions are applied to specifically religious bodies, rather than to individual Christians. So, for example, if you run a business and want to apply Christian principles in your business, it may not always be possible to do so, depending on the type of issue that comes up. In NSW, an early decision under the ADA in *Burke v Tralaggan* [1986] EOC 92-161 held that a couple who refused to allow an unmarried couple to rent a flat they owned, on moral grounds, had unlawfully discriminated on the ground of “marital status” under s 48 of the Act. (The interesting article by Moens comments on this case.)

Suppose, instead of renting out a flat, you offer accommodation in your own house to casual visitors, in a “bed and breakfast” situation. Do you as an individual have the right under NSW law to decline to accept a booking for a double bed from a gay couple, or from an unmarried couple?

²⁵ When the original version of the amendments was going through the lower house, a press release was issued by the AHRC urging this amendment: see <http://www.humanrights.gov.au/news/media-releases/there-should-be-no-exemption-discrimination-aged-care-2013>.

²⁶ The definition of “marital or relationship status” in s 4(1) of the SDA 1984 includes in para (e) the status of being “the de facto partner of another person”.

An issue of this sort came up recently in the UK, in *Bull v Hall* [2013] UKSC 73 (27 November 2013). The Bulls ran a boarding house, and had refused, on grounds of their religious views, to give double bed accommodation to a same sex couple. The Supreme Court upheld the decisions of lower courts fining them for breaching a regulation prohibiting discrimination on sexual orientation grounds. There was a slight difference of opinion within the Court- 3 members found that this was "direct" discrimination, whereas 2 members of the court hold that it was "indirect" discrimination (in my view a better opinion, since the ground of their refusal was expressed to be that the couple were not married, not that they were homosexual.) But even those who held it was indirect discrimination took the view that it could not be justified.

However, it is interesting to note that it may *not* be unlawful to do this in NSW. Under s 48 and s 49ZQ of the ADA, which deal with provision of accommodation, there is an exemption that applies where the accommodation in question is one in which the provider also resides, and where less than 6 beds are provided. So it seems that the NSW Parliament has explicitly decided not to require someone who offers accommodation in what is in effect their own house, to comply with the discrimination law in this area. Section 23(3)(a) of the Cth SDA 1984 contains a similar exemption, although interestingly it only applies where there are no more than 3 beds provided. (Since the Commonwealth provision will over-ride the State one where there is a clash, the "3 bed" rule is the one that will have to be applied in future.)

One of the things to be drawn from this is that what looks like "discrimination" in popular terms may not always be so, and that Parliaments for various reasons have provided what I am calling "balancing provisions". So it is always important to check the particular law that applies to your activity.

b. Public discussion on the issue of sexual orientation, vilification laws

Let's move on from discrimination law to the broader question of whether it is possible to publicly *discuss* Christian views on homosexuality without running foul of the law. (There are of course laws in some parts of Australia, though not in NSW, that prohibit "vilification" on the basis of religion. We don't have time to discuss these here today, but I do deal with those laws in my paper on the reading list - you can download it from a website where I upload my papers, and if anyone is interested there are other "religion and law" papers there as well, touching on some of the issues we are discussing today.)

Of course we all know that "freedom of speech" is an important human right, protected in many ways under our laws. But of course we also know that some speech can cause harm to people, and may on occasion need to be qualified or limited. So I have freedom to speak, but when my speech destroys someone's reputation by telling lies, then I can be sued for defamation. Similarly I am not allowed, to adapt a common example, to cry "fire" in a crowded Cathedral and cause a panic that may harm people, when I know there is no fire.

Where the debate in the area of sexual orientation arises is in the area of what has come to be called "hate speech" (although that is not the language that is always used.)

I should perhaps be clear upfront by saying that I think there is *some* role for "hate speech" law when properly understood. There is a genuine harm caused to persons by being the subject of continued hateful speech in public on

the grounds of race or homosexuality or religion. But, and this is an important but, the law should not be involved simply when someone is “offended”. Unfortunately, there is a tendency in some current laws for mere “offence” to be culpable.

We can see how easily offended some people are in this area. There was a news item in the last few weeks about a “celebrity” on UK TV, former boxer Evander Holyfield, who in an unguarded moment in a so-called “reality” TV show expressed the view that homosexuality was “not normal”. The current atmosphere is such that this innocuous remark sparked a “social media” avalanche of calls for him to be removed from the show. The producers of the show had him publicly rebuked: that “his views weren’t shared by a large section of society and that expressing those views and the language he used could be seen as extremely offensive to many people.”²⁷

While causing offence is a common part of human life in a fallen world, of course, until recently it has not been seen in the West as something that should be addressed by the law. But there are now increasingly laws that either penalise the causing of offence, or are in danger of doing so.

In NSW the ADA 1977 provides as follows:

49ZT **Homosexual** vilification unlawful

(1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the homosexuality of the person or members of the group.

There is a defence under s 49ZT(2)(c) for:

(c) a public act, done **reasonably and in good faith**, for academic, artistic, **religious instruction**, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

It seems fairly clear that a calm and reasoned explanation of the Bible’s teaching in a church service or school scripture class would probably fall well and truly within this exception. In addition, such a discussion should not fall foul in any event of the main provision, as one would hope that a discussion of Biblical morality would not amount to the “incitement of hatred or serious contempt or severe ridicule”. Still, the tone of public debate has shifted so much in recent years (as evidenced by the outrage expressed at Evander Holyfield’s remarks) that it is just as well that the defence is available.

In an important ruling in *Sunol v Collier (No 2)* [2012] NSWCA 44 (22 March 2012) the NSW Court of Appeal held that s 49ZT was not constitutionally invalid. It had been alleged that it was an undue infringement of the implied right of political communication under the Commonwealth Constitution.

In upholding the provision as valid, however, the Court pointed out that what was required was not simply an expression of hatred or contempt for a homosexual person, but “incitement” in the sense that others would be stirred up to such hatred or contempt. The defence of “good faith” had to be interpreted broadly.

Allsop P in addition made the following interesting comment:

²⁷ See <http://www.mirror.co.uk/tv/tv-news/celebrity-big-brother-evander-holyfield-2993538#ixzz2qMt77Ocx>.

The text of s 49ZT reflects an attempt by Parliament to weigh the policies of preventing vilification and permitting appropriate avenues of free speech. Subsections (1) and (2) should be read together as a coherent provision that makes certain public acts unlawful. Subsection (2) is not a defence; it is a provision which assists in the defining of what is unlawful. It attempts to ensure that certain conduct is not rendered unlawful by the operation of subsection (1).

This is consistent with my suggestion that it is not helpful to talk of “exemptions”, but that the various parts of the legislation work together to reach an appropriate balance.

A more recent example of the sort of behaviour that amounts to a breach of this provision is the decision in *Margan v Manias* [2013] NSWADT 177 (7 August 2013). Mr Margan was putting up posters in Oxford St in Sydney supporting same sex marriage. Mr Manias was following him along the road, and shouting “I am going to eradicate all gays from Oxford Street” and “Do not worry I am doing good work”. He also added: “There are wicked things taking place on Oxford Street”. In the circumstances it is probably not surprising that the Tribunal found that his words, shouted out in a very combative way, were liable to “incite hatred” for Mr Margan.

So this is an area where there is a legal prohibition of certain types of speech, and in some cases it seems reasonable. But as with all areas of law it is often difficult to be sure where the line should be drawn.

One of the overseas cases I note in my paper is the Canadian decision of *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 (27 Feb 2013.) In that case the Supreme Court of Canada unanimously upheld the decision of a lower tribunal to fine Mr Whatcott for the distribution of pamphlets opposing homosexuality. A provincial law, s 14 of the *Saskatchewan Human Rights Code*, provided:

14. – (1) No person shall publish or display, ..., any representation, ...:

(b) that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

“Prohibited grounds” included homosexuality.

The end result of the case was that the fine for breaching the legislation was upheld. Mr Whatcott had expressed himself in a very strong way.

But in the course of the decision the Canadian Supreme Court actually ruled that the part of the section that dealt with the mere “ridicule”, “belittling” or “affronting” of a person was in fact invalid, as being too great a restriction on freedom of speech. Unlike the situation in Australia, in Canada there is a “Charter of Rights” which includes a freedom of speech right. That was a good outcome. Minds could differ as to whether what Mr Whatcott had said was an incitement to hatred, but as I said, he had used some very strong language, and the Court ruled that the Tribunal’s decision could be justified. But it was a good reminder that there need to be very good reasons to prohibit speech, and mere “offence” is not enough.

Without going into them in great detail, in my paper I somewhat optimistically suggest that 2 decisions of our Australian High Court (oddly handed down on the same day as the *Whatcott* decision in Canada) also support

a strong principle of free speech. In one of the cases the High Court upheld an Adelaide by-law prohibiting preaching in the street without a permit, but stressed that decisions of the local council on this provision had to be based on the potential for disruption of traffic, *not* on the content of the preaching.²⁸ In the other case, the barest of margins saw an evenly divided High Court uphold a conviction for “causing offence through the postal service”, where two Muslims had sent letters to the parents of soldiers killed in Afghanistan, attacking the dead soldiers.²⁹ In that case, however, three members of the Court would have struck down the law, noting that a law that merely prohibited “offence” would contravene the implied freedom of political communication that exists under the Constitution.

The reason for my mentioning these cases are that they are a reminder that the courts are concerned to protect freedom of speech as an important value. Hence it is possible that some of the laws that have been introduced which might on their surface limit the ability of Christians to honestly express the Bible’s view on homosexuality, may either be invalid or will be interpreted so as to leave a fair degree of latitude.

Having said that, I want to stress that whether or not laws are in place, there may come a time when Christians have to speak up about these issues. Sometimes that speech will need to happen outside the sphere of a church service, and so we may have to simply run the risk that proclamation of God’s truth might be dangerous.

c. Issues raised by the same sex marriage debate

These sorts of issues are likely to increasingly come to the fore in the same sex marriage debate. The question as to whether the institution of marriage should be fundamentally changed to incorporate same sex relationships is a deep and complex social issue. It is not, contrary to the mantra of the proponents of same sex marriage, simply a question of “discrimination” or “equality”.³⁰ It involves a major restructuring of an essential component of society. It can be seriously opposed, not just on the basis of the Bible, but on a wide range of grounds based on social research into human society.³¹

But it is now increasingly being seen as a “shibboleth”, a touchstone issue to determine whether someone is “homophobic” (meaning, as noted previously, that they irrationally hate homosexual people.) It seems to be impossible for some commentators to believe that someone could be a rational, sane human being and oppose same sex marriage.

A case that arose in the UK a few years ago illustrates the point. In *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch) Mr Smith, a Christian employed by a local government body, saw a news item pop up on his internet while at home. It read: “Gay church ‘marriages’ set to get the go ahead’.” He

²⁸ See *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3.

²⁹ See *Monis v The Queen* [2013] HCA 4 (27 February 2013).

³⁰ See my paper on this, “Opposing same-sex marriage is not discrimination” (2011) at: http://works.bepress.com/neil_foster/40.

³¹ For a brilliant example of a sustained argument in favour of “traditional”, Biblical, marriage, based on purely “secular” grounds, see Sherif Girgis, Ryan T Anderson, & Robert P George *What Is Marriage?: Man and Woman: A Defense* (Encounter Books, 2012).

commented briefly: “an equality too far”. One of his Facebook “friends”, a fellow employee, pressed him to explain what he meant. He ended up responding:

“I don’t understand why people who have no faith and don’t believe in Christ would want to get hitched in church the bible is quite specific that marriage is for men and women if the state wants to offer civil marriage to same sex then that is up to the state; but the state shouldn’t impose it’s rules on places of faith and conscience.”

As Justice Briggs put in his decision at [5]:

For making those two comments Mr Smith was suspended from work, on full pay, on 17 February, made the subject of a disciplinary investigation and then disciplinary proceedings leading to a hearing on 8 March, at the end of which he was told that he had been guilty of gross misconduct for which he deserved to be dismissed.

In the end Justice Briggs ruled that the Housing Trust’s reaction had been an over-reaction and that Mr Smith had been wrongfully disciplined. (Rather than being dismissed, he had been reduced in rank to a position paying 40% of his previous position.) The Judge’s comments are an encouraging re-affirmation of common sense. As he said, the comments were made on a non-work forum and could not in any sense be seen to have been posted “on behalf of” his employer; the fellow employee who claimed to be most offended had been the one who invited Mr Smith to elaborate his initial remark; the employer had no right to control Mr Smith’s expression of general views unrelated to his employment in his own time; and were not objectively insulting or disrespectful to fellow workers. Despite these sensible findings, the fact that disciplinary proceedings should have been brought against Mr Smith at all is very disturbing and it simply illustrates the fact that it is sometime hard to avoid causing offence to others on this issue. Or at least saying something which others may take offence at.

Others have faced serious penalties for expressing opposition to same sex partnerships. The European Court of Human Rights handed down a decision on four high profile cases from the UK involving these issues at the beginning of 2013.³²

The one I want to mention specifically involved a Christian lady, Lillian Ladele, who had been working for many years as a marriage registrar for a local council. Even before the recent introduction of a same sex marriage law in the UK, they had provided for a “civil union” regime for same sex partners. Ms Ladele took the view that this system, designed as it was to be a “substitute” for marriage, was wrong on Biblical principles, and that she could not in all conscience be involved in registering such partnerships. Her action offended two of the other registrars working for the Council (although it did not impact on any members of the public, since there were plenty of other registrars who could have done the work.) As a result she lost her job.

Her appeal to the courts, and all the way up to the European Court, was on the basis that her freedom of religion had not been appropriately taken into account. She had started her job at a time when same sex registrations were not possible. It would have been perfectly possible for the Council to have made adjustments to its procedures not to roster her on to register these partnerships.

³² *Eweida and others v The United Kingdom* [2013] ECHR 37 (15 January 2013).

But in the end the majority view taken by the courts was that the Council were entitled to enforce their blanket policy on “non-discrimination”, and that the objections of colleagues were a reason for her to lose her job. My own view is that this decision was legally wrong, and indeed two of the judges in the European Court were in dissent and very bluntly attacked the “political correctness” of the Council. But it is an example of the cost that Christians may be called on to pay.

There is no doubt that, if same sex marriage is legally recognised in Australia, there may be similar issues that arise in the future. Those who teach in Government schools, for example, may be required to teach children that this is just another acceptable form of family (as no doubt many are required to today, although the view gains force if the institution is legally approved.) Indeed, as I note in my paper on the issue, formal recognition that homosexuality is a “valid” lifestyle is precisely what the proponents of the change are aiming to achieve—there are few if any practical differences now between the social and monetary benefits available to married, de-facto heterosexual, and de-facto homosexual couples. But the very reason that the marriage debate matters is that this will be final imprimatur from the State, that homosexuality is acceptable.

So Christians will need to be prepared, if they are to be true to the gospel, to suffer for expressing a different view.

One example of someone taking a public stand on this issue from within the Anglican church, which some of you may be aware of, is the statement made by the Bishop of North-West Australia, Gary Nelson, that if WA or the Federal Government recognised same sex marriage, he would withdraw permission for all the priests in his diocese to celebrate marriages under Australian law.³³ That may or may not be a policy response that everyone agrees with, but it is good to see a public representative of the church taking a strong stand.

By the way, let me be very clear: I do not think a change to legal recognition of same sex marriage in Australia is inevitable. Proponents of change have suffered major defeats in recent years: the refusal of Federal Parliament to agree to change the law a few years ago; and the striking down in December by the High Court of an attempt to “go it alone” by the ACT. An attempt to change the law in NSW also recently failed. In my view Christians should take heart from these, and continue to make their views known in public forums.

(i) Should Christians just withdraw from the debate since it is not a “gospel” issue?

Of course, you can find Christians who say that we shouldn’t really be spending time debating same sex marriage. After all, no one will enter the kingdom of God because they are opposed to same sex marriage! Is it really a “gospel” issue that Christians ought to be speaking about? Or are we just painting ourselves as moralistic “wowers” once again?

I have a lot of sympathy for this point of view. I *do* believe that the most important decision a person has to make is whether or not they will repent and put their faith in the Lord Jesus. A few years ago I was asked during the same year, first to give a talk about the legal evidence for the resurrection of Jesus (the local AFES group asked me about this), and then later was asked by the general Law students’ association to debate the subject of same sex marriage. I would

³³ <http://au.news.yahoo.com/thewest/news/a/19669931/same-sex-marriage-debate-diocese-to-opt-out-if-state-presses-unions/> (17 Nov 2013).

much rather be known around the University as “that guy who speaks about the resurrection” than “that guy who is against same sex marriage”! But as it turns out the Law Students association was not asking me to write about the resurrection!

My view is that as Christians we need to be prepared to provide answers to questions that people are asking. We will aim, and I do my best, to bring the topic of conversation back to the core truths of the gospel. But sometimes we need to speak about stuff simply because this is the presenting issue for our community.

The main reason that I have continued to occasionally write and speak about same sex marriage, however, is that it is the loving thing to do. I believe in a God who created the Heavens and the Earth and all that is in them; a God who made human beings in his own image and gave them principles to live by. If proper human flourishing involves humans living by God’s principles, then it will be bad for them to ignore his principles. Even without the social science research I know from reading my Bible that unrestricted heterosexual relationships, and homosexual sex, are sinful and are bad for people. Same sex marriage will undermine support for the institution that humans use to protect women and children by encouraging husbands to stay faithful and to care for their families. It will do lots of other bad things for society. If I love the people around me, I do not want them to have to live in a society like that. So I think I have a moral obligation to oppose same sex marriage and the “normalisation” of sex outside marriage and homosexual relationships.

Doing that won’t make me popular in popular culture. I am pleased to say that so far the traditions of academic freedom in the University world have meant that I have not personally suffered for the stance I have taken. That may change in the future, and if it does I pray that I will have the courage to continue to speak the truth of God’s word. There are others in other jobs for which this may be more directly costly.

Let me conclude today, then, by briefly talking about what I see as a Christian response to these pressures.

5. The Christian response to these pressures

a. In many ways a very old, not a new, situation- Christianity a direct challenge to the ethical consensus in the Roman Empire

In many ways we face a very old, not a new, situation. We have to some extent been lulled into security in the West by the fact that, through God’s grace, Christian values on many moral issues have been shared by our culture for many years.

But of course that was not the case in the 1st century when the gospel spread from Jerusalem and into the Roman Empire. Christianity then was a serious challenge to the social and ethical consensus in the Roman Empire. I have mentioned already some obvious points like the Roman attitudes to abortion, and infanticide, and divorce. Within the pages of the New Testament we see that the message of the gospel challenged the economy of the city of Ephesus, when in Acts 19 the silversmiths provoked a riot because their sales of silver idols were dropping off! Roman religion was essentially, worship the gods, but don’t make

too much of a fuss about it. But this radical Christian gospel proclaimed one god and one way to know him, and it was a threat to the established order! (And of course in Acts 19:27 Demetrius the silversmith piously accused Paul of what we might call “religious vilification” here, when he challenged the supremacy of the “great goddess Athena”!)

b. We are told by Jesus and Paul that we should expect opposition and persecution

Since the situation then was similar to now, it should not surprise us that we face hostility for the radical message of the gospel. Jesus and Paul both tell the 1st century Christians to expect to be insulted, and attacked, and persecuted- as they were (see John 15:18-21, 17:14-15; Acts 14:22; 1 Thess 3:4).

c. However, love for our neighbour and for the cause of continued gospel proclamation means that we cannot be silent!

But just like the early Christians, we cannot be silent when Jesus has commanded us to speak! In general, of course, Christians are law-obeyers rather than law-defiers. Romans 13 tells us that. But the line we draw comes when the State tells us to be silent, but the Lord Jesus has told us to speak.

This is especially clear in the area of direct gospel proclamation. We have an obligation to verbally share the gospel with others around us- politely, with grace, listening carefully, but we must do it. The apostles in Acts 4:18-20 were commanded not to preach about Jesus by what seems to have been the relevant lawful authority; but they said, clearly and directly, that they could not obey. God through Jesus had told them to proclaim the death and resurrection of the Messiah, and they had to obey.

In our country we are greatly blessed by the fact that we have inherited a strong tradition of freedom of speech, and there are very few circumstances where we would have to disobey the law to proclaim gospel truth. I even have to confess I agree with the decision of the High Court in the *Adelaide Preachers* case that it is legitimate for the State to put in some controls on street preaching in the interests of traffic! But should the time come when the law prohibits any *possible* public expression of the fundamental truths of the gospel- for example, an extreme religious vilification law which prohibited the public assertion in any forum that Jesus was the only way to God- then in that situation I think we would be obliged to disobey that law.

On social issues, I think what we mainly need is courage to stand out from the crowd, and wisdom. We don’t need to say everything that could possibly be said on every occasion. But I think that as people who do have an insight into what works best for human beings, we have an obligation to make our voices heard on issues where the Bible is clear.

d. We must not fall into “culture wars”- our stance should be on clear gospel issues

However, I do want to issue a warning that we ought not to fall into what we might call “culture wars”- defending positions simply because they are comfortable or they are what we are used to, or because they have become popular amongst the particular sub-culture of Christians we belong to. I am all

for Christians being clear where the Bible is clear, but allowing each other room to move where the Bible is not clear.

For this reason I don't find the tendency of some Christian groups to support fringe causes all that helpful. I have to nail my colours to the mast here and say that the vaccination issue is one of these. I am sad when I see some Christian brothers and sisters assuming that all Christians must be opposed to vaccination. Or else that all Christians must think that global warming is a hoax. These are issues, and there are others, where sadly it seems to me that sometime we adopt an unfortunate tendency of some Christian groups in the United States to an almost paranoid fear of the government or "official" scientific advice. Of course if there is serious scientific evidence in these areas, then feel free to discuss it. But they don't seem like issues that the Bible is clear on.

e. But we must be prepared to take a stand where gospel truth is denied and take the consequences

But where the Bible is clear, we should be clear, even if it is unpopular to do. We may be met by the response that we are "imposing" our moral view on others in the community. I think this is rubbish. To put forward a view as part of the process of democratic debate is not to "impose" anything on anybody. If Parliament enacts a law on *anything*, whether it is cigarettes or seatbelts or environment impact statements, it is "imposing" rules of behaviour on the community. But it does so through the democratic process, and Christians have just as much right to argue for what we see to be the best result for others, as anyone else has.

I think the issues are a bit more complex when we consider the specific position of a Christian Member of Parliament, or a Christian Prime Minister, say. In general, in our system of government, policies are announced and debated before they are introduced into Parliament, and an MP should be free to express their views in a party room debate. The forms of representative government as we now have them, require that the MP will usually have to support their party once a policy is decided. In an extreme case the MP may feel obliged to cross the floor to vote against their party position; in that case they may have to resign their membership of the party, and my own view is that they probably should then resign their seat and recontest it, as their constituents will have elected them at least in part on the basis of their Party membership. But I appreciate others may differ.

6 Conclusion

Can I sum up briefly with four points?

1. The moral and ethical consensus that meant that most of our laws reflected Christian morality is changing rapidly.
2. This may mean that laws that are passed now may impact heavily on those who wish to live in accordance with Biblical values. We looked briefly at the laws concerning discrimination and vilification.

3. However, most of those laws do contain “balancing clauses” which recognise freedom of religious exercise to be, what it is, which is a fundamental and internationally recognised human right. We should be careful to resist attempts to water down these balancing provisions.
4. In the end, however, some of us may have to bear a real cost for standing firm for the gospel in today’s society. But that is a cost that Jesus and the early apostles bore and warned us about. As the apostle Peter put it in 1 Peter 4:12-13

¹² Beloved, do not be surprised at the fiery trial when it comes upon you to test you, as though something strange were happening to you. ¹³ But rejoice insofar as you share Christ's sufferings, that you may also rejoice and be glad when his glory is revealed.

And later he encourages us in v 19:

¹⁹ Therefore let those who suffer according to God's will entrust their souls to a faithful Creator while doing good.

Further reading

- Carson, D *The Intolerance of Tolerance* (reprinted version, Eerdmans, 2013)
- Foster, Neil J “Religious Anti-Vilification Laws: Gatekeeping Freedom of Religion and Freedom of Speech in Australia” (paper presented at *The Australasian Law Teachers Association Annual Conference 2013: Law Teachers as Gatekeepers*; Australian National University College of Law, Canberra, ACT (Oct 2013) at: http://works.bepress.com/neil_foster/71
- Hart, David Bentley *Atheist Delusions: The Christian Revolution and its Fashionable Enemies* (New Haven; Yale UP, 2009)
- Moens, Gabriel “The Action-Belief Dichotomy and Freedom of Religion” [1989] *SydLawRw* 9; (1989) 12(1) *Sydney Law Review* 195
- Pietsch, C “Evolution of the *Sex Discrimination Amendment Act*” (2013)- <http://www.freedom4faith.org.au/resources/Work/Evolution%20of%20Sex%20Discrimination%20Amendment%20Act.pdf>
- Stark, R *The Triumph of Christianity: How the Jesus Movement Became the World's Largest Religion* (HarperOne, 2011)