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Churches and the Law of Sanctuary in Australia

Neil J Foster

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Associate Professor Neil Foster, Newcastle Law School

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In a high-profile decision of the High Court of Australia, Plaintiff M68-2015 v Minister for Immigration and Border Protection [2016] HCA 1 (3 February 2016), a 6-1 majority ruled that the Australian government was entitled to continue its policy of detaining certain asylum seekers off-shore in the Pacific nation of Nauru. In response to this there has been a lot of publicity on this issue, especially in relation to a group of mothers and their babies and young children who have been receiving medical treatment in Australia, and will now have to be returned to the dreadful conditions in Nauru. A number of Christian churches went public with an offer of "sanctuary" for those who are supposed to be returned.

From one of the press reports, "Churches become potential flashpoint after offering sanctuary to asylum seekers in wake of High Court verdict" (A Gartrell, Sydney Morning Herald, Feb 4, 2016):

Ten Anglican churches and cathedrals have invoked the ancient Christian tradition to offer protection to the 267 people - including 37 babies - facing imminent transfer to Nauru after the court on Wednesday upheld the legality of the government's offshore processing regime. The movement is being led by the Anglican Dean of Brisbane, Dr Peter Catt, who has declared his St John's Anglican Cathedral a place of sanctuary. Dr Catt said if any asylum seekers sought sanctuary in his church he would do his best to keep the authorities out. He said he fully accepts that he and other clergy could be charged with obstruction and potentially even face possible jail time.

A more recent report suggests that some 50 churches around Australia have offered their buildings as “sanctuaries” for asylum seekers: see Churches offer sanctuary to refugees (Lutheran Church of Australia, 25 Feb 2016). It seems worthwhile to comment briefly on the legal issues around "sanctuary" in Australia.

Background to the Law of "Sanctuary"

Most people are aware that church buildings in the past were a place of refuge, where some wrongdoers could seek sanctuary from arrest. As a number have noted, this idea no doubt had its roots in the Bible, where in the Old Testament there are some recorded references to people seeking sanctuary at the altar of the Temple (see 1 Kings 1:49-53, Adonijah, and 1 Kings 2:28-34, Joab; one was allowed to avoid punishment and the other, seen as a deliberate murderer, was not). The law of Moses also saw a system of "cities of refuge" (Joshua 20:1-6) where those who had committed what today would be called "involuntary manslaughter" could seek to flee from revenge at the hands of the family of the deceased. (For a careful discussion of these passages, and other material relating to Old Testament views of "asylum", see Jonathan Burnside, God, Justice and Society (Oxford, 2011) at 265-270. For a brief comment on the links between the Biblical models and the modern movement see David Ould, How to Think Safely About Sanctuary, March 2, 2016.)

In the early days of the common law of England, this was implemented by a system of sanctuary, which applied in local churches in different ways. For an

¹ See also this website, which refers to some 17 churches (perhaps a more realistic number): http://www.commongrace.org.au/vestosanctuary/.
overview of the history of legal sanctuary in Europe and elsewhere see L Rabben, Give Refuge to the Stranger (Left Coast, 2011), ch 3; for an analysis of the issue at common law see J H Baker "The English Law of Sanctuary" (1990) 2/6 Ecclesiastical Law Jnl 8-13.)

Baker’s excellent summary makes the following interesting points:

• The doctrine of sanctuary was recognized in Anglo-Saxon days, and so can be said to have always been part of the common law.

• It is was not a part of “canon law”, that law governing only churches, since the doctrine could be invoked before the secular courts when someone was seized from a sanctuary. Indeed, as a tort lawyer I love the fact that in Thorp v Lyster (1386), 100 Selden Soc 67, no 6.2, “the defendant cleric in an action for battery pleaded that he was resisting a bailiff trying to take a suspect from his church”! So the doctrine could be used as a defence to a tort action.

• There were 2 types of sanctuary, “general” and “special”.

  o The “general” applied to all churches or consecrated cemeteries, and if you could not get inside a consecrated building you could claim it by grasping the door handle.

    ▪ However, this general sanctuary only lasted for 40 days. Apparently after that the fugitive could stay in place but could not be given food, and hence would gradually be “starved out”.

    ▪ At the end of 40 days the fugitive could surrender and have a trial; or make a run for it and hope to get to another church (!); or, in the case of felony, could “abjure the realm”. This meant that he or she took an oath to leave England by the nearest port, and then was escorted along the road to that port by constables and allowed to board a ship.

  o “Special” sanctuaries were places that had been granted the right by papal or royal authority. Fugitives there did not have to leave after 40 days. Some of these places (often monasteries) became notorious as fugitives would shelter there while conducting criminal activities through others.

• Eventually the mis-uses of sanctuaries led to their abolition.

With the growing power of the secular monarchy, areas where wrongdoers could escape the King's justice were increasingly reduced, and in 1624 sanctuary as a common law doctrine was abolished by statute (21 Jam I, c 28, s 7).

Any legal operation of the doctrine, then, was well and truly removed from the common law before the European settlement of Australia, and not part of that law which was "received" into our system. In any event, the continuation of a law that gave special recognition to the status of church buildings may be thought unlikely to have survived the process of Federation, where at least for the purposes of the Commonwealth, no "establishment" of religion was possible under s 116 of the Constitution. (However, since s 116 does not apply to State law, it might in theory be possible for a State court to have recognized a doctrine of sanctuary. But still, as noted, the common law doctrine had been removed well before settlement.)

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Churches and Civil Disobedience

It seems likely, then, that members of a church who shelter someone who is supposed to be returned to Nauru may be guilty of an offence under s 233E of the Migration Act 1958 (Cth), subsection (3) of which provides:

(3) A person (the first person) commits an offence if:
(a) the first person harbours another person (the second person); and
(b) the second person is an unlawful non-citizen, a removee or a deportee.
Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

While I am not aware of other Australian cases dealing with the meaning of this provision, or of "harbouring", the general sense seems to be that of providing accommodation and support for someone who is breaking the law. In the United States a decision of the 9th Circuit US Court of Appeals, United States v Aguilar, 883 F 2d 662 (1989) found that a church which had engaged in support for illegal migrants was guilty of "harbouring" under a broadly equivalent provision of US law, 8 USC 1324. (For an article discussing the case, and others, while critical of the decisions, see E Breslin, "The Road To Liability Is Paved With Humanitarian Intentions: Criminal Liability For Housing Undocumented People Under 8 U.S.C. § 1324(A)(1)(A)(ii)" (2009) 11 Rutgers Jnl of Law and Religion 214-242.)

An article by Teresa Sutton, “Modern Sanctuary” (1996) 4/18 Ecclesiastical Law Jnl 487-492 discusses some of the issues raised by the “modern” sanctuary movement. She notes that in the United States in the 1970’s sanctuary offers by churches Led to undercover surveillance operations at churches by government representatives and prosecutions against some sanctuary workers. (at 487)

She also refers to a church asylum case in the UK in 1989, where initially the Home Office had allowed an asylum seeker to shelter in a church.

In a change of policy by the Home Office, Mendis was taken from sanctuary on 18 January 1989. Police officers and immigration officials were obliged to use sledgehammers and hydraulic equipment to enter the church. (at 488)

Sutton notes, however, that there are a number of examples of churches in continental Europe offering sanctuary, and generally this seems not to be disturbed by the government (at 490).

While churches usually acknowledge the importance of keeping the law (in line with the Biblical injunction in Romans 13:1), Christian history and the Biblical witness record occasions where their higher loyalty to God has to take precedence over obedience to civil authority. See for example Acts 4:18-21:

18 So they called them and charged them not to speak or teach at all in the name of Jesus. 19 But Peter and John answered them, "Whether it is right in the sight of God to listen to you rather than to God, you must judge, 20 for we cannot but speak of what we have seen and heard." 21 And when they had further threatened them, they let them go, finding no way to punish them, because of the people, for all were praising God for what had happened.

The reluctance of the authorities to punish the apostles, because of their popularity with the general public, is interesting, but the US examples noted above reveal that churches cannot always rely on the Government declining to prosecute!
The relevance of religious freedom

It might be argued, however, that a church determined to provide sanctuary was not necessarily breaking the law, if doing so was necessary to live out the commitments of their religious faith. Section 116 of the Commonwealth Constitution not only forbids the "establishment" of religion, but it also prohibits the Commonwealth Parliament from enacting a law "for prohibiting the free exercise of any religion". I have discussed the protection of religious freedom on a number of other occasions on my “Law and Religion Australia” blog previously: see here and here for material and links to a general overview. But this provision, while it has not been fully explored yet, might offer some protection for conscientious action by churches in this area. (I stress that this paper of course should not be viewed as formal "legal advice", and so of course anyone wanting to act in this area should seek such advice from their own lawyer. But I offer here a possible scenario.)

It seems best to deal with what may be two immediate objections to this suggestion.

One would be to say that religious freedom protects a person's right to believe, and perhaps their right to go to church, or a mosque, or a synagogue; but cannot over-ride a generally applicable law like the migration law. The short answer is that this is not the way a right to "free exercise of religion" operates. It is generally recognised in international law, and in other countries where religious freedom is protected, that it not only protects the area of belief and worship, but also provides at least some protection for action involved in living out one's faith. In the main Australian case on the issue so far, Adelaide Company of Jehovah's Witnesses Inc v Commonwealth (1943) 67 CLR 116, handed down at the height of World War 2 where it was thought that the Jehovah's Witnesses organisation were undermining the war effort and so should be banned, the High Court of Australia stressed that religious freedom was a key human right recognised by the Constitution, and involved not simply internal belief but also everyday action. As Latham CJ said:

The section refers in express terms to the exercise of religion, and therefore it is intended to protect from the operation of any Commonwealth laws acts which are done in the exercise of religion. Thus the section goes far beyond protecting liberty of opinion. It protects also acts done in pursuance of religious belief as part of religion. (at 124)

Now of course any human right must be balanced in the context of other human rights. The way that Latham CJ put it was that Commonwealth laws must not "unduly" interfere with religious freedom (at 128). In the context of that decision, the court deferred to the Commonwealth Government's views on what was necessary for national security in the midst of the war, and would have upheld the relevant provisions if they had otherwise been valid. But the case stands squarely for the proposition that this sort of balancing process is necessary.

Arguably, the judges in the Jehovah’s Witnesses case took a broad view of the free exercise clause, and assumed that a ‘facially-neutral regulation directed at the suppression of subversive organizations, burdening religion in its effect’, could offend the clause.1

Another objection to seeing the offering of sanctuary to refugees as a part of an exercise of religion might be that not all churches agree that this is an appropriate response to the situation. It might be said that offering sanctuary is not "required" by the Christian faith. Again, the short answer to this is that protection of religious freedom does not simply extend to parts of a faith that are universally agreed on by all members of the religion. Cases from around the world demonstrate that so long as a belief is genuinely motivated by a sincere religious faith (and the religion itself is not a "sham" or a "hoax"), then it can be taken into account and the balancing process needs to be undertaken.

This can be illustrated from the 2013 decision of the European Court of Human Rights in the case of Eweida v United Kingdom [2013] ECHR 37, where the Court held that Ms Eweida's religious freedom had been unduly impaired by a directive from her employer, British Airways, that she not wear a cross at work. It was conceded that not all Christians saw the wearing of a cross as "mandated", but Ms Eweida's belief that she should do so was sincere and a part of a tradition in Christianity that would be protected. No doubt churches offering sanctuary could point to strong arguments from the Bible, including the command to love one's neighbour, as supporting their offers, especially given the emerging evidence of the serious harm to which asylum seeker children in particular are exposed on Nauru, both in terms of the risk of physical and sexual assault, and the danger to long term psychological well-being.

So, these two objections do not mean that an argument based on religious freedom could not succeed. But of course there are still a number of hurdles to be overcome. A court asked to decide the matter would need to address the question whether a prosecution of a congregation for its religiously motivated decision to provide sanctuary to an asylum seeker was an "undue" infringement of its religious freedom (or, which is probably the same question here, the religious freedom of its members.) My previous papers noted above discuss the relatively few cases where this issue has been addressed in the past in Australia, not always satisfactorily.

There is one suggestion that may point to a way forward. In a previous post I noted that the High Court, in the decision of McCloy v New South Wales [2015] HCA 34 (7 October 2015), set out a detailed scheme for addressing the question of whether there had been a breach of the "implied freedom of political communication" found under the Constitution. In a later post on another case, I suggested that the "McCloy schema" could be adapted to this question of undue infringement of religious freedom. There I suggested:

Now that the High Court in McCloy has set up a careful scheme for balancing the implied freedom of political speech with other important social values, it may well be open to applying the McCloy tests, and in particular the questions of “proportionality”, to consideration of what is, after all, an explicit constitutional freedom in s 116. In fact my

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colleague Dr David Tomkins, in a helpful overview of the *McCloy* decision (“Developers, Election Funding and the Implied Freedom of Political Communication: the HCA weighs in” (Dec 2015) *Law Society Journal* 88-89), has suggested that indeed this is one direction that might be taken in the future. Such a balancing process, which gives weight to the importance of religious freedom and the need to only over-ride it in very limited circumstances, would in my view be a positive development. This would involve a Court considering not only whether the aim to be achieved by the particular provision was a legitimate aim, but also whether the over-riding of any religious freedom considerations was a "proportionate" method of achieving such an aim. It would at least be a matter worth considering.

**Conclusion**

It is not known yet whether the offer of the various churches to provide sanctuary will be taken up, and if so the attitude of the Commonwealth Government. It is worth noting that, while there does not seem to have been a strong tradition of this in Australia previously, other countries have experienced the phenomenon and dealt with it in different ways. A very useful article by Canadian Sean Rehaag, "*Bordering on Legality: Canadian Church Sanctuary and the Rule of Law*" (2009) 26/1 *Refuge* 43-56 discusses the Canadian experience and some of the issues that subsequently arose. One interesting issue he raises is that, when offering sanctuary became a well-established practice, churches had to develop a "screening process" to decide who, among the many candidates, would be offered sanctuary. In doing so, as he points out, they often replicated the sort of process adopted by the Canadian government in deciding who should be granted refugee status. These sort of issues will need to be considered by Australian churches as well, should it become necessary to proceed in this direction. (For those who are interested, there is a Canadian website at [http://sanctuarycanada.ca](http://sanctuarycanada.ca) with a lot of interesting material based on the experience of Canadian churches.)

The churches have been warned, both by legal experts and by the Immigration Minister, that they may face criminal sanctions if they go ahead with their proposals. They may respond that the law recognises their right to free exercise of religion, and that as a result they are not disobeying the law. They may accept that they are in breach of the law but choose to go ahead in obedience to a higher law. Complex issues may arise as to who is to be offered sanctuary, and for how long, and whether this will undermine an overall policy which some see as more humane in the long term. But in any event their willingness to stand up and risk their own comfort and safety for the rights of "little ones" who are loved by their Lord Jesus (see Matthew 19:13-14) seems thoroughly commendable.

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