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Articles

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Special Topic Forum: *The Future of Law and Religion in Australia*

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Room Q-416
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editorsAJLR@gmail.com

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Editorial

A student of history quickly discerns that few factors have been as important, contentious, and enduring in structuring human societies—past and present—as that of the relationship between law and religion. One can easily point to cultures where law and religion are essentially the same thing—the leaders of the faith and the leaders of the state are identical, and ascendancy in one is ascendancy in the other. We can find examples where religion is not formally part of government but in practice extremely influential in what policies and decisions are made. And of course, we can find the opposite: where secular authorities exercise political and legal powers to change or impair the beliefs and practices of religious groups. Understanding the relationship between law and religion in a given society tells us something fundamental about the nature of that society.

Australia and its neighbours are no exception. We can see it through a historical lens in the legally-sanctioned suppression of Aboriginal spirituality faced by the Stolen Generations or the colonial Dutch treatment of the cultural and religious beliefs of the indigenous inhabitants of what we today call Indonesia. We can see it in a broader theoretical lens through discussions of concepts like freedom, pluralism, multiculturalism, dignity, and tradition. We can see it in perennial political debates about whether Australia is a secular state and what 'secular' means in a culture of inherited but declining profession of traditional religion. We can see the practical importance of the relationship by looking at the controversies that continually grace the front pages of our newspapers and that occupy our parliaments: to what extent should the law suppress hateful statements made by, or against, religions; when the ability of religious organisations to govern themselves in accordance with their religion is in tension with equality norms, how do we reconcile or balance the two; are our laws adequate to protect religious freedom; and much more.

These are certainly issues worthy of scholarly attention. They should be researched, written about, and discussed. But until now, scholarship on law and religion has appeared scattered throughout generalist law journals or in an occasional special issue about a discrete controversy. Other countries may have speciality journals on law and religion, but Australian scholars have always had to make do with whatever outlets they could find.

Welcome to the inaugural issue of the *Australian Journal of Law and Religion.* The purpose of this twice-yearly publication is to provide a quality outlet for specialised scholarship on the intersection of law and religion across the South Pacific. The journal is open access, interdisciplinary, and uses double-blind peer review. These points should be emphasised. This is the first academic journal in the Antipodes specifically devoted to the scholarship of law and religion. The open access nature of the journal means no one pays to submit to, publish in, or read the *AJLR*; there are not and never will be paywalls or author fees. As an interdisciplinary journal, we welcome perspectives from a variety of academic fields: political science, history, theology, sociology, religious studies, philosophy, and, of course, law. To ensure only quality scholarship appears in its pages, every submission to the journal is vetted by two peer reviewers with expertise on the relevant topic.

Crucially, the journal is strictly non-partisan, non-sectarian, and open to all authors without regard to their faith commitments (if any). To ensure this, the journal's co-editors and the members of the Editorial Advisory Board feature a wide diversity of religious, political, and ideological perspectives. Some of us identify as progressives and others as conservatives: some

of us are strict secularists and some of us believe religion should have more influence in government policy; some of us are Christians and some of us are atheists; and some of us do not fit easily into any defined category of belief. The one thing we all share is a deep commitment to the liberal academic tradition: that the exchange of ideas, the dissemination of new research, and the (sometimes spirited!) debate of contested and controversial points are all positive steps toward the discovery of truth. If we have done our jobs well, every issue should feature something that leads you to nod your head in agreement and something that tempts you to pick up a pen to write a rejoinder. And yes, we do indeed publish rejoinders.

Australian scholars will be aware of the challenges of launching a new journal in the current research environment. The rising use of quantitative metrics (Q1 publications, citation counts, etc) to measure an individual's research performance places enormous pressure, especially on junior academics, to publish only in the most prestigious journals they possibly can. New outlets for research, including the *AJLR*, cannot hope to compete with established journals on that basis. Our pitch to you as a potential contributor is simple: this is the journal to submit to if you want your work to be read by other scholars interested in the field. Your work will not be buried behind a paywall, sandwiched between articles having absolutely nothing to do with law and religion, or reviewed by unsympathetic editors who doubt the importance of your topic. The *AJLR* will be the natural home for scholarship on law and religion in Australia.

The contents of this inaugural issue demonstrate the breadth of scholarship we aspire to publish. Muhammad Latif Fauzi provides a theoretically sophisticated historical overview of the formation of Islamic law in Indonesia. Patrick Parkinson thoughtfully engages with the fraught issue of gender identity and religious exemptions in the *Sex Discrimination Act 1984* (Cth). Andrew Hemming brings expertise in evidence and criminal law to bear on the question of whether the High Court was correct in overturning the jury verdict in the high-profile trial of Cardinal George Pell. Neil Foster writes about potential inconsistencies between religious exemptions in Commonwealth and State anti-discrimination laws which could create constitutional implications for the validity of those state laws. Renae Barker draws upon years of experience teaching law and religion to undergraduates for an article that shows not only why pedagogy on the subject is important, but also how it can be improved. Book reviews cover Greg Sheridan's *Christians: The Urgent Case for Jesus in Our World* and Md Jahid Hossain Bhuiyan and Darryn Jensen's edited collection *Law and Religion in the Liberal State*.

Every issue of the *AJLR* will feature a different Special Topic Forum that consists of short essays on a particular theme. Not everything valuable a scholar has to say need be encapsulated in a full-fledged research article, and this forum is intended to showcase as many contributors as possible. It is only fitting that the topic for the inaugural issue's forum is 'The Future of Law and Religion in Australia.' An impressive array of contributors—Luke Beck, Anthony Gray, and Joel Harrison—provide their answers to the question: where do we go from here?

When the proposal for a new journal on law and religion in Australia was first circulated, the response from the field's community of scholars was immediate and enthusiastic. Understandably, there are still some sceptical that a new endeavour like this can succeed. Our aspiration is that with every page and every issue produced, any scepticism is gradually replaced with confidence and support.

Alex Deagon
Jeremy Patrick
Co-Editors

Law and Religion in the Classroom: Teaching Church-State Relationships

Renae Barker*

The theory explaining different types of state–religion or state–church relationships is a fundamental part of the study of law and religion. At the tertiary level this is typically taught via the use of models which present a relationship between the different types of state–religion or state–church relationships and freedom of religion. These models have a number of shortcomings and tend to be used as a taxonomy rather than as an aid to understanding. In 2021, I piloted a new approach to teaching this model in a Law and Religion unit. This paper outlines the inspiration behind my approach in 2021, the steps involved in the activity, my reflections on the success of the activity, and my proposed refinements for 2022.

I INTRODUCTION

The study of law and religion was once a niche elective, available at only a handful of Australian law schools. While Australia still has a long way to go to catch up with jurisdictions such as the United States, where law and religion courses are regularly taught in law schools, the number of Australian law schools teaching a unit on law and religion and related topics[1] is growing.[2]

Writing in 2009 Babie outlined four key reasons why the study of law and religion is important:

> First, while political liberalism confers choice, and liberal law protects it, it is at least arguable that liberalism, alone, may not always differentiate good from bad choices. … Second, religion and faith influence values and behaviour — the value and behaviour that are part of making decisions when faced with liberal choices — and those values and behaviours ultimately become law. … The third … is that by overlooking the societal importance of religion, we miss something central to what law is and what it is becoming. ... Finally, by failing to recognise the place of religion in these debates, those in the academy and beyond it who study legal, political, and social structures, fail to address an increasing important part of contemporary social life …[3]

The urgency for a deeper understanding of law and religion amongst Australian law graduates has only increased since. This has been highlighted by recent public and political debates about religious discrimination, same-sex marriage, abortion and euthanasia to name just a few. The

* Senior Lecturer, University of Western Australia.

[1] In addition to units on law and religion some law schools offer electives on religious law such as sharia, canon, or rabbinical law.

[2] The author is aware of courses taught at the following Australian law schools: University of Western Australia, University of Adelaide, University of Newcastle, University of Notre Dame Australia, Macquarie University, University of Southern Queensland, and University of Queensland. For some examples of the teaching of courses on or related to law and religion in the American context, see Samuel J Levine, 'Teaching Jewish Law in American Law Schools: An Emerging Development in Law and Religion' (1999) 26(4) *Fordham Urban Law Journal* 1041. See also John Witte, 'The Study of Law and Religion in the United States: An Interim Report' (2012) 14(3) *Ecclesiastical Law Journal* 327.

[3] Paul Babie, 'The Study of Law and Religion in Australia: It Matters' (2009) 30(1) *Adelaide Law Review* 7, 8–9.

problems caused by a lack of awareness of the level and nature of interactions between law and religion in Australia was highlighted following the leaking of the Religious Freedom Review recommendations in late 2018. As the Senate Legal and Constitutional Affairs Committee noted in their report *Legislative Exemptions that Allow Faith-based Educational Institutions to Discriminate against Students, Teachers and Staff*:

> The leak of the recommendations of the Religious Freedom Review caused great concern in much of the community, not least because it appears many Australians were unaware of the broader exemptions to discrimination laws provided to faith-based educational institutions.[4]

While the importance of teaching law and religion may be evident, how to go about it in a modern law school is not necessarily so. One of the barriers to the incorporation of law and religion courses in more Australian law schools is a lack of scholarship on teaching and learning related to law and religion. This article begins to address that gap. It outlines one approach adopted at an Australian law school to teaching state–religion relationships and their interaction with freedom of religion.

Teaching law and religion at the tertiary level revolves around two interrelated, yet independent concepts. The first is the relationship between the state and religion in terms of the level of identification between the state and religion/religious institutions operating within that state. The second is the level of religious freedom experienced by both individuals and religious institutions in a given jurisdiction.[5] These two fundamental, yet largely abstract concepts, need to be understood by students before they can fully grapple with specific issues in law and religion or examine specific case studies.

The activity outlined in this paper was conducted, over two weeks, as part of the teaching of a unit on Law and Religion. The unit is a third-year elective in the Law and Society Major in the undergraduate Arts Degree at an Australian University. The Major is not a qualifying degree for legal practice, but is often taken by students intending to go on to study a *Juris Doctor* degree. The unit has been taught in its present format by the current unit coordinator since 2014. A similar unit was previously offered as part of a qualifying undergraduate law degree.[6]

The paper is divided into five parts. Part I introduces the context of the teaching of law and religion and sets out the structure of the paper. Part II outlines the model used to teach the relationship between the state and religion and outlines the key reasons this model was selected. Part III outlines the key teaching and learning methods employed to present the model while Part IV outlines in detail the steps involved in the activities used over two weeks of the course. Finally, Part V provides some reflections on the teaching and student learning experience.

[4] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Legislative Exemptions That Allow Faith-based Educational Institutions to Discriminate against Students, Teachers and Staff* (Report, 28 November 2018) 50 [2.121].

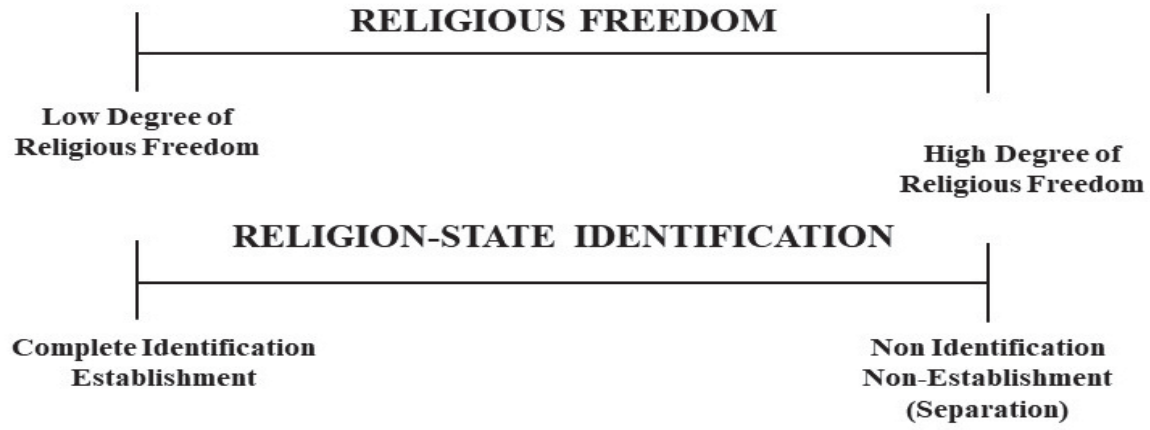
[5] See George R Ryskamp, 'The Spanish Experience in Church–State Relations: A Comparative Study of the Interrelationship between Church–State Identification and Religious Liberty' [1980] *Brigham Young University Law Review* 616, 616–617.

[6] The unit was first introduced in 2001. The current unit coordinator has been involved in teaching law and religion at the tertiary level since 2008.

II THE MODEL

Numerous models (variously called typologies and taxonomies) of state–religion relationships have been proposed to explain the various interactions between states and the religions, religious institutions, and religious individuals operating within a given state.[7] Traditionally the models of state–religion relationships have been presented as a straight-line continuum moving from non-identification on the left of the model through to complete identification on the right (and vice versa). Similarly, the degree of religious freedom in any given jurisdiction has been presented on a straight-line continuum from total religious freedom to the complete absence of religious freedom as shown in Figure 1 below.

Figure 1: Continuum of religious freedom.[8]

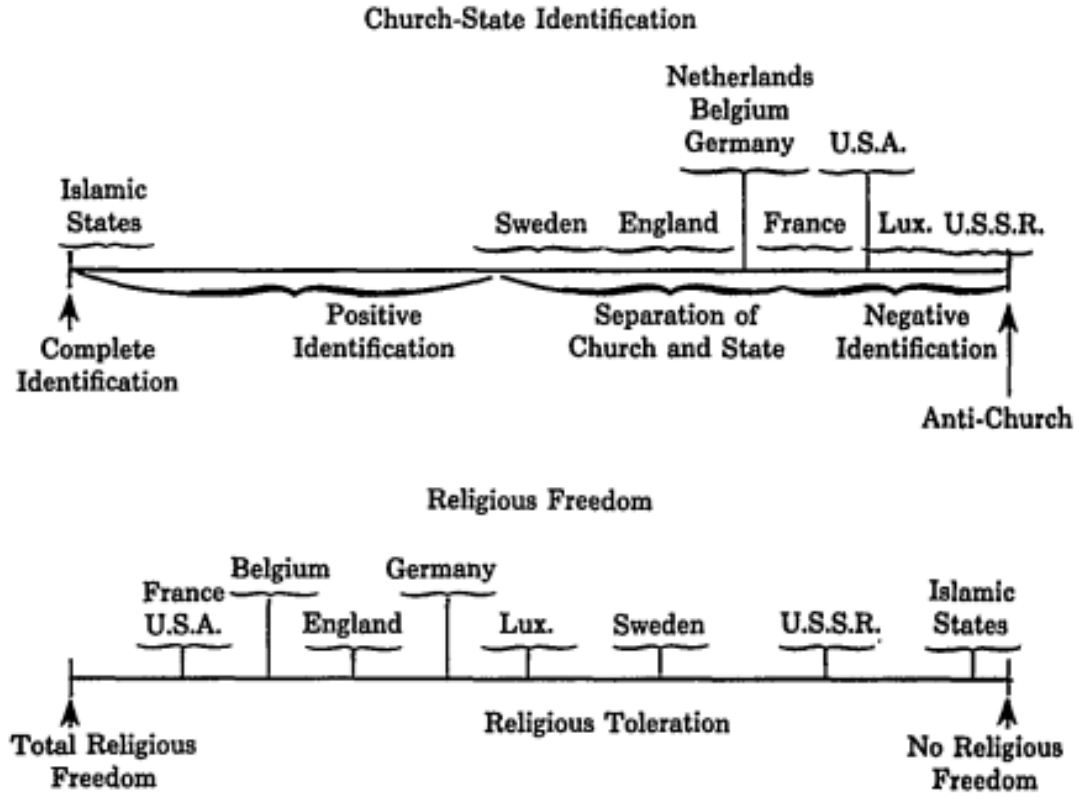


[7] See, eg, Shimon Shetreet, 'The Model of State and Church Relations and Its Impact on the Protection of Freedom of Conscience and Religion: A Comparative Analysis and a Case Study of Israel' in Winfried Brugger and Michael Karayanni (eds), *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* (Springer, 2007) 87, 87–93; Winfried Brugger, 'On the Relationship Between Structural Norms and Constitutional Rights in Church–State Relations' in Winfried Brugger and Michael Karayanni (eds) *Religion in the Public Sphere: A Comparative Analysis of German, Israeli, American and International Law* (Springer, 2007) 21, 31–48; Viet Bader, 'Religions and States A New Typology and a Plea for Non-Constitutional Pluralism' (2003) 6(1) *Ethical Theory and Moral Practice* 55, 65–72; Carl Esbeck, 'A Typology of Church-State Relations in Current American Thought' (1998) 15(1) *Religion & Public Education* 43; Jeroen Temperman, *State-Religion Relationships and Human Rights Law: Towards a Right to Religiously Neutral Governance* (Brill, 2010) 118–119; W Cole Durham, 'Perspectives on Religious Liberty: A Comparative Framework' in John Witte Jr and Johan D van der Vyver (eds), *Religious Human Rights in Global Perspective* (Martinus Nijhoff Publishers, 1996) bk 2, 1, 20–3; Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2013) 88–124; Michel Rosenfeld, 'Introduction: Can Constitutionalism, Secularism and Religion be Reconciled in an Era of Globalisation and Religion Revival' (2009) 30(6) *Cardozo Law Review* 2349–2351; Cécile Laborede, 'Political Liberalism and Religion: On Separation and Establishment' (2013) 21(1) *Journal of Political Philosophy* 67, 68; Richard Albert, 'The Separation of Higher Powers' (2012) 65(1) *Southern Methodist University Law Review* 3, 3–69; Renae Barker, *State and Religion: The Australian Story* (Routledge, 2019) 21–29 ('*State and Religion*'); Darryn Jensen, 'Classifying Church-State Arrangements: Beyond Religious Versus Secular' in Nadirsyah Hosen and Richard Mohr (eds), *Law and Religion in Public Life: The Contemporary Debate* (Routledge, 2011) 15; Julian Rivers, 'Irretrievable Breakdown? Disestablishment and the Church of England' (1994) 3 *Cambridge Papers* 2–4; Adrian Hastings, *The Faces of God Reflections on Church and Society* (Orbis Books, 1976) 47–67; Renae Barker, 'Pluralism versus Separation: Tension in the Australian Church-State Relationship' (2021) 16(1) *Religion and Human Rights* 1, 1–40 ('Pluralism Versus Separation').

[8] W C Durham Jr and B G Scarffs, *Law and Religion: National, International, and Comparative Perspectives* (Wolters Kluwer, 2nd ed, 2019) 122.

Using this model, the authors have designated states to specific places, or in some cases ranges, along the two continuums as shown in Figure 2.[9]

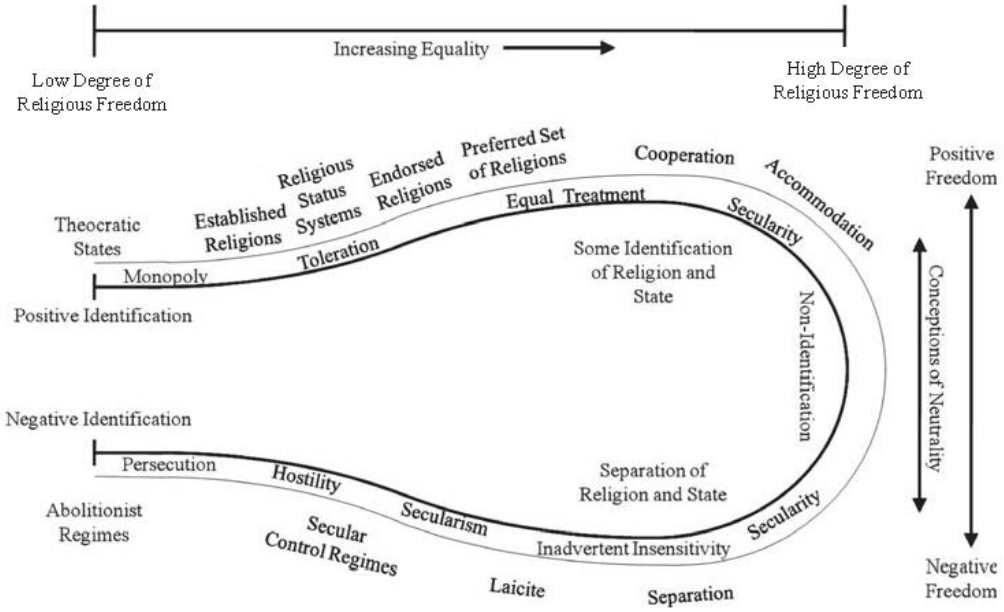
Figure 2: Allocation of states.[10]



However, as first identified by Ryskamp, '[e]xamination of the relationship between a country's position on the identification line versus its position on the religious freedom line yields no clear pattern.'[11] The two continuums are two separate models of two different phenomenon. While they are usually drawn together, doing so is not necessary, and does not reveal any link between the two phenomenon they depict. As a result, while these models are useful to demonstrate the range of potential state–religion relationships they do not adequately grapple with the relationship between state and religion models and freedom of religion which, as identified above, is at the heart of law and religion scholarship and teaching at the tertiary level. The solution, first posited by Ryskamp in 1980,[12] refined by Durham in 1996,[13] and later Durham and Scarffs in 2010,[14] is to redraw the state–religion identification continuum as a loop. (See Figure 3)

[9] See also Ahdar and Leigh (n 7) 88–89; Barker, *State and Religion* (n 7) 23.
[10] Ryskamp (n 5) 620.
[11] Ibid.
[12] Ibid 652–653.
[13] Durham (n 7) 1–44.
[14] Durham and Scarffs (n 8) 122-129.

Figure 3: State–religion identification as a loop.[15]



As Durham and Scharffs explain:

> The answer to this … lies in reconceptualizing the religious–state identification continuum in two respects. First, it is important to recognize that the range of possible relationships run not merely from complete identification to non-identification. In fact, the possibilities run from complete (and positive) identification through non-identification to outright hostility and persecution (ie negative identification). Second, in order for the correlations between institutional configurations and the religious freedom continuum to become clear, the identification continuum needs to be laid out as a loop, …[w]hat this schematization suggests is that a lack of religious freedom correlates with a high degree of *either* positive *or* negative identification of the state with religion.[16]

This model is, of course, not the only one which could be used to teach the twin concepts of the interaction between state and religion and freedom of religion. Ahdar and Leigh, for example, have proposed an alternative model based on a grid.[17] Nor is the Loop model without its faults. As will be discussed below, part of the exercise with the students involved identifying strengths and weaknesses of the model. For now, two important weaknesses of the model need to be highlighted. First it is based largely on descriptive categories. As a result, there is a certain element of subjectivity in determining where a particular jurisdiction fits into the model. Secondly, the model assumes that the laws within a given jurisdiction will be relatively

[15] Ibid 123.
[16] Ibid (emphasis in original). A full explanation of the model is beyond the scope of this paper. For more details of the model and how it operates including definitions of the various state–religion relationship categories see Durham and Scarffs (n 8) 122-129.
[17] Ahdar and Leigh (n 7) 87–124.

consistent with just one or a small range of state–religion relationships. As a result, federations and states where the state–religion relationship is in tension or transition can be difficult to plot.[18]

Despite the model's shortcomings and the numerous alternatives available, this model was selected to teach students in this Law and Religion unit for a number of reasons. First, it is a model the lecturer / unit coordinator has worked with extensively, having used and refined it in their own research.[19] Further, in 2019, they were part of the second cohort for the 'Young Scholars Fellowship on Religion and the Rule of Law' run by the International Centre for Law and Religion Studies at Brigham Young University.[20] During this Fellowship they took part in a masterclass on the model presented by Professor Cole Durham. As a result, they are familiar with the model and confident in presenting it and assisting students to work with it in class. Second Durham and Scarffs included the model in their text *Law and Religion: National, International and Comparative Perspectives*.[21] As explained in the preface to the first edition '[t]he guiding philosophy of this case book is that less is more and more is more. We have attempted to cover the subject matter of law and religion in about half the pages of most law and religion casebooks: that's the less. We also address at least three times the subject matter, focusing a majority of the book on international and comparative law material: that's the more ...'[22] This approach makes the relevant chapter on state–religion models well-suited to undergraduate students studying in an Australian university. There is currently a paucity of textbooks suited to the study of law and religion in Australia.[23] As a result, rather than assigning a specific text, a series of readings from a range of sources including journal articles, book chapters, textbooks, and online news sources were assigned. Finally, the Loop model is presented in both text and visual form, as outlined above, making it more accessible to undergraduate students as well as allowing for easier facilitation in the in-class activities outlined below.[24]

III TEACHING AND LEARNING STRATEGIES

While the Loop model outlined above resolves the problem of relating the relationship between the state and religion to freedom of religion, it is complex. While it is this complexity that makes the model so useful, it can also overwhelm students. The challenge therefore, from a teaching and learning perspective, is to find a method of teaching which simplifies the model and enables students to engage with it. Simply teaching the students the various categories on the model and where they are positioned is not enough. As Ramsden explains, such an approach only enables students to 'focus on passing [the] course or completing [the] particular learning assignment as an end in itself.'[25] Such an approach would reduce the teaching of the

[18] See Barker, 'Pluralism Versus Separation' (n 7) 1–40.
[19] See Barker, *State and Religion* (n 7) 21–29; Barker, 'Pluralism Versus Separation' (n 7).
[20] The Fellowship itself takes place in Oxford. The first Fellowship program took place in 2018. The third intake of the Fellowship was due to take place in 2020 but has been postponed to 2022 due to COVID-related travel restrictions.
[21] Durham and Scarffs (n 8).
[22] Ibid xxxi.
[23] Australia specific texts available include: Paul Babie et al, *Religion and Law in Australia* (Wolters Kluwer Law International, 2nd ed, 2018); Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012); Barker, *State and Religion* (n 7).
[24] The use of visual learning is well established at the Law School. See Carruthers et al, 'Enhancing Student Learning and Engagement in the Juris Doctor Through the Rich Tapestry of Legal Story-Telling' (2017) 10 *Journal of the Australasian Law Teachers Association* 26; Camilla Baasch Andersen, 'Teaching Comic Book Contracting' in Emily Allbon and Amanda Perry-Kessaris (eds), *Design in Legal Education* (Routledge, forthcoming).
[25] Paul Ramsden, *Learning to Teach in Higher Education* (Taylor and Francis Group, 2nd ed, 2003) 46.

model to a mere taxonomy, rather than a model to be applied and understood as an approximation of the real world.

Further, the aim of this Law and Religion unit is not to simply teach law about religion. As a unit in a Law and Society Major, where the interaction between the law and societal phenomenon is pivotal, student learning needs to go further. It needs to enable students to engage with the 'meaning the course or assignment has in relation [to] the subject matter and the world that the subject matter tries to explain.'[26] Two of the three Learning Outcomes for the unit speak directly to the need to do more than simply teach law that relates to religion. Specifically, Objective One requires students to be able to 'explain the relationship between law and religion in Australia in a global context' while Objective Two requires students to 'demonstrate basic knowledge of the breadth and complexity of issues in the discipline of law and religion.'[27]

The activity set out below drew on a number of different learning and teaching strategies and philosophies to move students from surface learning to a deeper form of learning.[28] This included Montessori, visual learning, active learning, peer-led learning and, consequently, problem-based learning.

The first challenge in developing this activity was to simplify and make accessible a complex model. As outlined above, part of the rationale for selecting this model was that it has been represented both visually and in text form. The use of and success of incorporating visual elements into teaching is well-established in the Law School, having been incorporated into teaching in both the Business Law Major[29] and *Juris Doctor* programs.[30] The next challenge therefore was how best to use the existing visual representation of the model effectively. The answer lay in inspiration drawn from Montessori.

Montessori was developed by Dr Maria Montessori, working in Italy in the early 1900s.[31] While Montessori principles were primarily designed for early childhood, many of the fundamentals, such as allowing the learner to take responsibility for their own learning, observing the learner, and adapting teaching according to those observations,[32] can be transferred to adult learning environments.[33] Another key principle is that learning moves from the concrete to the abstract. Therefore, in a Montessori classroom or learning environment 'the sequence in which the Montessori materials are introduced is structured to move children to increasingly abstract representations over time.'[34] This can take many forms, but one way this can manifest is via the creation and manipulation of physical materials to represent abstract ideas. Well-known examples of this from Montessori classrooms and educational settings

[26] Ibid.
[27] The third learning objective is for students to 'develop their skills in undertaking scholarly research of primary and secondary sources utilising legal and social sciences databases'.
[28] Ramsden (n 24) 46–49.
[29] See Baasch Andersen (n 23).
[30] See Carruthers et al (n 23).
[31] Maria Montessori, *The Montessori's Method: The Origins of an Educational Innovation: Including an Abridged and Annotated Edition of Maria Montessori's The Montessori Method*, ed Gerald Lee Gutek (Rowman & Littlefield Publishers, 2004) 1–42.
[32] Carol Garhart Mooney, *Theories of Childhood: An Introduction to Dewey, Montessori, Erikson, Paiget & Vygotsky* (Redleaf Press, 2nd ed, 2013) ch 2.
[33] See, eg, Josef Brozek et al, 'Application of the Montessori Method in Tertiary Education of a Computer 3D Graphics' (2016) *ELEKTRO* 655–659.
[34] Elida V. Laski et al, 'What Makes Mathematics Manipulatives Effective? Lessons from Cognitive Science and Montessori Education' (2015) 5(2) *SAGE Open* 1, 4.

include: the pink tower, golden beads, and moveable alphabet. The activity outlined below adapted this principle by the use of a large A0 printed version of the model. As outlined in Step 3 below, students manipulated the material by placing assigned countries onto the physical model. This introduced a kinaesthetic element alongside the visual, thus reinforcing learning. In her writings and lectures Montessori emphasised the use of the hands as essential to the learning process. As Montessori explained:

> [the child] becomes a man [sic] by means of his [sic] hands, by means of his [sic] experience, first through play, then through work. The hands are the instrument of the human intelligence.[35]

While Montessori was focusing on children and early childhood, the use of one's hands to facilitate learning, arguably, should not be limited to childhood. In the activity outlined below, the physical manipulation of the material enabled students to work in a more concrete form before moving onto working with the model in more abstract forms in subsequent in-class activities and their group research projects.

Also key to the activity outlined below is both active and peer-led learning. Both are key elements of problem-based learning. Problem-based learning involves the presentation of a problem followed by a process of learning, guided by a tutor, in order to build upon prior knowledge and answer questions raised by the problem.[36] While it was originally developed for medical students the method has since been applied to a variety of disciplines, including law.[37] There are a variety of approaches to problem-based learning.[38] Which variety is chosen depends largely on the educational objectives of the activity.[39] Barrows, writing in a medical context, identified four educational objectives of problem-based learning: (1) '[s]tructuring of knowledge for use in clinical contexts', (2) '[t]he development of an effective clinical reasoning process', (3) '[t]he developing of effective self-directed learning skills' and (4) '[i]ncreased motivation for learning.'[40] Replacing the word 'clinical' with 'real-world' produces a set of objectives suitable for application in a law and religion unit. While the activity outlined below strives to achieve these objectives it is not a pure problem-based approach. Drawing from problem-based learning, it incorporates the use of prior knowledge, group work, and the teacher as tutor and guide. However, the activity is not self-directed. Students are provided with a model, assigned countries, and set tasks to complete during the workshop. As such it does not fulfil the third objective identified by Barrows.

IV THE ACTIVITY

A *Aims of the Activity and Position in the Unit*

[35] Maria Montessori, *The Absorbent Mind* (1949) <https://gseuphsdlibrary.files.wordpress.com/2013/06/the-absorbent-mind-montessori.pdf?fbclid=IwAR2sF7yi48IJvvnBpMOAF7mUMyMJBVYNCELJOTEvcPCmuOkIPk8IRwmUToc>

[36] Jos H C Moust, Peter A J Bouhuijs and Henk G Schmidt, *Introduction to Problem-based Learning* (Taylor & Francis Group, 1st ed, 2007) 10.

[37] Ibid 11; Paul Maharg, '"Democracy Begins in Conversation": The Phenomenology of Problem-based Learning and Legal Education' (2015) 24 *Nottingham Trent University Journal* 94, 95, 105–109.

[38] Maggi Savin Baden and Claire Howell, *Foundations of Problem-based Learning* (McGraw-Hill Education, 2004) 4.

[39] H S Barrow, 'A Taxonomy of Problem-based Learning Methods' (1986) 20(6) *Medical Education* 481.

[40] Ibid 481–482.

The aim of the activity outlined in this paper was to introduce students to different types of state–religion relationships and a model for understanding these different relationships. In previous years this had been taught in a traditional lecture format. However, this did not provide students with an opportunity to engage with the model, nor did the traditional lecture format sufficiently highlight the strengths and weaknesses of the model. The traditional lecture format also tended to focus on the various categories of state–religion relationship as a mere taxonomy rather than categories within a dynamic model. As part of an overall revision of the unit, the activity outlined in this paper was devised to provide a more interactive peer-led approach.[41]

The activity took place in weeks four and five of the semester (with Steps 1 to 4 in week four and Steps 5 and 6 in week five). Individual steps are outlined below. The previous weeks' content included: the definition of religion and religious demographics in Australia (week one), religious autobiographies and understanding diverse religious perspectives (week two) and freedom of religion (week three). All weeks included some elements of peer to peer and active learning. Weeks one and three also incorporated learning via a more traditional lecture format. Subsequent weeks' content included a research project workshop (week six), field trip to the university library to view religious texts and manuscripts (week seven), and guest panel on the role of religion in politics and political action in secular Australia (week eight). The remaining weeks were dedicated to oral presentations on group research projects (weeks ten and eleven) and a workshop titled, 'Wrapping it up – How does it all Fit Together', in which students developed mind maps of the unit content (week twelve).[42]

The unit assessment was comprised of: a 3,000 word reflection journal (50%) due at the end of semester; a group oral presentation (30%) in weeks ten and eleven; and participation in open space discussions in weeks two, three, four, five, eight, and twelve (20%). The activity outlined below was assessed as part of the reflection journal. For the reflection journal students were required to write four to six entries on topics covered in weeks one through five and week twelve.

The unit was taught using a three-hour workshop which was not recorded. In most weeks this consisted of a two-hour workshop involving a combination of a traditional lecture format together with active and peer to peer learning opportunities, followed by a one-hour open space discussion based on topics proposed by the students.

B *Steps of the Model*

Step 1: Presentation of the Model

The first step of this activity was to present the model to the students. Prior to the class students had been asked to read chapter 4 from *Law and Religion: National, International and Comparative Perspectives,*[43] as well as research applying the model to Australia.[44] However,

[41] A simpler version, consisting of Steps 1 and 2 only, was used in 2019.

[42] 'A Mind Map is a diagram for representing tasks, words, concepts, or items linked to and arranged around a central concept or subject using a non-linear graphical layout that allows the user to build an intuitive framework around a central concept. A Mind Map can turn a long list of monotonous information into a colorful, memorable and highly organized diagram that works in line with your brain's natural way of doing things.' See 'What is a Mindmap *Mindmapping.com* <https://www.mindmapping.com/mind-map>.

[43] Durham and Scarffs (n 8).

[44] Barker, 'Pluralism Versus Separation' (n 7).

given that it has been estimated that as few as 20 – 30% of students read the set class material,[45] the model was also presented (and the different categories of state and religion relationships explained) using a traditional lecture format during the first 30 minutes of the class. During this portion, the presenter avoided giving specific jurisdictional examples of States that are traditionally ascribed to each category. Where this was unavoidable, often due to student questions, the presenter gave examples that were not included in the second stage of the activity.

Step 2: Small Group Work

After giving the students a basic outline of the various state–religion categories, the presenter laid out a large A0-sized printed version of the model. This was placed on the floor at the front of the class. The room in which the workshops are conducted has the student seating arranged in three semi-circular rows — leaving a large empty space at the front of the class between the lecturer's desk and the front row. This space is ideal for activities of this nature and provided plenty of space to lay out the large form printed version of the model.[46]

The class was then divided into small groups of 2–4 students making a total of 16 groups. Each group was assigned one country (Brazil, India, Belgium, Italy, South Africa, Egypt, Netherlands, Iran, Vietnam, Indonesia, Canada, Saudi Arabia, Malaysia, New Zealand, Germany, and Nigeria). Each group was given a card with the name of their assigned country written on it. The groups were then asked to research their country and, based on this research, determine which category of state–religion relationship they believed their assigned country belonged to.

The 16 countries were not chosen at random. The countries were deliberately selected to represent a wide range of state–religion relationships, regime types, geographical regions, and legal systems. They were also, for the most part, countries whose state–religion relationships or whose main law and religion issues the presenter was familiar with from their own research or projects they had been involved in. The presenter was therefore confident and comfortable speaking about each of these countries during the workshop.

The students had approximately one hour to complete Step 2. Some groups finished relatively quickly — proclaiming that they knew the answer within the first 20 minutes (New Zealand and Saudi Arabia). Others took much longer, and after a full hour still had not reached a conclusion (Nigeria and Belgium). Throughout the hour allocated to the task the presenter circulated amongst the groups, asking questions to prompt further discussion and research as well as answering questions as they arose about both the model and country the group was researching. The presenter's main role during this phase was to act as a guide.

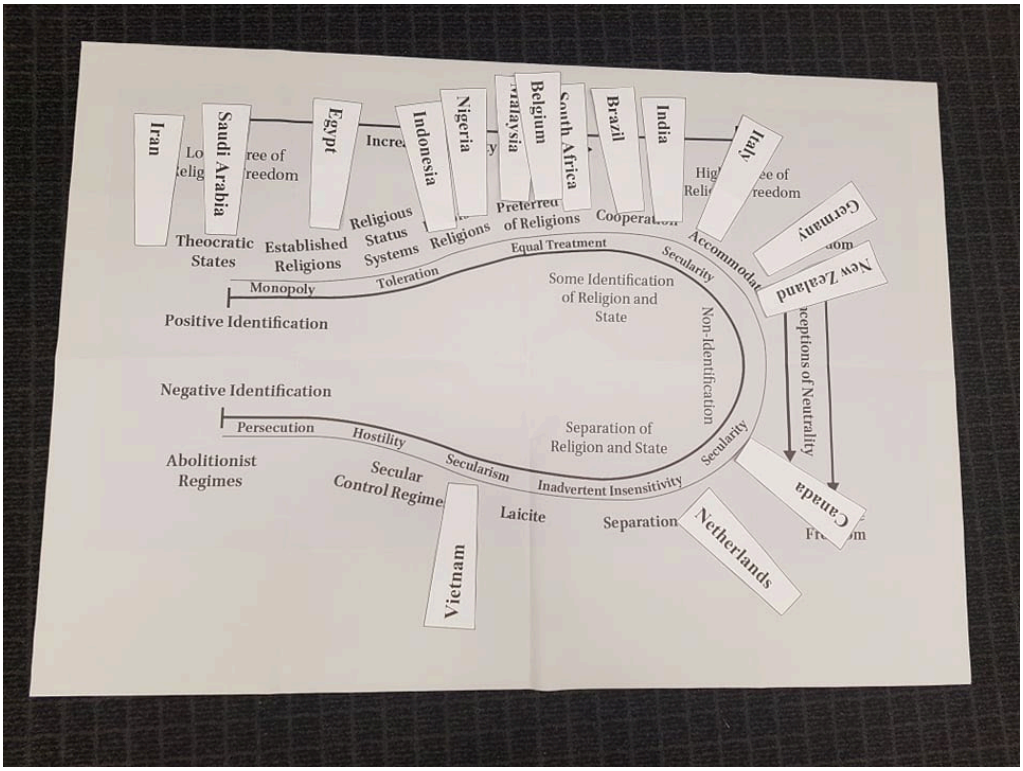
Step 3: Building up a Picture

At the conclusion of Step 2, each group was asked to place their assigned country onto the large A0 printed version of the model as shown in Figure 4. The students' work is also summarised in Figure 5 further below.

[45] Cynthia S Deale and Seung Hyun (Jenna) Lee, 'To Read or Not to Read? Exploring the Reading Habits of Hospitality Management Students' (2021) *Journal of Hospitality & Tourism Education* 45, 46.

[46] If space was not available, a similar result could be achieved by hanging the model on a wall or using a version projected onto a wall or screen. During Step 1 the presenter used a version of the model projected onto a screen.

Figure 4: Student work applying model and categories to their assigned country.



Each group was asked to explain where they had placed their assigned country. As will be discussed in more detail below, the students' decisions were relatively consistent with the generally accepted positions in the literature for each country. The only country for which there was a significant difference between the position on the model chosen by the students and the literature was India. Durham and Scarffs assigned India to the 'religious status systems'[47] category while the students assigned it to 'accommodationist regimes.' This was the only country which the presenter moved (after the picture in Figure 4 was taken) as the difference was significant in terms of both the actual position of India on the Loop model and the implications for freedom of religion.

While the students had been asked to read chapter 4 of *Law and Religion: National, International and Comparative Perspectives* and had been presented with the various types of state–religion relationships at the beginning of the class; they were not instructed to consider any specific laws or policies in determining the appropriate category for their assigned country. During Step 3, it became apparent that different groups had focused on very different aspects of the state–religion relationship. The relationship between the state and religion in any given jurisdiction is influenced by a range of factors. In his 1976 typology, The *Faces of God: Reflecting on Church and Society*, Hastings identified six factors:

> The first is the various basic patterns of relationship possible; the second, an analysis of types of church in relation to the state; the third, types of state in

[47] Durham and Scarffs (n 8) 126.

> relation to the church; the fourth, deeper elements in the shape of society which can influence both state and church; the fifth, the grounds of cooperation; the sixth, the grounds of conflict.[48]

Applying Hastings' six factors to the students' conclusions reveals the different levels at which the student groups engaged with the activity. All groups engaged to a greater or lesser extent with the first factor via the set readings and in-class presentation of the model. However, very few groups engaged with the second element: 'an analysis of types of church in relation to the state'. This would have required consideration of factors such as the '(i) size, (ii) a this worldly as against another worldly emphasis, (iii) attitudes towards other churches and religion, [and] (iv) ecclesiastical organisation'[49] of the religions in their assigned jurisdiction. Most groups engaged to some extent with the third element via considerations of their assigned country's constitution and other formal documents of state. Several groups also considered the regime type and governmental structures.

A significant number of groups focused on the lived experience of freedom of religion and religion generally within their assigned jurisdiction. This fits within Hasting's fourth factor. This factor requires consideration of the extent to which 'religious belief and practice are a manifest and unquestionable part of ordinary life' as opposed to 'societies in which there is a recognised divorce between the religion and the secular' as well as where 'there is a clear chasm between a small elite and the vast mass of the people' and 'societies in which the gap is much less'. It also considered factors such as 'the difference between societies in which the decisive bonds and influences in most people's lives are on a small scale'[50] and 'societies in which bonds tend to be on a large scale',[51] as well as, societies which are 'fairly stable' and 'those in which massive and rapid social change is going on'.[52] Finally almost all groups considered factors five and six, 'grounds of cooperation' and 'grounds of conflict', to various degrees via the laws in place in each jurisdiction which manifest conflict or cooperation between state and religion. Laws considered by the students included those relating to taxation, education, discrimination, criminal law, and family law.

As outlined above, there are numerous models of state–religion relationships. Part of the explanation for this is that different models focus on different aspects of the relationship depending on the purpose of the model.[53] For example Temperman's model, outlined in *State–Religion Relationships and Human Rights Law: Towards A Right to Religiously Neutral Government,* focuses on the formal state–religion relationship outlined in a country's constitution and other formal documents of state.[54] To apply Hasting's analysis to Temperman's typology focuses on the third factor 'types of state in relation to the [religion].'[55] This approach works well when considering a very large number of jurisdictions, as Temperman does in his seminal work on the subject, but does not allow for a more nuanced understanding of the way in which the constitutional provisions have been interpreted by national courts nor of the ways in which different laws operating at a lower level than the constitution may impact the state–religion relationship. It also does not account for the lived

[48] Hastings (n 7) 49. The author, writing in 1976, used the older language of church and state.
[49] Ibid 51.
[50] Hastings (n 7) 60.
[51] Ibid.
[52] Hastings (n 7) 60-61.
[53] Barker, *State and Religion* (n 7) 21-22.
[54] Temperman (n 7).
[55] Hastings (n 7) 49.

experience of majority and minority faiths within a given jurisdiction. The students' differing approaches therefore echoed the differing approaches taken by scholars working in the field.

As Figure 5 below demonstrates, in most cases the students' decisions for their assigned countries closely matched that outlined by Durham and Scarffs (where applicable). The table also includes Temperman's classifications, as it is more comprehensive, along with those from Ahdar and Leigh discussed above; although the class did not discuss these alternative models. As Figure 5 demonstrates, significant discrepancies in both terminology and classification exist in the literature. The variance between the students' choice of category and the category assigned by Durham and Scarffs is therefore not as problematic as it first appears given that scholars who work in this field also disagree.

*Figure 5: Comparison of student categorisation decisions with three models***.**

Country	**Students**	**Durham and Scarffs[56]**	**Temperman[57]**	**Ahdar and Leigh[58]**
Brazil	Cooperation	N/A	Non-establishment	N/A
India	Accommodation	Religious status systems	Separation of State and Religion	N/A
Belgium	Preferred set of Religions	N/A	Accommodation of Religion	State Religion: Establishment
Italy	Cooperation / Accommodation	Cooperation	State support and Acknowledgment of Religion / Separation of State and religion	N/A
South Africa	Cooperation	N/A	Accommodation of Religion	N/A
Egypt	Established Religion	Positive Identification	Islam as State Religion	N/A
Netherlands	Separation	N/A	Accommodation of Religion	Principled Pluralism
Iran	Theocratic State	Extreme Positive Identification	Islam as State Religion	Theocracy
Vietnam	Secular Control Regime	N/A	Secular State Ideology	N/A
Indonesia	Endorsed Religions	N/A	(mono)theist State / State Religion	N/A
Canada	Separation	N/A	State support and acknowledgment of Religion	State Religion: Establishment
Saudi Arabia	Theocratic State	Extreme Positive Identification	Islam as State Religion	N/A

[56] Durham and Scarffs (n 8).
[57] Temperman (n 7).
[58] Ahadr and Leigh (n 7).

Malaysia	Preferred set of Religions	N/A	Islam as State Religion	N/A
New Zealand	Accommodation	N/A	Non-identification	N/A
Germany	Accommodation	Cooperation	Accommodation of Religion / non-establishment	State Religion: Establishment
Nigeria	Endorsed Religions	N/A	Non-establishment	N/A

In future presentations, the activity will be adjusted to include an additional step between Steps 1 and 2. After being presented with the model students will also be presented with Hastings' six factors. Students will then be asked to identify a list of laws and social, governmental, and legal structures as well as religious and societal demographics which, based on the pre-reading and models presented in Step 1, they believe are relevant in determining the correct category for their assigned jurisdiction. Involving the students in this additional step will maintain the integrity of the problem-based and peer-led learning approaches while providing additional scaffolding.

Step 4: Exploring the Complexity

Students began to identify some of the weaknesses and complexities of the Loop model during the presentations of their conclusion in Step 3 and during discussions between the presenter and individual groups in Step 2. Following the presentations by the groups the class engaged in a whole-of-class discussion about the challenges they faced in deciding which category to assign their country to as well as some of the weaknesses of the model.

A number of groups identified that they had difficulty choosing which category to assign their country to, due to discrepancies between the constitutionally mandated relationship between state and religion in their assigned country and the lived experiences of people from that country (Nigeria, Malaysia, and India). The class was fortunate to have students with personal experiences of living in a number of the countries considered which added to the richness of the discussion and further highlighted the difference between law and lived experience.

A number of the assigned countries are federations (India, Malaysia, Brazil, Germany, Belgium, Canada, and Nigeria). Several groups identified that in these countries there may be a discrepancy between the state–religion relationship at the central (federal, national, unitary) level and that which exists at the local (state, province, regional) level. Further the state–religion relationship may vary between different provinces or states depending on the allocation of legislative power and competence as between the central government and the local governments.

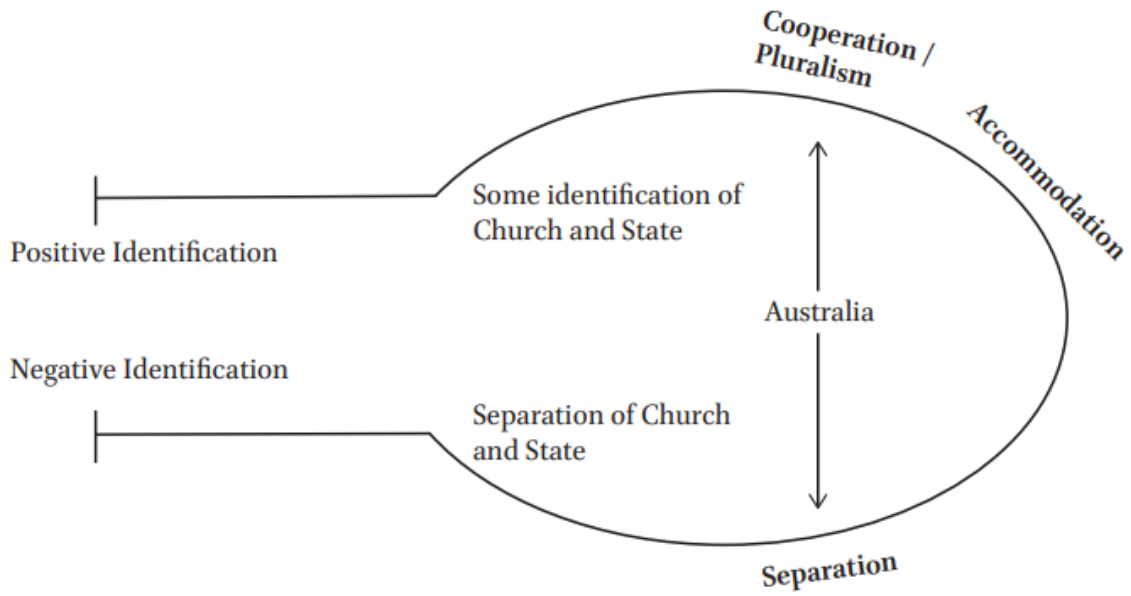
As a consequence of these student-identified complexities of the Loop model, several groups also identified that most if not all of the countries considered had laws which could fit into more than one of the state–religion categories. Models of the state–religion relationship are, like all other models of the real world, oversimplifications.[59] They inevitably stereotype the real world relationships[60] and erase complexity and nuance. In week one of the semester, the class discussed the use of statistics of religious affiliation (in particular, those from the

[59] Barker, 'Pluralism Versus Separation' (n 7) 7.
[60] Esbeck (n 7); Bader (n 7).

Australian census) along with the limitations of such data. Mainly, the class focused on what such statistics cannot or do not tell us about religious belief and practice.[61] Students were therefore able to apply this previous knowledge to critically analyse the use of the Loop model as a description of real-world conditions.

As the discussion progressed, a small number of groups who had particular difficulties determining where to place their allocated country on the Loop model noted that the two potential categories they had considered were often opposite (or effectively) opposite each other on the model. This is consistent with the model when used at a more advanced level. For example, Durham and Scharffs have observed that Spain oscillates between 'regimes strongly supportive of an established church to secularist, anti-clerical regimes.'[62] Similarly, Barker has argued that Australia currently exists in a state of tension between cooperation/pluralism and separation as demonstrated in Figure 6.[63]

Figure 6: Australia in Oscillation.[64]



Rather than existing at one point on the Loop model, state–religion relationships exist within a range. This range may be very narrow or it may be very wide depending on factors such as the stability and flexibility of the legal mechanism on which the state–religion relationships are based. [65] The students were able to identify this complexity and therefore build on the initial presentation of the Loop model to better fit the real world data uncovered during Step 2.

Step 5: Applying the Model to Australia

As outlined above, Steps 1 through 4 were completed during the first two hours of a three-hour workshop in week four of the semester. Week five of the semester was dedicated to the topic

[61] For a discussion of the religion question in the Australian census see Tom Frame, *Losing My Religion: Unbelief in Australia* (University of New South Wales Press, 2009) 86–104.
[62] Durham and Scarffs (n 8) 131.
[63] See Barker 'Pluralism Versus Separation' (n 7); See also Durham and Scarffs (n 8).
[64] Barker 'Pluralism Versus Separation' (n 7) 34.
[65] Barker, 'Pluralism versus Separation' (n 7) 38–40.

'Law and Religion in the Australian Context / Law and Religion in a Global Context.' This provided an opportunity to further apply the Loop model and develop a more explicit link between the state and religion relationship and freedom of religion.

The first hour of the three-hour class in week five focused on the Australian experience and applying the Loop model to Australia. In particular, the class analysed s 116 of the *Australian Constitution*[66] and associated case law.[67] The class also considered other laws and policies which influence the Australian state–religion relationship.[68] Finally the class considered the role Australia's federal nature plays in the state–religion relationship. As discussed above, during Steps 2 and 3 the students had identified federations as posing a particular challenge when determining how to categorise their assigned country. Examining Australia in more detail provided an opportunity for the students to build upon prior learning to analyse why federations posed such a challenge in the preceding week.

As a third-year elective unit, 'Law and Religion' prerequisites include content on Australia's federal structure and constitutional division of powers. Students were therefore able to draw upon their previous learning, identifying that many of the areas of interaction between the state and religion in Australia (education, health, criminal law, etc.) occur at individual state or territory level. This has two consequences. Firstly, s 116 of the *Australian Constitution* does not apply, as its application is limited to Commonwealth law.[69] Secondly, given that each state and territory has separate legislation, significant inconsistences can occur. Students were then able to hypothesise that similar issues may explain the difficulty they had with assigning other federations during Step 2.

Step 6: Links to Freedom of Religion

While the Loop model explicitly links freedom of religion and the level of separation between the state and religion, this link had not been drawn out during the preceding five steps of the activity. Step 6 made this link via the use of data from the Pew Research Centre.

The Pew Research Centre regularly publishes a Government Restriction Index ('GRI') and Social Hostility Index ('SHI') for freedom of religion. The GRI 'measures government laws, policies and actions that restrict religious beliefs and practices' while the SHI 'measures acts of religious hostility by private individuals, organizations or groups in society'.[70] As well as a formal report the Centre also publishes an online, interactive summary of their findings. Users are able to search for specific countries and view the GRI and SHI index plotted over time

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[66] Section 116 states:

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

[67] *Krygger v Williams* (1912) 15 CLR 336; *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116; *Attorney General (Vic); ex rel Black v The Commonwealth* (1981) 146 CLR 559; *Kruger v Commonwealth* (1997) 190 CLR 1; *Williams v The Commonwealth* (2012) 248 CLR 156.

[68] These included: prayers in parliament; federal funding of religious schools; religious welfare services; religious politicians; religiously-based moral laws; religious exemptions in anti-discrimination laws; religious marriages; tax exemptions; charity status; religious chaplains in public schools; religious chaplains in the military and police etc; and use of religious oaths.

[69] For the issue about whether s 116 applies to the Australian self-governing territories (ACT and Northern Territory) see H T Gibbs, 'Section 116 of the Constitution and the Territories of the Commonwealth' (1947) 20 *Australian Law Journal* 375.

[70] Samirah Majumdar and Virginia Villa, 'Globally, Social Hostilities Related to Religion Decline in 2019, While Government Restrictions Remain at High Levels' (Annual Report No 12, Pew Research Centre, 30 September 2021) 3.

(2007 – 2019).[71] Students were therefore asked to search for their assigned country and record both the GRI and SHI and compare this to the category they had assigned their country to the previous week. These were then recorded and added to a photograph of the outcome from week four presented on a PowerPoint slide as shown in Figure 7. These results have been summarised for convenience in Figure 8. As Figure 7 below demonstrates, there is a high degree of correlation between the location of the countries on the Loop model and their GRI and SHI. Broadly speaking countries with a high GRI and SHI are located towards the left while those with a low or moderate GRI and SHI are located towards the right.

Figure 7: Loop model combining student work with Pew Research Centre GRI and SHI.

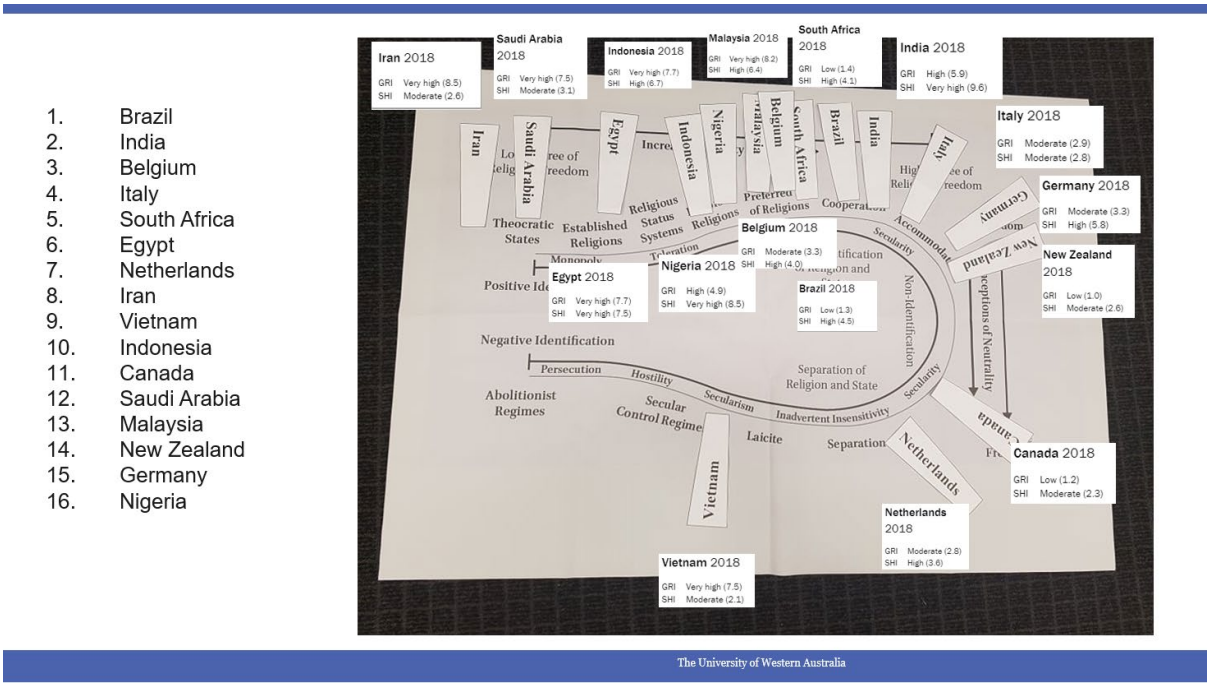


Figure 8: Tabular summary of Loop model depicted in Figure 7.

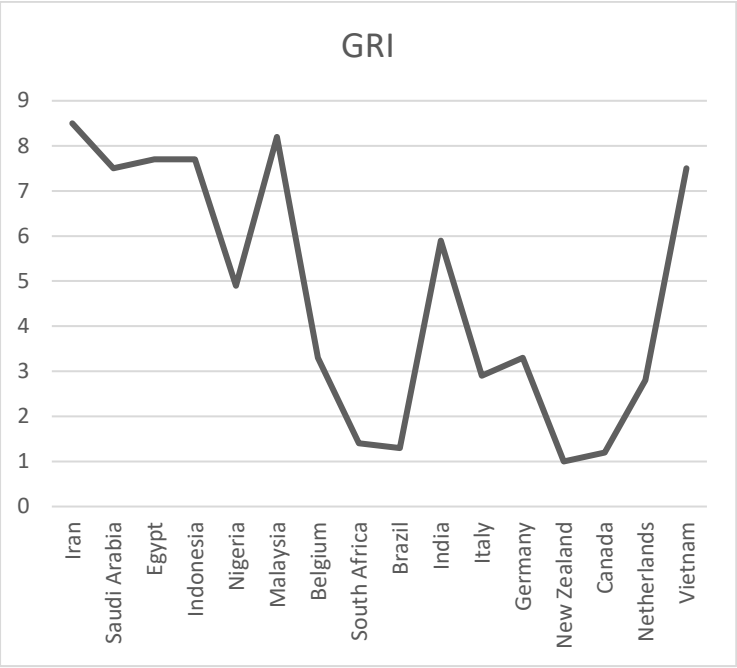
Country	Students Categorisation	GRI	SHI	Country	Students Categorisation	GRI	SHI
Brazil	Cooperation	1.3	4.5	Vietnam	Secular Control Regime	7.5	2.1
India	Accommodation	5.9	9.6	Indonesia	Endorsed Religions	7.7	6.7
Belgium	Preferred set of religions	3.3	4.0	Canada	Separation	1.2	2.3
Italy	Cooperation / Accommodation	2.9	2.8	Saudi Arabia	Theocratic State	7.5	3.1
South Africa	Cooperation	1.4	4.1	Malaysia	Preferred set of religions	8.2	6.4

[71] Chris Baronavski, Samirah Majumdar, Virginia Villa and Bill Webster, 'Religious restrictions around the world', *Pew Research Centre* <https://www.pewresearch.org/religion/interactives/religious-restrictions-around-the-world/>.

Egypt	Established Religion	7.7	7.5	New Zealand	Accommodation	1.0	2.6
Netherlands	Separation	2.8	3.6	Germany	Accommodation	3.3	5.8
Iran	Theocratic State	8.5	2.6	Nigeria	Endorsed Religions	4.9	8.5

As Durham and Scarffs explain 'a lack of religious freedom correlates with a high degree of *either* positive *or* negative identification of the state with religion.'[72] However the relationship between the level of identification between the state and religion and freedom of religion is not perfectly explained by the Loop model. As Figures 9 and 10 demonstrate, the GRI and SHI data in the order plotted by the students in Figure 7 does not perfectly fit the expected pattern. If there was a perfect relationship between the type of state–religion relationship and freedom of religion as predicted by the Loop model as outlined by Durham and Scarffs, one would see a 'U' shape for the GRI and, arguably, an 'M' shape for the SHI.[73] While the graphs do show this trend, it is far from perfect, indicating that either the students did not assign their countries to the correct place on the model or that the model in not a perfect representation of the real world. Given, as outlined above, the variation in allocation of states to specific categories in the literature and the relative consistency of the student's work with the literature, the latter explanation is just as probable. This outcome, in fact, should be expected given that, as outlined above, any model is by necessity a simplification of the real world. When tested against real world data some variation from the expected trend is inevitable. It is also worth noting that, as outlined above, the one instance where the student's choice did not align with the literature was in relation to India. When India is moved to better align with the literature (Figure 11), the GRI more closely resembles a 'U' shape.

Figure 9: GRI data plotted against student categorisation.



[72] Durham and Scarffs (n 8) 123 (original emphasis).

[73] The SHI is more likely to exhibit an 'M' shape as social hostility would, arguable, decrease where there is either homogeneity of belief, as on the far left-hand side of the Loop model, and where freedom of religion in maximised via plurality, as on the far right-hand side of the Loop model.

Figure 10: SHI data plotted against student categorisation.

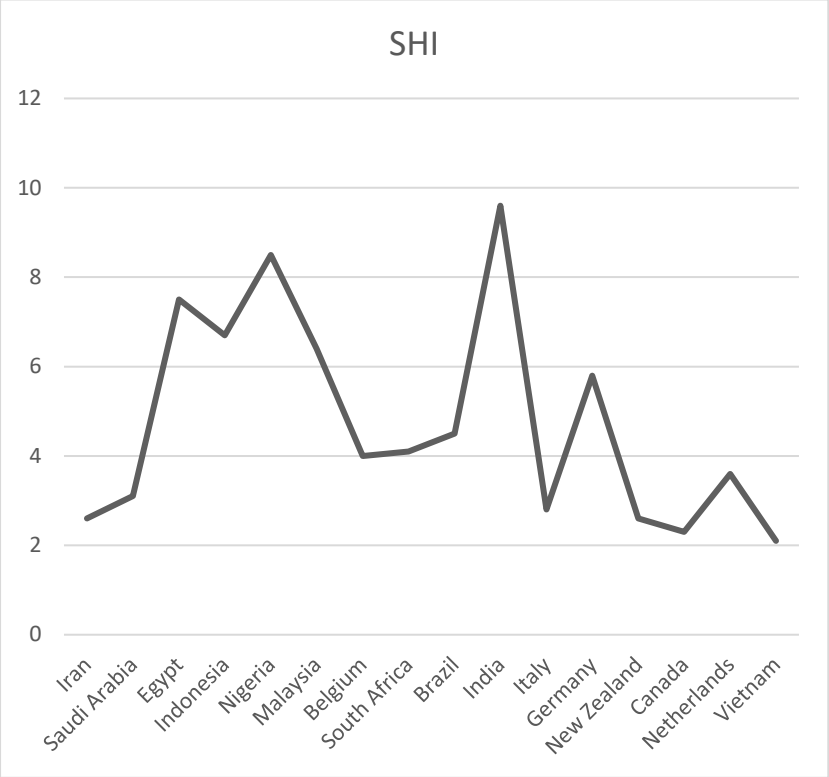
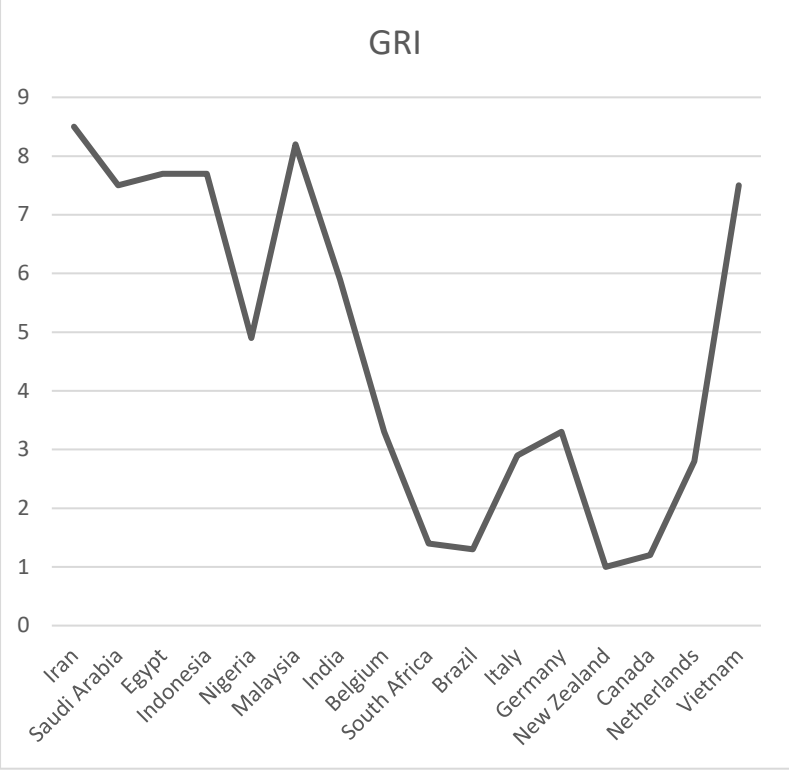


Figure 11: GRI data plotted against student categorisation with corrections for India.



Given that the comparative data in Figures 9 and 10 is derived from the work of undergraduate students completing an in-class exercise under time constraints, the level of consistency with the expected outcome of the Loop model suggests the efficacy of this approach to teaching both state and religion models, and the relationship between those models and freedom of religion.

V Reflection on Student Learning and Conclusion

As outlined at the beginning, an essential element of a tertiary-level law and religion course is an understanding of the relationship between the state and religion. The primary aim of the activity outlined in this article was to introduce students to different types of state–religion relationships and a model for understanding these different relationships. In the context of the course in which this activity was presented, its success in achieving this aim was able to be measured via reference to the models and categories within the Loop model through subsequent class discussion (open space discussions), assessments (group oral presentation and reflection journal), and the final week twelve workshop ('Wrapping It Up — How Does It All Fit Together').

As outlined, students participated in online and in-class open space discussions in weeks, two, three, four, five, eight and twelve. These discussions were assessed and worth 20% of the final mark in the unit. An open space is a form of self-directed learning guided by five key principles.[74] A full discussion of the benefits and structure of open spaces in tertiary education is beyond the scope of this paper. In the context of a law and religion unit taught at an undergraduate level, open space learning allowed students to select the topics of discussion and analysis making student-directed choices of case studies. The format is also informal and in the first iterations in a course appear 'unorganised'. However, as Van Woezik et al identified:

> A second phase will involve the emergence of a sense of community, as participants discover common interests. People will start to group around shared interests and viewpoints. In the end, conclusions and decisions can be made by way of convergence of ideas, interests and personal relationships.[75]

In this unit, this 'second phase' also coincided with greater understanding of the theory underpinning the law and religion issues being discussed in the open space. Following the activities outlined in this article, the open space discussion increasingly referred to the relationship between the state and religion inherent in the case studies and issues selected by the students as well as the implications for freedom of religion.

The model and categories of state and religion relationships also featured in the other two formal assessment items in the unit. Two groups referred specifically to the model during their oral presentations. The majority of reflective journals also focussed reflections on the model or some aspect of the activities outlined above. The reflections were split between those that reflected on the model and its implications at a macro level and those that focused on the country their group was assigned. Those that took a more macro approach often reproduced

[74] These are: (1) whoever comes is the right person, (2) whenever it starts is the right time, (3) wherever it happens is the right place, (4) whatever happens is the only thing that could have happened, and (5) when it is over, it is over. In the context of tertiary education, which is inevitably governed by timetables and assessment imperatives, some of these key principles need to be modified.

[75] Tamara Von Woezik, Rob Reuzel, and Jur Koksma, 'Exploring Open Space: A Self-Directed Learning Approach for Higher Education' (2019) 6(1) *Cogent Education* Art. No. 1615766.

the model or a version of it in their final reflection. While most students took a traditional approach to writing the reflective journals, students were permitted to incorporate more creative elements into their reflections. This took a variety of forms including visual diaries, poetry, cartoons, and artistic interpretations of the content. While the creative elements of the reflective journals tended to focus on content from other weeks of the unit, a small number of students did attempt creative elements reflecting on the state–religion relationship — including one which simplified the model to a haiku.

Finally, students had an opportunity to demonstrate the incorporation of the model into their learning during the final workshop in week twelve. As described, during this workshop students worked in groups to create a mind map of their learning in the unit. The majority of mind maps incorporated the content from the activity in some way, with a number reproducing versions of the model in visual form.

The repeated reproduction of the model in visual form reinforced the utility of presenting learning using visual elements. As Andersen has identified in the context of legal education, 'a combination of many different forms of communication come together to form effective frameworks for legal understanding.'[76] While not all aspects of law and religion will be able to be presented in multiple formats, models of state and religion relationships are one area where this is possible; and as demonstrated by the effectiveness of this outlined activity, should be used when possible.

However, as discussed above and as should be expected in the first iteration, the activity was not perfect. Further refinement will be needed for future presentations. In particular, greater scaffolding is needed to enable students to more easily and consistently identify those aspects of the state–religion relationship which are relevant to determining where their assigned country fits on the Loop model. Hastings' six factors were not taught directly in 2021. Incorporating these into the pre-reading as well as between steps 1 and 2, and the whole of class discussions in step 4, in 2022 will add to the richness of the presentation of the activity. Finally, no formal survey was undertaken of the student learning experience related to this activity. This was in part due to time constraints and due to the fact that the activitity presentation in 2021 was a pilot which would inevitably be refined in future years. Such a survey will need to be undertaken, with appropriate ethics approvals, following a future presentation of the activity.

[76] See Baasch Andersen (n 23); See also Jojappa Chowder, 'The Nonverbal Dimensions of Presentation' (2013) 1(4) *Research Journal of English Language and Literature* 1; Peter Andersen, *Nonverbal Communication: Forms and Functions* (Waveland Press, 2nd ed, 2007).

The Formation of Islamic Law in Indonesia: The Interplay between Islamic Authorities and the State

Muhammad Latif Fauzi*

In the course of the early twentieth century, Muslim majority countries, including Indonesia, attempted to transform Sharia into Islamic law. This transformation has encompassed diverse orientations and interests of Islamic scholars and the (colonial) state. The transformation in Indonesia deserves a special inquiry as Indonesia is a nation with a high degree of cultural heterogeneity. This article addresses the extent to which the interplay between Islamic authorities and the state has shaped the coming into being of Islamic law and its judicial institutions. I argue that Islamic authorities and the state have simultaneously taken part in revising and articulating the content, meaning, and scope of Islamic law. Islamic authorities had to adjust Islamic law with modern law and national sovereignty to make its norms possible. However, for Muslims, the issue was not only the formation of the national legal system but rules on the application of matrimonial matters as stipulated in Islamic legal doctrines. Through Islamic family law, devout Muslims found it important to claim a clearer position of the relationship between Islam and state authority.

I. INTRODUCTION

Despite the multifaceted nature of Sharia either as God's will, religious law, or jurists' interpretation (*fiqh*), Muslim states in the course of the first half of the twentieth century attempted to transform Sharia into 'Islamic law.'[1] Such a modern transformation of Sharia into state law was an inevitable consequence of the rise of Western scholarship on Islamic law. The need for the transformation of Sharia into Islamic law becomes noticeable when the modern state demands a more authoritative and decisive statement of law. Given the context of colonialism, the making of Islamic law has remarkably encompassed the diverse orientations and interests of: native legal scholars, Islamic scholars, and the (colonial) state. While the native legal scholars imposed positive legal norms, Islamic scholars and local rulers served as intermediaries.[2] What is now known as Islamic law is a result of the intense negotiations of Islamic legal knowledge and the state authority in the modern period. The state left aside the plurality of legal opinions of different *fiqh* schools (*madhāhib*) and the open discourse of Sharia.[3]

Although there has never been a universal acceptance of Sharia interpretations as represented in the Islamic substantive laws, the Muslim world demonstrated varying experiences of continuities and changes in the Islamic legal system. However, the differentiation between

* Associate Professor, UIN Raden Mas Said Surakarta.

[1] Léon Buskens and Baudouin Dupret, 'The Invention of Islamic Law: A History of Western Studies of Islamic Normativity and Their Spread in the Orient' in Jean-Claude Vatin and François Pouillion (eds), *After Orientalism: Critical Perspectives on Western Agency and Eastern Re-Appropriations* (Brill, 2014) vol 2, 31.

[2] Léon Buskens, 'Sharia and the Colonial State' in Rudolph Peters and Peri Bearman, *The Ashgate Research Companion to Islamic Law* (Ashgate, 2014) 209 ('Sharia and the Colonial State').

[3] Léon Buskens, 'A Medieval Islamic Law? Some Thoughts on the Periodization of the History of Islamic Law' in A. Vrolik and J.P. Hogendijk (eds), *O Ye Gentlemen: Arabic Studies on Science and Literary Culture* (Brill, 2007) 469, 472.

Sharia and secular law has never been clear. Since the fourteenth century, Muslim scholars have been concerned with what factors determine the meaning of Sharia. The outstanding scholar Ibn Qayyim al-Jawziyya (d 1350) argued that Sharia had to do with justice. This means that any worldly attempts to bring about justice in accord with Islamic principles, including the promulgation of legal codes, can be necessarily religiously justified and part of Sharia.[4] The current situation shows that the political interest of the state is required to define and implement Sharia.[5]

In the latter part of the nineteenth century, many of the colonial states in Asia witnessed a major transformation of Sharia into a state-sponsored legal code.[6] Without a doubt, the current form of Islamic law in these former colonies is indebted to a European legal construction. After the demise of colonial power in these states, the struggle for the incorporation of Sharia into state law intensified. The institutionalisation of Sharia into Islamic law has much to do with the construction and the preservation of not only Islamic commitment, but Islamic identity. Here, the transformation of a scattered and locally-administered set of substantive laws into a state-centred and codified system has taken place. This Islamic law jurisdiction has been generally limited to personal status.[7]

This article addresses the key question: how did the power relations of state and non-state actors shape the coming into being of Islamic law and its judicial institution in Indonesia? The basic argument is that Islamic authorities and the state (the colonial state and the independent state) in Indonesia took part in the negotiation of the content and meaning of Islamic law. These powers and their relationship contributed to the remaking of definitions within, and determined the scope of, Islamic law. I expect to emphasise an understanding of the interplay between these important powers that have been involved in the process of how Sharia turns into modern Islamic law. This article aims to enhance existing scholarship on the history of Islamic law by considering it as a social and political phenomenon.[8]

This article consists of five sections. Section II addresses the role of *siyāsa shar'iyya* (the state's legal-political right) and the modernisation of law in the Muslim world. Section III analyses the development of Islamic law in the pre-colonial and the colonial periods and includes an explanation of the position of the Sultanate, aristocracy, and the institutionalisation of *penghulu* (religious scholars promoted by the state) within the formation of Islamic law in Indonesia. Section IV deals with the development of Islamic law in the post-colonial phase, including the institutionalisation of Islam, legal unification, and the establishment of Islamic judiciaries. Section V reemphasises my core argument about the interplay of Islamic authorities and the state in the formation of Islamic law in Indonesia.

II *SIYĀSA SHAR'IYYA* AND LEGAL POSITIVISM

As Muslim societies developed into nation-states, religious norms were often deemed positive law.[9] Until this development, never had Sharia been considered formally legal in nature and neither had *fiqh* been instantiated in formal law codes promulgated by legislative authorities.

[4] Arskal Salim, *Challenging the Secular State: The Islamization of Law in Modern Indonesia* (University of Hawai'i Press, 2008) 12–13.
[5] Abdullahi Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a* (Harvard University Press, 2008).
[6] Buskens and Dupret (n 1) 41.
[7] Iza R. Hussin, *The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State* (University of Chicago Press, 2016).
[8] Buskens, 'Sharia and the Colonial State' (n 2) 210.
[9] Buskens and Dupret (n 1) 36.

Colonial discourse and doctrine led to the reformation of Sharia, replacing it with a Western legal conception.[10] Nevertheless, the cooperation of *ulama* (experts in religious law and practice) remained important. Their presence provided legitimacy to the state codification of Sharia.[11] The production of state Islamic law incorporated multiple aspects. For example, it incorporated the reformation of traditional Islamic precepts[12] through *ijtihād* (deriving laws from the sacred legal sources) that included the process of selection (*takhayyur*) and harmonisation (*talfīq*)[13] and it also promoted the notion of public interest (*maṣlaḥa*).[14]

With the development of *fiqh*, *madhāhib* (schools) of *fiqh* and *uṣūl al-fiqh* (legal theories),[15] the introduction of institutions into this process was unavoidable. The Umayyad period (661-750) witnessed the rise of the so-called judicial officer (*qāḍi*s), standing independently from the caliphate's power. In the 'Abbasid period in the late ninth century, the task diffusion between the *qāḍi*s and the political ruler became more obvious. While the former played the role of the guardian, arbitrators and administrators of the Sharia, the latter took charge of the implementation of Sharia'.[16]

In contradiction to the formal duties of *qāḍi*s, another unofficial legal institution, namely *muftī*, also emerged. It involved legal experts who produced non-binding legal decisions and worked beyond the administration of the officialdom. The assortment of the political authority and the *qāḍi* institution in the enforcement of this Islamic law necessarily shows that the development of Sharia is indeed a worldly, rational process. Yet, Islamic piety and moral behaviour also co-determine the epistemic quality of legal authority. At this juncture, even though legislation was unacknowledged in Islamic history, the state had the right to make and apply rules and regulations with an indirect initiative to provide 'uniformity of the law' among different legal schools.[17] It is safe to suggest that such a legal-political right which belongs to the ruler, popularly known as *siyāsa shar'iyya*, requires the incorporation of legal knowledge, legal authority, and religious piety.

As a consequence of the interference of the state in the legal domain, scholarly discussions of Islamic legal interpretations tended to converge. As remarked by Western scholars like Schacht,[18] Coulson,[19] and Anderson,[20] the rise of the caliph's legal authority went hand in hand with the idea of closing the gates (*insidād bāb*) of *ijtihād* by the end of the ninth century. This condition generated the spirit of *taqlīd* (following or imitating). *Taqlīd* has been believed over centuries to be the symbol of the stagnation of the Islamic scholarly tradition and to have

[10] Wael B. Hallaq, *Sharia: Theory, Practice, Transformations* (Cambridge University Press, 2009) 2 ('*Sharia: Theory, Practice, Transformations*').
[11] Aharon Layish, 'The Transformation of the Sharīʿa from Jurists' Law to Statutory Law in the Contemporary Muslim World' [2004](1) *Die Welt Des Islams* 85, 89.
[12] Buskens, 'Sharia and the Colonial State' (n 2) 211.
[13] J.N.D. Anderson, *Islamic Law in the Modern World* (State University of New York Press, 1959) 28; Anver M. Emon, 'Shari'a and the Modern State' in Anver M. Emon, Mark Ellis, and Benjamin Glahn (eds), *Islamic Law and International Human Rights Law* (Oxford University Press, 2012) 66.
[14] Felicitas Opwis, 'Maṣlaḥa in Contemporary Islamic Legal Theory' (2005) 12(2) *Islamic Law and Society* 182.
[15] Wael B. Hallaq, 'The Development of Logical Structure in Sunni Legal Theory' (1987) 64(1) *Der Islam* 42; Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunnī Uṣūl Al-Fiqh* (Cambridge University Press, 1997).
[16] Hoexter Miriam, 'Qāḍī, Muftī and Ruler: Their Roles in the Development of Islamic Law' in Ron Shaham (ed), *Law, Custom, and Statute in the Muslim World* (Brill, 2007) vol 28, 67.
[17] Layish (n 11) 87–88.
[18] Joseph Schacht, *An Introduction to Islamic Law* (Clarendon Press, 1964).
[19] Noel Coulson, *A History of Islamic Law* (Edinburgh University Press, 1964).
[20] J.N.D. Anderson, *Law Reform in the Muslim World* (Athlone Press, 1976).

limited Muslim jurists' ability to produce new legal ideas. Due to this situation, Islamic law was widely considered unable to attain modern ideals—a view that gained impetus from Weber's suppositions regarding Islamic law as lacking rationality and systematisation and being inadequately developed.[21]

But subsequently, Wael Hallaq demonstrated that this conception of *ijtihād* was theoretically and practically incorrect.[22] Hallaq showed the extent to which reinterpretations of substantive law, through its interaction with social practices and the process of fatwa-giving (*iftā'*), contributed to the development of statutory law.[23] Another scholar affirming the productivity of *fiqh* reasoning is Baber Johansen. His work is concerned with the land-tax practice in early Ottoman Egypt, which ceased the concept of payment of *kharāj* (*'ushr*) in the Hanafite law and, instead, developed the concepts of tenancy, through *ijāra*, and cultivation partnership (*muzāra'a*).[24] With respect to such changes, albeit done under the strong influence of a certain legal school, it is clear that substantial reforms of legal doctrines were made in order to meet the challenges of social circumstances.

According to Hallaq, the evolution of Islamic law since its early development resulted in the so-called 'great rationalist-traditionalist synthesis.'[25] By this, Hallaq means that Islamic law has incorporated traditionalism: ideas and norms indicated in the sacred texts, the Quran and prophetic traditions, and rationalism in the form of scholarly consensus and analogical reasoning. Other scholars emphasised the aspects of Sharia that comprise traditional Islamic values.[26] For the sake of legal uniformity and certainty, state legislation incorporated the power of 'ulama' to define Sharia by codifying preferred *fiqh* doctrines. This legal conception of Sharia was influenced by the European studies of Islamic law that tended to employ a hierarchical, administrative understanding of the law.[27]

Contemporary scholarship often understood the implicit sense of religion within Sharia by placing it in opposition to rationalism. How Sharia actually functioned in the socio-political domain of a nation lacked serious scholarly concern. Due to this narrative, the ideology of reform in some ways shaped the construction of the modern state and its system of administration.[28] It was in this realm that the nineteenth-century Ottoman Empire started to launch the ideas of legal reform in the sense of European legal codes. Although since the fifteenth century a number of ordinances (*qānūn*) on land, finance, and crimes had been enacted by the Ottoman sultan, the introduction of law reform occurred during the *Tanzimat* period (1839-1876). Centralisation, legal positivism, and legal unification were important concepts accompanying the process of legislation. Codification was also unavoidable. The codification could be performed in two models, either modernising the existing traditional *fiqh* doctrine or imposing Western legal codes. The Ottoman civil code, the *Mejelle*, exclusively deriving from the Hanafi law and the Penal Codes of 1840 and 1851, represented the first model.[29] Both

[21] Mohammad Fadel, 'State and Sharia' in Rudolph Peters and Peri Bearman (eds), *The Ashgate Research Companion to Islamic Law* (Ashgate, 2014) 93.
[22] Wael B. Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16(1) *International Journal of Middle East Studies* 3.
[23] Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (Cambridge University Press, 2001).
[24] Baber Johansen, *The Islamic Law on Land Tax and Tent: The Peasants' Loss of Property Rights as Interpreted in the Hanafite Legal Literature of the Mamluk and Ottoman Periods* (Croom Helm, 1988).
[25] Hallaq, *Sharia: Theory, Practice, Transformations* (n 10) 55.
[26] Rudolph Peters, 'From Jurists' Law to Statute Law or What Happens When the Shari'a Is Codified' (2002) 7(3) *Mediterranean Politics* 82; Layish (n 11).
[27] Fadel (n 21) 94.
[28] Hallaq, *Sharia: Theory, Practice, Transformations* (n 10) 4–5.
[29] Peters (n 26) 88.

legislation and codification were believed to be in accord with Sharia, although the source of authority lay in parliament. The notion of Sharia was degraded in the eyes of the State to something simply symbolic. Frequently, however, *qadi* ignored the codified law which, in their view, might seem to deviate from Sharia. They persisted in relying on traditional religious-legal authorities rather than the new statutory codes.[30]

In line with the above discussion, scrutinising the history of Islamic law in Indonesia, political scientists and socio-legal scholars have developed the thesis that the formation of state-sponsored Islamic law in a country primarily involved power relations. Modern scholarship has called out the need for an understanding of the multifaceted social, political, and legal narratives in the studied country. Buskens emphasised that the implementation of modern law was only made possible by the modern state, and the other way around.[31] Meanwhile, Hussin asserts the notion that "Islamic law was an arena for politics, a space whose scope, boundaries, rules, and content underwent a remarkable transformation during the late eighteenth and nineteenth centuries…"[32] Diverse powers in politics strove for the transformation of the content, scope, and rules of 'unofficial' religious precepts into state-promoted Islamic law. Within this framework, it is thus important to emphasise the importance of critically contextualising the study of the legal system and institutions in ever-changing historical situations.

The next section will address the practice of Islamic law during the pre-colonial and colonial periods. It emphasises the role played by colonialism in the conceptualisation of Islamic law. This development results in the notion of colonial legal modernity and of colonial Sharia.[33] My argument is that although the national legal framework of the colonial state was often decisive for the formation of Islamic law, the participation of local rulers, who played an important role as intermediaries, was crucial.

III PRE-COLONIAL AND COLONIAL PERIODS: SULTANATE, ARISTOCRACY AND THE INSTITUTIONALISATION OF *PENGHULU*

The making of a new state cannot completely escape its colonial past. Institutions and legal reforms display well-preserved evolutionary continuities from kinship and colony to sovereignty as an independent state. Daniel Lev, referring to other scholars like Benda, Anderson and Sutherland, has shown the extent to which the legal history of a nation reflects the distribution of political, social and economic realities in that nation.[34] Although legal institutions involve power relationships, it is also significant to address dynamics beyond the law itself.

Historical studies of Islamic law in Indonesia usually set the arrival of the Dutch East Indies Company, Verenigde Oost-Indische Compagnie ('VOC'), to the Archipelago as the starting point of analysis. To be more precise, the narrative starts with an explanation of the legal and political development which took place after the establishment of the city of Batavia in 1619[35]

[30] Layish (n 11) 97.
[31] Buskens, 'Sharia and the Colonial State' (n 2) 210.
[32] Hussin (n 7) 7.
[33] Buskens, 'Sharia and the Colonial State' (n 2) 209.
[34] Daniel S. Lev, 'Colonial Law and the Genesis of the Indonesian State' (1985) 40(2) *Indonesia* 57 ('Colonial Law and The Genesis of the Indonesian State').
[35] Stijn Cornelis van Huis, 'Islamic Courts and Women's Divorce Rights in Indonesia: The Cases of Cianjur and Bulukumba' (PhD Thesis, Leiden University, 2015) 30.

and the issuance of the 1642 Statute of Batavia ('*Bataviasche Statuten'*).[36] Historians working on the formation of law in other colonies, such as India, also made the creation of a state, imposed by the East India Company in the latter part of the eighteenth century, as the starting point.[37] It was the second period of the VOC (1650-1798) in the East Indies where their activities exceeded commercial trade in the sense that the idea of colonising territories had also been included.[38] With consideration of the need for effectiveness and social stability, the VOC and other colonial powers elsewhere found it necessary to acquire the local knowledge and the cultural and religious norms adhered to by the indigenous inhabitants of the area. Nevertheless, historians generally conclude that from the beginning the VOC, despite its mercantile nature, sought to respect local laws.[39] The VOC did not interfere in the application of Islamic law by native Muslim communities.

In conjunction with the greater interest in agricultural commodities, any laws made by the VOC were used to secure their commercial interests. They were aware of the vital position of economic and political relationships which served as the fundamental sources of laws. In other words, they made and executed laws to attain their trading goals. For half a century after the founding of the Dutch colonial government in 1800, Islamic precepts were enforced legally. This practice was perceived to be justified by the view that the Netherlands Indies had been entirely subject to Islam before colonial rule.[40]

Throughout this pre-colonial period, mainly during the Islamic kingdom of Mataram in seventeenth-century Java, the comparability between the sultan ordinance and Islamic jurisprudence (*fiqh*) was a matter of incorporation. The influence of *fiqh* on the sultan ordinance was notably strong, particularly in matters pertaining to family law. To give an example, the present Indonesian *taklik talak* (conditional divorce) formula, signed by a husband at the time of marriage and enclosed on the last page of the marriage certificate, is an obvious result of the interplay between *fiqh* authority and the power of the local ruler.[41] As one of the divorce procedures, it is believed to derive from the classical tradition of *fiqh* which is the concept of delegating the right to divorce to the wife (*tafwīḍ al-ṭalāq*).[42] Scholars believe that the *taklik talak* was inspired by the sixteenth-century Shafiite book, *Taḥrīr*, written by Zakariyyā al-Ansārī (d 1520) and subsequently elaborated by the Egyptian scholar al-Sharqāwī (d 1812) in his book *Ḥāshiya al-Sharqāwī.*[43]

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[36] Euis Nurlaelawati, *Modernization, Tradition and Identity: The Kompilasi Hukum Islam and Legal Practice in the Indonesian Religious Courts* (Amsterdam University Press, 2010) 44.

[37] Bernard S. Cohn, 'Law and the Colonial State in India' in June Starr and Jane F. Collier (eds), *History and Power in the Study of Law: New Directions in Legal Anthropology* (Cornell University Press, 1989) 131.

[38] Ratno Lukito, 'Sacred and Secular Laws: A Study of Conflict and Resolution in Indonesia' (PhD Thesis, McGill University, 2006) 132.

[39] Lev, 'Colonial Law and the Genesis of the Indonesian State' (n 34) 58.

[40] Sebastiaan Pompe, 'Islamic Law in Indonesia' (1997) 4(1) *Yearbook of Islamic and Middle Eastern Law* 180, 182.

[41] Mark Cammack, Helen Donovan and Tim B. Heaton, 'Islamic Divorce Law and Practice in Indonesia' in R. Michael Feener and Mark Cammack (eds), *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Harvard University Press, 2007) 99.

[42] Lucy Carroll, 'Talaq-i-Tafwid and Stipulations in a Muslim Marriage Contract: Important Means of Protecting the Position of the South Asian Muslim Wife' (1982) 16(2) *Modern Asian Studies* 277.

[43] Azyumardi Azra, 'The Indonesian Marriage Law of 1974: An Institutionalization of the Shari'a for Social Changes' in Arskal Salim and Azyumardi Azra (eds), *Shari'a and Politics in Modern Indonesia* (Institute for Southeast Asian Studies, 2003) 76; Hisako Nakamura, *Conditional Divorce in Java* (Islamic Legal Studies Program, Harvard Law School, 2006).

The old practice in Java demonstrated that this Islamic legal tradition was adopted and enacted by Sultan Agung, the third ruler of the Islamic kingdom of Mataram, and practised with a sort of modification. The earliest form of this *taklik talak* was called *janji dalem* or *janjining ratu* (the royal promise). This means Islamic law had to negotiate with local customs. The word '*dalem*' represented the relationship between the ruler and the groom.[44] The Islamic official appointed by the ruler with the authority to administer marriage and divorce read out the promise and asked for the groom's confirmation of acceptance or rejection.[45] The groom only needed to give a 'yes' or 'no' answer, although rarely did the groom refuse. Different regions had their own wordings, (thirty versions were noted) although most of them shared essential conditions, such as desertion for a certain period and failure to provide food, clothing and lodging for a few months.

In addition to substantive law, the collaboration of different authorities has been evident in the establishment of legal institutions. It is worth noting that the development of *penghulus*, religious officials promoted by the state, was done to handle and administrate Islamic affairs and justice. Since the Demak Islamic kingdom, the *penghulu* had the same functions as the local Islamic judicial (*qadi* or *kadi*). The *penghulu* took charge of not only Islamic affairs but diplomatic matters. This development had two causes: it was a consequence of the emerging commitment of the local ruler to Islam and it served the purpose of keeping the loyalty of Muslim subjects. The *penghulu* was a collegial member who had a good comprehension of Islamic doctrines and whose position was as important as a prime minister and a military commander.[46] In the 1750s, after the division of the Islamic Mataram kingdom into the Yogyakarta sultanate in the west and Surakarta in the east, the *penghulu* enjoyed a more hierarchal position. *Pengulu ageng* (great *penghulu*) enjoyed the highest level. This individual chaired the Islamic court, namely *Surambi*. The function of Islamic affairs at the lowest village level was run by *modin* or *kaum*. The substantive laws applied in the court derived from several prominent Shafiite *fiqh* texts, such as *al-Muḥarrar fī fiqh al-imām al-syāfi'ī* by Muḥammad al-Qazwīnī al-Rāfi'ī (d 1226), *Tuḥfat al-muḥtāj* by Shihāb al-Dīn ibn Ḥajar al-Haytamī (d 1566), *Fatḥ al-wahhāb bi sharḥ minhāj al-ṭullāb* by Zakariyyā Muḥammad al-Anṣārī (d 1520), and *Fatḥ al-mu'īn bi sharḥ qurrat al-ʿayn* by Zayn al-Dīn al-Malībārī (d 1567).

The *penghulu* institution exemplified the close relation between Islam and Javanese customs.[47] The institutionalisation of the *penghulu* body was based upon a hybrid of mixed rules from both Islamic law and local custom. It is likely that for this reason the VOC found it desirable to promote the *penghulus* as the primary native legal officials in the colony. When the VOC introduced the first general court for native affairs, namely *landraad* (courts), in the city of Semarang in 1746, the *penghulu*s had the function of advisors. The *landraad* was chaired by a colonial administrator.[48] Not only in central Java but across the island, the *penghulu* and other institutions of Islamic judges played important roles in court affairs.[49] However, after having

[44] Christiaan Snouck Hurgronje, *The Achehnese* (Brill, 1906) 349; A.H. van Ophuijsen, *De Huwelijksordonnantie En Hare Uitvoering* (P.W.M. Trap, 1907) 80–81.
[45] Hisako Nakamura, 'Implementation of Islamic Law in Indonesia in Cases of "Conditional Divorce" and "Divorce Counseling"' (lecture manuscript, Harvard Law School, 2005).
[46] Muhamad Hisyam, *Caught between Three Fires: The Javanese Pangulu under the Dutch Colonial Administration, 1882-1942* (INIS, 2001).
[47] R. Abdoelkadir Widjojoatmojo, 'Islam in the Netherlands East-Indies' (1942) 2(1) *The Far Eastern Quarterly* 48.
[48] Mark Cammack, 'Indonesia's 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?' (1997) 63 (April) *Indonesia* 144.
[49] Martin van Bruinessen, 'Shari'a Court, Tarekat and Pesantren: Religious Institutions in the Banten Sultanate' (1995) 50 *Archipel* 165.

been incorporated into the administration of the Dutch colonial government by the end of the nineteenth century, the *penghulu*s were challenged with three competing situations that they had to maintain. Holding dual identities as devout Muslims and *qadi*, they were bound by Islamic obligation to ensure proper application of Sharia; by colonial government expectation to properly deal with with administrative matters; and, as social leaders, to set moral standards for the community.[50]

Concerning the strategies and policies made by both the VOC and the colonial government, historians and political scientists are interested in looking at the way these external powers dealt with local norms. When the Dutch colonial government took over the VOC position after its collapse in the last years of the eighteenth century, maintaining the equivalence of substantive law and the judicial institution of Islam was an essential concern. The Dutch introduced a division of the legal system. Lev has asserted that in the subsequent years a heated dispute developed over the primacy of statutory law.[51] Irrespective of the diverse views of the colonial scholars, the basic idea remained that the colonial law was intended to make colonializing efficient. However, only with the cooperation of the local elites who were involved in the colonial administration did the codification of Sharia successfully turn ideas into results.[52]

Despite the dominance of the Shafii school, the practice of Islam in society did not mean much for the effectiveness of Islamic law as it had to negotiate with the pre-existing local practices and customs.[53] The intermixture of different religious and social norms in societies created complex situations. Politically, the externally-penetrating Dutch power intervened considerably in such dynamics. For more than a century, the question of whether law in the Netherland Indies should reflect pluralism or unification was debated among Dutch jurists and Indonesian law leaders. There were opposing views at that time on whether there should be the creation of a liberal state or of an administrative system. The colonial government agreed with the latter.[54]

Ideological, political, and cultural conflicts occurred simultaneously and the struggle between Islamic law, pre-Islamic custom, and foreign law was evident. Once understood as being in opposition (domination versus resistance), more recent views understand the process as one of negotiation over different norms. From this point of view, the law issued by Deandels in 1808 can be considered to be the result of negotiation.[55] The ordinance stipulated that the native people would remain subject to their laws and it continued recognizing the role of *penghulu*, in the capacity of an adviser, in attending court hearings between Muslim parties. This law culminated in 1835 when the *penghulu*'s jurisdiction in family law and a legal mechanism to enforce the *penghulu*'s decision were formally recognized by the colonial administration.[56]

The recognition of the *penghulu* had not truly ended the complexity of the native custom and Islamic law. The colonial government was, nonetheless, still reluctant to grant indigenous Muslims any extensive recognition in the legal sphere. The political and religious power of

[50] Hisyam (n 46).
[51] Daniel S. Lev, *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions* (University of California Press, 1972) ('*Islamic Courts in Indonesia*').
[52] Buskens and Dupret (n 1) 39.
[53] C. A. O. van Nieuwenhuijze, 'The Legacy of Islam in Indonesia' (1969) 59(3-4) *The Muslim World* 210.
[54] Lev, 'Colonial Law and the Genesis of the Indonesian State' (n 34) .
[55] Lukito (n 38) 43.
[56] van Huis (n 35) 34.

penghulu was of serious concern and triggered criticism in the Dutch parliament. An outcome of this political instability was the incorporation of *penghulu* and mosque officials into the official *priesterraden* (priests' councils or collegial tribunal) in 1882. This process signified the official incorporation of *penghulu* into the state. While the colonial government separated Islamic courts from the authority of the aristocrats, it created a dual system of civil and Islamic courts. The Dutch increasingly took control over Muslim jurisdiction, and accordingly, the judges of Islamic courts had to receive approval from the general court to pronounce decisions.

In the next development, the term *priesterraden* used to name the Islamic collegial court provoked strong criticism and was deemed misleading. The term which had root in the Christian tradition was used to represent the Dutch understanding of Islamic institutions. The independence of Islamic officials from the aristocracy, in the eye of Snouck Hurgronje, was disadvantageous. This was because the Dutch could no longer drive the moderate evolution of Islam in Indonesia through the hands of the aristocracy. The failure of the colonial government to grant Islamic officials good salaries also disturbed the incorporation of the *penghulu* institution into the colonial administration.[57]

It is apparent that, subsequent to the transfer from aristocracy to the colonial administration, Islamic judiciaries did not gain support from the Islamic modernist wings nor were they connected with informal Islamic leaders whose political potential was significant. This official Islamic group, according to Lev, even took a considerable distance from other Islamic groups who not only dominated the economic enterprises in the Javanese coastal areas but created intellectual figures and political stars. Hisyam has shown the extent to which Muslim organizations in the early twentieth century stereotyped the *penghulu* as colonial-promoted civil servants with an inferior knowledge of Islam.[58] Because their comprehension of Islamic knowledge was still questionable, *penghulus* had to base their position on the support of traditional local authorities. Therefore, there was no reason to confront these traditional authorities, and the Islamic officials could preserve their status.

The great colonial concern with controlling the judicial system in the Netherlands Indies was as significant as its intervention in law. Lev underlines this striking pattern of colonialism in his sentence 'what was unusual was the way in which law was used to serve their end'.[59] Although the disputes over imposing one law or plural law for indigenous groups have come to an end with the latter view's triumph, the situation was more complicated than simply the fact that the Indies had observed a dual legal system. Internal conflicts of law and interactions between different laws were more noteworthy.[60] The new identification of *adat* (local customs) as *adat* law (customary law) created by the Dutch, and the growing awareness of *adat's* role in the late nineteenth century encouraged conservative political forces to unify and diminish Islamic forces.[61] Legislation of Islamic law was underprivileged, especially when compared with that of customary law.

The principle of 'to each his own law' in the sense of substantive law was strongly in force. Nonetheless, in terms of procedure, the practice seems more complicated. The basic principle was Dutch law for Europeans, *adat* law for those considered natives, and Islamic personal law

[57] Lev, *Islamic Courts in Indonesia* (n 51) 15.
[58] Hisyam (n 46).
[59] Lev, 'Colonial Law and the Genesis of the Indonesian State' (n 34) 58.
[60] M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press, 1975) 257.
[61] Pompe (n 40) 182.

for Muslims (with an exception of law cases concerning maintenance (*nafkah*), the division of property upon divorce, and inheritance). This sharp legal distinction still leaves problems. The natives were fragmented into some groups, Christians requested to be assimilated into Dutch law, the local aristocracies and elites claimed a privileged procedure, and the legal classification of non-natives and non-Europeans was indistinct.[62] Still, the politics of legal pluralism of the colony worked very well. Despite enjoying judicial autonomy, *adat* and the Islamic judicial system remained controlled under colonial regulation.

The next section will explain the historical development of Sharia in the post-colonial phase in Indonesia. I argue that after independence, the institutionalisation of Islam remained an important issue for Muslims. However, the transformation was not easy because not only Sharia was incorporated into the national law, but also *adat* law. Both Islamic groups and *adat* communities seek different principles of legitimacy.

IV POST-COLONIAL PHASE: INSTITUTIONALISING ISLAM, LEGAL UNIFICATION, AND THE POLITICS OF AN ISLAMIC JUDICIARY

During the last decades of the colonial era not only were the demands for independence strongly voiced, but so too were urgings for the creation of a new legal system that met traditional Indonesian concerns on the one hand and international and modern concerns on the other. What was going on before and after the transfer of sovereignty and independence was no more than the transformation of 'the myths' of the colonies to 'the myths' of the independent state. According to Lev, the use of 'myth' here is to refer to the symbols of legitimacy which are nevertheless major bonds of social, political, economic, and legal life.[63] The transformation of governance structures of former colonies depends on the formation of new ideals, which requires changes to the legal rules that prevailed in the colony.

The demand for institutionalizing Islam remained an important issue, and Islamic law continued to matter greatly in the late colonial administration. At the same time, the escalating dynamics of elite politics and institutional structures gave rise to changes in Islamic law. The incorporation of Islamic law and *adat* law into national law had been accompanied by a certain degree of tension. The main factor was, despite Muslims forming a majority in Indonesia, both *adat* and Islamic groups searching for different principles of legitimacy.

Given the newly-launched Ethical Policy in the early twentieth century which endorsed a more visible, yet half-hearted, humanitarian concern for the natives' welfare,[64] some Islamic groups emerged and seized the opportunity to raise the spirit of anti-colonialism. A few years before, Snouck Hurgronje, an outstanding Dutch scholar on Arabic and Islamic cultures, influenced changes to colonial policy on Islam.[65] An outcome of these processes was an array of legislation transforming the jurisdiction of Islamic law which took place from 1929 to 1938. The 1937 regulation not only authorised the setting-up of an appeal tribunal (*Mahkamah Islam Tinggi*) but was directed to changing the name of the court from *Priesterraad* to *Penghulugerecht*, providing equivalent court structure in South Kalimantan and reforming the

[62] Lev, 'Colonial Law and the Genesis of the Indonesian State' (n 34) 62.
[63] Daniel S. Lev, 'The Lady and the Banyan Tree: Civil-Law Change in Indonesia' (1965) 14 *American Journal of Comparative Law* 282, 306.
[64] Harry J. Benda, 'Decolonization in Indonesia: The Problem of Continuity and Change' (1965) 70(4) *The American Historical Review* 1058, 1060.
[65] Harry J. Benda, 'Christiaan Snouck Hurgronje and the Foundations of Dutch Islamic Policy in Indonesia' (1958) 30(4) *The Journal of Modern History* 338.

adjudication of Islamic courts.[66] The regulation defined the jurisdiction of Islamic courts comprising matrimonial matters (excluding inheritance as it had to go under the competence of the general court). At this juncture, the policy was considered to have curtailed the power of Islamic courts and to have disheartened Islamic law and Muslims.[67]

Prior to and after Indonesia proclaimed its independence, two legal traditions had been available to draw on. Some advocates and intellectuals were keen on the European-oriented legal system and the preservation of the older colonial symbol. Yet the Indonesian majority favoured the minimisation of the political influences entrenched by the colonial system and endorsed the ideas of revolutionary law. This had a historical root in the emerging feelings of anger towards the dominant influence of the colonial past. Women's organisations opposed an orthodox interpretation of Islamic law which allows a husband to divorce or marry more than one wife.[68]

For Islamic groups, the establishment of the Ministry of Religion a year after the proclamation of independence has been very meaningful. It corresponded to the feeling of organisational fragmentation and the appeal for a unitary organisation. Interestingly, notwithstanding being perceived as catering to the interests of all religious groups, the Ministry of Religion was staffed largely by Muslims.[69] According to Lev, this newly-formed Ministry was never fully accepted by non-Islamically oriented nationalists or by Islamic groups themselves.[70] In terms of legal practice, the Ministry of Religion identifies its role as mediating the lacunae between national law and Islamic law. The transfer of Islamic courts from the Ministry of Justice to the Ministry of Religion has been remarkable. Under an Islamic home, Islamic courts permit themselves to function as more than a judicial institution. They are also charged with the responsibility of giving Islamic guidance. The support of the Muslim community, the changing treatment of the kinship system, and civil law play roles altogether. Despite the absence of a legal basis for jurisdiction, the courts remain open to receiving inheritance cases.[71]

The push by some Indonesians for a unified legal system did not come to an end with decolonisation. In terms of the substantive law on marriage, an intense debate over the unification or the diversity of laws continued. Some demanded one law for all of the different religious groups, while others argued for different laws consistent with the tenets of the different religious groups. Religious political parties strived for the latter.[72] It was hardly possible to bring together the conflicting groups to a shared point. Despite the myriad proposals for marriage law reform up to 1973, none of them came into legislation.[73] It was only with the full support from the Suharto government that it was possible for the bill to be brought before the House of Representatives. The role of the Ministry of Religion was terminated at the same

[66] Nurlaelawati (n 36) 47.
[67] Mark Cammack, 'The Indonesian Islamic Judiciary' in R. Michael Feener and Mark Cammack (eds), *Islamic Law in Contemporary Indonesia: Ideas and Institutions* (Harvard University Press, 2007) 146; Mark Cammack and R. Michael Feener, 'The Islamic Legal System in Indonesia' (2012) 21(1) *Pacific Rim Law & Policy Journal* 13; Jan Michiel Otto, 'Sharia and National Law in Indonesia,' in Jan Michiel Otto (ed), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press, 2010) 433.
[68] Cora Vreede-de Stuers, *The Indonesian Woman: Struggles and Achievements* (Mouton, 1960).
[69] van Nieuwenhuijze (n 53) 212.
[70] Lev, *Islamic Courts in Indonesia* (n 51) 45.
[71] Mark Cammack, 'Islamic Law in Indonesia's New Order' (1989) 38(1) *International and Comparative Law Quarterly* 53 ('Islamic Law in Indonesia's New Order').
[72] Nani Soewondo, 'The Indonesian Marriage Law and Its Implementing Regulation' (1977) 13 *Archipel* 283.
[73] June S. Katz and Ronald S. Katz, 'The New Indonesian Marriage Law: A Mirror of Indonesia's Political, Cultural, and Legal Systems' (1975) 23(4) *American Journal of Comparative Law* 653.

time. Muslims felt disappointed in the drafting of the bill, as if they had been left aside. Some articles proposed in the bill were perceived as violating Islamic doctrine. Both Islamic parties and Muslim youths strongly opposed it. The government had to make some careful compromises in its drafting[74] to maintain political stability and meet desires for social reform.[75]

By accommodating the ideas of reformist Muslims, the law strengthened the state's authority to regulate and control family matters. However, with respect to the degree of the influence of Islamic law in the legislation, Muslims were fairly satisfied. The law placed the state apparatus in a vital position as the guardian of marriage. By this law, substantive issues of marriage were addressed by the government through state law[76] in a way that responded to the problems of an entrenched plurality of legal systems, religious affiliations, and local ethnic attachments.[77] The law said much about the dissolution of marriage. Among the important issues were the abolition of the husband's right to unilateral repudiation (*talak*), the making of divorce subject to court review, and the grant of an equal position for both husband and wife to petition for divorce.

The failure of the earlier attempts to impose a secular marriage law enforced by the general court to a certain degree influenced the subsequent direction of the relation between Islam and the state. Instead of curtailing Islamic law and Islamic courts, the government decided to take the side of Islam.[78] From the mid-1980s there had been a seemingly radical shift in the New Order government's policy toward Islam on diverse issues.[79] Given warm treatment by the central government, Muslim scholars and institutions took the opportunity. Among other issues, the proposal of the Ministry of Religion for a legal code regulating Islamic courts was the most prominent. The proposal finally resulted in the Islamic judicature law which came into legislation in 1989.

The important role played by Islamic groups remained visible at the turn of the 1990s. The demand for a uniform substantive law to be used by judges in Islamic courts was obvious. Despite controversies over the provisions, the government agreed to a compilation of Islamic jurisprudence, officially called the *Kompilasi Hukum Islam*. Covering the laws of marriage, inheritance, and endowment, this codification of Islamic law received its legal basis in 1991 from the Presidential Instruction (*Instruksi Presiden*) endorsing all relevant state institutions to refer to it when resolving the issues mentioned.

Compared to marriage and divorce, the issue of inheritance was the most controversial topic debated among legal practitioners. Up to the present, attempts have been made to have a unified law but no single inheritance code has been passed into legislation. Despite the variety of different kinship systems across the entire country, practices of inheritance are dependent upon local features. Meanwhile, complicated issues about how norms interact with the law are usually simplified into a discourse of whether it derives from Islam or *adat*. Despite controversies surrounding the law of inheritance in the compilation, the law, as Otto has argued,

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[74] Ibid.

[75] June S. Katz and Ronald S. Katz, 'Legislating Social Change in a Developing Country: The New Indonesian Marriage Law Revisited' (1978) 26(2) *American Journal of Comparative Law* 309.

[76] M. B. Hooker, 'State and Syarî'ah in Indonesia, 1945–1995' in Timothy Lindsey (ed), *Indonesia: Law and Society* (Federation Press, 1999) 97–110.

[77] Cammack, 'Islamic Law in Indonesia's New Order' (n 71) 61.

[78] Mark Cammack, 'Islam, Nationalism and the State in Suharto's Indonesia' (1999) 17 *Wisconsin International Law Journal* 27.

[79] R. William Liddle, 'The Islamic Turn in Indonesia: A Political Explanation' (1996) 55(3) *Journal of Asian Studies* 613.

almost shares the traditional conception most largely adhered to by the majority of Muslims. One of the provisions demonstrating this reproduction is the stipulation that when a decedent has sons and daughters, the sons have the right to inherit twice the share that belongs to each daughter.[80]

V THE FORMATION OF ISLAMIC LAW AND THE INTERPLAY OF ISLAMIC AUTHORITIES AND THE STATE

The hybrid mixture of Islamic legal authority and polity has played a significant role in the making of Islamic law in Indonesia. While the centrality of Islam for Indonesian culture is indisputable, Sharia in the very sense of Islamic law has been regarded as incapable of being a determinant factor in shaping decisive norms and legal institutions. Moreover, it is evident that during the colonial encounter, there were competing struggles of different groups for the European Dutch legal codes over other preceding norms (Islamic or customary) and the other way around. Instead of creating conflict, the colonial politics of legal plurality and the pattern of indirect rule were quite successful in mobilising the potential of Islam. During this process of negotiation, the colonial state was not the sole actor in the legal sphere: local elites and Islamic leaders played influential roles as well.

The making of Islamic law in Indonesia, which included the transformation of Sharia from jurists' law into state law, is therefore indebted to the interplay of different actors: colonial state, sovereign nation-state, Muslim jurists and scholars, and local leaders. After independence, the Indonesian term *umat* (Ar. *umma*) has been an important political symbol used by Muslims to negotiate their interests in the colonial encounter and the modern state. Devout Muslims had to ally with the local authorities and aristocrats who were in general nominally Islamic. Despite the very hesitancy of Muslim society to give productive meaning to the inevitable modernity, Indonesian Muslims have persistently attempted to prove that Islamic law could be modern and compatible with the concept of the nation-state.

The history of Islamic law in Indonesia has demonstrated that legal systems and judicial institutions are the instruments of not only social but political systems. On the one hand, for devout and active Muslims, Islamic law has been a symbol of the struggle for the observance of God's commands. On the other hand, it is safe to suggest that the political elements in the formation of Islamic law are unavoidable. This framework permits legal scholars or historians to understand the extent to which legal rules and formal structures are constructed, manipulated, accepted, and avoided along with other non-state structures. Islamic law has represented legal authority and polity at the same time. The authority is not necessarily forceful, but a social and political one that makes it possible to gain people's devotion and compliance. In other words, the making of Islamic law has involved political, academic and pragmatic interests.

VI CONCLUSION

The variety of factors has significantly contributed to the extent to which the making of Islamic law in Indonesia underwent substantive changes. The making of Islamic law has encompassed remarkably diverse orientations and interests of religious scholars and the state. While the latter imposed positive legal norms, the former has significantly served as intermediaries. The most important factor is the colonial construction of the category of Islamic law. The colonial power (later on the independent state) and Islamic authorities took part in the negotiation of the

[80] Jan Michiel Otto, 'Islam, Family Law and Constitutional Context in Indonesia' in Eugene Cotran and Chibli Lau (eds) *Yearbook of Islamic and Middle Eastern Law* (Brill, 2009) 82.

content and meaning of Islamic law, contributed to the remaking of definitions, and determined the scope of Islamic law. However, Islamic law needed to attain an adjustment to the notions of modern law and national sovereignty to make such substantive legal changes possible.

In Indonesia, after the demise of colonialism, the political support of the sovereign state, which involved Muslim jurists in the making of new interpretations of classical *fiqh* doctrine, was fundamental. Another important factor in the reformulation of new understandings of Islam, law and culture is the construction of political symbolism. The centrality of the substantive Islamic law, largely represented in personal status, has little effect on Muslim life up to the present day. This process has become an indispensable part of the development of Islamic law. Nevertheless, the Indonesian case had a special characteristic, since Indonesia is a nation with a high degree of cultural diversity. One day after Indonesia proclaimed its independence on 17 August 1945, the Constitution was commenced. The Constitution explicitly declares the concept of *negara hukum* (state based on rule-of-law, *rechtsstaat*).[81] This wording implies an important meaning that the rule of law is to persistently guide the further development of the nation, not the state authority. At the surface level, there have never been disputes over the state principle. The majority of the people were fairly satisfied with such a new development. However, the intense contestations over what ideology ought to lead the nation did not necessarily disappear.

The different ideological interests of some Islamic groups influenced the direction of the relationship between state sovereignty and religious laws. Therefore, the making of the national legal system has involved the processes of contestation and resolution between local cultures, colonial European law and Islamic norms for centuries. However, for Muslims, the issue was not only the formation of the national legal system but the rules about matrimonial matters as regulated in Islamic legal doctrines. Through Islamic legal matters, which have been broken down to stipulations on a private sphere or personal status, devout Muslims found it important to claim a clearer position of the relationship between Islam and state authority. For them, Islamic personal status has turned into a fundamental Islamic identity.

[81] Daniel S Lev, 'Judicial Authority and the Struggle for an Indonesian Rechtsstaat' (1978) 13(1) *Law & Society Review* 37, 43–44.

Religious Freedom, Section 109 of the *Constitution*, and Anti-discrimination Laws

Neil Foster*

Many Australian anti-discrimination statutes contain special provisions to balance equality with religious freedom. However, if these religious freedom provisions in state anti-discrimination laws are narrowed too much, the laws may become inoperative by virtue of s 109 of the Australian Constitution, *which says that an inconsistency between State and Commonwealth law shall be resolved in favour of the latter. This article explores the relationship between religious freedom, s 109 of the* Australian Constitution*, and anti-discrimination laws. It concludes that, to avoid constitutional difficulty, states should ensure religious freedom provisions in their anti-discrimination statutes are at least as wide in scope and effect as that provided by the Commonwealth in its anti-discrimination statutes.*

I INTRODUCTION

One of the ways that religious freedom is protected in Australia at the moment is through recognition of the right in 'balancing clauses' that are included in laws prohibiting unjust discrimination.[1] These clauses recognise that prohibitions on unjust discrimination need to be balanced with other important rights, including the significant internationally-recognised right to religious freedom.[2] Even laws that explicitly prohibit religious discrimination recognise that in some contexts religious beliefs are a valid ground of decision-making.

In recognition of the need to protect Australians from religious discrimination, and in response to the report of a committee of inquiry into the issue,[3] the Federal government in November 2021 introduced a Bill to address these and other issues.

The Religious Discrimination Bill was, however, stalled in the Senate, and lapsed with the calling of the 2022 federal election.[4] It is now not clear whether, and in what form, the new federal Labor government will deal with these issues. It seems appropriate, therefore, to ask the question whether, even in the absence of a Commonwealth law forbidding religious

* Associate Professor of Law, Newcastle Law School, NSW.

[1] See Neil J Foster, 'Freedom of Religion and Balancing Clauses in Discrimination Legislation' (2016) 5 *Oxford Journal of Law and Religion* 385. These clauses are sometimes described as 'exceptions' or 'exemptions' in the legislation — see Part III, below, for comment on why these terms are inappropriate. The terminology of 'balancing clause' does not refer to the form of the provisions — they do not explicitly empower courts to undertake the balancing process between different rights. But they represent a balancing process undertaken by parliaments which courts are to apply to achieve these ends.

[2] See, eg, art 18 of the *International Covenant on Civil and Political Rights*, opened for signature 19 Dec 1966, 999 UNTS 171 (entered into force 23 March 1976).

[3] See Department of the Prime Minister and Cabinet, *Religious Freedom Review* (Final Report, 18 May 2018), (also known as the 'Ruddock Report').

[4] While the Bill passed the House of Representatives on the early morning of February 10, 2022, it did so having been amended by a motion moved by the Opposition (and supported by some back-benchers from the Government crossing the floor) in a form that the Government found unacceptable. The Bill had its formal First Reading in the Senate later that day, and the Second Reading was moved, but neither major party tried to bring it on for debate before the election was called. For more details see Parliament of Australia, *Religious Discrimination Bill 2022* <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6821>.

discrimination, s 109 of the *Constitution* may provide a defence where religious bodies (including religious educational institutions) are sued for discrimination under State laws which provide narrower protections than federal law.

This paper outlines the need for, and provides some examples of, balancing clauses in discrimination law generally. It then surveys these clauses as implemented in Commonwealth and state laws on the topic, noting their similarities but also where they differ. It considers two specific examples of state laws which provide much narrower balancing clauses than provided under Commonwealth law. It then discusses the application of s 109 of the *Constitution* to this situation and argues that where these state laws impair or detract from rights of protection given by federal law, those laws will, to that extent, be inoperative. These views are supported by both judicial and academic comment. The paper considers arguments which might be made against this view, but concludes in the end that the case for s 109 inconsistency remains strong, and that where Commonwealth law provides protection for the religious freedom of individuals and organisations, state laws purporting to impair such protection cannot actually do so.

II Background

This paper is particularly concerned with what might be called 'balancing clauses' or 'exemptions', which are used in discrimination laws at both the state and federal level. These provisions recognise that a prohibition on 'discrimination' (if viewed as simply meaning 'differential treatment') must be qualified by recognition that there are other rights at stake, rights other than the right not to be differentially treated on prohibited grounds. International human rights laws recognise this; see, for example, the view of the UN Human Rights Committee in its general comment on discrimination, where the committee comments that

> not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[5]

Examples of such differential laws are provided below, in Part III (non-religious contexts) and Part IV (religious contexts).

Current laws prohibiting discrimination recognise that actions which on general grounds might be seen as 'discriminatory' should not be unlawful where the actions, and their reasons, are informed by a religious worldview which sees certain criteria as relevant to decisions, not *ir*relevant.

III Reasons For Balancing Clauses

It could be argued that there are two justifications for these balancing clauses: (1) that the right to religious freedom of religious groups and persons needs to be recognised; and (2) that a decision based on a relevant religious reason, made by a religious body or person, is not in any event 'discriminatory'. For example, to move away from the religious area for the moment, how would one describe a decision by a clothing store to only employ female staff to monitor and supervise female changing rooms?

[5] Human Rights Committee, *General Comment No. 18: Non-discrimination*, 37th sess, UN Doc CCPR/C/GC18 (10 November 1989) para 13.

Such a decision is permissible under the federal *Sex Discrimination Act 1984* (Cth) ('*SDA*'). While there is a general prohibition on discrimination based on sex in work arrangements in s 14 of the *SDA*, we read the following in s 30:

> (1) Nothing in paragraph 14(1)(a) or (b), 15(1)(a) or (b) or 16(b) renders it unlawful for a person to discriminate against another person, on the ground of the other person's sex, in connection with a position as an *employee*, *commission agent* or *contract worker*, being a position in relation to which it is a *genuine occupational qualification* to be a person of a different sex from the sex of the other person.[6]
>
> (2) Without limiting the generality of subsection (1), it is a genuine occupational qualification, in relation to a particular position, to be a person of a particular sex (in this subsection referred to as the ***relevant sex***) if:…
>
> > (c) 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.[7]

Section 30 is found in Division 4 of Part II of the Act, headed 'Exemptions'. It is submitted that the terminology 'balancing clauses' is more appropriate, because where something is labelled an 'exemption' there is often an implied judgment that such provisions are a temporary and unprincipled departure from a general rule, which should be removed as soon as possible. To the contrary, provisions in Division 4 are important and enduring clauses designed to balance other important rights. In this instance, the rights being recognised are rights of 'decency' and 'privacy', rights which may be seen as historically being particularly important to women.

On the other hand, one could argue that s 30 of the *SDA* was not entirely necessary, because a decision not to employ a man in a female changing room could be said in any event not to be an act of 'sex discrimination'. Consider how the term is defined in s 5 of the *SDA*:

> (1) For the purposes of this Act, a person (in this subsection referred to as the ***discriminator***) discriminates against another person (in this subsection referred to as the ***aggrieved person***) on the ground of the sex of the aggrieved person if, by reason of:
>
> > (a) the sex of the aggrieved person; …
>
> the discriminator treats the aggrieved person less favourably than, in *circumstances that are the same or are not materially different,* the discriminator treats or would treat a person of a different sex.[8]

A decision not to employ a man in a woman's change room is indeed one that has been made 'by reason of the sex' of the applicant; and it could be said that they have received 'less favourable' treatment by not being employed. But the employer could well respond that the 'circumstances' of the potential employee *are* 'materially different' from those of a potential

[6] *Sex Discrimination Act 1984* Cth s 30(1) (emphasis added) ('*SDA*').
[7] Ibid s 30(2) (c) (emphasis in original).
[8] Ibid s 5(1)(a) (bold emphasis in original) (italics emphasis added).

female employee, precisely because human experience tells us that for many women, issues of dignity and privacy are indeed raised by having a male in a change room.

However, while this argument might be made, the wisdom of including s 30(2)(c) to avoid doubt on the issue is clear. Rather than having to enter a complex debate about the relevant 'circumstances', Parliament has made a clear provision outlining when this specific decision is not considered unlawful. Balancing clauses dealing with religious bodies play a similar role.

IV RELIGIOUS BALANCING CLAUSES

For religious groups, these issues are mainly raised by sex discrimination legislation. There may be issues under other laws, but sex discrimination laws are the main focus of this paper.[9] Religious groups will be concerned about behaviour by employees and others that contravenes strong moral prohibitions in their faith. In general terms, what might be called the 'Abrahamic' faiths (Judaism, Christianity and Islam), as understood throughout most of their history have taught that sexual relationships are only legitimately entered into between a biological man and a biological woman who have committed themselves to each other in marriage. Homosexual activity is outside those limits, as is premarital and extra-marital heterosexual sex of all kinds. The traditional understanding of, for example, the Christian Bible, is that human beings in the image of God come in two forms, male and female, and those identities are fixed and cannot be changed.[10] Not all roles in the church, or in the family, are equally open to both sexes. Many churches believe that only men are able to be appointed as priests or senior ministers.

Issues for religious bodies are then raised by discrimination laws which forbid discrimination on the grounds of sex, or marital status, or gender identity, or sexual orientation. In some of those areas it is sometimes suggested by religious groups that they are entitled to make decisions on the basis of 'conduct' so long as they do not automatically discriminate on the grounds of inherent 'identity'. But a number of decisions at the highest level from around the world hold that, if a criterion relates to a person expressing their 'identity' in sexual activity, then that criterion will be legally discrimination based on the prohibited ground of sexual orientation.[11] Explicit balancing clauses are required to protect action in accordance with faith commitments in these situations.

A *Federal Balancing Clauses in* SDA

In broad terms the *SDA* provides balancing clauses which allow some of these decisions to be made in accordance with faith commitments, even apart from arguments about whether something is actually 'discrimination' or not. The principally relevant provisions are s 37 ('Religious Bodies') and s 38 ('Educational Institutions Established for Religious Purposes').

[9] Somewhat oddly, there is a religious balancing clause in s 35 Age *Discrimination Act 2004* (Cth). A provision not very widely used in litigation, but presumably inserted to allow specific rules about 'rites of passage'. For example, an Anglican bishop only confirming someone at the age of 13, or a Jewish congregation setting an age for a bar mitzvah.

[10] See, eg, Genesis 1:27.

[11] See, in Australia, comments in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75, [57] (Maxwell P); in the UK, *Bull & Bull v Hall & Preddy* [2014] 1 WLR 3741, [52] (Hale LJ) 'Sexual orientation is a core component of a person's identity which requires fulfilment through relationships with others of the same orientation'; and in the US, *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez* 561 US 661 (2010). For a detailed comment as to why this US decision was wrong, see Michael W. McConnell, 'Freedom of Association: Campus Religious Groups' (2020) 97 *Washington University Law Review* 1641.

Section 37(1) states:

> Nothing in Division 1 ['Discrimination in Work]' or 2 ['Discrimination in Other Areas'] 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.[12]

Section 38 states:

> (1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the *other person's sex*, *sexual orientation*, *gender identity*, *marital or relationship status* or *pregnancy* in connection with *employment* as a member of the staff of an *educational institution* that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.[13]

Section 38 provides similar balancing clauses found 'in connection with a position as a contract worker' covered under s 16(b)[14] and 'in connection with the provision of education or training by an educational institution' covered by s 21.[15]

It is not entirely clear why s 38 was considered necessary, given that s 37 was present. One explanation may be that a 'faith-based school' (a religious educational institution) may be 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed'[16] but not actually be currently operated by 'a body established for religious purposes'.[17] So, s 38 may protect a school where its governing documents require it to confirm to Christian or Muslim principles, for example, even though the board do not share those principles.

[12] *SDA* (n 6) s 1(a)–(d) (emphasis added). Section 37(2)(a)–(b) of the *SDA* provides that 's 37(1)(d) does not apply to an act or practice of a body established for religious purposes if the act or practice is connected with provision of *Commonwealth-funded aged care* and the act or practice is not connected with the *employment* of persons to provide that aged care' (emphasis added).
[13] Ibid s 38(1) (emphasis added).
[14] Ibid s 38(2).
[15] Ibid s 38(3).
[16] Ibid s 38(1).
[17] Ibid s 7(1)(d).

While this view seems plausible, it does not appear to be articulated in the traditional sources for determining Parliamentary intention. The second reading speech for the Sex Discrimination Bill 1983 in the House of Representatives drew attention to these exemptions:

> Clause 37 exempts acts and practices of religious bodies. Clause 38 provides for an exemption for certain practices in regard to employment and education in educational institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed.[18]

The Explanatory Memorandum for the Sex Discrimination Bill 1983, while providing more detail, unfortunately is no clearer on this point.

> [Clause 37] provides an exemption from Divisions 1 and 2 of this Part in regard to certain activities of religious bodies including the education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order.[19]
>
> [In Clause 38] [s]ub-clause (1) of this clause provides an exemption in relation to discrimination on the ground of sex, marital status or pregnancy for the hiring or dismissal of staff for employment at an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a religion or creed where the discrimination is done in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.[20]
>
> [And] [s]ub-clause (2) provides a similar exemption in relation to the hiring or dismissal of contract workers. Sub-clause (3) provides a similar exemption in relation to discrimination on the grounds of marital status or pregnancy for educational institutions with regard to their educational practices.[21]

Could *both* provisions be relied on by a faith-based school, or not? It could be argued that a school cannot rely on s 37, as its only protection is intended to be given by s 38. It seems unlikely, however, that this view is correct. Section 37 contains no such 'carve-out', which would have been easy enough to include if this was what Parliament intended.

Are the protections provided by s 38 less than those provided by s 37? Table 1 suggests that they are, slightly.

[18] Commonwealth, *Parliamentary Debates,* House of Representatives, 28 February 1984, 67 (Mick Young, Special Minister of State).
[19] Explanatory Memorandum, Sex Discrimination Bill 1983 (Cth) 10.
[20] Ibid 10-11.
[21] Ibid 10-11.

Table 1: Difference between protections provided by sections 37 and 38 of the SDA.

Area of operation	**Section 37 *SDA***	**Section 38 *SDA***
Applies to…	'any other act or practice' of the religious group	Decisions in relation to employees, contractors and students
Which type of discrimination is excluded?	'Nothing in Division 1 or 2' will apply; ie discrimination based on all the prohibited grounds 1. Sex 2. sexual orientation, 3. gender identity *4. intersex status* 5. marital or relationship status 6. pregnancy or potential pregnancy, 7. *breastfeeding* or *8. family responsibilities.*	Decisions protected are those based on 1. sex 2. sexual orientation 3. gender identity 4. marital or relationship status or 5. pregnancy
To what religious grounds does the exemption apply?	To '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'	To 'discriminat[ion] in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'

The result of this comparison is that it does seem that the s 38 protections are not as extensive as those under s 37. This might suggest that s 37 may be seen to be not available to schools. But this view is not inevitable. As noted above, s 37 contains no indication that it is intended to operate completely separately from s 38.

In particular, a school that was actually conducted by a religious body could legitimately argue that it should be entitled to the full range of protections under s 37, since the s 38 lesser protections are only intended to be used by schools which are only 'historically' religious, in the situation noted above, where the current management of the school does not share the religious beliefs on which the school is intended to operate. (This would give s 38 genuine work to do, as otherwise it could be argued that it would be otiose.)

It is worth noting that the view that both sections may be applicable to schools conducted on religious grounds by religious bodies seems to lie behind amendments which were introduced into Federal Parliament by Ms Sharkie (Independent) during the debate on the Human Rights Legislation Amendment Bill 2021, and cognate legislation.[22]

[22] See Commonwealth, *Parliamentary Debates,* House of Representatives, 9 February 2022, 280 (Rebekha Sharkie, Member for Mayo). The amendment repealed s 38(3) of the *SDA* and at the same time amended s 37 to make it clear that a religious school could not rely on s 37 once the relevant provision of s 38 had been removed. The amendment was notable in that it passed the House without the official support of the government, 5 members of the government crossing the floor. But as noted previously, the amended package of legislation of which this was a part did not pass the Senate prior to the prorogation of Parliament for the 2022 election.

B *State Balancing Clauses Relating to these Issues*

Protections of the sort noted here at the federal level are not always so clearly provided at the state and territory level.[23] We may take two jurisdictions where currently protections are much reduced from the federal standard — Tasmania and Victoria.

1 *Tasmania*

Section 52 of the *Anti-Discrimination Act 1998* (Tas) ('Tas *ADA*') only allows discrimination 'on the ground of religious belief or affiliation or religious activity' to be justified by *religious* views (the other grounds of discrimination, such as sexual orientation or gender identity, are not covered by this exemption). In addition, s 52(d) requires that an otherwise discriminatory decision outside the narrow area of ordination, etc, must be (i) 'in accordance with the doctrine of a particular religion; *and* (ii) 'necessary to avoid offending the religious sensitivities of any person of that religion.'[24] This seems to be the only example in Australia where *both* criteria must be satisfied.

Indeed, if it were not for the separate s 27(1)(a) (in Div 2 'Exceptions Relating to Certain Attributes') which seems to narrowly cover the point so long as 'religious institution' (otherwise undefined) includes churches, Tasmania would be the only jurisdiction prohibiting the Roman Catholic church from only ordaining male priests. As it is, that policy is allowable.

But there seems no provision allowing a church in Tasmania, when deciding whether or not to ordain a person as a priest or appoint them as a congregational minister, to decline to appoint someone who is a practicing homosexual, or who is in a heterosexual unmarried (de facto) relationship. Such a decision would arguably be contrary to paras 16(c) and (d) of the Tas *ADA*. Appointment of a member of the clergy would probably be covered by the Tas *ADA*, even though s 22(1)(a) only refers to 'employment' as a prohibited area of discrimination and ministers of religion are not usually 'employees'. The extended definition of 'employment' in s 3 picks up 'engagement under a contract for services'. It would certainly seem that the provision would prevent a church, for example, from refusing to employ a youth worker in one of these categories.

2 *Victoria*

Consider the situation that pertains in Victoria now that the recent *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic) ('*Vic EOREA Act*') has commenced operation.[25] There are a number of consequences for religious bodies and schools.

Religious bodies (including schools) may not, under s 82A of the amended *Equal Opportunity Act 2010* (Vic) ('Vic *EOA*'), make staffing decisions based on whether or not the staff member agrees with the fundamental moral values being taught by the body or school; the grounds on which a staff member can be hired or fired are limited to 'religious belief' *alone* (and it seems from the way this is worded, to mean that this will apply even to someone hired as a 'religious

[23] For an overview of balancing clauses for religious groups under different jurisdictions, see Neil J Foster 'Protecting Religious Freedom in Australia Through Legislative Balancing Clauses' (14 June 2017) *Occasional Papers on Law and Religion* < http://works.bepress.com/neil_foster/111/>. See also, Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-Discrimination Law and Implications for Reform' (2020) 47(1) *University of Western Australia Law Review* 112.

[24] *Anti-Discrimination Act* 1998 (Tas) s 52(d)(i)-(ii) ('Tas *ADA*').

[25] The amending Act received the Royal Assent on 14 December 2021. Division 1 of Part 2 commenced operation on 14 June 2022. This Division contains the provisions with most impact on schools and religious bodies in general.

studies' teacher.) This rule will also apply (after a further 6 months) to any organisation 'providing services funded by the Victorian Government'.[26]

All schools and 'religious bodies' (however that is defined) can *only* make an otherwise 'discriminatory' staffing decision based on religious beliefs when it is justified in doing so by demonstrating that the 'inherent requirements' of the position require such a criterion.[27] The implication is that a secular Victorian tribunal or court will have to determine whether such requirements are applicable by examining the religious beliefs of the body or school for themselves.[28] In addition it will need to be demonstrated (again to whatever secular body has to decide) that this decision is 'reasonable and proportionate in the circumstances'.[29]

For current purposes those general impacts are enough to see the clash with Commonwealth law. Table 2 illustrates the point.

Table 2: Rights given by the Commonwealth SDA *taken away by State laws.*

Rights given by Cth law (*SDA* s37, s 38)	**Tasmanian *ADA* 1998**	**Victorian *EOA* 2010 (as amended)**
Religious body may decline to employ staff member living in de facto relationship or otherwise openly rejecting religious moral values regarding sexual relationships.	Such a decision cannot be made as no part of s 52 allows discrimination on these grounds.	Does not allow a decision to be made on this basis. *EOA* s 82A seems to only allow discrimination based on 'religious belief'. See s 82A(3): 'This section does not permit discrimination on the basis of any attribute other than as specified in subsection (1)'.[30]
Schools run on religious grounds may decline to employ staff in above circumstances.	Again, no provision of the *ADA* allows this.	Does not allow a decision to be made on this basis. *EOA* s 83A applies to schools in relation to religious belief, but not to other grounds.

V APPLICATION OF S 109

The question, then, is whether these State laws can limit a right or privilege given by Commonwealth law. This raises issues under s 109 of the *Constitution*, which reads:

> When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

There is, of course, a lot of jurisprudence and scholarship on this provision. But to briefly summarise: the *Constitution* has as one of its functions the allocation of law-making responsibility between the Federal and the various State and Territory Parliaments. Where there

[26]Section 82B of amended *Equal Opportunity Act 2010* (Vic) ('Vic *EOA*').
[27] Section 82A(1)(a) of amended Vic *EOA*.
[28] See Neil Foster, 'Victorian Religious Exceptions Amendment Bill Introduced' *Law and Religion Australia* (Blog Post, Oct 28, 2021) <https://lawandreligionaustralia.blog/2021/10/28/victorian-religious-exceptions-amendment-bill-introduced/> .
[29] Section 82A(1)(c) of amended Vic *EOA*.
[30] It has to be said that s82A(1) is ambiguous in specifying what prohibited ground it refers to. Still, the focus is on the 'religious belief or activity' of the complainant under s 82A(1)(b), so presumably the intention is that that ground is the only area where the limited rights given by s 82A apply.

are multiple legislative bodies, there is always the dilemma of conflicting commands. Section 109 of the *Constitution* resolves that clash in favour of the Commonwealth Parliament.

It has been suggested that there are two main ways in which s 109 can operate. In one situation, sometimes described as 'direct' inconsistency, there is an obvious clash — for example, a state law may impose an obligation to act in a way which a Commonwealth law says is unlawful. Another situation is sometimes described as 'indirect' inconsistency, and the common example given is where the Commonwealth has 'covered the field' so as to exclude State laws on a matter.

The general approach to inconsistencies was summed up most recently by the majority in *Work Health Authority v Outback Ballooning Pty Ltd ('Outback Ballooning')*[31] as follows:

> In *Victoria v The Commonwealth* ('*The Kakariki*'), Dixon J referred to two approaches which might be taken to the question whether an inconsistency might be said to arise between State and Commonwealth laws. They were subsequently adopted by the Court in *Telstra Corporation Ltd v Worthing*, *Dickson v The Queen* and *Jemena Asset Management Pty Ltd v Coinvest Ltd*.
>
> The first approach has regard to when a State law would 'alter, impair or detract from' the operation of the Commonwealth law. This effect is often referred to as a 'direct inconsistency'. Notions of 'altering', 'impairing' or 'detracting from' the operation of a Commonwealth law have in common the idea that a State law may be said to conflict with a Commonwealth law if the State law in its operation and effect would undermine the Commonwealth law.
>
> The second approach is to consider whether a law of the Commonwealth is to be read as expressing an intention to say 'completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed'. This is usually referred to as an 'indirect inconsistency'. A Commonwealth law which expresses an intention of this kind is said to 'cover the field' or, perhaps more accurately, to 'cover the subject matter' with which it deals. A Commonwealth law of this kind leaves no room for the operation of a State or Territory law dealing with the same subject matter. There can be no question of those laws having a concurrent operation with the Commonwealth law.[32]

Gageler J, while agreeing with the order of the majority, suggested a slightly different approach, as his Honour reasoned legislation was more complex than use of a clear dichotomy between 'direct' and 'indirect' inconsistency.[33] His Honour noted that even where Commonwealth law expressed a general intention to allow State law to operate:

> Few Commonwealth laws are framed to operate cumulatively upon the entire corpus of State and Territory laws. Most Commonwealth laws will have a definite area of affirmative operation which will admit of the concurrent operation of some, but not all, State and Territory laws.[34]

[31] (2019) 266 CLR 428 ('*Outback Ballooning'*).
[32] Ibid 446-7, [32]-[34] (Kiefel CJ, Bell, Keane, Nettle, and Gordon JJ) (citations omitted).
[33] *Outback Ballooning* (n 31) 456-61, [64]-[78] (Gageler J).
[34] *Outback Ballooning* (n 31) 457, [68] (Gageler J).

In the scenario we are considering, it can be argued that a right given to religious bodies and schools by Commonwealth law has been reduced or removed by State law.[35]

Section 109 renders State law inoperative where it clashes with Federal law. As noted above, one recognised type of clash is where the Federal law has 'covered the field'. This type of clash, however, is not applicable to laws currently being considered, since most discrimination laws contain 'non-field-covering' provisions.

These provisions were added following the decision in *Viskauskas v Niland*, [36] where the High Court ruled that the New South Wales provisions of the *Anti-Discrimination Act 1977* relating to racial discrimination were inoperative due to the 'covering' of the relevant field by the Commonwealth *Racial Discrimination Act 1975* ('*RDA*').

To overcome that problem, and allow State law on the area of discrimination to have concurrent operation with federal law, all Commonwealth discrimination laws since that decision have contained a 'non-field-covering' clause to make it clear that State law on the matter is to be allowed to operate generally so long as it does not directly clash with the Commonwealth law. Such a provision is to be found in s 10 of the *SDA*:

> A reference in this section to a law of a State or Territory is a reference to a law of a State or Territory that deals with discrimination on the ground of sex, discrimination on the ground of sexual orientation, discrimination on the ground of gender identity, discrimination on the ground of intersex status, discrimination on the ground of marital or relationship status, discrimination on the ground of pregnancy or potential pregnancy, discrimination on the ground of breastfeeding or discrimination on the ground of family responsibilities.
>
> This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of *operating concurrently* with this Act.[37]

This means that State law on discrimination may continue to operate, so long as it is 'capable of operating concurrently' with the *SDA*. But what does this mean? Clearly where a person is bound to do an act under the Commonwealth law, but forbidden from doing it by the State law, then the State law will be inoperative.

However the further question that arises here is, suppose a person is *permitted* to do something under the Commonwealth law, but *forbidden* from doing it under State law, is there a relevant clash? In short, the authority of the High Court is that in such a case, the State law is inoperative. There can be no concurrent operation in such a situation. This is a case of 'direct', rather than 'indirect', inconsistency.

[35] A similar argument can be made in relation to ACT law; with relevant minor adaptations, it seems likely that a view reached on a clash between State and Commonwealth law under s 109, will also be applicable to the relevant provisions preventing Territory laws from clashing with federal laws.
[36] *Viskauskas v Niland* (1983) 153 CLR 280.
[37] Section 10 (2)–(3) *SDA* (emphasis added).

Viskauskas v Niland[38] deals with this precise issue. While the main ground of the decision was that the Commonwealth law 'covered the field', the court did address the situation that would arise if they had not found this.

> It appears from both the terms and the subject matter of the Commonwealth Act that it is intended as a complete statement of the law for Australia relating to racial discrimination.[39]

Their reasoning went further:

> *Even if that were not so*, the provisions of s 19 of the State Act deal with the subject of racial discrimination in relation to the provision of goods and services in terms substantially similar to those of s 13 of the Commonwealth Act. The consequences provided by the respective Acts for breaches of the sections, although in some respects similar, are not the same…[40]

In other words, even if the Commonwealth Act did not cover the field, there would be s 109 inconsistency if the two Acts had different penalties or outcomes for similar behaviour. The same reasoning would also clearly apply where the relevant area of activity was the same but different behaviour was made unlawful; for example, a religious body conducting a school faced with a claim of sexual orientation discrimination where different 'defences' applied.

One example may be seen outside the specific area of discrimination law in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd.*[41] A defence which was available under Commonwealth law would have been precluded from being raised if the relevant State law was operative. The NSW Court of Appeal held that since this was the case, the State law was inoperative to that extent. This was because of 'the existence of a right arising under a Commonwealth law and the direct impairment of its enjoyment, as a result of the operation of a State law'.[42]

One of the first High Court cases dealing with this issue was *Clyde Engineering Co Ltd v Cowburn*.[43] Commonwealth law set a maximum 48-hour week for workers; NSW law set a maximum 44-hour week. In theory both laws could have been obeyed if an employer engaged an employee for only 44 hours. But the majority of the High Court (agreeing with arguments put forward by senior counsel Owen Dixon KC) held that the right of an employer to expect a 48-hour week could not be taken away by the state law:

> Statutes may do more than impose duties: they may, for instance, confer rights; and one statute is inconsistent with another when it takes away a right conferred by that other even though the right be one which might be waived or abandoned without disobeying the statute which conferred it.[44]

[38] *Viskauskas v Niland* (n 35).
[39] Ibid 292 (Gibbs CJ, Mason, Murphy, Wilson, and Brennan JJ).
[40] Ibid (emphasis added).
[41] [2006] NSWCA 238.
[42] Ibid [115] (Basten JA).
[43] (1926) 37 CLR 466.
[44] Ibid 478 (Knox CJ and Duffy J; Isaacs J agreeing at 499)

Another example of this sort of principle can be seen in *Colvin v Bradley Brothers Pty Ltd*[45] where Commonwealth law gave a right to employers to employ women on certain machines, but State law prohibited such employment. In the circumstances, the State law was inoperative, as it would have impaired the enjoyment of a right given by the Commonwealth law.

A more recent important case where this issue arose was in *Dickson v The Queen ('Dickson').*[46] The Commonwealth law made a conspiracy to steal Commonwealth property a crime in certain circumstances, but Victorian law imposed criminal liability in a broader set of circumstances. The High Court unanimously ruled that the Victorian provision was inoperative.

The Court summed up previous authority on the matter in this way:

> The statement of principle respecting s 109 of the Constitution which had been made by Dixon J in *Victoria v The Commonwealth*[47] was taken up in the joint reasons of the whole Court in *Telstra Corporation Ltd v Worthing*[48] as follows:
>
> 'In *Victoria v The Commonwealth*,[49] Dixon J stated two propositions which are presently material. The first was: "When a State law, if valid, would *alter, impair or detract from* the operation of a law of the Commonwealth Parliament, then to that extent it is invalid"'…[50]
>
> The passage in *Telstra* which is set out above [at 13] was introduced by a discussion of earlier authorities which included the following:[51]
>
> 'Further, there will be what Barwick CJ identified as "direct collision" where *the State law, if allowed to operate, would impose an obligation greater than that for which the federal law has provided.*[52] Thus, in *Australian Mutual Provident Society v Goulden*,[53] in a joint judgment, the Court determined the issue before it by stating that the provision of the State law in question "would qualify, impair and, in a significant respect, negate the essential legislative scheme of the *Life Insurance Act* 1945 (Cth)". A different result obtains if the Commonwealth law operates within the setting of other laws so that it is supplementary to or cumulative upon the State law in question.[54] But that is not this case.'[55]

The Court stressed that this operation of s 109 was important 'not only for the adjustment of the relations between the legislatures of the Commonwealth and States, but also for the citizen

[45] (1943) 68 CLR 151.
[46] (2010) 241 CLR 491 ('*Dickson*').
[47] Ibid 502[13] n 31.
[48] Ibid 502 [13] n 32.
[49] Ibid 502 [13] n 33 (emphasis added).
[50] Ibid 502 [13] ((French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ).
[51] Ibid 503 [15] n 34.
[52] Ibid 503[15] n 35 (emphasis added).
[53] Ibid 503 [15] n 36. See also *Outback Ballooning* (n 31) 468 [69] (Gaegler J).
[54] Ibid 503[15] n 37.
[55] Ibid 503 [15] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ).

upon whom concurrent and cumulative duties and liabilities may be imposed by laws made by those bodies.'[56] The Court concluded that the State law was inoperative:

> The direct inconsistency in the present case is presented by the circumstance that s 321 of the *Crimes Act* (Vic) renders criminal conduct not caught by, and indeed deliberately excluded from, the conduct rendered criminal by s 11.5 of the *Criminal Code* (Cth). In the absence of the operation of s 109 of the *Constitution*, the *Crimes Act* (Vic) will *alter, impair or detract from* the operation of the federal law by proscribing conduct of the appellant which is left untouched by the federal law. The State legislation, in its application to the presentment upon which the appellant was convicted, would undermine and, to a significant extent, negate the criteria for the existence and adjudication of criminal liability adopted by the federal law. No room is left for the State law to attach to the crime of conspiracy to steal property in the possession of the Commonwealth more stringent criteria and a different mode of trial by jury. To adapt remarks of Barwick CJ in *Devondale Cream*, the case is one of 'direct collision' because *the State law, if allowed to operate, would impose upon the appellant obligations greater than those provided by the federal law*.[57]

These remarks are directly applicable to the situation created by the 'overlapping prohibitions' which would be set up if the Victorian and Tasmanian laws were allowed full operation in relation to religious bodies and schools. The Commonwealth *SDA* s 37 would, for example, allow a religious organisation to adopt a policy that would involve not hiring a person advocating and living out a policy that favoured sex outside marriage (arguably their 'marital status'), because hiring such a person would either inflict 'injury to the religious susceptibilities' of believers, or not be in conformity with the 'doctrines, tenets or beliefs' of the religion.

However, such an organisation, if the Victorian and Tasmanian laws described above were operative, would be acting unlawfully. It seems fairly clear that this would be a 'direct impairment' by a State law of a right given by a Commonwealth law through consideration of the operation of s 109. To adapt the language of the *Dickson* judgment,[58] the Victorian law 'would alter, impair or detract from the operation of the federal law by proscribing conduct of the [organisation] which is left untouched by the federal law' and 'the State law, if allowed to operate, would impose upon the [organisation] obligations greater than those provided by the federal law'.

As a result, it seems likely that these provisions of the State laws would be 'inoperative' in this sort of case by virtue of s 109 of the Constitution.

In *Outback Ballooning,* Gageler J summed up the law on this aspect of s 109:

> A State or Territory law is inconsistent with a Commonwealth law to the extent that the State or Territory law, if operative, would 'alter, impair or detract from the operation' of the Commonwealth law. If the Commonwealth law 'was intended as a complete statement of the law governing a particular matter or set of rights and

[56] Ibid 503-4 [19] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ).
[57] Ibid 504 [22] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ) (emphasis added) (citations omitted).
[58] See ibid.

> duties, then for a State [or Territory] law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent'.[59]

Later in that decision his Honour expounded upon *Australian Mutual Provident Society v Goulden*,[60] where federal law was found to prevail over a state discrimination law:

> There the Court held that the *Life Insurance Act 1945* (Cth), although 'framed on the basis that it will operate in the context of local laws of the various States and Territories of the Commonwealth', 'should be understood as giving expression to a legislative policy that the protection of the interests of policy holders is to be achieved by allowing a registered life insurance company to classify risks and fix rates of premium in its life insurance business in accordance with its own judgment founded upon the advice of actuaries and the practice of prudent insurers'. In its application to regulate the life insurance business of a registered life insurance company, the prohibition in the *Anti-Discrimination Act 1977* (NSW) of 'discrimination against a physically handicapped person on the ground of his physical impairment in the terms or conditions appertaining to a superannuation or provident fund or scheme' was held to be inconsistent with the *Life Insurance Act* because the prohibition would 'effectively preclude such companies from taking account of physical impairment in classifying risks and rates of premium and other terms and conditions of insurance in the course of their life insurance business in New South Wales' and would thereby '*qualify, impair and, in a significant respect, negate the essential legislative scheme* of the Commonwealth *Life Insurance Act* for ensuring the financial stability of registered life insurance companies and their statutory funds and the financial viability of the rates of premium and other terms and conditions of the policies of insurance which they write in the course of their life insurance business'.[61]

In the circumstances being considered here, it seems clear that the area of law being considered is the question whether a religious body will be liable for discrimination on, say, grounds of sexual orientation. The policy implemented by the Commonwealth law is that in general it will, *but not* where its action is in accordance with its genuine religious commitments (to summarise the effect of sections 37 and 38.) If a state law conditions enjoyment of this privilege on satisfaction of additional requirements, or by removing the privilege altogether, as is done under Tasmanian and Victorian laws, then in doing so it has *qualified*, *impaired*, and to a significant respect *negated*, the scheme set up by the Commonwealth.

The view put above is also shared by some significant academic commentators on discrimination law.

In *Australian Anti-Discrimination and Equal Opportunity Law*[62] the authors explicitly refer to s 38 of the *SDA* and the fact that the Commonwealth law is 'more generous' to employers than some State laws:

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[59] *Outback Ballooning* (n 31) 456 [65] (Gageler J) (citations omitted).
[60] *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330.
[61] *Outback Ballooning* (n 31) 458 [69] (Gageler J) (emphasis added) (citations omitted).
[62] Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (Federation Press, 3rd ed , 2018) at 81 [2.14.24] .

> Conversely, a s 109 inconsistency might exist when State and Territory anti-discrimination legislation *removes or diminishes an exception that a Commonwealth law makes*, so that the State or Territory anti-discrimination [law] prohibits conduct that the Commonwealth legislation would allow. For example, s 38 of the *SDA*…[citing the defence]. But under the Queensland and Tasmanian anti-discrimination laws, conduct of this nature is unlawful because the exceptions granted to educational institutions established for religious purposes are not as broad as those in the *SDA*, not extending to discrimination against job applicants and employees.[63]

The authors are saying that s 109 would probably invalidate these differing State provisions. The authors also propose that from an employee rights perspective, provisions of the NSW *Anti-Discrimination Act* which limit discrimination actions by excluding small businesses (in contrast to the Commonwealth *SDA* which applies to all businesses) are probably invalid as they argue the NSW Act 'purports to diminish' the right given to employees.[64] The same language can be used about this right given to religious organisations by the Commonwealth *SDA*, that the Tasmanian or Victorian laws would 'purport to diminish' the right.

An article by Tarrant made a similar point in suggesting that State laws which imposed limits on when abortions could be carried out were inoperative due to a clash with what she argued were rights granted to women by the *SDA*.[65] Tarrant noted that in *Pearce v South Australian Health Commission*[66] the Supreme Court of SA had found that a provision of that State's legislation which did not allow single women to access fertility treatments was contrary to the *SDA* and hence inoperative under s 109.

The view put forward here has been summed up by one eminent judicial commentator, Leeming, writing extra-curially:

> [C]onstitutional inconsistency may be engaged merely by a purported alteration, impairment or detraction from a right, obligation, power, privilege or immunity conferred by federal statute.[67]

However, this analysis is not accepted by all commentators. Professor Jeremy Gans provided a devastating critique of the decision in *Dickson* shortly after the decision was handed down.[68] He saw the decision as creating major problems for concurrent federal and state criminal offences. His critique of the substantive decision was based on a number of issues. On the s 109 point he suggested that the decision did not properly account for prior decisions of the High Court where similar state and federal criminal laws had been allowed to operate concurrently (such as in *McWaters v Day*[69]). He also criticised the High Court decision for

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[63] Ibid 81 [2.14.24] (emphasis added) (footnotes omitted).
[64] Ibid 81 [2.14.23].
[65] Stella Tarrant, 'Using the Commonwealth Sex Discrimination Act and s 109 of the Constitution to Challenge State Abortion Laws' (1998) 20(2) *Adelaide Law Review* 207.
[66] (1996) 66 SASR 486.
[67] Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 149.
[68] See Jeremy Gans, 'Concurrent Criminal Offences after *Dickson v R*' (Conference paper, Gilbert & Tobin Constitutional Law Conference 18th February 2011) <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/2011%20Con%20Law%20Conference%20Paper%20J%20Gans_0.pdf>.
[69] (1989) 168 CLR 289.

stressing differences between the Victorian and Commonwealth offences which existed in theory, but which were not actually applicable to the facts of the specific prosecution.

He followed this up with an analysis of the later decision of the High Court in *Momcilovic v R,*[70] suggesting that in this decision, handed down only a short time after *Dickson*, the majority of the court in effect ignored the reasoning in the earlier case.[71]

While there may be much to be said for the critique offered by Gans, the fact is that the High Court continues to cite *Dickson* and clearly regards it as a controlling authority.[72] In those circumstances it seems clear that the operation of s 109 has continuing importance, and the general principle that state law cannot impair the operation of federal law by narrowing the grounds of liability seems to be still applied.

Another example in the discrimination area, handed down even prior to *Dickson,* can be seen in the decision of the Full Court of the South Australian Supreme Court in *Central Northern Adelaide Health Service v Atkinson ('Atkinson').*[73] Mr Atkinson was refused services from the Central Northern Adelaide Health Service because he was not an Indigenous person. He sued for racial discrimination. The Service responded that they were relying on a provision in the State law, s 65 of the *Equal Opportunity Act 1984* (SA) ('SA *EOA'*) which allowed special services to be provided 'for the benefit of persons of a particular race'.

However, Mr Atkinson noted that there was a similar provision in section 8(1) of the *Racial Discrimination Act* (Cth), but this applied in a narrower set of circumstances.[74] This meant that there was a clash between the *RDA* and the SA *EOA*. Conduct that would be lawful under State law, could be unlawful under the *RDA*.

> There is a tension between section 8 of the *Racial Discrimination Act* and section 65 of the *Equal Opportunities Act*. In my view a literal reading of section 65 would lead to an inconsistency with the *Racial Discrimination Act* such that section 109 of the *Australian Constitution* would have application, and as a consequence, section 65 would be inoperative.[75]

However, in the circumstances his Honour concluded that 'limitations' could be read into the State law to make it consistent with the Commonwealth law.[76] If this had not been possible, there would have been a clash between the laws and s 109 would have operated in favour of Commonwealth law.

It is interesting that an argument of the State was that s 65 of the SA *EOA* and s 8 of the Commonwealth *RDA* could both operate, on the basis that s 65 only applied to a claim under State law and s 8 would still apply to a claim under Commonwealth law.[77] But Gray J rejected

[70] (2011) 245 CLR 1.
[71] Jeremy Gans, 'Concurrent Criminal Offences After *Momcilovic v R*' (Seminar Paper, Australian Association of Constitutional Law, 21 Oct 2011).
[72] See *Outback Ballooning* (n 31) [31]. See also citation of *Dickson* by the NSW Court of Appeal in *Allianz Australia Insurance Ltd v Viksne* [2021] NSWCA 268, [39].
[73] *Central Northern Adelaide Health Service v Atkinson* (2008) 103 SASR 89 *('Atkinson')*.
[74] Any such arrangements had to be only temporary and had to comply with other requirements under the special measures exception in Article 1.4 of the relevant international Convention.
[75] *Atkinson* (n 70) 115 [106] (Gray J).
[76] Ibid 116 [112] (Gray J).
[77] Ibid 117[116] (Gray J).

this argument. Both laws clearly dealt with the topic of 'racial discrimination'. The topic of both laws was 'discrimination on the basis of race, and if the SA law could not be 'read down' then it would be contrary to the Commonwealth law by permitting actions that were unlawful under that law.[78]

Note that a similar argument was run by New South Wales in *Viskauskas v Niland* and was also rejected. For example, the court accepted that

> there is no inconsistency between a State law and a Commonwealth law simply because each authorises an inquiry into the same facts, and provides for punishment or other legal consequences for the same acts. That may be so where the statutes are made for different purposes - for example, a State law enacted for the protection of consumers might validly require an inquiry to be made into conduct, and might penalise conduct, which also amounted to racial discrimination.[79]

But in *Atkinson*, the court said that was not so here as both federal and state Acts deal with the one subject of racial discrimination.

It seems clear that in the examples being considered in this paper, the federal law and the state laws deal with the 'one subject': sexual orientation discrimination. Indeed, that this is so can be seen from the specific terms of s 10 of the *SDA* quoted above, which refers to 'a law of a State or Territory that deals with discrimination … on the ground of sexual orientation'. The Commonwealth itself, in effect, has defined its 'area of operation' in a way which makes it clear that it is the same area as the state law.

Atkinson is clear authority, then, at a superior appellate level that a 'defence' that applies in one discrimination law, but not in another, may lead to a s 109 clash. The *Atkinson* case is formally the reverse of the situation we are considering; in that case there was a defence under state law which was absent in Commonwealth law. But the logic leads to the conclusion that if there is a defence under Commonwealth law, in a law dealing with discrimination on the basis of sexual orientation, but that defence is missing from a state law on the same topic, then the state law will be inoperative under s 109 to the extent of the clash.

True, an argument might be put leading to a different outcome, by giving a different characterisation of the legislation. It could be said that the Commonwealth *SDA,* as an overall law, gives rights to individuals not to be discriminated against on the basis of protected characteristics such as sexual orientation or marital status. However, the Commonwealth has chosen not to extend this right in certain cases involving religious bodies (under s 37 *SDA*) or educational institutions (under s 38 *SDA*). But the state laws we have mentioned choose to extend the rights to those cases, and in that sense might be seen as simply broadening a protection provided by the Commonwealth, and not 'impairing' the operation of the Commonwealth law at all.[80]

The case as put seems attractive. But I would argue that it is not ultimately persuasive. As noted above, an essential part of all legislation dealing with discrimination is that it must balance important rights enjoyed by *all* parties involved. It would be a serious over-simplification to say that the *only* purpose of the *SDA* was to, in all cases, prohibit decision-making based on

[78] Ibid 117 [118] (Gray J , Kelly J agreeing at [143]).
[79] *Viskauskas v Niland* (n 35) 295 (Gibbs CJ, Mason, Murphy, Wilson, and Brennan JJ).
[80] I acknowledge that this interesting argument was put by one of the anonymous referees for my paper.

the protected characteristics. The very fact that the Act contains a number of 'exemptions' or 'balancing clauses' makes this point. Those clauses protect rights based on matters such as decency and the right to privacy as well as religious belief. A state law which impairs those rights is rightly seen as undermining the scheme carefully established by the federal legislation.

Suppose, for example, a state law provided that it would be unlawful *not* to allow the employment of a man in a woman's changing room area. That state law could (if the argument above were accepted) be characterised as extending non-discrimination rights to men who are being detrimentally treated on the grounds of sex. Yet of course to uphold such a law would undermine the interests of women in decency and privacy protected by the current provisions in s 30(2)(c) of the *SDA*, noted above. Similarly, the *SDA* scheme provides protections for religious freedom which should not be undermined by the state laws mentioned.

A case raising similar issues to those discussed here has recently been decided by the High Court, although unfortunately for the present discussion, the substantive s 109 issues were not reached. In *Citta Hobart Pty Ltd v Cawthorn*[81] the issues arose in relation to disability discrimination law. Commonwealth law states that a certain standard of providing access for disabled persons must be used in buildings. Tasmanian law imposes a higher and more expensive standard. Must a builder comply with the state law, or may they build to the Commonwealth standard?

While there were s 109 issues involved, the case was complicated, because it also raised important issues as to what body has authority to decide the question. The Tribunal before which the matter first was heard concluded that the case involved matters arising under federal law, and on authority of *Burns v Corbett*[82] that it had no jurisdiction to hear the matter because it was not a 'court'. The appeal to the Tasmanian Full Court involved this question, but it also required discussion of whether there was a s 109 issue or not.

Blow CJ in the Tasmanian Full Court seemed to adopt the argument that had been rejected by the majority in *Atkinson* and found that the Commonwealth rule only applied to cases where a breach of the Commonwealth law was involved, and hence there was no clash.[83] Other members of the court offered similar comments. On appeal the High Court upheld the decision of the Tribunal to decline jurisdiction. Once it became clear that there was a constitutional issue raised by the litigation, which was 'genuinely raised in answer to the complaint in the Tribunal and was not incapable on its face of legal argument',[84] the Tribunal were correct to dismiss the claim. The merits of the s 109 argument, however, were not canvassed in any detail, beyond all members of the court accepting that the issue was 'genuinely raised' and 'not incapable of legal argument'.

Edelman J, while agreeing that the issue did not need to be resolved, offered a few hints as to what matters might have been considered had the court been going to resolve the s 109 point:

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[81] *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16 on appeal from *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15.
[82] (2018) 265 CLR 304.
[83] *Cawthorn v Citta Hobart Pty Ltd* [2020] TASFC 15, at [5].
[84] *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16 [10] (Kiefel CJ, Gageler, Keane, Gordon, Steward, and Gleeson JJ); this statement repeated at [35]. The majority said that a higher standard, that an argument must not amount to 'abuse of the process of that court', should not be adopted; at [41]. Compare Edelman J in dissent on this point, who said that the test as to whether a matter was a 'real question' was: 'An issue will involve no "real question" for the same reasons that it would be an abuse of process': at [51]. His Honour also used, however, the phrase 'manifestly hopeless' to sum up this test: at [52], [73].

> The s 109 issue raised by the appellants is *not manifestly hopeless*. It suffices to say that, whatever may be the strength of the argument concerning what is sometimes, awkwardly, described as 'direct inconsistency', it was not manifestly hopeless to allege that the State Act was 'indirectly' inconsistent with the Commonwealth Act on the argued basis that the Commonwealth Act was intended to be 'exhaustive' in its coverage of the relevant subject matter of disability standards. The argument is not manifestly hopeless in circumstances in which the Commonwealth Act contemplates a comprehensive regime of disability standards to be formulated by the Minister.[85]

To sum up, in general, in those areas where the prohibited grounds of discrimination set out in the Commonwealth *SDA* and State laws overlap (particularly in the specific areas of sex, sexual orientation, marital status, and gender identity), any State laws which provide a more restrictive set of criteria than the Commonwealth law would remove a liberty given to religious organisations by the Commonwealth law: the liberty to make hiring and firing determinations 'conform[ing] to the doctrines, tenets or beliefs of that religion' or doing what is 'necessary to avoid injury to the religious susceptibilities of adherents of that religion'.[86] These State laws would impair the operation of the Commonwealth law, and in respect of those overlapping grounds would be inoperative in accordance with s 109 of the Constitution.

VI APPLICATION TO TERRITORY LAW

The same general logic will apply to a Territory such as the ACT, though s 109 will not itself be relevant.

The ACT legislature, for example, derives its legislative powers from the *Australian Capital Territory (Self-Government) Act 1988* (Cth) ('*Self-Government Act'*), which provides in s 28 that:

> (1) A provision of an enactment *has no effect to the extent that it is inconsistent with a law* defined by subsection (2), but such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with that law.[87]
>
> (2) In this section:
>
> *law* means: *a law in force in the Territory* (other than an enactment or a subordinate law)…[88]

It is clear from this that a law of the Territory cannot have an effect which is inconsistent with a law of the Commonwealth. This sort of clash was discussed in the decision of the High Court of Australia in *The Commonwealth v Australian Capital Territory*[89] ('ACT *Same-Sex Marriage Case*') where the court ruled that ACT legislation establishing an institution of 'same sex marriage' (before the law of the Commonwealth had been changed) was invalid as inconsistent with the *Marriage Act 1961* (Cth).

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[85] Ibid [79] (Edelman J) (emphasis added) (citations omitted).
[86] *SDA* s 37, 38.
[87] *Australian Capital Territory (Self-Government) Act 1988* (Cth) s 28(1) (emphasis added).
[88] Ibid s 28(2) (italics emphasis added).
[89] [2013] HCA 55 ('ACT *Same-Sex Marriage Case*').

Determining whether an ACT law is inconsistent with a federal law is not merely a matter of the verbal formulation used, but, as the High Court said in the ACT *Same-Sex Marriage Case*, 'the topic within which the status falls must be identified by reference to the legal content and consequences of the status, not merely the description given to it'.[90] In this case it is not a question of 'status' but 'obligations'. Here it seems that the 'topic' can be fairly described as the question 'may a religious school use the marital status or sexual orientation of a student or teacher as part of its decision-making in employment or education'? If an ACT law precludes this, the answer would be, 'No'. But the *SDA* of the Commonwealth answers that question, 'Yes'.

VII CONCLUSION

It may be asked, if this argument is correct, why it has not been previously put to a court in the context of religious bodies, educational institutions, and discrimination law. Any answer is of course pure speculation, but it seems that at least part of the reason may be that, until recently, federal and state discrimination laws on this topic were mostly similar, and there would have been no practical benefit in relying on the federal law. Tasmania has been out of kilter with seriously restrictive provisions for some time, but for some reason no major litigation has ensued there. The major change in 'balance' brought by the recent Victorian amendments noted above, and the possibility that other jurisdictions may move to copy these, may foreshadow a greater need for religious organisations to rely on Commonwealth law for at least a minimum level of protection.

In short, it has been argued that where a State or Territory law dealing with discrimination provides a narrower balancing clause in relation to religious bodies or educational institutions than the Commonwealth law provides, the State or Territory law will, to the extent of that inconsistency, be inoperative by virtue of s 109 of the Constitution, and the religious body will be free to act within the parameters permitted by the Commonwealth law. Provision of protections for religious freedom in this way will assist in the Commonwealth meeting its internationally-mandated obligations under art 18 of the *International Covenant on Civil and Political Rights*, at least until a consensus at the federal level can be reached for agreed federal legislation protecting religious freedom more widely.

[90] Ibid [60] (French CJ, Hayne, Crennan, Kiefel, Bell, and Keane JJ).

Why the Jury in *Pell v The Queen* Must Have Had a Doubt and the High Court was Right to Quash the Guilty Verdicts

ANDREW HEMMING*

In the aftermath of the High Court's decision in Pell v The Queen *to quash the guilty verdicts and enter verdicts of acquittal in their place, there has been considerable public discussion and academic commentary on the respective roles of the jury and appellate courts, with particular focus on the jury as the tribunal of fact.* Pell v The Queen *was a high-profile case involving sexual assault charges against a Cardinal of the Roman Catholic Church, when just a year earlier the Royal Commission into Institutional Responses to Child Sexual Abuse had published its final report which was dominated by abuses perpetrated in the Roman Catholic Church. This article considers the test for the unreasonableness ground of appeal set out by the High Court in* M v The Queen*, which is reflected in s 276(1)(a) of the* Criminal Procedure Act 2009 *(Vic), whether 'upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'; and concludes that the High Court was correct to adopt Weinberg JA's dissenting judgment in the Victorian Court of Appeal which in the author's view was compelling.*

I. INTRODUCTION

This article argues that while juries are central to the criminal justice system in Australia, it needs to be more widely recognised that juries can and do make mistakes. Jury verdicts are not sacrosanct or inviolate, which is one of the reasons (other reasons include judicial errors) why guilty verdicts can be appealed and quashed. Appeal grounds vary. The focus of the appeal in *Pell v The Queen* ('*Pell High Court Appeal'*)[1] was that the guilty verdicts were unreasonable and could not be supported by the evidence. In order to succeed on this ground, the appellant has to meet a very demanding test, namely, that on the whole of the evidence the jury must have had a doubt against the criminal standard of proof. This article contends that, in the circumstances of the *Pell High Court Appeal*, the above test as set out in s 276(1)(a) of the *Criminal Procedure Act 2009* (Vic) was met.

The case[2] attracted widespread media and public attention because of the prominence of the defendant, Cardinal Pell, the most senior member of the Roman Catholic Church ever brought to trial for child sexual offences. The trial took place in the aftermath of the Royal Commission into Institutional Responses to Child Sexual Abuse, to which Cardinal Pell had given evidence. Consequently, when Pell's convictions were unanimously quashed by the High Court (whose seven members were only too well aware of the significance of overturning a jury verdict) there was widespread criticism of the decision as undermining both the jury's guilty verdicts in particular and the status of the jury in general. This article respectfully defends the High Court's

* Associate Professor in Law, University of Southern Queensland. The author would like to thank the anonymous referees for their helpful comments which improved the quality of the article.

[1] *Pell v the Queen* [2020] HCA 12 ('*Pell High Court Appeal'*).

[2] See case history: *DPP (Vic) v Pell* [2019] VCC 260, affd *Pell v The Queen* [2019] VSCA 186 ('*Pell Appeal Vic'*), revd *Pell v the Queen* [2020] HCA 12 ('*Pell High Court Appeal'*).

decision based on the compelling evidence of the defence witnesses, and contends that the quashing of Pell's convictions remedied a miscarriage of justice.

The *Australian Constitution* is a document that contains few rights, but an exception is s 80 which enshrines the right to trial by jury,[3] although the High Court has stated '[o]n its established interpretation, s 80 is a weak conditional guarantee'.[4] However, the passage of time since 1901 has seen this right qualified such that the original right, which meant the jury had to return a unanimous verdict for the defendant to be found guilty, has been statutorily overruled in seven Australian jurisdictions to allow majority verdicts of either 11-1 or 10-2 depending on the seriousness of the offence and the particular jurisdiction.[5] Thus, state and territory governments, frustrated by single dissenting jurors leading to hung juries, made policy decisions to dilute the right to trial by jury by statutorily removing the requirement for a unanimous verdict.

In addition, defendants today can elect or request to be tried by judge alone, either on their own election, with the agreement of the prosecution or with the leave of the court, again depending on the jurisdiction.[6] For example, s 614 and s 615 of the *Criminal Code 1899* (Qld) provide that the prosecutor or the accused person may apply to the court for a no jury order, and inter alia the court 'may refuse to make a no jury order if it considers the trial will involve a factual issue that requires the application of objective community standards'.

A defendant who faced trial in a similar blaze of negative publicity to Cardinal Pell was Dr Patel, who had been employed as a surgeon at the Bundaberg Base Hospital and been dubbed by the media as 'The Butcher of Bundaberg'. Dr Patel faced a second trial for criminal negligence manslaughter in 2012 after the High Court had quashed his convictions and ordered a new trial because evidence 'that was highly prejudicial and now largely irrelevant had been admitted and it was not possible to ameliorate its effects on the jury by directions'.[7] At the outset of the second trial, the defence applied for a no jury order. However, Douglas J exercised his discretion to refuse the application.

> The risk of prejudice that may exist from the publicity is likely to be able to be contained and is offset to a significant extent by the interest in deciding the criminal negligence issue by reference to objective community standards considered by a jury.[8]

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[3] *Australian Constitution* s 80 'Trial by Jury':

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

[4] *Alqudsi v The Queen* (2016) 258 CLR 203, 216 [25] (French CJ). French CJ expanded on this understanding of s 80, discussing *R v Bernasconi* (1915) 19 CLR 629, 635 (Griffith CJ), 637 (Issacs J): at 216-17 [26].

[5] See *Jury Act 1977* (NSW) s 55F; *Criminal Code* (NT) s 368; *Jury Act 1995* (Qld) s 59A; *Juries Act 1927* (SA), s 57; *Juries Act 2003* (Tas) s 43; *Juries Act 2000* (Vic) s 46; *Criminal Procedure Act 2004* (WA) s 114.

[6] *Criminal Procedure Act 1986* (NSW) s 132; *Criminal Code 1899* (Qld) s 615; *Juries Act 1927* (SA) s 7; *Criminal Procedure Act 2004* (WA) s 118; *Supreme Court Act 1933* (ACT) s 68B. To place no jury orders in perspective, in NSW in 2014, judge-only trials accounted for a quarter of all trials: Felicity Gerry, 'Jury is Out: Why Shifting to Judge-alone Trials is a Flawed Approach to Criminal Justice', *The Conversation* (online, 5 May 2020). <https://theconversation.com/jury-is-out-why-shifting-to-judge-alone-trials-is-a-flawed-approach-to-criminal-justice-137397>

[7] *Patel v The Queen* (2012) 247 CLR 531, 535 [6] (French CJ, Hayne, Kiefel and Bell JJ).

[8] *R v Patel* [2012] QSC 419, [47] (Douglas J).

Arguably, judges take an overly sanguine view of the ability of judicial directions to the jury to contain the risk of prejudice arising from widespread negative publicity concerning the accused. For example, James Wood, QC, Chairman of the NSW Law Reform Commission, has raised concerns that the assumptions underpinning judicial warnings or comments to the jury might be misplaced.

> Perhaps the time is ripe to reconsider whether the assumptions are soundly based for all or some of these warnings or comments and whether, in fact, jurors do lack the fairness, underlying knowledge, experience of life, and common sense which has underpinned their use.[9]

Further empirical support can be found in a study of thirty mock jury deliberations which were performed to explore whether pretrial publicity ('PTP') affected the content of jury deliberations.[10]

> The pattern of results suggests that PTP has a powerful effect on jury verdicts and that PTP exposure can influence the interpretation and discussion of trial evidence during deliberations. Jurors who were exposed to negative PTP (anti-defendant) were significantly more likely than their non-exposed counterparts to discuss ambiguous trial facts in a manner that supported the prosecution's case, but rarely discussed them in a manner that supported the defence's case. This study also found that PTP exposed jurors were either unwilling or unable to adhere to instructions admonishing them not to discuss PTP and rarely corrected jury members who mentioned PTP.[11]

In any event, at the time of Pell's trial in 2018 there was no statutory provision for a no jury order in Victoria.[12] Arguably, the Crown would not have proceeded to trial if it was to be heard by a judge sitting alone, as the author contends that it is virtually inconceivable for a judge to have convicted Pell on such a weak case against the standard of beyond reasonable doubt.
In support of this contention, the author draws attention to the Policy of the Director of Public Prosecutions for Victoria, and in particular Chapter 1 Prosecutorial Discretion.[13] The decision to prosecute lists two criteria: 'A prosecution may only proceed if: (1) there is a reasonable prospect of conviction; and (2) a prosecution is in the public interest.'[14] The factors listed under the first criteria include inter alia all the admissible evidence, the reliability and credibility of the evidence, and any possible defence. The argument developed in this article is that any

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[9] James Wood, 'Summing up in Criminal Trials — a New Direction?' NSW Law Reform Commission, (Conference paper, Jury Research, Policy and Practice Conference, 11 December 2007). <https://www.lawreform.justice.nsw.gov.au/Pages/lrc/LRC_jrtw02.aspx>; See also Lily Trimboli, NSW Bureau of Crime Statistics and Research, 'Juror Understanding of Judicial Instructions in Criminal Trials' (September 2008) 119 *Crime and Justice Bulletin* <https://www.bocsar.nsw.gov.au/Publications/CJB/cjb119.pdf>.
[10] Christine Ruva and Michelle LeVasseur, 'Behind Closed Doors: The Effect of Pretrial Publicity on Jury Deliberations' (2012) 18(5*) Psychology, Crime and Law* 431, 431-452.
[11] Ibid 431.
[12] In 2020, Victoria passed legislation allowing judge-only criminal trials as a short-term measure to deal with the absence of court sittings during the COVID-19 lockdown. This legislation was repealed in 2021. However, Victoria has recently passed laws allowing judge-only trials to be reintroduced for one year to help the state cope with a backlog of court cases following the passage of the *Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Act 2022* (Vic). The laws allow for the option of judge-only trials in criminal matters and special hearings for 12 months, including video link hearings, with jury trials to also continue over this time.
[13] Director of Public Prosecutions Victoria, 'Policy of the Director of Public Prosecutions for Victoria' (24 January 2022) <https://www.opp.vic.gov.au/getattachment/a26fab55-0c8a-48a9-b4e5-71f3a898e6cb/DPP-Policy.aspx>.
[14] Ibid 3.

objective assessment of the strength of the defence in the *Pell* case based on all the admissible evidence and 23 defence witnesses would lead to the conclusion that there was no reasonable prospect of conviction.

The decision to prosecute in the *Pell* case has parallels with the prosecution of Senior Sergeant Chris Hurley on manslaughter and assault charges. In Hurley's case, the Queensland Director of Public Prosecutions announced no charges would be laid. After media and public pressure, the Queensland Attorney-General appointed Sir Laurence Street to review the decision not to charge Hurley. Street found there was sufficient evidence to prosecute Hurley. Consequently, for the first time since the establishment of the Director of Public Prosecutions, the Attorney-General rather than the Director of Public Prosecutions indicted Hurley. Hurley was found not guilty in 2007.

A more recent case with similar political overtones was the decision of the Director of Public Prosecutions in the Northern Territory in 2019 to charge Constable Zachary Rolfe with murder. Rolfe was found not guilty of all charges. The Northern Territory's anti-corruption commissioner subsequently announced an investigation into the decision to arrest and charge Rolfe, in the wake of ongoing allegations of political interference.

Kerri Judd, QC, the Director of Public Prosecutions for Victoria, could reasonably have anticipated similar media, political and public pressure to prosecute Cardinal Pell, in the public interest, in light of the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse. In the author's view, the unchallenged evidence of the 'opportunity witnesses' in the *Pell* case, as suggested by Weinberg JA in dissent in the Victorian Court of Appeal, would warrant a not guilty verdict at first instance.

As to juror understanding of judicial directions, Virginia Bell, a former Justice of the High Court, writing extrajudicially, has observed in relation to various law reform commission references on the directions given to juries in criminal trials that '[t]here was a concern that the intended audience had become the appellate court and not the jury'.[15] Bell went on to note research from the New South Wales Law Reform Commission[16] which found 'while the empirical evidence suggests that jurors are generally conscientious in their efforts to follow the directions, which they are reported to find helpful, the evidence is less positive about the level of juror comprehension of directions'. [17] Even the New South Wales Law Reform Commission's assessment that jurors found judicial directions 'helpful' is open to challenge given the far reaching reforms contained in the *Jury Directions Act 2015* (Vic), which Bell concluded provided 'a workable template for reform'. [18] The importance of juries understanding the trial judge's directions was stressed by McHugh J: 'Put bluntly, unless we act on the assumption that criminal juries act on the evidence and in accordance with the directions of the trial judge, there is no point in having criminal jury trials.'[19]

II. THE CRIMINAL STANDARD OF PROOF

[15] Virginia Bell, 'Jury Directions: The Struggle for Simplicity and Clarity' (Banco Court Lecture, Supreme Court of Queensland, 20 September 2018) 1. <https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/bellj/bellj20Sep2017.pdf>.
[16] New South Wales Law Reform Commission, *Jury Directions* (Report No 136, November 2012) 28 [1.83].
[17] Bell (n 15) 3.
[18] Ibid 27.
[19] *Gilbert v The Queen* (2000) 201 CLR 414, 425 [31] (McHugh J).

The author has previously argued that juries in sexual assault cases appear to struggle with the criminal standard of proof of beyond reasonable doubt, based on five cases: *Tyrell v The Queen*,[20] *IW v The Queen*,[21] *JN v The Queen*,[22] *Xu v The Queen*,[23] and *Pell v The Queen*,[24] where appellate courts have quashed the convictions of the accused.[25] Although these five cases are scarcely a significant sample, as far back as the year 2000 Justice Wright marked his retirement from the Tasmanian Supreme Court with critical comments about the jury system.

> In particular, His Honour stated that he was fully convinced that juries return what he considered to be wrong verdicts in about twenty five percent of all cases tried. He explained that by 'wrong verdict' he meant a verdict that 'flies in the face of the evidence of palpably honest witnesses or unimpeachable documentary material'. In addition, His Honour suggested that juries make compromises that may result in inconsistent verdicts, in order to bring a trial to a conclusion or for some other inappropriate reason, particularly in cases of serious sexual assault.[26]

The genesis for the author's earlier article that juries in sexual assault cases appear to struggle with the criminal standard of proof of beyond reasonable doubt was a publication entitled 'When Emotions Tip Scales',[27] which posed the question as to why a number of sexual abuse convictions were being overturned on appeal. Solicitors for three of the successful appellants were quoted in this article. John Tyrell's solicitor, Peter Mihailidis, saw the conviction of his client, a former Christian Brother, in the context of outrage over the revelations of the Royal Commission.[28]

> My view is that, in the current climate, defendants have a strong chance of being convicted in these cases whether they are guilty or not. It takes a brave prosecutor to say, 'This doesn't add up'. The prevailing attitude seems to be to prosecute and let the courts sort it out, but many juries are making decisions based on emotion and preconceptions, not evidence or facts.[29]

Similarly, Carol Younes, the solicitor for 'IW', was reported as saying: 'There is a genuine growing concern that defendants in sexual assault cases do not really enjoy the presumption of innocence.'[30] This view was reinforced by Sydney solicitor Ron Malouf, whose 39 year old client, 'JN', successfully appealed his conviction for rape of a brother and sister who were once his childhood neighbours.

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[20] [2019] VSCA 52.
[21] [2019] NSWCCA 311.
[22] [2019] NSWCCA 287.
[23] [2019] NSWCCA 178.
[24] *Pell High Court Appeal* (n 1).
[25] Andrew Hemming, 'Do Juries Understand the Criminal Standard of Proof of Beyond Reasonable Doubt?' (2021) 30(3) *Journal of Judicial Administration* 103, 103-125.
[26] Terese Henning, 'Beyond "Beyond Reasonable Doubt": Wrong Decisions in Sexual Offences Trials' (2000-2001) 15 *Australian Journal of Law and Society* 1, 1.
[27] Richard Guilliatt, 'When Emotions Tip Scales' (18 July 2020, *Weekend Australian Magazine*) 12-17. <https://www.theaustralian.com.au/weekend-australian-magazine/reasonable-doubt-why-sex-abuse-convictions-are-being-overturned/news-story/7a5bd5c868ff829b9b2813ea67bbc70d>.
[28] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 15 December 2017).
[29] Guilliatt (n 27) 14.
[30] Ibid.

> [T]his blanket approach of assuming allegations are true, no matter how flawed or vexatious they may be, is creating a lot of unfairness for the accused. Juries, from my experience, seem to struggle with the fundamental concept of reasonable doubt.[31]

It may be objected that general assertions made by solicitors involved in the above cases as to the erosion of the presumption of innocence carry little weight. However, there is a common thread linking these cases in that the alleged sexual offences took place many years before the respective trial and the defendant faced a significant forensic disadvantage. Two of the cases involved clerical defendants whose cases were dealt with in the aftermath of the Royal Commission, and all the cases were heard while the #MeToo movement was at its zenith.

Ever since the establishment of the English Court of Criminal Appeal in 1907 in the wake of public disquiet over the wrongful convictions of Adolf Beck and George Edalji, it has been recognised that juries are not infallible and that a mechanism of appellate court review was necessary in the interests of justice.[32] Indeed, capital punishment was abolished in England in 1965 largely because subsequent events proved that an innocent person had been sent to the gallows. In the shocking case of the execution of Timothy Evans in 1950 for the murder of his daughter, the serial murderer John Christie (who was the chief prosecution witness in Evans's trial) later confessed to the murder. Evans was granted a royal pardon in 1966.

While the jury is the constitutional tribunal for deciding issues of fact,[33] Latham CJ in *Hocking v Bell* acknowledged that a jury verdict should be set aside if it is against the weight of the evidence.

> If a verdict is against evidence and the weight of the evidence a new trial may be ordered. If the evidence on one side so greatly preponderates over the evidence on the other side that it can be said that the verdict is such as reasonable jurors, understanding their responsibility, could not reach, a verdict may be set aside and a new trial may be ordered.[34]

The case of Lindy Chamberlain is perhaps the best-known example of mistaken conviction in Australian criminal history, and it took a judicial inquiry to exonerate her, as the High Court dismissed her appeal 3-2. Justice Murphy, who was one of the dissenting judges, explained the role of appellate courts as a safeguard against conviction of the innocent.

> [I]nevitably, juries sometimes make mistakes. History demonstrates that in Australia as elsewhere, despite the protection of the jury system and other safeguards, sometimes the innocent are convicted. Because of such miscarriages courts of criminal appeal have been given power to set aside convictions, not only where the judge wrongly admitted or rejected evidence, or misdirected the jury, but also where although there was evidence which could justify the verdict,

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[31] Ibid 15.
[32] See The Hon Justice Peter McClellan, 'A Matter of Fact: The Origins of the Court of Criminal Appeal' (Speech, Centenary of the Court of Criminal Appeal Dinner, 3 December 2012) <https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/McClellan/mcclellan031212.pdf>
[33] *Mechanical and General Inventions Co. Ltd. v Austin* (1935) A.C. 346, 373 (Lord Wright).
[34] *Hocking v Bell* (1945) 71 CLR 430, 440 (Latham CJ).

> the appeal court considered it unsafe. The appellate system thus operates as a further safeguard against mistaken conviction of the innocent.[35]

However, by the same token, the High Court has consistently acknowledged the unique position juries occupy as representatives of the community in the criminal justice system, and whose verdicts should not be lightly set aside.

> A jury is taken to be a kind of microcosm of the community. A 'verdict of a jury', particularly in serious criminal cases, is accepted, symbolically, as attracting to decisions concerning the liberty and reputation of accused persons a special authority and legitimacy and hence finality.[36]

Furthermore, the High Court has stressed that 'the jury is the body entrusted with the primary responsibility of determining guilt or innocence'.[37] More recently, in a case where the High Court restored the jury's guilty verdict of murder (the Queensland Court of Appeal had substituted a verdict of manslaughter), the High Court observed:

> [T]he setting aside of a jury's verdict on the ground that it is 'unreasonable' within the meaning of s 668E(1) of the *Criminal Code* is a serious step, not to be taken without particular regard to the advantage enjoyed by the jury over a court of appeal which has not seen or heard the witnesses called at trial.[38]

The point being that the High Court, in the *Pell High Court Appeal*, in overturning the jury's verdict and reversing the decision (majority) of the Victorian Appeal Court, was only too well aware of its previous authority on the strictures applying to such a course of action, and needed no reminding that 'quashing a jury's verdict on the basis that it has made a factual error is a significant step for an appellate court to take'.[39]

III. *PELL V THE QUEEN*

Pell v The Queen[40] involved a religious figure who was alleged to have committed sexual offences against children many years previously.[41] Such prosecutions for alleged historical sex assault are relatively common. The public policy reasons behind the decision to prosecute are centred on the complainant's need to feel believed and to heal from the trauma she or he has experienced. The High Court decision reversed the Victorian Court of Appeal's decision to dismiss an appeal by a 2-1 majority.[42] The High Court in unanimously (7-0) allowing the appeal, agreed with the analysis of the dissenting judge of the Supreme Court of Victoria Appeal case, Weinberg JA.

The applicant had been convicted of one charge of sexual penetration of a child under 16 years and four charges of committing an act of indecency with or in the presence of a child under the age of 16 years.

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[35] *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, 569 (Murphy J).
[36] *MFA v The Queen* (2002) 213 CLR 606, 621 [48] (Gleeson CJ, Hayne and Callinan JJ).
[37] *SKA v The Queen* (2011) 243 CLR 400, 405 [13] (French CJ, Gummow and Kiefel JJ).
[38] *The Queen v Baden-Clay* (2016) 258 CLR 308, 329 [65] (French CJ, Kiefel, Bell, Keane and Gordon JJ).
[39] Greg Byrne, 'The High Court in *Pell v The Queen*: An "unreasonable" review of the jury's decision' (2020) 45(4) *Alternative Law Journal* 284, 284.
[40] *Pell High Court Appeal* (n 1).
[41] The time period was 22 years.
[42] *Pell Appeal Vic* (n 2). Ferguson CJ and Maxwell P constituted the majority, with Weinberg JA in dissent.

> All the offences were alleged to have been committed in St Patrick's Cathedral, East Melbourne following the celebration of Sunday solemn Mass and within months of the applicant's installation as Archbishop of Melbourne. The victims of the alleged offending were two Cathedral choirboys, 'A' and 'B'.[43]

The Crown case depended on the truth and reliability of A's evidence, as B had died before A made his complaint in 2015. Significantly, in 2001, in response to a question from his mother, B had said he had not been 'interfered with or touched up' while in the Cathedral choir.[44]

The High Court in the *Pell High Court Appeal* set out the appropriate process[45] to be followed by an appellate court when the appeal ground is that the jury's verdict is unreasonable.

> The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence [*Criminal Procedure Act 2009* (Vic), s 276(1)(a)], in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable. The court examines the record to see whether, notwithstanding that assessment — either by reason of inconsistencies, discrepancies, or other inadequacy; or in light of other evidence — the court is satisfied that the jury, acting rationally, ought nonetheless to have entertained a reasonable doubt as to proof of guilt.[46]

The above passage takes a common-sense approach to the task of assessing whether the jury's verdict is unreasonable. Clearly, the jury must have found the complainant credible and reliable in order to convict Cardinal Pell, as the complainant provided the only evidence that the alleged offences had occurred.[47]

Essentially, the split in the Victorian Court of Appeal centred on the weight to be given to A's evidence in light of the evidence of the 'opportunity witnesses'.[48] The High Court summed up the differences between the majority and the minority views as follows:

> The members of the Court of Appeal viewed the recording of A's evidence, and that of a number of other prosecution witnesses. The majority, Ferguson CJ and Maxwell P, assessed A as a compellingly credible witness. There was evidence, adduced in the prosecution case from witnesses described as 'the opportunity

[43] *Pell High Court Appeal* (n 1) [1] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[44] *Pell High Court Appeal* (n 1) [2] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[45] Section 276(1)(a) of the *Criminal Procedure Act 2009* (Vic) reflects the test set out by the High Court in *M v The Queen* (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ):

> [T]he question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. (citations omitted)

[46] *Pell High Court Appeal* (n 1) [39] Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[47] In *Pell High Court Appeal* (n 1), the High Court was critical of the majority in the Victorian Court of Appeal who suggested A's evidence was corroborated by his knowledge of the interior layout of the priests' sacristy where the alleged offences were said to have occurred, discounting the possibility this knowledge may have come from a tour of the Cathedral when A joined the choir. 'Satisfaction that A had been inside the priests' sacristy did not afford any independent basis for finding that, on such an occasion, he had been sexually assaulted by the applicant': at [50] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[48] The term 'opportunity witnesses' refers to witnesses in the Cathedral at the time of the alleged offending, whose unchallenged evidence greatly restricted the span of time in which the alleged offending could possibly have occurred.

> witnesses', with respect to the applicant's and others' movements following the conclusion of Sunday solemn Mass, which was inconsistent with acceptance of A's account. Their Honours concluded that no witness could say with certainty that the routines and practices described by the opportunity witnesses were never departed from [*Pell v The Queen* [2019] VSCA 186 at [166]]. Their Honours reviewed a number of 'solid obstacles' to conviction and in each case concluded that the jury had not been compelled to entertain a doubt as to the applicant's guilt.
>
> Weinberg JA, in dissent, considered that, in light of the unchallenged evidence of the opportunity witnesses, 'the odds against [A's] account of how the abuse had occurred, would have to be substantial' [*Pell v The Queen* [2019] VSCA 186 at [1064]]. His Honour concluded that the jury, acting reasonably on the whole of the evidence, ought to have had a reasonable doubt as to the applicant's guilt.[49]

Two points should be made in relation to the above passage. First, the majority concluded that while the jury *might* have had a doubt, the evidence was insufficient to establish the jury *must* have had a doubt, whereas Weinberg JA concluded the opposite because the odds against A's account were so substantial. Secondly, the majority approached their task by focusing on the possibility A's account was true ('no witness could say with certainty'), as compared with Weinberg JA's more balanced approach ('the unchallenged evidence of the opportunity witnesses').

In this regard, the High Court observed '[t]he division in the Court of Appeal in the assessment of A's credibility may be thought to underscore the highly subjective nature of demeanour-based judgments'.[50] The reason why the High Court in *Pell v The Queen* stressed the dangers of relying on demeanour[51] was because the Victorian Court of Appeal had watched video-recordings of A's evidence and the evidence of other witnesses, in an attempt to place the court in the position of the jury. The High Court admonished the Victorian Court of Appeal for adopting this practice because there is a demarcation between the province of the jury and the province of the appellate court, stating 'generally speaking, the appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of the witnesses where that assessment is dependent upon the evaluation of the witnesses in the witness-box'.[52]

In this context, McClellan cites various sources for the proposition that demeanour is a poor indicator as to whether or not a witness is lying.[53] For example, Ekman came to the conclusion

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[49] *Pell High Court Appeal* (n 1) [5]-[6] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[50] *Pell High Court Appeal* (n 1) [49] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ), citing *Fox v Percy* (2003) 214 CLR 118, 129 [31] (Gleeson CJ, Gummow and Kirby JJ).
[51] For a fuller discussion of demeanour in the context of the *Pell* case, see Fiona Hum and Andrew Hemming, 'The Inconsistencies, Improbabilities and Impossibilities in the case of Cardinal George Pell: A Reply to Memory Science' (forthcoming). This article is a rejoinder to an article published in the *Criminal Law Journal* in 2020 by psychological researchers Goodman-Delahunty, Martschuk, and Nolan. In particular, the authors evaluate the arguments by the researchers that the High Court decision in *Pell v The Queen* was based upon a misunderstanding of an application of memory science involving routine practices versus singular impactful events. The authors criticise the narrow focus on memory science rather than other relevant issues associated with the mind such a confabulation and demeanour.
[52] *Pell High Court Appeal* (n 1) [37] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[53] The Hon Justice Peter McClellan, 'Who is Telling the Truth? Psychology, Common Sense and the Law' (2006) 80 *Australian Law Journal* 655, 657-658.

that 'most liars can fool most people most of the time'.[54] Similarly, Ellard has argued that demeanour will only reveal incompetent liars.[55]

With respect, it also suggests that the majority fell into error by preferring the evidence of the complainant, which goes to the standard of proof of beyond reasonable doubt is not met by the jury making a choice between the veracity of the complainant and the accused. On the clear conflict between the evidence of the complainant and the evidence of Pell, the trial judge, Chief Judge Kidd, directed the jury in the following terms:

> It is not sufficient for you to merely find the prosecution case preferable to the defence case. So even if you do not think the accused is telling the truth but are unsure where the truth lies, you must find the accused not guilty. Even if you are convinced his statements in the recorded interview [with Victorian detectives in the Vatican] are not true … you simply put it to one side and ask yourself if the prosecution has proven the accused's guilt beyond reasonable doubt.[56]

Whether or not the jury understood and applied this fair but nuanced direction will never be known. What can be said is that the majority in the Victorian Court of Appeal appear not to have put the credibility of the complainant to one side, and instead asked themselves whether the Crown had proved Pell's guilt beyond reasonable doubt.

The trial judge was satisfied that the accused has experienced a significant forensic disadvantage due to the prolonged delay in the complainant coming forward,[57] and informed the jury of the nature of the disadvantage experienced by the accused and the need to take the disadvantage into account when considering the evidence.[58]

> Because of the delay … Cardinal Pell lost the opportunity to make inquiries at or close to the time of the alleged incidents … Most of the church and cathedral witnesses could only give evidence on practice or protocol or routine rather than what they recalled on specific dates. If this trial was being held proximate to 1996 or 1997, then one might expect more witnesses to give specific recollection of the dates in question.[59]

However, such a direction on forensic disadvantage is somewhat undermined by s 39(3)(b) of the *Jury Directions Act 2015* (Vic), which prevents the trial judge from saying or suggesting that it would be dangerous or unsafe to convict the accused or that the victim's evidence (here A's uncorroborated evidence) should be scrutinised with great care.

More broadly, the weight of authority in Australia supports the proposition that a judge who entertains strong doubts as to the strength of the Crown's case is neither permitted to advise

[54] Paul Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics and Marriage* (Norton, rev ed, 2009) 162.
[55] John Ellard, 'A Note on Lying and its Detection' (1996) 2(4) *The Judicial Review* 303, 307.
[56] Melissa Davey, *The Case of George Pell: Reckoning with Child Sexual Abuse by Clergy* (Scribe, 2020) 191.
[57] Section 39(2*) Jury Directions Act 2015* (Vic).
[58] Section 39(3)(a) *Jury Directions Act 2015* (Vic).
[59] Davey (n 56) 192.

the jury to return a verdict of not guilty,[60] nor direct them to do so unless the evidence taken at its highest could not sustain a guilty verdict beyond reasonable doubt.[61]

This was the second trial of the charges against Cardinal Pell (the jury at the first trial having been unable to agree on its verdicts), which was presided over by Chief Judge Kidd of the County Court of Victoria. Arguably, given the strength of Weinberg JA's dissent, which was endorsed 7-0 in the High Court, Chief Judge Kidd should have directed the second jury to return a verdict of not guilty because the evidence taken at its highest could not sustain a guilty verdict beyond reasonable doubt as a result of the compounding improbability of events having occurred as A described them in light of the unchallenged evidence given by church witnesses. The standard of criminal proof is well beyond 'probable', yet objectively A's evidence was improbable, not even passing a *prima facie* case for prosecution.

This argument follows from the High Court's demolition of the analysis undertaken by the majority in the Court of Appeal.

> Their Honours reasoned, with respect to largely unchallenged evidence that was inconsistent with those allegations [made by A] (the 'solid obstacles' to conviction), that notwithstanding each obstacle it remained *possible* that A's account was correct. The analysis failed to engage with whether, against this body of evidence, it was reasonably possible that A's account was not correct, such that there was a reasonable doubt as to the applicant's guilt.[62]

The High Court then proceeded to examine the 'solid obstacles' to conviction.

> The applicant adopted Weinberg JA's analysis of his submission below with respect to the 'compounding improbabilities' [*Pell v The Queen* [2019] VSCA 186 at [840]-[843], [1060]-[1064]]. His Honour distilled the applicant's case to ten claimed compounding improbabilities [*Pell v The Queen* [2019] VSCA 186 at [841]].
>
> In this Court, the respondent correctly noted that a number of the claimed improbabilities raise the same point. It remains that acceptance of A's account of the first incident requires finding that: (i) contrary to the applicant's practice, he did not stand on the steps of the Cathedral greeting congregants for ten minutes or longer; (ii) contrary to long-standing church practice, the applicant returned unaccompanied to the priests' sacristy in his ceremonial vestments; (iii) from the time A and B re-entered the Cathedral, to the conclusion of the

[60] *Director of Public Prosecutions Reference No 1 of 2017* [2019] HCA 9. The High Court overruled *The Queen v Prasad* (1979) 23 SASR 161, 163 (King CJ) which was authority for the judge being able to direct a jury in a criminal trial that it is open at any time after the close of the prosecution case to acquit the accused if the jury consider the evidence is insufficient to support a conviction. The High Court unanimously held that:

> '[T]he exercise of the discretion to give a *Prasad* direction based upon the trial judge's estimate of the cogency of the evidence to support conviction is inconsistent with the division of functions between judge and jury and, when given over objection, with the essential features of an adversarial trial': at [56].

[61] *Doney v The Queen* (1990) 171 CLR 207, 214-5 (Deane, Dawson, Toohey, Gaudron and McHugh JJ). For a fuller discussion on this point, see Andrew Hemming, 'When Should a Judge Stop a Trial?' (2013) 15 *University of Notre Dame Australia Law Review* 56*,* 56-82.

[62] *Pell High Court Appeal* (n 1) [46] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) (emphasis in original).

> assaults, an interval of some five to six minutes, no other person entered the priests' sacristy; and (iv) no persons observed, and took action to stop, two robed choristers leaving the procession and going back into the Cathedral.
>
> It suffices to refer to the evidence concerning (i), (ii) and (iii) to demonstrate that, notwithstanding that the jury found A to be a credible and reliable witness, the evidence as a whole was not capable of excluding a reasonable doubt as to the applicant's guilt.[63]

For present purposes, it is illuminating (and in the author's view decisive) to expand on the High Court's summary of Weinberg JA's analysis by extracting the key passages from his Honour's dissenting judgment, starting with the compounding improbabilities of the complainant's version of events.

> Mr Richter [Pell's barrister at trial] submitted that each of a large number of independently improbable, if not 'impossible', things would have had to have occurred within a very short timeframe (perhaps 10 minutes or so), if the complainant's account were true.
>
> The matters relied upon by Mr Richter in support of that 'compounding improbabilities' submission were:
>
> - the applicant does not remain on the front steps.
> - he is alone when he enters the priest's sacristy.
> - Portelli does not enter to help the applicant disrobe, or to disrobe himself.
> - Potter is not there to assist in the disrobing.
> - Potter is not moving between the sanctuary and the Priests' Sacristy.
> - the altar servers are not moving between the sanctuary and the Priests' Sacristy.
> - there are no concelebrant priests in the Priests' Sacristy, or for some reason, they do not disrobe.
> - 40 people, some of whom are adults, do not notice the complainant and the other boy break away from the procession.
> - the complainant and the other boy enter the choir room, having gone through two locked doors, without anyone having noticed; and
> - the complainant and the other boy enter a choir rehearsal which they were required to attend, after being missing for more than 10 minutes, without anyone having noticed.
>
> By 'compounding improbabilities', Mr Richter was plainly inviting the jury to approach the matter using a form of probabilistic analysis (without using that expression), demonstrating that the complainant's account could not possibly satisfy the requirement of proof beyond reasonable doubt.[64]

Weinberg JA returned to this submission later in his judgment.

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[63] *Pell High Court Appeal* (n 1) [56]-[58] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[64] *Pell Appeal Vic* (n 2) [840] – [842] (Weinberg JA).

> In order for the complainant's account to be capable of being accepted, a number of the 'things' set out by Mr Richter at [840] - [842] of my reasons, had to have taken place within the space of just a few minutes. In that event, the odds against the complainant's account of how the abuse had occurred, would have to be substantial. The chances of 'all the planets aligning', in that way, would, at the very least, be doubtful. This form of 'probabilistic analysis, if properly applied, suggests strongly to me that the jury, acting reasonably, on the whole of the evidence in this case, ought to have had a reasonable doubt as to the applicant's guilt.[65]

In his dissenting judgment, Weinberg JA used the following heading: 'Only a "madman" would attempt to sexually abuse two young boys in the Priests' Sacristy immediately after Sunday solemn Mass', which Weinberg JA considered reflected Mr Richter's closing submission 'in precisely these somewhat florid terms'.[66] This submission has considerable weight as (i) the complainant had not suggested the door to the Priests' Sacristy was closed and anyone could have walked in; (ii) there were dozens of people congregating around the area of the Priests' Sacristy shortly after the conclusion of Sunday solemn Mass; (iii) there was no ambiguity whatever about the nature of the acts alleged which could not be explained away; (iv) there was nothing to have prevented either of the boys from leaving the room while the other was being attacked; and (v) if one of the two boys subsequently made a complaint, the other could corroborate it.[67]

On the issue of risk, the *Pell High Court Appeal* can be distinguished from *Hughes v The Queen*[68] where in a 4-3 decision the majority in the High Court held that '[w]hen considered together, all the tendency evidence provided strong support to show the appellant's tendency to engage opportunistically in sexual activity with underage girls despite a high risk of detection'.[69] In *Hughes*, the defence had argued that the evidence of the various complainants was fantasy as it involved the appellant courting a substantial risk of discovery by friends, family members, workmates or even casual passers-by. In the *Pell High Court Appeal*, there was a single complainant, and the risk of discovery to a newly installed Archbishop in full regalia opportunistically, without any grooming, raping two choirboys during a period of some five to six minutes, when the sacristy door could open at any time to reveal priests returning to disrobe, would rate a reading of 10 on a Richter scale of risk.[70]

Essentially, the High Court adopted the applicant's submission, which was based on Weinberg JA's dissent in the Victorian Court of Appeal, that the majority had reversed the standard and burden of proof 'by asking whether there existed the reasonable possibility that A's account was correct, rather than whether the prosecution had negatived the reasonable possibility that it was not'.[71]

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[65] Ibid [1064] (citations omitted).
[66] Ibid [752].
[67] Ibid [752] – [757].
[68] [2017] HCA 20.
[69] *Hughes v The Queen* [2017] HCA 20, [62] (Kiefel CJ, Bell, Keane and Edelman JJ).
[70] Readers will perhaps forgive the double entendre. The Richter scale is a quantitative measure of an earthquake's magnitude and Robert Richter QC was Pell's barrister at trial. On appeal, Pell was represented by Bret Walker SC.
[71] *Pell High Court Appeal* [54] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

The sheer improbability[72] that a newly installed Archbishop in full regalia, who was normally accompanied by another Church official (the High Court observed that Portelli's evidence on this point was unchallenged[73]), would choose such a tiny window of time to sexually abuse two choirboys after Mass in a Cathedral on a Sunday morning with numerous other church officials and members of the congregation in attendance, sits uncomfortably with and is in stark contrast to the meaning of 'proof beyond reasonable doubt'. The High Court was unanimous in finding the *M* test, namely, the jury '*must* have had a doubt'[74] (as opposed to 'might') about the applicant's guilt had been satisfied: 'Making full allowance for the advantages enjoyed by the jury, there is a significant possibility in relation to charges one to four that an innocent person has been convicted.'[75]

IV. WHY DID THE JURY FIND PELL GUILTY?

It is no insignificant feat to persuade 12 jurors as to the guilt of the accused beyond reasonable doubt, let alone to do so with only the testimony of one uncorroborated witness, more than 20 years after the alleged offending.[76]

Any conjecture as to why the jury found Pell guilty is pure speculation, although the jury must have found the complainant to be credible and reliable, as jurors are not required to give reasons, and indeed in Australia jurors are prevented from disclosing information about jury deliberations both during and after the trial.[77] This has not deterred Pell's barrister (after the trial) and various commentators from offering their opinions.

Robert Richter QC was interviewed by Melissa Davey in February 2020 and gave as his view that the reason Pell was convicted was because of 'three years of Royal Commission shit'.[78] Davey went on to expand on Richter's view of the guilty verdict, which amounted to prejudice based on negative prior publicity.

> Pell's appearance before the royal commission had damaged his reputation and influenced people's perceptions of him, Richter said … the media coverage of Pell's evidence, in which he 'came across as wooden and doctrinaire', had turned the public against him, Richter said. 'There was three years of press that painted him as a monster.'[79]

A similar view has been taken by Keith Windschuttle, editor of *Quadrant* magazine.

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[72] It is acknowledged that sexual predators sometimes offend in the most unlikely contexts with a high risk of detection, as in *Hughes v The Queen* [2017] HCA 20. However, there is no suggestion that Pell's personality included paraphilia (a condition characterised by abnormal sexual desires, typically involving extreme or dangerous activities) or narcissism, two comorbidities of sexual predators prepared to risk detection. Neither is it credible that Pell would have believed he was beyond suspicion or detection in the circumstances of the case, where defence witnesses testified Pell was always accompanied when in robes and the sacristy door was open at a busy time immediately after the Mass in the Cathedral. The risk was further magnified by virtue of the lack of grooming. In addition, there were two boys allegedly assaulted who would have been able to reinforce each other's testimony.

[73] *Pell High Court Appeal* [102] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

[74] Ibid [119] (emphasis added).

[75] Ibid [119].

[76] Samuel Beer and Charlotte Butchart, '"A Witness of Truth": The Court of Appeal's Cardinal Sin in *Pell v The Queen*' (2020) 41(2) *Adelaide Law Review* 683, 693.

[77] See, for example, s 68B Jury *Act 1977* (NSW); s 70 *Jury Act 1995* (Qld); s 78 *Juries Act 2000* (Vic).

[78] Davey (n 56) 314.

[79] Ibid.

> The decision in the George Pell case suggests that Australian juries are no longer what they once were. In this case, finding the defendant guilty of sexually assaulting two 13-year-old choirboys in Melbourne's St Patrick's Cathedral did not involve balancing competing scales of evidence and argument and delivering a finding beyond a reasonable doubt. Enough of this case has already been publicly discussed - the location, timing and intricacies of the incident concerned, the alibis given by those accompanying the archbishop at the time, the denial by one of the two boys in the case that he was ever sexually abused, and the complete absence of any corroboration of the alleged victim's claims - to demonstrate that the Pell jury could not have come to its decision on the basis of reason and evidence alone. Other influences must have made an impact on the jury.[80]

Windshuttle identified these 'other influences' as the Royal Commission into Institutional Responses to Child Sexual Abuse and the #MeToo movement.[81]

The implication of Windshuttle's observation above that 'Australian juries are no longer what they once were' is that juries have become less discerning, less objective, and more easily influenced by extraneous factors over the years. The difficulty faced by any study of the quality of jury decisions in Australia is that jury secrecy prevents an accurate assessment of whether juries are getting it 'right'. Australian jurors are forbidden from discussing their deliberations with anyone, including why they came to a decision. Consequently, Windshuttle's suggestion that 'other influences' were at work in Pell's guilty verdict is unknowable, although maintaining juror impartiality has become more difficult in the age of the internet and social media.

There is some support for juries being subject to biases when it comes to deciding on a trial.[82] In a recent article,[83] Curley, Monroe, and Dror examined three main sources of bias: 1) pre-trial bias; 2) cognitive bias; and 3) bias from external legal actors (expert witnesses). The review concluded that bias is a multifaceted phenomenon introduced from many different elements, and that several sources of bias may interact with one another during a jury trial to cause the effects of bias to snowball.

One problem with jury selection can be confidently identified, namely, the pre-emptive challenge, which allows either the prosecution or defence counsel to veto a potential juror from being empanelled without having to give any reason or justification. The pre-emptive challenge undermines the notion that the jury is a randomly selected representative cross-section of the community. The potential for jury bias is obvious.

Be that as it may, the author offers an alternative viewpoint and one that Robert Richter QC doubts. Davey asked Richter if he thought the outcome might have been different if Pell had taken the stand. Richter replied that the collective view of the defence team and Pell himself

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[80] Keith Windschuttle, 'George Pell and the Jury' (online, 12 March 2019) 63(4) *Quadrant* 4 < https://quadrant.org.au/opinion/qed/2019/03/george-pell-and-the-jury/>.
[81] Ibid.
[82] Lee John Curley, Itel Dror and James Munro, 'Juries are Subject to all Kinds of Biases when it comes to Deciding on a Trial' *The Conversation* (online, 28 February 2022). <https://theconversation.com/juries-are-subject-to-all-kinds-of-biases-when-it-comes-to-deciding-on-a-trial-176721>.
[83] Lee J Curley, James Monroe and Itiel E Dror, 'Cognitive and Human Factors in Legal Layperson Decision Making: Sources of Bias in Juror Decision Making' (online, 17 February 2022) *Medicine, Science, and the Law* <https://doi.org/10.1177%2F00258024221080655>.

was there was no point in calling Pell to give evidence because the jury had already seen Pell's interview with Victorian detectives in the Vatican, and all Pell could say if called was he didn't do it.[84]

The most important decision a defence lawyer has to make at trial is whether or not to call the defendant to give evidence. Whilst defence lawyers act according to instructions and it is ultimately a matter for the accused to choose whether or not he or she takes the stand, the decision is heavily influenced by the advice of the accused's defence counsel. Juries expect defendants to take the stand and loudly proclaim their innocence. There may be good reasons for not putting the defendant through the rigours of cross-examination if the view is that the defendant will not perform well on the witness stand and strengthen the prosecution case if the jury does not believe the defendant is telling the truth. However, such reasons did not apply in this case as Pell is an articulate, educated man well capable of giving his version of events and backed by a strong defence from the 'opportunity witnesses'.

For example, Pell would have been able to demonstrate in court that the complainant's claim his liturgical vestments could be easily parted to engage in the alleged offending was incorrect. Frank Brennan, a Jesuit priest, explained the restrictions in movement when someone is wearing an alb worn under a chasuble and secured by a cincture.

> Witnesses familiar with liturgical vestments had been called who gave compelling evidence that it was impossible to produce an erect penis through a seamless alb. An alb is a long robe, worn under a heavier chasuble. It is secured and set in place by a cincture which is like a tightly drawn belt. An alb cannot be unbuttoned or unzipped, the only openings being small slits on the side to allow access to trouser pockets underneath. The complainant's initial claim to police was that Pell had parted his vestments, but an alb cannot be parted; it is like a seamless dress. Later the complainant said that Pell moved the vestments to the side. An alb secured with a cincture cannot be moved to the side.[85]

While the jury were able to examine Pell's liturgical vestments for themselves as the alb, chasuble and cincture were all tendered,[86] Charles Portelli, the Master of Ceremonies, and Max Potter, the sacristan, had both given evidence that the alb could not be moved to the side in the way the complainant had suggested and nor could it be parted.[87] The prosecution accepted this was the case, but argued the alb could be lifted up allowing the penis to be exposed.[88] However, as Weinberg JA pointed out 'the problem with the complainant's account was not so much with the physical impossibility of exposing the penis, but with doing so in anything remotely like the manner that the complainant himself, at various times, and in various ways, described'.[89]

Arguably, under cross-examination, Pell could have reinforced the evidence of Portelli and Potter by giving clear, confident denials of the complainant's version of events, and highlighted the stark difference between parting his vestments, as alleged by the complainant, compared with lifting up the alb, which as mentioned above, is a long robe. This in court demonstration

[84] Davey (n 56) 316.
[85] Frank Brennan, 'Truth and Justice after the Pell Verdict' (online, 26 February 2019) 29(4) *Eureka Street* <https://www.eurekastreet.com.au/article/truth-and-justice-after-the-pell-verdict#>.
[86] *Pell Appeal Vic* (n 2) [825] (Weinberg JA).
[87] Ibid [819].
[88] Ibid [825].
[89] Ibid [824].

may well have destroyed the Crown's argument that such a difference did not matter given the passage of time,[90] as opposed to seeing Pell sitting impassively in the dock in clerical dress and not hearing from him at all, other than the recorded Vatican interview with Victorian detectives.

V. CONCLUSION

There are two words that leap off the pages of the High Court's judgment in *Pell v The Queen*[91]: 'unchallenged' and 'possible'. There are 14 references to the unchallenged evidence of the 'opportunity witnesses', and 21 references to the word 'possible' in the context of the 'opportunity witnesses' accepting under cross-examination that a particular event might just have occurred although they strongly doubted this possibility. An example of the former is that 'Portelli's evidence was unchallenged'.[92] A good example of the latter can be found in the following exchange between the prosecutor and Portelli, bearing in mind it was essential to the Crown case that Pell did not spend any more than two minutes meeting and greeting members of the congregation on the Cathedral steps after Sunday Mass when he normally spent 10 to 15 minutes doing so.

Portelli explained … [t]he 'meet and greet' could vary from 'as little as ten minutes, say up to 15 or nearly 20. It would depend on what else we had to do that afternoon'. Portelli disputed that, even on occasions when there was an engagement in the afternoon, the length of the 'meet and greet' might be shorter, saying 'it wouldn't be much shorter. It wouldn't make sense to stop for any less time than at least - at least six or seven minutes.' He was asked:

> 'Q. Sure, but was there an occasion or were there occasions, as best you can recall, where the Archbishop might depart from that practice and speak for a short period of time before returning to the sacristy?
> A. He may have done so on occasion, yes.
> Q. When I say short period of time, I'm speaking of just a couple of minutes?
> A. Yes, I suppose that's possible but I don't really recall it, but it's possible.'[93]

A similar exchange occurred between the prosecutor and Potter, again on the vital point of whether Pell had ever spent just a few minutes on the Cathedral steps after Sunday Mass.

> The prosecutor pressed Potter as to whether it was possible that the applicant had remained on the front steps speaking with congregants 'for a very short period of time', to which Potter responded, 'not the first time when he was the Archbishop, it took him a while to adjust, and [he] stayed in there welcoming people for a couple of months in the cathedral'. Potter agreed that it was possible that on occasions the applicant greeted congregants for a period of ten or 15 minutes rather than the 20 to 30 minutes that he had initially stated. He could not recall the applicant spending 'just a short time' in this activity unless the weather was inclement. …[94]

Thus, it can be seen that both Portelli and Potter had no recollection of Pell ever having spent just two minutes on a 'meet and greet', but admitted it was just possible. However, while the two-minute scenario might just survive scrutiny as a possibility, there was far more powerful

[90] Ibid [825].
[91] *Pell High Court Appeal* (n 1).
[92] *Pell High Court Appeal* (n 1) [91] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).
[93] Ibid [60].
[94] Ibid [64].

evidence pointing to another major obstacle to the Crown's case, namely, that Archbishop Pell in liturgical vestments was unaccompanied when he entered the Priests' Sacristy. The evidence of both Portelli and Potter was that this, consistent with unchallenged church protocol, never happened.

> Apart from these two instances, Portelli had no recall of any occasion when he did not accompany the applicant [Pell] to the sacristy to disrobe.[95]
>
> Potter disputed that on any occasion the applicant [Pell] had returned to the sacristy unaccompanied; '[i]f Father Portelli wasn't there, he would let me know. I would go down and greet the Archbishop to bring him back in'.[96]
>
> Potter confirmed that the applicant would never return to the sacristy unaccompanied.[97]

The High Court was singularly unimpressed by the majority's (in the Victorian Court of Appeal) treatment of the evidence of Portelli and Potter, reinforced by their discounting of the forensic disadvantage experienced by Pell.

> Their Honours were required to take into account the forensic disadvantage experienced by the applicant arising from the delay of some 20 years in being confronted by these allegations [*Jury Directions Act 2015* (Vic), s 39(3)(a)]. Their Honours, however, reasoned to satisfaction of the applicant's guilt by discounting a body of evidence that raised lively doubts as to the commission of the offences because they considered the likelihood that the memories of honest witnesses might have been affected by delay.[98]

In the author's view, the High Court's decision to quash Pell's convictions was the only available outcome consistent with justice. The High Court's judgment evinces frustration with the majority in the Victorian Court of Appeal[99] for not properly applying the test in *M v The Queen*,[100] which is reflected in s 276(1)(a) of the *Criminal Procedure Act 2009* (Vic), whether 'upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty'.

As this article has sought to demonstrate, the Crown case against Pell was built on the uncorroborated evidence of complainant A, which in turn was predicated on an aggregated series of possibilities amounting to links in a chain. In order to convict, the jury would have had to be satisfied that each link in the chain was proven beyond reasonable doubt, such that

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[95] Ibid [78]. These two instances were in June 1997 when Portelli was overseas, and in October 2000 when Portelli underwent surgery. As the alleged events were purported to have occurred on either 15 or 22 December 1996, these two instances were completely irrelevant.
[96] Ibid [64].
[97] Ibid [79]
[98] Ibid [91].
[99] Mr GJC Silbert QC has written an article critical of the performance of the Victorian Court of Appeal under its President, the Hon Chris Maxwell: Gavin Silbert QC, 'The First 24 Years of the Victorian Court of Appeal in Crime' (2020) 94 ALJ 455. The thrust of the article is that under the first President, the Hon John Winneke, between 1995 and 2005 the Victorian Court of Appeal was only reversed twice by the High Court, whereas under the Hon Chris Maxwell between 2006 and 2019 the Victorian Court of Appeal was reversed 16 times by the High Court.
[100] (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ).

(i) Pell only stood on the Cathedral steps for two minutes; (ii) Pell was unaccompanied on returning to the Priests' Sacristy; and (iii) no-one entered the Priests' Sacristy for five to six minutes immediately after the conclusion of Sunday Mass.

When applying the test in *M v The Queen*,[101] the High Court had to take into account (i) the 'compounding improbabilities' set out by Pell's defence counsel; (ii) the unchallenged evidence given by the 'opportunity witnesses'; and (iii) the forensic disadvantage experienced by Pell after 22 years. In light of the countervailing evidence measured against the criminal standard of proof of beyond reasonable doubt, it was predictable that the High Court unanimously (7-0) allowed the appeal. Perhaps the final word should be left with Weinberg JA when assessing complainant A's account: 'The chances of "all the planets aligning", in that way, would, at the very least, be doubtful.'[102]

[101] (1994) 181 CLR 487, 493 (Mason CJ, Deane, Dawson and Toohey JJ).
[102] *Pell Appeal Vic* (n 2) [1064] (Weinberg JA).

Adolescent Gender Identity and the *Sex Discrimination Act*: The Case for Religious Exemptions

Patrick Parkinson*

There is a lot of controversy about section 38(3) of the Sex Discrimination Act 1984 *(Cth) ('*SDA*') which permits discrimination by faith-based schools against students on the basis of their sexual orientation and gender identity. This article explains the background to this provision, which in its present form was the result of amendments in 2013. It also explains the problems that would arise if the subsection were repealed without making other amendments to the* SDA.

Faith leaders have consistently made it clear that they do not want the right to expel or discipline students on the basis of sexual orientation or gender identity and so support the repeal of s 38(3). However, other amendments are needed to protect the rights of faith-based schools. These are, in any event, necessary to buttress the (very doubtful) constitutional validity of the 2013 amendments insofar as they concern gender identity.

There is also a need for broader changes to the SDA *to address the confusion about how the law on gender identity applies to children and adolescents. It is unclear when a child gains a legally protected gender identity; whether a clinical diagnosis of gender dysphoria is needed; what respect needs to be given to the views of parents, even with a Gillick-competent adolescent; and what professional discretion can be exercised by school principals when they consider that supporting the social transition of an adolescent is not in his or her best interests. The* SDA *needs to be amended to make clear that it does not require schools to support and affirm the 'social transition' of a young person against the wishes of a parent or when the school considers in good faith that this is not in the best interests of the young person. Difficult pastoral issues need to be left to professional judgment, drawing upon the best advice available from the young person's treating medical and mental health practitioners.*

INTRODUCTION

In late 2021 and early 2022, the Parliament of Australia was once again embroiled in controversy about the religious exemptions given to faith-based schools in the *Sex Discrimination Act 1984* (Cth) *('SDA').* These allow schools to discriminate against students on the basis of their sexual orientation or gender identity.

The relevant provision, s 38(3) of the *SDA,* is as follows:

> Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training

* Professor, University of Queensland.

> by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.[1]

While this does not specifically give faith-based schools a right to expel a child on the basis of sexual orientation or gender identity, were a school to do so, it would not risk a discrimination action under federal law.

This article explains the origins of this subsection and the controversy which has surrounded it in recent years. The article goes on to focus on the issue of gender identity. It explains the difficulties that would arise if the subsection were entirely repealed, without making other substantial amendments to the provisions of the *SDA*, so far as they concern discrimination on the basis of gender identity.

BACKGROUND: THE INCLUSION OF GENDER IDENTITY AS A PROTECTED CATEGORY

The sexual orientation and gender identity provisions of the *SDA*, in their current form, are the result of the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) *('Amendment Act'),* passed in the twilight days of the then Labor government. The *Amendment Act* prohibited discrimination on the basis of sexual orientation, gender identity and intersex status. It also added 'relationship status' to the existing prohibition on marital status.

A *Exemptions in the Legislation*

The 2013 *Amendment Act* provided various exemptions that were already contained in the legislation insofar as discrimination concerned sex. So, for example, s 21 of the *SDA* prohibits discrimination in educational institutions. Prior to 2013, this section referred to discrimination on the basis of 'sex, marital status, pregnancy or potential pregnancy, or breastfeeding'. As a result of the amending legislation, the prohibition extended to 'sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding'. An exemption is contained in s 21(3) of the *SDA* to protect single-sex schools; after the 2013 amendments, this exemption was extended to the larger list of prohibited characteristics.

The religious exemptions for faith-based schools were amended in a similar way. Prior to 2013, s 38(3) provided that:

> Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's marital status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

As with many other sections of the *SDA*, s 38 was amended by omitting the words 'marital status' and substituting 'sexual orientation, gender identity, marital or relationship status'. So, the religious exemptions now applied to a larger list of prohibited characteristics. Intersex

[1] *Sex Discrimination Act 1984* (Cth) s 38(3) *('SDA').*

status was not included, presumably because there was no known issue about intersex status that required any religious exemption.

B *The Constitutional Problem*

There is reason for serious doubt whether the 2013 legislation is constitutional, at least insofar as it deals with gender identity. Prior to these amendments, the *SDA* was only concerned with discrimination on the basis of sex and related matters such as breastfeeding, and gave effect to Australia's international commitments under the *Convention on the Elimination of All Forms of Discrimination Against Women* ('*CEDAW*').[2] This gave the legislation a clear constitutional basis under the external affairs power.[3]

Likewise, the 2013 amendments relied on the external affairs power for their constitutional validity; but these new protected categories of sexual orientation, gender identity and intersex status were not supported by any specific international convention to which Australia is a signatory. This is a problem, because as Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ explained in *Victoria v Commonwealth*:

> To be a law with respect to 'external affairs', the law must be reasonably capable of being considered appropriate and adapted to implementing the treaty.[4]

It is not sufficient that an issue is a matter of international concern.[5]

It is doubtful that a law could be validly enacted pursuant to the external affairs power by reference to just one article of the *International Covenant on Civil and Political Rights* ('*ICCPR*') taken in isolation, since this is not implementing a treaty.[6] International law recognises that human rights are not only universal and indivisible, but also interdependent and interrelated.[7] So legislation that cherry picks art 26 concerning equal protection from discrimination, ignoring other rights guaranteed by the *ICCPR*, cannot be a proper implementation of that Convention. Article 26 must be read in the light of other articles in this Convention, including, for example, art 18 (freedom of thought, conscience and religion), art 22 (freedom of association) and art 27 (rights of ethnic, religious of linguistic minorities).

In the Explanatory Memorandum to the *Amending Act*, the government based the constitutionality of the provision mainly on art 26 of the *ICCPR* and other conventions of international law that support the goal of promoting equality and non-discrimination. The drafters explained:

> [A]rticle 26 of the ICCPR is a 'free-standing' bar on discrimination, prohibiting discrimination in law or in practice in any field regulated by public authorities. The list of grounds in article 26 is not exhaustive and decisions by the United Nations Human Rights Committee suggest that a clearly definable group of people linked by their

[2] *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 17 July 1980, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*').
[3] *Australian Constitution* s 51 (xxix).
[4] (1996) 187 CLR 416, 487.
[5] *Alqudsi v Commonwealth* [2015] NSWCA 351, [147] (Leeming JA).
[6] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 172 (entered into force 23 March 1976) art 26 ('*ICCPR*').
[7] *Vienna Declaration and Programme of Action*, UN GAOR, World Conf on Hum Rts, 48th sess, 22d plen mtg, part I, 5, UN Doc A/CONF.157/24 (1993).

> common status is likely to fall within 'other status'. 'Other status' has been found by the Committee to include age, sexual orientation and marital status.[8]

Even if the reference to 'other status' is sufficient as a constitutional basis for the prohibition of discrimination on the basis of sexual orientation, it seems very difficult to find a similar constitutional basis for the amendments concerned with gender identity.[9] The Explanatory Memorandum made no attempt to justify it beyond this general appeal to non-discrimination in art 26 of the *ICCPR*.

Part of the difficulty in treating gender identity as an 'other status' is that the legislation is so broad. It does not apply only to transgender people who have completed sex reassignment surgeries, and who might arguably be covered by the prohibition of sex discrimination on the basis of medically reassigned and legally recognised sex. The prohibition on discrimination is not even limited to those who have been clinically diagnosed with gender dysphoria, and therefore a recognised medical condition. There is also no need to have taken any medical steps to align the person's body more closely with the external characteristics of the sex with which he or she identifies.[10] The Act protects the gender identity of anyone who declares himself or herself to have one.

If the provisions on gender identity do have a valid basis as an implementation of the *ICCPR*, or insofar as employment is concerned, as implementation of an International Labour Organisation Convention,[11] then it is arguably necessary for the legislation to situate the prohibition of discrimination within a broader framework of human rights in order to buttress that constitutional platform. Currently, the legislation engages art 18 as well as art 26. If the religious exemptions concerning gender identity are stripped from the *SDA,* then the already very tenuous constitutional platform for the gender identity provisions in the 2013 legislation collapses. If other protections for religious freedom are introduced at the same time as removing s 38(3), then there would be less of a constitutional problem.

FAITH-BASED SCHOOLS AND THE EXPULSION ISSUE

Section 38(3) of the *SDA* attracted little or no attention until the recommendations of the Expert Panel report on religious freedom,[12] chaired by the Hon. Philip Ruddock, were made known in the latter part of 2018.

A *After Ruddock*

Recommendation 7 of the Expert Panel was as follows:

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[8] Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 5.

[9] United States law might be thought to provide some limited support. In *R.G. & G.R. Harris Funeral Homes Inc, v. Equal Employment Opportunity Commission*, 139 S Ct 1599 (2019) the Supreme Court interpreted the sex discrimination provisions of the *Civil Rights Act 1964* to include those who identify as transgender, since discrimination on the basis of transgender identity was in effect, discrimination on the basis of sex. However, the *SDA* clearly distinguishes between sex and gender identity as two different protected attributes, and so this interpretative route to constitutional validity does not seem open.

[10] '"[G]ender identity" means the gender-related identity, appearance or mannerisms or other gender-related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth.': *SDA* s 4(1).

[11] *Discrimination (Employment and Occupation) Convention,* 1958, 111 ILO (entered into force 15 June 1960).

[12] Expert Panel, Department of Prime Minister and Cabinet, *Religious Freedom Review* (Report, 13 December 2018) <https://pmc.gov.au/domestic-policy/religious-freedom-review>.

> The Commonwealth should amend the Sex Discrimination Act to provide that religious schools may discriminate in relation to students on the basis of sexual orientation, gender identity or relationship status provided that:
>
> (a) the discrimination is founded in the precepts of the religion
>
> (b) the school has a publicly available policy outlining its position in relation to the matter
>
> (c) the school provides a copy of the policy in writing to prospective students and their parents at the time of enrolment and to existing students and their parents at any time the policy is updated, and
>
> (d) the school has regard to the best interests of the child as the primary consideration in its conduct.[13]

This represented a narrowing of the broad-based exemption contained in s 38(3) of the *SDA*, and to that extent a diminution in the religious freedom of faith-based educational institutions. Nonetheless, the Panel recognised that the retention of a religious exemption was an important and justifiable expression of Australia's commitment to religious freedom and parental choice in schooling.

However, in the press, a quite different view gained traction. It seems to have come as a great surprise to many people that religious schools were allowed to expel gay or lesbian students at all, whether or not in practice, any of them did so. Hurriedly, two Bills were introduced into the federal Parliament by opposition parties to eliminate the right of faith-based educational institutions to discriminate on the basis, inter alia, of sexual orientation or gender identity. One of those Bills, introduced on behalf of the Greens, sought the removal of any discrimination in schools (whether in application to students or staff).[14] The other, introduced by Labor frontbencher Senator Penny Wong, sought to remove any right to discriminate in relation to students by repealing s 38(3).[15]

Church leaders supported the removal of s 38(3), provided other changes to the Act were made to deal with issues arising in consequence of that removal. For example, the Anglican Archbishop of Sydney at the time, Glenn Davies, explained to a Senate Inquiry in 2019:

> Our Anglican schools do not discriminate against LGBT students, and legislation which gives them the right to discriminate against any student is deeply problematic.[16]

With support from churches and organisations representing faith-based schools, the Government moved amendments to ensure that religious institutions could impose reasonable rules in good faith and in the best interests of students, consistently with their religious ethos. They also sought to ensure that schools could maintain their faith-based teachings on sexuality and gender without coming into conflict with discrimination laws.[17]

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[13] Ibid 2.
[14] Discrimination Free Schools Bill 2018 (Cth), introduced by Senator Di Natale (Greens), 16 October 2018.
[15] Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (Cth), introduced by Senator Wong (Labor), 29 November 2018.
[16] Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* (Report, February 2019) 26 [3.75].
[17] Ibid 8-9.

Such was the complexity involved in amending the *SDA* to achieve these outcomes, that the majority of the Senate Committee reviewing the Bill recommended that the issues be referred to the Australian Law Reform Commission,[18] as subsequently occurred. The Commission was required to conduct an inquiry into the religious exemptions in anti-discrimination laws generally.[19] However, the Government subsequently decided to change its timetable for reporting so that the Australian Law Reform Commission was not to do further work on the subject until after a Religious Discrimination Bill was passed. It was unfortunate that the limited *SDA* issues, involving largely technical drafting problems, were not resolved soon after the 2019 election.

B *The SDA and the Religious Discrimination Bill*

The Religious Discrimination Bill was finally introduced on 25 November 2021, at a time when few parliamentary sitting days were left before an election was called in April 2022. As part of a deal to get members of the Government's backbench onside, the Government agreed to amend the *SDA* to address the issue of discrimination against students in religious schools. The Prime Minister wrote to the Leader of the Opposition on December 1 2021, indicating the Government's intention to introduce an amendment removing s 38(3).[20] Subsequently when the amendment was introduced to the Human Rights Legislation Amendment Bill 2021 (Cth) (a Bill which formed part of a legislative package with the Religious Discrimination Bill) it was much more limited. It provided only that faith-based schools could not expel students on the basis of their sexual orientation. It did not repeal s 38(3) in its entirety and nor did it remove the exemption in relation to gender identity.

Labor, with support from five Liberal MPs, successfully moved an amendment in the House of Representatives, repealing s 38(3). As a consequence, the Government decided it would not proceed to debate the legislative package in the Senate. The *SDA* remains unamended at the time of finalisation of this article.

The situation, then, is one in which all the major parties have agreed that religious schools should not have the right to discriminate against students on the basis of sexual orientation or gender identity, but there are differences between the parties on what consequential amendments, if any, are required to address the concerns of some faith-based schools about their position if s 38(3) is repealed.

THE RELIGIOUS CASE FOR EXEMPTIONS ON THE BASIS OF GENDER IDENTITY

In the *SDA*, and the various state and territory laws that provide religious exemptions,[21] the relevant exemption is not based upon the religious character of the institution but rather on the basis of acts of discrimination which conform to the doctrine of the religion, or where the

[18] Ibid 28 [3.86].
[19] Australian Law Reform Commission, *Review into the Framework of Religious Exemptions in Anti-discrimination Legislation* (Terms of Reference, April 2019) <https://www.alrs.gov.au/inquiry/review-into-the-framework-of-religious-expemptions-in-anti-disdcrimation-legislation/terms-of-reference/>.
[20] Letter on file with the author.
[21] Tasmania only allows faith-based schools to discriminate in employment on the basis of religious belief: *Anti-Discrimination Act 1998* (Tas) s 51(2). In Victoria, religious exemptions concerning sexual orientation and gender identity were removed from the *Equal Opportunity Act 2010* (Vic) by the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic).

discrimination is necessary to 'avoid injury to the religious susceptibilities of adherents'.[22] Thus, there must be a religious basis to justify discrimination.

If the question is asked whether there is a religious case for being permitted to expel students on the basis of their sexual orientation or gender identity, it should almost certainly be answered in the negative. Organisations representing faith-based schools have endeavoured to make it clear that they do not wish to expel any student on the basis of sexual orientation or gender identity, and are guided by an ethic of care and concern for all their students, whatever their characteristics.[23] This ought to be unsurprising. In conservative faith traditions, the relevant prohibitions relate to sexual acts,[24] not to sexual orientation, and if a school has rules about its students' sexual activity, justifying disciplinary action of some kind, then to be consistent with Christian teaching the rule needs to apply equally to heterosexual and same-sex activity. There is no Christian basis for treating same-sex attracted young people in any adverse way. Catholic teaching is clear about condemning discrimination against same-sex attracted people,[25] and this is significant in Australia given it is the Church with which the largest number of Australians identify,[26] and has the largest non-public school system.[27]

A *Gender Identity and Christian Teaching on Discrimination*

Theological reflection on gender identity is much more recent, but to similar effect.[28] The Vatican's Congregation for Catholic Education criticises unjust discrimination against those who identify as transgender, and acknowledges that "through the centuries forms of unjust discrimination have been a sad fact of history and have also had an influence within the Church".[29] A Committee of the Anglican Diocese of Sydney also expresses its strong opposition to discrimination. It advocates for the compassionate care of all those with gender identity issues.[30] It is therefore a complete misunderstanding of Christian teaching, at least, to think that there is a theological basis for treating any child or young person adversely either because of their sexual orientation or gender identity.[31]

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[22] See, eg, the law in NSW: *Anti-Discrimination Act 1998* (NSW) s 56. In NSW, a similar exemption applies to all private schools, whether or not religious. For a review of the exemptions in the various laws, see Sarah Moulds, 'Drawing the Boundaries: The Scope of the Religious Bodies Exemptions in Australian Anti-Discrimination Law and Implications for Reform' (2020) 47(1) *University of Western Australia Law Review* 112.

[23] See, eg, John Sandeman, 'Missing: Schools that Expel Gay Students' (October 2018) *Eternity News*, <https://www.eternitynews.com.au/australia/missing-schools-that-expel-gay-students>; Russell Powell, 'Anglican Educators Write Open Letter to MPs' (October 2018) *SydneyAnglicans* <https://sydneyanglicans.net/news/anglican-educators-write-open-letter-to-mps>.

[24] See, eg, Libreria Editrice Vaticana, *Catechism of the Catholic Church* (United States Conference of Catholic Bishops, 2nd ed, 2000) [2357].

[25] Ibid [2358].

[26] See Chara Scroope, 'Religion: Australian Culture', SBS *Cultural Atlas* (online, 2019) <https://culturalatlas.sbs.com.au/australian-culture/australian-culture-religion#australian-cultre-religion>.

[27] Australian Bureau of Statistics, *Schools* (Catalogue No 4221.0, 23 February 2022) <https://www.abs.gov.au/statistics/people/education/schools/latest-release>.

[28] For a more detailed examination of theological positions on gender identity, see Patrick Parkinson, 'Gender Identity Discrimination and Freedom of Religion' *Journal of Law and Religion* (forthcoming).

[29] Congregation for Catholic Education, For Educational Institutions *'Male and Female He Created Them': Towards A Path Of Dialogue On The Question Of Gender Theory In Education* (2019) 9 [15] <http://www.vatican.va/roman_curia/congregations/ccatheduc/index.htm>.

[30] Anglican Diocese of Sydney, Social Issues Committee, *Gender Identity* (Report, 2017) 11

[31] Understanding of this is not universal in the Christian Church in Australia, as the controversy concerning Citipointe Christian College in early 2022 demonstrated: <https://www.theguardian.com/australia-news/2022/feb/03/brisbanes-citipointe-christian-college-withdraws-anti-gay-contract-but-defends-statement-of-faith>.

B *Protection for Religious Beliefs*

That does not mean that s 38(3) can be deleted without any other changes. One of the protections that faith-based schools might need, in this context, is clarity that nothing in the *SDA* should be understood as preventing the school from teaching in accordance with its religious and scientific understanding that *Homo sapiens* is a sexually dimorphic species. In essence, for the species to reproduce, it takes a male's sperm to fertilise a female's egg. There are only two sexes, male and female, and while a very small number of babies are born with intersex conditions,[32] these are examples of the natural variations known to many species, and not indicative of any third sex or gender.

The larger question though, is what the law requires of schools when a child or young person, with or without support from a parent or parents, declares a gender identity that is incongruent with natal sex and demands that the school accommodates his or her changed identity. Is it discriminatory, under the *SDA,* not to affirm the adolescent's new gender identity?

DOES THE LAW REQUIRE AFFIRMATION OF AN ADOLESCENT'S GENDER IDENTITY?

This question may be explored through asking what the responsibilities of the school are, as a matter of law, if 15 year old Chris identifies as a member of the opposite sex and wishes to be treated as such. What if the parents object, or one of them does so while the other is supportive? What about the role of medical professionals? How should the school take account of impacts upon other students? On all these issues, the *SDA* is vague or silent.

In seeking to be treated as a member of the opposite sex, and making gender-related changes to pronouns, registration of gender at school, and uniform, Chris wants to engage in what is called a 'social transition'. If children or young people make a social transition, this does not mean, necessarily, that they will go on to live permanently as another gender, nor even that they will take steps to transition medically, through taking puberty blockers, cross-sex hormones or undertaking major surgeries. However, social transition is typically a major step along the pathway to medical transition, particularly if the responses of the most important adults in the young person's life are to affirm his or her new gender identity unequivocally, and to support medical transition.

Once a decision to transition socially is made, the child or young person may have difficulty reverting to their natal sex. As Ristori and Steensma explain:

> The rationale for supporting social transition before puberty is that children can revert to their originally assigned gender if necessary since the transition is solely at a social level and without medical intervention. Critics of this approach believe that supporting gender transition in childhood may indeed be relieving for children with [gender dysphoria] but question the effect on future development. The debate thereby focuses on whether a transition may increase the likelihood of persistence because, for example, a child may 'forget' how to

[32] The presence of both ovarian and testicular tissues at birth is very uncommon. See G Krob, A Braun and U Kuhnle, 'True Hermaphroditism: Geographical Distribution, Clinical Findings, Chromosomes and Gonadal Histology' (1994) 153(1) *European Journal of Paediatrics* 2. There are other disorders of sexual development that can be included within a very broad definition of being 'intersex': see Amar Y Rawal and Paul F Austin, 'Concepts and Updates in the Evaluation and Diagnosis of Common Disorders of Sexual Development' (2015) 16(12) *Current Urology Reports* 83.

> live in the original gender role and therefore will no longer be able to feel the desire to change back; or that transitioned children may repress doubts about the transition out of fear that they have to go through the process of making their desire to socially (re)transition public for a second time.[33]

For these reasons, the Interim Report of the Cass Review in England (an independent review commission by the National Health Service) has made it clear that social transitioning is not a 'neutral act'. As the report noted, 'it may have significant effects on the child or young person in terms of their psychological functioning.'[34] The decision to make a social transition requires sufficient maturity to be able to understand the implications and potential consequences.

A *When Does a Child or Young Person have a Legally Protected Gender Identity?*

An initial question is when does a child or young person have a gender identity that is protected by law? Does a small child, for example, have a legally protected gender identity, and if so, who determines this and in accordance with what threshold? On this, the *SDA* is silent.

If a four-year-old boy likes playing with dolls and wearing a dress when playing 'dress-ups', does this mean he has a legally protected gender identity that is incongruent with his natal sex? The common-sense answer to this is no. It cannot yet be said that there is anything in the child's play that would justify the drastic step of treating him as other than a boy. Indeed, in the past, a substantial majority of children who have been patients of specialist gender clinics have resolved these issues before or around the time of puberty. Most go on to be gay or lesbian adults.[35]

One answer to the question of when a child has a legally-protected gender identity might be if he or she is clinically diagnosed with gender dysphoria. The *Diagnostic and Statistical Manual of Mental Disorders* defines 'Gender Dysphoria' in children as involving 'a marked incongruence between one's experienced/expressed gender and assigned gender, of at least 6 months' duration' and evidenced by at least six of eight criteria. [36] An essential criterion is A1: '[a] strong desire to be of the other gender or an insistence that he or she is the other gender (or some alternative gender different from one's assigned gender)'.[37] There are different criteria used for diagnosing gender dysphoria in adolescence and adulthood.[38]

Having a clinical diagnosis of gender dysphoria would at least offer some rational basis for determining the point at which it could become discriminatory, as a matter of law, to take particular actions or fail to take such actions in a way that adversely impacts upon the child or

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[33] Jiska Ristori and Thomas D Steensma, 'Gender Dysphoria in Childhood' (2016) 28(1) *International Review of Psychiatry* 13, 17 (citations omitted) ('Gender Dysphoria in Childhood').
[34] 'Principles of Evidence Based Service Development' in *Independent Review of Gender Identity Services for Children and Young People: Interim Report* (February 2022) 62 -63. The report observed that 'better information is needed about outcomes': at 63.
[35] See, eg, Kelley Drummond et al, 'A Follow-up Study of Girls with Gender Identity Disorder' (2008) 44(1) *Developmental Psychology* 34; Thomas Steensma et al, 'Factors Associated with Desistence and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study' (2013) 52(6) *Journal of the American Academy of Child and Adolescent Psychiatry* 582; Ristori and Steensma 'Gender Dysphoria in Childhood'(n 33); Devita Singh, Susan Bradley and Kenneth Zucker, 'A Follow-Up Study of Boys with Gender Identity Disorder' (2021) 12 *Frontiers in Psychiatry* 632784.
[36] American Psychiatric Association, 'Gender Dysphoria' in *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*, (5th ed, 2013) 302.6 (F64.2) ('Gender Dysphoria').
[37] Ibid.
[38] Ibid 302.85 (F64.0).

young person. By not referencing gender dysphoria at all, the *SDA* creates confusion about the application of the law to children.

B *What About the Rights of Parents?*

In the hypothetical posited, Chris is 15. What if the parents are opposed to Chris's wish to engage in a social transition? Arguably, Chris has a legally protected gender identity at the point at which he or she has the legal capacity to make a decision about social transition independently of the parents. Such a view would be based upon the common law principle explained by the House of Lords in *Gillick v West Norfolk and Wisbech A.H.A,* ('*Gillick'*)[39] that young people gain some legal capacity to give their own consent to medical treatment, and by analogy therefore, other decisions, if they have sufficient maturity to understand all the issues involved.[40]

However, it is an error to suppose that Gillick-competence, as it is known, displaces parental authority entirely.[41] In the related area of medically assisted transition, Watts J of the Family Court of Australia[42] has made it clear in *Re Imogen (no 6)*, that parents have a continuing role until the child turns 18.[43] Justice Watts held that, notwithstanding the Full Court's decision in *Re Kelvin*,[44] court approval is needed if a parent disputes either the Gillick-competence of an adolescent, a diagnosis of gender dysphoria, or the proposed treatment. Even if Chris is deemed Gillick-competent, the parents, or either of them, still have the right to go to court to question the diagnosis or treatment, should Chris seek the prescription of cross-sex hormones. In the exercise of its *parens patriae* jurisdiction, a state or territory Supreme Court may override the wishes of a Gillick-competent minor,[45] and there is an analogous power in s 67ZC of the *Family Law Act 1975* (Cth).

The issue of Gillick-competence is far from straightforward when a child or young person wants to make very important decisions with potentially long-term implications. Many of the adolescents attending gender clinics and seeking prescriptions for puberty blockers or cross-sex hormones are on the autism spectrum.[46] Many also have serious psychiatric comorbidities.[47] Research conducted at the Children's Hospital at Westmead, Sydney, indicates that many of the young people seeking medical treatments for gender dysphoria have

[39] [1986] AC 112 ('*Gillick*')
[40] The decision in *Gillick* concerned the capacity of teenage girls under 16 to give consent to the prescription of the contraceptive pill without their parents' knowledge.
[41] See further, Patrick Parkinson, 'Reconsidering Kelvin: Cross-Sex Hormone Treatment as a Response to Adolescent Gender Dysphoria', *Australian Journal of Family Law* (in press).
[42] This Court is now known as the Federal Circuit and Family Court of Australia.
[43] [2020] FamCA 761.
[44] [2017] FLC ¶ 93-809.
[45] *X and Others v The Sydney Children's Hospital Network* (2013) 85 NSWLR 294. The court authorised a blood transfusion on a Gillick-competent 17 year old notwithstanding his refusal of that treatment.
[46] Annelou de Vries et al, 'Autism Spectrum Disorders in Gender Dysphoric Children and Adolescents' (2010) 40(8) *Journal of Autism and Developmental Disorders* 930; Vicky Holt, Elin Skagerberg and Michael Dunsford, 'Young People with Features of Gender Dysphoria: Demographics and Associated Difficulties' (2016) 21(1) *Clinical Child Psychology and Psychiatry* 108. See also Doug VanderLaan et al, 'Do Children with Gender Dysphoria Have Intense/Obsessional Interests?' (2015) 52(2) *Journal of Sex Research* 213.
[47] Riittakerttu Kaltiala-Heino et al, 'Two Years of Gender Identity Service for Minors: Overrepresentation of Natal Girls with Severe Problems in Adolescent Development' (2015) 9(1) *Child and Adolescent Psychiatry and Mental Health* 9; Tracy Becerra-Culqui et al, 'Mental Health of Transgender and Gender Nonconforming Youth Compared with Their Peers' (2018) 141(5) *Pediatrics* 1.

suffered adverse childhood events, family dysfunction or disordered attachments.[48] The application of the Gillick-competence test to adolescents with poor mental health, and who may be on the autism spectrum, is not nearly as straightforward as the question whether a healthy and intelligent fifteen year old could consent to an appendectomy in the absence of parental consent.[49]

It follows that it is far from simple to say that an adolescent gains a legally protected gender identity when he or she is Gillick-competent. That just begs the question of who gets to decide the issue of Gillick-competence. When psychiatric illness or a neurobiological disorder such as autism is involved, what qualifications does the adult need who is being relied upon to assess Gillick-competence?

C *What if the School Thinks the Gender Identity is Likely to be Transient?*

It would not be responsible for a school to facilitate social transition if it were of the view that this is a temporary phase. There is reason for great caution before accepting that Chris was assigned to the 'wrong' gender at birth, that he or she was born in the wrong body,[50] that he or she should be encouraged from henceforth to identify as the opposite sex, and that others should treat Chris as the gender with which he or she identifies.

There is now a lot of evidence that peer and social influences are playing a role in persuading at least some young people that they are transgender. It used to be the case that the gender dysphoria was mostly diagnosed in natal males, with signs of gender incongruence identifiable from early childhood.[51] Now, a substantial majority of adolescents seeking medical transition to another gender identity are adolescent females,[52] and there has been a massive increase in

[48] Kasia Kozlowska et al, 'Attachment Patterns in Children and Adolescents with Gender Dysphoria' (2021) 11 *Frontiers in Psychology* 582688; Kasia Kozlowska et al, 'Australian Children and Adolescents with Gender Dysphoria: Clinical Presentations and Challenges Experienced by a Multidisciplinary Team and Gender Service' (2021) 1(1) *Human Systems: Therapy, Culture and Attachments* 70.

[49] Gillick (n 39) 201 (Lord Templeman [dissenting in the outcome] but not on this point). See further, Parkinson (n 41).

[50] This is the popular idea that while a person's body may be unequivocally one sex, their brains are wired to identify as the opposite sex. The search for a physiological basis for transgender identification has provided limited support for such a view: see Sven C Mueller, Griet De Cuypere and Guy T'Sjoen, 'Transgender Research in the 21st Century: A Selective Critical Review from a Neurocognitive Perspective' (2017) 174(12) *American Journal of Psychiatry* 1155. The authors observe: 'Despite intensive searching, no clear neurobiological marker or "cause" of being transgender has been identified': at 1158. See also Jack Turban and Diane Ehrensaft, 'Research Review: Gender Identity in Youth: Treatment Paradigms and Controversies' (2018) 59(12) *Journal of Child Psychology and Psychiatry* 1228; But see Aruna Saraswat, Jamie Weinand and Joshua Safer, 'Evidence Supporting the Biologic Nature of Gender Identity' (2015) 21 *Endocrine Practice* 199. These authors were unable to assign specific biological mechanisms for gender identity and noted the need for caution due to small sample sizes.

[51] For international statistics, see Griet De Cuypere et al, 'Prevalence and Demography of Transsexualism in Belgium' (2007) 22(3) *European Psychiatry* 137.

[52] Hayley Wood et al, 'Patterns of Referral to a Gender Identity Service for Children and Adolescents (1976–2011): Age, Sex Ratio, and Sexual Orientation' (2013) 39(1) *Journal of Sex and Marital Therapy* 1; Madison Aitken et al, 'Evidence for an Altered Sex Ratio in Clinic-Referred Adolescents with Gender Dysphoria' (2015) 12(3) *Journal of Sexual Medicine* 756; Nastasja de Graaf et al, 'Sex Ratio in Children and Adolescents Referred to the Gender Identity Development Service in the UK (2009–2016)' (2018) 47(5) *Archives of Sexual Behavior* 1301.

adolescents seeking that treatment.[53] No research-based explanation has emerged for why this inversion has occurred.[54]

The increase in cases ought not to be surprising. In recent years a high profile has been given to transgender issues. Popular figures on YouTube promote a somewhat rosy view of the transition journey.[55] Media reporting about transgender issues has also been shown to have significant impact on referrals to gender clinics in England and Australia.[56] Yet how many of these young people really have a condition that justifies supporting them in a social transition, let alone a medical transition? Does the huge and rapid increase in adolescents, but not adults, identifying as 'trans' have anything to do with 'social contagion'?[57]

Lisa Littman, in a landmark study,[58] provided evidence that this is so. She surveyed parents who reported that their child had a sudden or rapid onset of gender dysphoria, occurring during or after puberty. There were responses from 256 parents. Nearly 83% of the young people concerned were female and on average were 15 years old at the time they announced a new gender identification. The majority had been diagnosed with at least one mental health disorder or neuro-developmental disability prior to the onset of their gender dysphoria. None of them, based on parents' reports, would have met diagnostic criteria for gender dysphoria in childhood. Nearly half had been formally assessed as academically gifted. Over 40% expressed a non-heterosexual sexual orientation prior to identifying as transgender. Nearly half had experienced a traumatic or stressful life event prior to the onset of their gender dysphoria such as parental divorce, sexual assault or hospitalisation for a psychiatric condition.

For 45% of these young people, parents reported that at least one of the members of their friendship group came to identify as transgender. The average number of individuals who became transgender-identified was 3.5 per group; for 37% of the young people, the majority of friends in the group had come to identify as transgender. Parents reported that about 60% of the young people experienced increased popularity within their friendship group when they announced that they now identified as transgender. A similar proportion of the parents reported that the friendship groups were known to mock people who did not identify as LGBTQI+.

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[53] Kenneth Zucker, 'Adolescents with Gender Dysphoria: Reflections on Some Contemporary Clinical and Research Issues' (2019) 48(7) *Archives of Sexual Behavior* 1983.

[54] Gary Butler et al, 'Assessment and Support of Children and Adolescents with Gender Dysphoria' (2018) 103(7) *Archives of Disease in Childhood* 631.

[55] Elin Lewis, 'Transmission of Transition via YouTube' in Michele Moore and Heather Brunskell-Evans (eds) *Inventing Transgender Children and Young People* (Cambridge Scholars Publishing, 2019) 180.

[56] Ken Pang et al, 'Association of Media Coverage of Transgender and Gender Diverse Issues with Rates of Referral of Transgender Children and Adolescents to Specialist Gender Clinics in the UK and Australia' (2020) 3(7) *JAMA Network Open* e2011161.

[57] Lisa Marchiano, 'Outbreak: On Transgender Teens and Psychic Epidemics', (2017) 60(3) *Psychological Perspective* 345.

[58] Lisa Littman, 'Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria' (2018) 13(8) *Plos One* e0202330 (as amended, 2019). The article was amended post-publication following pressure from transgender activists. The amendments were required by the editor following reviews by senior members of the journal's editorial team, two Academic Editors, a statistics reviewer, and an external expert reviewer. However, the journal editors stood by the article and refused to retract it. For some criticisms and the author's response, see Arjee Restar, 'Methodological Critique of Littman's (2018) Parental-respondents Accounts of "Rapid-onset Gender Dysphoria' (2020) 49(1) *Archives of Sexual Behavior* 61; Lisa Littman, 'The Use of Methodologies in Littman (2018) Is Consistent with the Use of Methodologies in Other Studies Contributing to the Field of Gender Dysphoria Research: Response to Restar (2019)' (2020) 49(1) *Archives of Sexual Behavior* 67.

The majority of parents reported that when the young person disclosed the belief that he or she was transgender, the language came word for word from online sites. More than half had very high expectations that transitioning would solve their social, academic, occupational or mental health problems.

Sudden, post-pubertal identification as transgender, influenced by social media and peers, helps to explain the very high rates at which adolescents now identify as transgender, and in particular the increase in the number of teenage girls.[59] For example, a study of responses of over 3000 9th-12th graders in Pittsburgh, Pennsylvania in 2018 found that 9.2% identified as a gender other than their natal sex, choosing one or more of 'trans girl', 'trans boy' 'genderqueer', 'nonbinary' and 'another identity'.[60] Thirty-nine percent were natal males identifying as female, 30% of these were natal females identifying as male, and 31% were non-binary 'genderqueer', choosing another identity or adopting more than one descriptor. The DSM-5 records gender dysphoria as occurring in between 0.005% to 0.014% of natal adult males, and 0.002% to 0.003% of natal females.[61] Unless rates of gender identity disorder, as it used to be known, or gender dysphoria, were massively undiagnosed in the past, it is likely that for the vast majority of these teenagers in Pittsburgh, the transgender or non-binary identification is either fad or fantasy. The huge increase in transgender identification among teenagers has simply not been matched by a similar increase amongst adults, suggesting that generalised lack of diagnosis in the past is not the issue.

None of this is to deny the real and painful experiences of those who are exploring their gender identity or those diagnosed with gender dysphoria. No great harm is done if transgender or 'genderqueer' identification is little more than a way of getting status in a peer support group and the student does not make major changes by way of social transition. However, if social transition leads to requests for cross-sex hormones and surgery, such as a double mastectomy, the implications are much greater. An increasing number of young adults are now regretting the irreversible changes to their bodies that they demanded as teenagers, thinking they were trans.[62]

D *What Can Parents Expect from State Schools?*

Given all this, there is reason for schools to be very cautious about affirming Chris's self-declared gender identity, at least without requiring careful mental health evaluation as is required by even those medical organisations most supportive of assisting people to transition medically.[63] However, state education department policies may not reflect that need for caution. One reason is because they understand the *SDA*, and related state anti-discrimination

[59] Abigail Shrier, *Irreversible Damage: The Transgender Craze Seducing Our Daughters* (Regnery Publishing, 2020). See also Anna Hutchinson, Melissa Midgen and Anastassis Spiliadis, 'In Support of Research into Rapid-Onset Gender Dysphoria' (2020) 49(1) *Archives of Sexual Behavior* 79.

[60] Kacie Kidd et al, 'Prevalence of Gender-Diverse Youth in an Urban School District' (2021) 147(6) *Pediatrics* e2020049823.

[61] DSM-5 (n 36) 454.

[62] Lisa Littman, 'Individuals Treated for Gender Dysphoria with Medical and/or Surgical Transition Who Subsequently Detransitioned: A Survey of 100 Detransitioners' (2021) 50(8) *Archives of Sexual Behavior* 3353; Elie Vandenbussche, 'Detransition-Related Needs and Support: A Cross-Sectional Online Survey' (2021) *Journal of Homosexuality* <https://doi.org/10.1080/00918369.2021.1919479>. For a different view of reasons for detransition, see Jack Turban et al, 'Factors Leading to ''Detransition'' Among Transgender and Gender Diverse People in the United States: A Mixed-Methods Analysis' (2021) 8(4) *LGBT Health* 273.

[63] See e.g. World Professional Association for Transgender Health *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (version 7, 2012) 23-24 (referring to adults) <https://www.wpath.org/publications/soc>.

laws, to require affirmation of a child's gender identity. In essence, the message of some of these documents is that not to support Chris to change gender identity, at least in school, could constitute unlawful discrimination.

AFFIRMATION OF GENDER IDENTITY – THE GUIDANCE FROM GOVERNMENTS

A *The Safe Schools Coalition Guidance*

Clearest on this position are the publications of the Safe Schools Coalition, which was for some time funded by the federal Department of Education. Selected publications remain on the federal Government's website and therefore have some level of official imprimatur. One of those publications is its guidance to schools on helping young people transition to a new identity.[64] At least some of its advice purports to be based upon what the *SDA* requires. Remarkably, there is almost no mention of consultation with parents or the rights of parents as decision-makers about their children's lives. Teachers and school principals are advised that:

> Consideration should be given to the age and maturity of the student and *whether it would be appropriate* to involve the students' parent(s) or guardian(s) in each decision.[65]

There is mention of getting parental consent for information about the child's transition to be shared if the student is 'unable to give explicit consent' but there is no guidance on when the child might have reached that threshold of independence as a matter of law. Under the heading, 'Prepare for community responses' school leadership teams are advised to 'be prepared to respond to questions or concerns from parents'. If parents are known not to be supportive of the child or young person's desire to transition to a new name and gender, then the school should proceed anyway:

> If a student does not have family or carer support for the process, a decision to proceed should be made based on the school's duty of care for the student's wellbeing and their level of maturity to make decisions about their needs.[66]

It is difficult to see how this could be done without a massive and continuing deception of the parents (for example school reports continuing to be issued in the child's legal name) or taking actions that could lead to the breakdown of the parent-child relationship. Nowhere in this document is there any reference to the need for any advice from a psychologist, doctor or psychiatrist.

The document also recommends changes that have consequences for other students, such as use of bathrooms and changing rooms and participation in gender-segregated sports, without reference to the needs and concerns of those other students. In particular, no mention is made of the rights and needs of female students who may consider their bodily privacy is compromised if a male-bodied person uses their changing rooms or is permitted to sleep in female-only accommodation on camps.

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[64] Roz Ward et al, 'The Student Wellbeing Hub' *Safe Schools Coalition Australia and Foundation for Young Australians* (Web Page) <https://studentwellbeinghub.edu.au/educators/resources/supporting-a-student-to-affirm-or-transition-gender-identity-at-school/>.

[65] Guide to Supporting a Student to Affirm or Transition Gender Identity at School' *Safe Schools Coalition Australia and Foundation for Young Australians* (Web Page) <guide-to-supporting-a-student-to-affirm-or-transition-gender-identity-at-school_oct-2015.pdf (studentwellbeinghub.edu.au)> (emphasis added).

[66] Ibid.

It is unsurprising that many parents were concerned about the Safe Schools program. By way of illustration, the Chinese-Australian population in New South Wales circulated a petition against the program in 2016, complaining that it promoted a particular ideology which was contrary to their culture and beliefs. It attracted over 17,000 signatures.[67]

B *State Education Department Policies*

Some education department policies reflect the radicalism of the Safe Schools Coalition. Typically, these policy documents refer to the need to work with parents, and some emphasise this strongly;[68] but others are rather more equivocal. For example, the legal guidance in NSW, based upon its interpretation of discrimination laws (including the *SDA*), is that:

> It is important to consult with the student and their parents or carers where practicable when planning for the student's support unless the principal *believes on reasonable grounds that it is not in the student's best interests to do this*.[69]

In a similar vein, Victoria's state education department policy, referencing state law and the *SDA*, states that 'gender affirmation student support plans' 'should be developed in consultation with the student and their parents or carers, where possible.'[70] On the issue of parental consent, the guidance is specific:

> There may be circumstances in which students wish or need to undertake gender transition without the consent of their parent/s (or carer/s), and/or without consulting medical practitioners. If no agreement can be reached between the student and the parent/s regarding the student's gender identity, or if the parent/s will not consent to the contents of a student support plan, it will be necessary for the school to consider whether the student is a mature minor. If a student is considered a mature minor they can make decisions for themselves without parental consent.[71]

There is further guidance on whether the child or young person is a mature minor, but this is rather casually left as a decision of the school, without consultation with a child psychologist or even a requirement that the decision be made at senior management level within the Department.[72] Principals or others working with students in schools can decide that the student is capable of making their own decision on the basis that the student has sufficient maturity, understanding and intelligence to understand the nature and effect of their particular decision.

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[67] Danuta Kozaki, 'Safe School: Australian Chinese community petition against anti-bullying program lodged in NSW', *ABC News* (online , 23 August 2016) <https://www.abc.net.au/news/2016-08-23/safe-schools-mp-lodges-petition-against-program-signed-by-17000/7777030>.

[68] See, eg, 'Gender Diverse and Intersex Children and Young People Support Procedure' *Department for Education South Australia* (Web Page, 4 February 2022) 6 <https://www.education.sa.gov.au/doc/gender-diverse-and-intersex-children-and-young-people-support-procedure>; 'Diversity in Queensland Schools – Information for Principals' *Education Queensland* (Fact sheet) <https://education.qld.gov.au)>.

[69] New South Wales Government-Education, 'Transgender Students in Schools – Legal Rights and Responsibilities', *Legal Issues Bulletin No 55* (Web Page, December 2014) <https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/transgender-students-in-schools> (emphasis added).

[70] Department of Education and Training Victoria, 'LGBTIQ Student Support' *Policy and Advisory Library* (Web Page, 15 June 2020) <https://www2.education.vic.gov.au/pal/lgbtiq-student-support/policy>.

[71] Ibid.

[72] Department of Education (Vic), 'Mature Minors and Decision Making' *Policy and Advisory Library* (Web Page, 15 June 2020) <https://www2.education.vic.gov.au/pal/mature-minors-and-decision-making/policy>.

There are three issues with these policies. The first, is that to the extent it relies on an interpretation of what is legally required to avoid discriminating against a student, it elides two quite different obligations. The first is an obligation not to treat the young person adversely. That is what the arguments about discrimination and the exemptions under s 38(3) have been all about. There is an understandable revulsion against the idea that faith-based schools should be allowed to expel students who identify as transgender. However, that is surely different from requiring the school to facilitate the young person's transition to another gender based upon nothing more than that this is what the child or young person wants to do.

Properly understood, the *SDA* does not provide that gender identity should be equated with sex. The issue can be tested by asking whether it is discriminatory to refuse enrolment to a natal male who now identifies as female and wants to be admitted to a single-sex girls' school. Section 21 of the *SDA* makes clear that an educational institution can refuse to admit a student who identifies as the opposite sex if it is conducted solely for students of a different sex from the applicant. Nothing in the *SDA* states that an educational institution must treat any student as a different sex because their gender identity differs from their natal sex. However, on this issue, state education department policies and the guidance of the Safe Schools Coalition have caused confusion.

The second issue concerns the role of parents in decision-making about their children. The guidance from the Safe Schools Coalition and the Department of Education in Victoria indicates that parents need not be informed at all of the actions the school is taking to facilitate the social transition. This conflicts with the position stated in *Re Imogen (no 6)* that the consent of both parents must be obtained before a doctor prescribes cross-sex hormones to a child under 18, even if some other adult says the child is Gillick-competent, because each parent must be given the opportunity to go to court to challenge this finding, or the proposed medical treatment. It would be surprising therefore, if the *SDA* could be interpreted to say that the school is discriminating against Chris if it declines to go along with his or her wishes to transition at school without telling the parents. Yet the *SDA* has been interpreted to support social transition without parental knowledge or consent.

The third issue concerns the role of mental health professionals. A surprising aspect of the legal and policy guidance available from state governments is the absence of a requirement that important decisions about social transition be made with expert guidance from clinicians and on the basis of a clinical diagnosis of gender dysphoria. Specifically, Victoria's policy provides that while a letter from a gender identity specialist may be requested by the school to support it in developing a student's transition plan, such a letter is not a conditional requirement for the school in providing support to the student.[73]

This reflects the very controversial view that gender incongruence should not be seen as a medical issue at all,[74] and mental health professionals should not become gatekeepers to interventions that assist children and young people to transition.[75]

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[73] See above n 70.

[74] This position can be found, for example, in the Yongyarta Principles, drawn up by non-government human rights specialists in 2006. Principle 18 states: "Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed . . ." <https://yogyakartaprinciples.org/principle-18/>.

[75] See, eg, Anastacia Tomson, 'Gender-affirming Care in the Context of Medical Ethics – Gatekeeping v Informed Consent' (2018) 11(1) *South African Journal of Bioethics and Law* 24; Florence Ashley, 'Gatekeeping Hormone Replacement Therapy for Transgender Patients is Dehumanising' (2019) 45(7) *Journal of Medical Ethics* 480.

CONCLUSION: REFORMING THE *SDA*

The *SDA*, at least as it is interpreted by influential communities of interpretation, may lead school principals and other decision-makers to make decisions about a child's request for social transition which are not in the child's best interest, or respectful of the role of parents. It also treats gender identity as an attribute requiring legal protection without reference to medical understanding of gender incongruence and gender dysphoria.

If the *SDA* were interpreted as requiring only that children and young people who have a gender identity that is incongruent with natal sex should not be expelled from school or be subjected to any other disciplinary consequence, based upon their gender identity, then it would be entirely uncontroversial to delete s 38(3) of the Act. However, that is not how it has been interpreted.

There is a need for a comprehensive review of gender identity discrimination laws in Australia which examines the medical and scientific evidence that is now emerging concerning the aetiology of gender incongruence among adolescents – particularly those with significant psychiatric comorbidities or neurobiological disorders. In the absence of an overhaul of these laws generally, the faith-based schools provide an alternative option to parents who are deeply concerned about what is being taught and done in state schools and who can afford an alternative. Many of these schools have quite low fees, and so are affordable to many.

The case for religious exemptions on the basis of gender identity, then, is not only that the law needs to recognise the right of faith-based schools to adhere to their understanding that *Homo sapiens* is a sexually dimorphic species, but also to provide an alternative to parents, who may not be deeply religious at all, who are worried by the ideological capture of state education departments. As the controversies about the Safe Schools program a few years ago demonstrated, there is significant concern in the community about some aspects of school programs which present new theories and ideas about gender identity which many would regard as unscientific and which conflict with parents' culture and beliefs.

There is therefore both a religious and rational case for religious exemptions to continue — not to allow the expulsion or discipline of students based upon sexual orientation or gender identity, but to allow parents an alternative to state education policies that conflict with either their religious beliefs or their wish to be involved in all major decisions affecting their children's lives.

If s 38(3) is to be repealed, then various other amendments to the *SDA* are essential. Section 21 needs an additional provision to the effect that nothing in the Act requires a school to treat a child or young person as having a sex that is congruent with their gender identity or to support a child or young person to adopt a new gender identity without parental knowledge or consent. This then leaves it up to school principals and other leaders to use their best professional judgments in responding to a request of a young person to undertake a social transition, respecting the views of parents. A pastoral approach, unconstrained by the influence of poorly considered anti-discrimination laws, will take into account issues of mental health and suicidal ideation in working out the most sensitive and caring pastoral response to the student in the circumstances, working hand in hand with the young person's treating medical and mental health practitioners.

Free from legislative coercion, a Christian school principal may, after due consideration, decide that the most compassionate response to a young person who seeks to change gender is not to embrace his or her newly found gender identity, or not yet. That may be for many reasons, including concerns about the rapid onset of gender dysphoria, observable influences in the young person's friendship group, awareness of other mental health disorders and concern that those other mental health issues may not receive the attention they warrant if transitioning is seen as the answer to all the young person's difficulties. At the very least, a Principal's interpretation of his or her duty of care may lead to an insistence upon a program of counselling, or expert diagnosis together with advice to affirm the young person's gender identity, before agreeing to the transition she or he wishes to make.

All schools ought to have an absolute defence to a claim of discrimination against a young person under the age of 18 that they acted in good faith on the basis of what they considered at the time to be in the best interests of the child. Without such a provision, an educational professional may be unable to reconcile his or her duty of care towards the child with the requirements of the *SDA*. It would be contrary to fundamental principles of child protection if the law compelled, or was understood to compel, a professional with a duty of care towards a child to make decisions that are contrary to what he or she considers are the child's best interests and which could cause them harm.

The law could also be more clearly stated so that people realise that gender identity is not to be equated with biological sex when it comes to the use of sex-segregated facilities or sex-segregated activities, except insofar as the law specifically provides. Such clarification in the law would go a long way to resolving the dilemmas now being created by laws which base changes to gender identity on nothing more than self-declaration.

The *SDA* would also need to make clear that it is not indirect discrimination against any student for a faith-based educational institution to teach in accordance with its beliefs or to maintain school rules consistent with those beliefs. Putting in new protections for religious freedom into the *SDA* to replace s 38(3) would reduce the vulnerability of the 2013 amendments to constitutional challenge as being inadequately based upon implementation of a treaty.

People of faith have long been dissenters from prevailing secular worldviews. Being grounded in beliefs that are ancient, they tend to be unpersuaded by newly fashionable ideas that cannot be reconciled with those beliefs. Religious exemptions need to remain, insofar as they allow faith-based organisations the freedom not to have to treat someone as a gender different to their natal sex, and for the sake of parents who want the option to educate their children at a school consistent with their own beliefs.

Book Review

Christians: The Urgent Case for Jesus in Our World

Christians: The Urgent Case for Jesus in Our World. By Greg Sheridan. Allen & Unwin Australia, 2021. Pp. 384. ISBN: 1760879096

Review by Katie Murray*

Christians: The Urgent Case for Jesus in Our World continues Greg Sheridan's examination of Christianity following on from his earlier work, *God is Good for You*.[1] Familiar to many Australian readers as the foreign editor of *The Australian*, Sheridan brings his engaging and relatable writing style to such topics as the historicity of the Gospels, key figures in the Bible, and the impact of Christianity on society ─ including explorations of popular culture and contemporary expressions of faith. Of particular interest to many readers will be Sheridan's views on the intersection of politics, political leadership, and faith commitments.

The book includes interviews with practising Christians from a range of backgrounds, denominations and political persuasions, including Gemma Sisia (founder of the School of St Jude in Africa), multiple pastors and archbishops, a Hollywood film producer, Chinese Christians whose identities could not be disclosed, and even a former Prime Minister of Australia. The breadth and diversity of their stories, recounted in the second half of the book, add both interest and realism. Indeed, even those who are not interested in the theme of the book itself may nevertheless find themselves enthralled by the window that Sheridan opens into the motivations, challenges and occasional flaws of those he interviewed. The intensely personal memories and insights with which Sheridan has been entrusted are a key feature of the book.

The concept of Christian universalism is referred to a number of times throughout the book. This is the belief that '[e]very human being is created by God and participates in the saved and glorified human dignity of Christ's new creation',[2] best reflected, Sheridan says, in the statement by St Paul in Galatians 3:28 : 'There is no longer Jew or Greek, there is no longer slave or free, there is no longer male or female; for all of you are one in Christ Jesus.'[3]

Although Christianity was not a political force and did not seek to revolutionise society through 'military policy',[4] 'political overthrow',[5] or 'civic disobedience',[6] Sheridan argues that the concept of universalism led to significant social and later political changes in ancient society, including in the abolition of existing social hierarchies and the treatment of women, and in this way 'Christianity was extraordinarily liberating'.[7] Universalism is also a concept, Sheridan

* Lecturer, University of Southern Queensland.
[1] Greg Sheridan, *God is Good for You: A Defence of Christianity in Troubled Times* (Allen & Unwin Australia, 2018).
[2] Greg Sheridan, *Christians: The Urgent Case for Jesus in Our World* (Allen & Unwin Australia, 2021) 166.
[3] Ibid 162.
[4] Ibid 149.
[5] Ibid.
[6] Ibid 150.
[7] Ibid 164.

suggests, that contributed to Christianity's appeal and consequent spread throughout the world, and which continues to make a significant contribution to society today.

In his examination of the intersection between Christianity and politics, Sheridan proposes that Christian universalism places natural limits on political extremism, asserting, for example, that '[n]o Christian can ever have an excuse in any circumstance for racism',[8] and that movements such as Nazism and Communism would conflict with Christian universalism by disregarding human dignity and equality.[9] Apart from this however, Sheridan contends: 'Moderate politics of centre left or centre right are not adjudicated on by Christianity. It is possible for faithful Christians to vote Conservative or Labour in Britain, Republican or Democrat in the US, and Liberal/National or Labour in Australia.'[10]

Rather, Sheridan says that 'Christianity gives you clear principles but not specific policies'[11] and that there might be a range of conflicting but legitimate views on how to give effect to these. For example, Sheridan argues that, whilst Christianity might advocate assistance for the poor, weak and powerless, there might be diverse approaches to doing so, and:

> How they do that is up to individuals and organisations, proceeding from goodwill. It is perfectly legitimate to think you can help the poor by giving trade unions more power to protect the low paid. Alternatively, it is equally legitimate to think you can help the poor best by deregulating the labour market, which might involve reducing union power, so that more jobs are created and fewer people are unemployed and thereby poor.[12]

Whilst, elsewhere, Sheridan suggests that '[h]aving met many remarkable Christians, I've found that there is no one, set way that Christian faith expresses itself'[13]— he is clear that in politics at least, faith may inspire and motivate, but should not seek to dominate or exclude. That is, as Sheridan argues '[i]t's legitimate for a politician to think: these policies are the best way I can give effect to my Christian principles; it's entirely wrong, except in extreme cases, for them to say, only this policy is a Christian policy, or, if you don't follow my policy, you're breaching Christian teachings'.[14] Similarly, Sheridan reflects, it is 'about right'[15] for politicians to be authentic and honest about their beliefs, but to be mindful that they are the political representatives 'for all Australians, for Australians of all faiths and none',[16] thus giving expression to the key characteristics of Christian universalism.

Looking forward, Sheridan considers Christian belief in the context of contemporary China, examining the history and treatment of religious belief in that country, and suggesting that it is again Christian universalism that may present the greatest challenge to totalitarianism, having, as it does, 'the potential to appeal to tens of millions, indeed hundreds of millions, of mainstream Chinese, ethnic Chinese, all across the nation'.[17] Whilst acknowledging the capacity for conflict, Sheridan also proposes that the purpose of Christianity in China is not to

[8] Ibid 166.
[9] Ibid 241.
[10] Ibid 179.
[11] Ibid 241.
[12] Ibid.
[13] Ibid 214.
[14] Ibid 241.
[15] Ibid 242.
[16] Ibid.
[17] Ibid 286.

effect political reform but rather individual faith, and that its emphasis on care for the poor and weak may also provide scope for Chinese Christians to 'help the government with charitable works, care for the aged and the otherwise marginalised … '[18]

Overall, Sheridan's views about the intersection between Christianity and contemporary politics may be compared to the juxtaposition between the contemporary worship style he observed in the course of interviews he conducted at London's Holy Trinity Brompton (an Anglican 'megachurch') [19] and the ancient Tridentine Mass celebrated (in Latin) by its Catholic neighbour, the Brompton Oratory. That is, although the two might seem 'poles apart … the two churches strike me as not much different at all on the things that really matter'.[20] From the perspective of Christian universalism, it is the principles of human equality and dignity that matter, however diverse their expression.

[18] Ibid 300.
[19] Applying the description adopted by Sarah Dunlop in 'Anglican Megachurches: Transforming society one person at a time' (Undated) <https://www.birmingham.ac.uk/Documents/college-artslaw/ptr/theology/research/2-Dunlop-Transforming-Society.pdf>
[20] Sheridan (n 2) 325.

Book Review

Law and Religion in the Liberal State

Law and Religion in the Liberal State. Edited by Md Jahid Hossain Bhuiyan and Darryn Jensen. Hart Publishing, 2021. Pp. 262. ISBN: 9781509943845

Review by Jeremy Patrick*

Law and Religion in the Liberal State is an edited collection of 13 essays grouped loosely into two parts: 'Religious Freedom and Particular Traditions' and 'Contested Issues'. The essays cover a broad range of topics—everything from exorcism to Shari'a—and also involve a variety of jurisdictions, with the United States and Europe receiving particular attention. Although it is inevitable that some essays in a collection like this will be better than others, the standard across the board is high. The editors obviously chose material carefully and the essays that made the final cut are well-researched and interesting.

The introduction articulates a useful distinction between different understandings of the role of the liberal state when it comes to dealing with religious pluralism: 'liberalism as a truce'[1] (accommodating religious pluralism) versus 'comprehensive liberalism'[2] (displaying hostility toward religious values). The high-profile debates over how the oft-clashing values of equality and religious freedom should be resolved in the context of anti-discrimination laws are a good example of the challenges that liberal societies face.

Part I of the collection, 'Religious Freedom and Particular Traditions', contains three essays. Charlotte Carrington-Farmer's 'Roger Williams and the Architecture of Religious Liberty' is a fascinating and well-written discussion of Williams' role in bringing what was, at the time, a truly radical vision of religious freedom and the separation of church and state into reality. The essay clearly demonstrates that ideas—and a single proponent of them—really can shape the world. Daniel Kalkandjieva offers a fine overview of his topic in 'Orthodox Churches in Post-Communist Countries and the Separation between Religion and State'. One could argue that most of the nation-states discussed within it do not properly fit under the label of 'liberal states' to begin with, but that may be neither here nor there. The last essay in Part I is Zachary Calo's 'Catholic Social Thought, Religious Liberty and Liberal Order'. It is a very good, readable discussion detailing the history of the Catholic Church's opposition to religious freedom and the separation of church and state, followed by a discussion of *Dignitatis Humanae* and the influence of John Courtney Murray on later Catholic thought.

From a stylistic point of view, Part II ('Contested Issues') serves as an inelegant catch-all grouping of the book's 10 remaining essays. Nonetheless, the essays are generally good. Anthony Bradney contributes 'The Right to be Different: Religious Life in Twenty-First Century Great Britain'. The focus is much narrower than the title indicates, as it is really about the use of government inspection agencies to suppress faith-based schools in Britain. Less impressive was the constant hand-wringing on display in Rafael Palomino's 'Law, Religion

* Lecturer, University of Southern Queensland.

[1] Md Jahid Bhuiyan and Darryn Jensen, 'Introduction: Law and Religion in the Liberal State' in Md Jahid Bhuiyan and Darryn Jensen (eds), *Law and Religion in the Liberal State* (Hart Publishing, 2021) 1, 3.

[2] Ibid 4.

and States: Searching for a Soul for Europe'. Palomino's concern is that the lack of a reference to God and/or the purported Christian heritage of Europe in the foundational documents of the EU means that the region lacks a shared sense of value and purpose — as if a few ceremonial deisms would instantly address the deep political and practical challenges of unifying such a disparate collection of peoples. Carlo Panara's essay has a mouthful for a title, but essentially provides an overview of the role of the crucifix in Italian religious and political life — it is interesting to see the real ebb and flow of its perceived importance by government authorities, as well as its adoption by nationalist movements. Carla Zoethout also discusses crucifixes, but in the context of the European Court of Human Rights' caselaw over them, face-covering veils, and insults to religious sensibilities. From the Court's varied rationales and decisions, it may just be that no clear synthesis of them is possible.

Three essays in the book are focussed specifically on modern American issues involving law and religion. 'Religious Exemptions from Civil Laws and Free Exercise of Religion in the USA' by Maimon Schwarzschild is a short but interesting history of the Supreme Court's roller-coaster ride on the meaning of the Free Exercise Clause. Schwarzschild makes the interesting point that the liberal–conservative alliance in favour of exemptions in the 1990s may be eroding under a growing fear among liberals that widespread exemptions undermine progressive legislation. He also suggests that by focussing on exemptions, religious groups may be gradually distancing themselves from influence over the general content (or wisdom) of legislation in the first place. Chad Flanders and Sean Oliveira contribute an essay arguing that United States' courts fail in their written opinions to give proper weight to the burdens suffered both by queer and by religious communities in litigation over anti-discrimination cases. However, the proffered solution (better, more sensitively-written opinions) would seem to offer little solace to most litigants who are likely more concerned with the outcome of their case rather than a court's written justification for it — someone is always going to lose when disputes have to be resolved through litigation. Dorothy Rogers offers 'Sanctuary: Religion and Law in the United States'; an illuminating essay on the history of the refugee sanctuary movement in the United States in the 1980s (likened by some to the Underground Railroad) and its renewal in the Trump years.

The final three essays are on very different topics. Whether a harmful exorcism could create liability for professional negligence (or other tort-based claims) in the UK is the focus of Javier García Oliva's and Helen Hall's essay, although the paucity of caselaw on the topic means the answer can only be speculative. The incredible, long-running Ayodhya temple controversy is the theme of Peter Edge and MC Rajan's essay. Although much has been written on the dispute, the essay provides a good introduction to it. Finally, co-editor Md Jahid Hossain Bhuiyan contributes the only Australia-specific essay in the collection, 'The Place of Shari'a in Australia'. Bhuiyan's excellent essay discusses, among other things, the dichotomy between the country's stiff rejection of Islamic family law but gradually warming approach to Islamic finance law.

Reviewing an edited collection like *Law and Religion in the Liberal State* is always a difficult task. The nature of specialised academic writing means that most readers will only find a few essays that speak directly to their interests. What can be said about this particular collection, at least, is that a reader is likely to find those few essays well-written, credible contributions to their topic.

The Continued Existence of the Crime of Blasphemy in Australia

Luke Beck*

I INTRODUCTION

The future of law and religion in Australia will depend in part on how we address the legacies of the past. One of the more bizarre legacies of the past is that blasphemy is still a crime in most parts of Australia. This is despite a growing trend internationally among developed countries of abolishing this antiquated offence and a general official recognition in Australia that the offence should be abolished. The purpose of this comment is to present an overview of the current legal position and recent movements towards law reform.

II BLASPHEMY IN AUSTRALIA

Blasphemy offences are regulated by statute in New South Wales,[1] Tasmania,[2] and the Australian Capital Territory,[3] and the offence exists entirely at common law in Victoria and South Australia.[4] Blasphemy was abolished in Queensland and Western Australia through its omission from the criminal code of those jurisdictions.

In 1987, the Federal Court gave this summary of the elements of the offence of blasphemy:

> The essence of the crime of blasphemy is to publish words concerning the Christian religion which are so scurrilous and offensive as to pass the limits of decent controversy and to be calculated to outrage the feelings of any sympathiser with or believer in Christianity. A temperate and respectful denial of the existence of God is not an offence against the law which does not render criminal the mere propagation of doctrines hostile to the Christian faith. The crime consists in the manner in which the doctrines are advocated. Whether in each case this is a crime is a question of fact …[5]

The New South Wales and ACT statutes give 'scoffing' at Christianity as an example of the kind of conduct that attracts criminal liability.[6]

In Victoria, statute also provides for the destruction of blasphemous documents following conviction[7] and that there is no privilege against prosecution for publishing material of blasphemous nature as part of a fair report of court proceedings.[8] In South Australia, there is a

* Associate Professor, Monash University

1 *Crimes Act 1900* (NSW) ss 529, 574.
2 *Criminal Code Act 1924* (Tas) s 119.
3 *Crimes Act 1900* (ACT) s 440.
4 Thomson Reuters, *Indictable Offences in Victoria* (at 19 November 2021) Indictable Offences A-D, 'Blasphemy (common law)' [53.10]– [53.120].
5 *Ogle v Strickland* (1987) 13 FCR 306, 317 (Lockhart J) (citations omitted).
6 *Crimes Act 1900* (NSW) s 574; *Crimes Act 1900* (ACT) s 440.
7 *Crimes Act 1958* (Vic) s 469AA.
8 *Wrongs Act 1958* (Vic) s 4.

statutory defence in respect of participating in the production and distribution of certain classified publications, films, and computer games.[9]

It is important to distinguish blasphemy from other legal concepts like religious vilification and religious discrimination. Vilification and discrimination laws protect *individuals* against incitement to hatred and less favourable treatment respectively. By contrast, the law of blasphemy protects Christianity itself rather than individuals or groups of individuals. As I have observed elsewhere, blasphemy laws involve the state in enforcing religious orthodoxy (correct belief) and religious orthopraxy (correct behaviour) by threatening people who do not conform with criminal punishment.[10]

III THE OFFENCE OF BLASPHEMY IS INCONSISTENT WITH AUSTRALIA'S INTERNATIONAL LAW OBLIGATIONS

Blasphemy offences of the kind that exist in Australia are wholly inconsistent with international human rights law. Australia is a party to the *International Covenant on Civil and Political Rights*.[11] Blasphemy laws are inconsistent with both Article 18's guarantee of freedom of thought, conscience and religion, and Article 19's guarantee of freedom of opinion and expression.

In respect of Article 19, the United Nations Human Rights Committee's *General Comment 34* declares that '[p]rohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant.'[12] In respect of Article 18, the United Nations Special Rapporteur on Freedom of Religion or Belief explained in his 2019 report to the Human Rights Council that blasphemy laws 'cannot be justified under the international human rights framework as that framework is intended to protect human beings and does not protect religions or beliefs as such.'[13] The Special Rapporteur also emphasised 'the growing consensus in the international human rights community that anti-blasphemy laws run counter to the promotion of human rights for all persons.'[14] The Special Rapporteur concluded that 'the international normative standard is clear: States may not impose punishment for insults, criticism or giving offence to religious ideas, icons or places, nor can laws be used to protect the feelings of religious communities.'[15]

In making these comments, the Special Rapporteur drew attention to the *Beirut Declaration on Faith for Rights*, a 2017 declaration made by faith-based and civil society actors under the auspices of the United Nations High Commissioner for Human Rights. The Beirut Declaration is accompanied by eighteen commitments, including a call for the repeal of blasphemy laws: '[W]e urge States that still have anti-blasphemy or anti-apostasy laws to repeal them, since such laws have a stifling impact on the enjoyment of freedom of thought, conscience, religion or belief as well as on healthy dialogue and debate about religious issues.'[16]

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[9] *Classification (Publications, Films and Computer Games) Act 1995* (SA) s 84.
[10] Luke Beck, 'Blasphemy is still a crime in Australia – and it shouldn't be', *The Conversation* (online, 19 June 2017) <https://theconversation.com/blasphemy-is-still-a-crime-in-australia-and-it-shouldnt-be-78990>.
[11] *International Covenant on Civil and Political Rights,* opened for signature 16th December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[12] Human Rights Committee, *General Comment No 34: Article 19, Freedoms of Opinion and Expression*, 102nd session, CCPR/C/GC/34 (12 September 2011) [48].
[13] Special Rapporteur on Freedom of Religion or Belief, *Report of the Special Rapporteur on Freedom of Religion or Belief*, A/HRC/40/58 (5 March 2019) [56].
[14] Ibid [22].
[15] Ibid.
[16] Office of the High Commissioner for Human Rights, *18 Commitments on 'Faith for Rights'* (27 June 2018) XI.

IV RECENT DEVELOPMENTS

In recent times, the offence of blasphemy has been abolished in a number of countries to which Australia often compares itself. Legislation abolished the offence of blasphemy in England and Wales in 2008,[17] in Scotland in 2021,[18] in the Republic of Ireland in 2019,[19] in Canada in 2018,[20] and in New Zealand in 2019.[21]

At the federal level in Australia, there has been recent recognition that the continued existence of blasphemy laws is problematic. In 2017, the Joint Standing Committee on Foreign Affairs, Defence and Trade's Human Rights Sub-Committee observed that it was 'noteworthy' that blasphemy remains a crime in most Australian jurisdictions.[22] However, the committee made no recommendations about reforming this area of law. In 2018, the *Expert Panel Report: Religious Freedom Review* (also known as the 'Ruddock Review' or 'Ruddock Report' after the panel chair, former federal Attorney-General Phillip Ruddock) described blasphemy laws as 'out of step with a modern, tolerant, multicultural society.'[23] The Panel concluded that 'abolition of blasphemy laws is desirable' and that since blasphemy laws exist at the sub-national level 'the abolition of these laws should commence and take place entirely within those jurisdictions [which presently retain the offence].'[24] In other words, the Panel did not consider that the Commonwealth should enact a law under the 'external affairs power'[25] to override State laws in order to abolish blasphemy offences throughout Australia. The Panel offered no reasons for this approach.

The Commonwealth Government's official response to the 'Ruddock Report' accepted this recommendation in principle, commenting 'State and Territory laws specifically prohibiting blasphemy place too great a burden on freedom of expression and infringe upon people's enjoyment of other fundamental rights.'[26] The Government also undertook to work with the States and Territories to bring about the necessary law reform. Since the 'Ruddock Report' was published, the issue of blasphemy laws has not appeared in any Meeting of Attorneys-General Communiques and no law reform has taken place in any relevant State or Territory.

Despite the lack of law reform, there is recognition at a State level that the existence of blasphemy laws is problematic. In 1994, the New South Wales Law Reform Commission recommended that the offence should be abolished.[27] However, the New South Wales Parliament has never acted on this recommendation. In 2002, the Tasmanian Law Reform Institute was asked by the Tasmanian Government to conduct a project into the repeal of obsolete offences such as blasphemy. However, 'due to other priorities' that project was not

[17] *Criminal Justice and Immigration Act 2008* (UK) s 79.
[18] *Hate Crime and Public Order (Scotland) Act 2021* (Scot) s 16.
[19] *Blasphemy (Abolition of Offences and Related Matters) Act 2019* (Ireland).
[20] *An Act to Amend the Criminal Code and the Department of Justice Act and to make Consequential Amendments to another Act,* SC 2018, c 29.
[21] *Crimes Amendment Act 2019* (NZ) s 5.
[22] Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Interim Report Legal Foundations of Religious Freedom in Australia* (Report, 15 November 2017) [2.30].
[23]Department of Prime Minister and Cabinet, *Expert Panel Report: Religious Freedom Review* (Report, 18 May 2018) [1.367].
[24] Ibid [1.368].
[25] *Australian Constitution* s 51(xxix).
[26] Department of Prime Minister and Cabinet, *Australian Government Response to the Religious Freedom Review* (13 December 2018) 13.
[27] New South Wales Law Reform Commission, *Blasphemy* (Report No 74, November 1994).

completed.[28] More recently in 2017 in Tasmania, the Leader of the Government in Legislative Council expressed surprise upon being informed during the course of parliamentary debate on a bill to expunge historical gay sex convictions that blasphemy remains an offence in Tasmania.[29]

An attempt at substantive law reform occurred more recently in Victoria. In 2019, a private member's bill, the *Crimes Amendment (Abolition of Blasphemy) Bill 2019*, was introduced into the Victorian Legislative Council by a crossbench parliamentarian (Fiona Patten of the Reason Party) to abolish the offence in that State. Beyond the private member's own Second Reading Speech, the bill has not progressed and has not been debated. The Victorian Legislative Council's Scrutiny of Acts and Regulations Committee declined to offer any comments on the bill.[30] The bill looks likely to lapse when the Victorian Parliament is dissolved for a general election in November 2022. There does not appear to have been any recent action on the subject of blasphemy in other Australian jurisdictions.

V CONCLUSION

There is much in the relationship between law and religion in Australia that requires reform, and the continued existence of the crime of blasphemy is one obvious example. Given the general consensus in Australia that blasphemy laws should be abolished, it is curious that that abolition has not happened, especially when opportunities for reform of this area of law have come onto the political agenda such as with the response to the Ruddock Report and the Victorian private member's bill. As one Tasmania parliamentarian put it in 2017, 'it is a crazy situation. I cannot understand why we have not gone through our legislation and brought it up to a contemporary standard.'[31]

[28] Tasmanian Law Reform Institute, *Annual Progress and Financial Report 2011* (Report, 2011) 3.
[29] Tasmania, *Parliamentary Debates*, Legislative Council, 20 September 2017, 30 (Leonie Hiscutt).
[30] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 1 of 2020, 5 February 2020) 1.
[31] Tasmania, *Parliamentary Debates*, Legislative Council, 20 September 2017, 30 (Ivan Dean).

Proportionality in Australian Constitutional Law: Next Stop Section 116?

Anthony Gray*

The High Court's interpretation of s 116 of the Australian *Constitution*, and in particular the limb prohibiting the Commonwealth from passing laws that prohibit the free exercise of religion, seems relatively settled. It is trite to observe that the section has been interpreted narrowly, consistent with other express human rights protections in the Constitution. Not surprisingly, this has meant that no s 116 challenge to the validity of Commonwealth legislation has ever been successful. There are two main ways in which the interpretation has been narrow. Firstly, the High Court has found that laws potentially offensive to s 116 must have a purpose, or the dominant purpose, of prohibiting the free exercise of religion.[1] The mere fact that a law has this effect is not relevant to issues of constitutionality. Obviously, it is much easier to show that a law has the effect of prohibiting the free exercise of religion rather than that this was the purpose, or dominant purpose, of the law. This approach has greatly narrowed the potential operation of the section. Secondly, the High Court has found that the prohibition is not absolute. This means that even if a law does prohibit the free exercise of religion, the Commonwealth may nevertheless be able to justify the challenged provisions, for example on the grounds of national security.[2] Again, this is quite concordant with the approach to other express rights in the Australian *Constitution*,[3] and also to constitutional interpretation more generally.[4]

However, constitutional waters are never entirely still. Elsewhere, the High Court has utilised with increasing frequency the concept of proportionality.[5] Though it has long been used in Australian constitutional law to interpret so-called 'purposive powers',[6] it has increasingly become accepted in the rights/freedoms context as well. In *McCloy v New South Wales* ('*McCloy*'),[7] a majority of the Court accepted and applied proportionality analysis to interpretation of the implied freedom of political communication.[8] It has subsequently been adopted in relation to s 92 of the Australian *Constitution*,[9] also a rights/freedoms provision.

* Professor of Law, University of Southern Queensland.

[1] *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Brennan CJ), 86 (Toohey J), 134 (Gaudron J), 160 (Gummow J, Dawson J agreeing at 60).

[2] *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 126-131 (Latham CJ), 149 (Rich J), 155 (Starke J), 157 (McTiernan J), 160 (Williams J).

[3] In relation to s 117, see *Street v Queensland Bar Association* (1989) 168 CLR 461, stating that provisions that might otherwise infringe the prohibition on discrimination on the basis of residence might be 'justified' in some way and thereby be held constitutional.

[4] See *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388, 425 [91] (Gleeson CJ, Gummow, Hayne, Callinan, and Heydon JJ), stating that laws that might otherwise infringe the prohibition against discriminatory taxation might be held valid if 'related to a proper objective'.

[5] Shipra Chordia, *Proportionality in Australian Constitutional Law* (Federation Press, 2020).

[6] *Richardson v Forestry Commission* (1988) 164 CLR 261, 311 (Deane J), 346 (Gaudron J).

[7] (2015) 257 CLR 178 ('*McCloy*').

[8] Ibid 194 (French CJ, Kiefel, Bell and Keane JJ).

[9] *Palmer v Western Australia* (2021) 95 ALJR 229 ('*Palmer*').

The current Chief Justice is a leading proponent of proportionality analysis in the context of the Australian *Constitution*.[10]

Those justices who apply proportionality analysis, which includes all current members of the High Court apart from Gordon and Gageler JJ, have settled on three aspects: whether the law is suitable, whether it is necessary, and whether it is adequate in its balance. A law will be suitable if it has a rational connection to the purpose of the provision. It must be necessary, in the sense that there is no obvious and compelling alternative means of achieving the purpose with a less restrictive effect on the freedom. And the court will consider whether it is adequate in its balance, given the importance of the measure and the extent to which it restricts the freedom.[11]

Although this framework of analysis was developed in the context of proportionality as applied to the implied freedom of political communication, it was subsequently applied to the express freedom of trade, commerce and intercourse in *Palmer v Western Australia* (*'Palmer'*).[12] This obviously begs the question regarding the use of proportionality for other freedoms in the *Constitution*, including freedom of religion in s 116. Given the embrace of proportionality by a majority of the High Court in relation to both express and implied freedoms in the Australian *Constitution*, it is considered likely that, when the Court next considers a s 116 challenge to a law, it will apply proportionality analysis to that section.[13] This would be a logical, modest progression from where the Court's jurisprudence currently sits. How might proportionality analysis apply to s 116, and what implications might this have for the scope of the provision?

If the Court were to so move, it would consider whether the challenged law was suitable, in the sense of being rationally connected to its identified purpose. Most laws would meet this requirement. However, the second requirement is more difficult to meet – whether the law that impacted on religious freedom was *necessary*. The court would need to be convinced that there was no obvious and compelling alternative available to meet the legitimate purpose of the legislation, in a way that was less invasive of freedom of religion. On paper this is a difficult thing for those supporting the legislation to show. There will often be alternative means of achieving the objectives of legislation other than those chosen by the legislature, and these may be less invasive of the freedom. However, as applied, the High Court has effectively made this requirement easier for defenders of the legislation to meet – it has insisted the alternatives must be *obvious and compelling*.[14] The court has effectively accorded deference to legislative judgments. While this will be applied on a case by case basis, it is considered that potentially this requirement might provide stronger support for freedom of religion than the status quo, by effectively requiring the legislature to demonstrate its laws are minimally invasive of freedom of religion rights, at least where compelling and obvious alternatives exist.

Thirdly, the law must be adequate in its balance. The Court would weigh up the importance of the object of the legislation, bearing in mind its impact on the fundamental right to freedom of religion. This has been approached narrowly, so that the benefit of the law must be *manifestly*

[10] Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23 *Public Law Review* 85.
[11] *McCloy* (n 7) 195 (French CJ, Kiefel, Bell and Keane JJ).
[12] *Palmer* (n 9).
[13] Alex Deagon, 'Defining the Interface of Freedom and Discrimination: Exercising Religion, Democracy and Same-Sex Marriage' (2017) 20 *International Trade and Business Law Review* 239, 278-285; Alex Deagon, 'Liberal Assumptions in Section 116 Cases and Implications for Religious Freedom' (2018) 46(1) *Federal Law Review* 113, 136.
[14] *Comcare v Banerji* [2019] HCA 23, [35] (Kiefel CJ, Bell, Keane and Nettle JJ), [194] (Edelman J) ('*Comcare*').

outweighed by the adverse impact on the freedom.[15] Some have expressed it as an 'outer limit', only not met where there is a gross imbalance or disproportionality between the benefit of a provision and its impact on fundamental freedoms.[16] Again, while this will be applied on a case by case basis, it might be suggested this test could effectively provide greater protection for freedom of religion than the current approach to s 116 questions. It clearly contemplates consideration of the *effect* of laws on established freedoms,[17] for example, in a manner eschewed by the current approach to s 116. Of course, it remains to be seen whether these possibilities crystallize into real change to the current approach, as would be favoured by those who are concerned that the current interpretation of s 116 accords little to no effective protection of religious freedoms.[18] The possibilities are, however, interesting.

[15] *Comcare* (n 14) [38] (Kiefel CJ, Bell, Keane, and Nettle JJ); *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18, [85] (Kiefel CJ, Keane and Gleeson JJ).
[16] *Brown v Tasmania* [2017] HCA 43, [290] (Nettle J); *Comcare* (n 14) [205] (Edelman J).
[17] *Clubb v Edwards* [2019] HCA 11, [72] (Kiefel CJ, Bell and Keane JJ).
[18] Luke Beck, 'The Case Against Improper Purpose as the Touchstone for Invalidity Under Section 116 of the Australian *Constitution*' (2016) 44 *Federal Law Review* 505.

Special Forum: The Future of Law and Religion in Australia

The Liberal and Post-Liberal Futures of Law and Religion in Australia

Joel Harrison*

At the beginning of 2022, the Commonwealth Government's attempt to pass a Religious Discrimination Bill was shelved. The Bill and its State-based equivalents has dominated law and religion debate in Australia. This reflects more broadly a focus on questions of religious liberty. These are important questions. However, in this reflection I want to suggest that such a focus — or more particularly the terms in which it is addressed — points to an emerging dynamic: a contest between liberal and post-liberal voices. I will focus on Christian thought and practice as it interacts with the law, but I hope that my reflection resonates with anyone interested in examining how religion contributes to and shapes our common life. I will suggest that recent Christian arguments adopted a liberal conceptual apparatus, emphasising a model of separate spheres: the neutral or autonomous law regulating the sphere of religion. In contrast, I suggest that there is an emerging post-liberal criticism that will be increasingly voiced in Australia. Its focus will be on how Christian thought and practice can shape the purposes of the law.

Much of the conflict over the Religious Discrimination Bill centred on a provision that would secure the liberty of religious schools to select staff and students based on religious affiliation.[1] Vocal Christian advocates claim that conventional liberal principles demand this kind of provision. They argue that religious groups must be autonomous to support a key value — pluralism and diversity. That then requires State neutrality — a hands-off approach — in the face of different conceptions of the good.[2] In one version of this argument, the Christian legal thinktank Freedom for Faith advocates for a metaphorical 'zoning law' against 'the encroachment of the spreading city'.[3] What is demanded of law on these accounts is clear, if minimal: neutrality with respect to this religious sphere, meaning religious liberty protection understood as a zoning law. For some, the hope appears to be that this encourages a détente or modus vivendi. If we assert the neutrality of the law this will provide a 'live and let live' approach for different confessions. For others, the neutrality of the law sitting above our diversity appears to provide a shared 'public' language that can be used to convince others of the need for religious autonomy without recourse to religious talk.[4]

With the failure of the Religious Discrimination Bill, the separate spheres, autonomy and neutrality framing raised in Christian argument may be increasingly questioned. This is likely to result in different post-liberal accounts of the relationship between Christian thought and practice and the law that will compete with liberal frames. For these accounts (a version of

* Senior Lecturer, Sydney Law School, University of Sydney.

[1] Religious Discrimination Bill 2022 (Cth) cl 7.

[2] See, eg, Australian Christian Lobby, Submission No 56 to Senate Legal and Constitutional Affairs Committee, *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* (15 January 2019) 2; Anglican Church Diocese of Sydney, Submission No 7482 to Expert Panel, *Religious Freedom Review* (13 February 2018) 8.

[3] Freedom for Faith, Submission No 2520 to Expert Panel, *Religious Freedom Review* (29 January 2018) 91.

[4] Appeals to international law increasingly take on this role in Australian debates.

which I develop elsewhere), the law cannot be understood to be neutral.[5] It demands some kind of argument from somewhere as to its purpose, which then shapes how we understand, for example, questions of liberty. If so, then what is needed is deeper discussion of the good of religion — as a goal, an end — in our shared life that shapes the purposes of the law or our public institutions. Appeals to autonomy or pluralism and the neutral State will not secure religious liberty. They do not answer the question 'why liberty for *religious* persons and groups rather than any other persons or groups?' Securing religious liberty requires some understanding of why religion matters as integral to our society and the ends of the person, and thus why the law should serve it in some way.[6]

However, on the post-liberal view, this inquiry is not limited to a distinct domain of religious liberty discourse. If religion matters to our common life — if it is integral to society and to the ends of the person — then this should affect how we address central questions of constitutionalism that shape that common life. The liberal frame adopts a minimalist approach to law in its relationship to religious thought and practice: the law is a neutral regulator of confessional interests. Emerging post-liberal accounts will reject this. To take examples, general as well as particular to Australia, they will ask: What is the nature of sovereignty, generally and in relation to First Nations? What is the meaning of rights and of dignity? What is the role of civil society in our democracy? What is the right relationship between branches of government? Is there a right 'mix' between democratic and 'aristocratic' or expert-based forms of authority? What of a republic or constitutional monarchy? Indeed, the contention will be that questions of religious liberty — which remain important — can only be considered against the backdrop of some of these wider matters. For each of these, the analysis will involve asking how a Christian vision of the good life shapes any answer.[7]

Put simply then, these accounts will take up what I would characterise as a traditional component of at least Christian thought and practice: to propose something true about our common life or about the common goal of human flourishing, and develop how this shapes law and our legal institutions. On this view, the liberal hope of an autonomous religious sphere presided over and protected by a neutral State is unrealistic: neutrality is mythical. It is also potentially too self-focused and too self-limiting as to what is imaginatively possible.

Of course, attempting to shape our understanding of the law's purposes or ends towards a vision of the good life poses a risk of authoritarian argument, but that is not inevitable. Post-liberal accounts can secure a concern for pluralism, understood as esteeming others for their different contributions to the project of society. Nevertheless, we should expect a noisy argument. Liberal voices will continue. Post-liberal voices will not be uniform. But especially, after the defeat of the Religious Discrimination Bill, the forms that argument may take is much more open.

[5] Joel Harrison, *Post-Liberal Religious Liberty: Forming Communities of Charity* (Cambridge University Press, 2020).
[6] See, eg, ibid ch 5.
[7] For an important set of reflections, see Nicholas Aroney and Ian Leigh (eds), *Christianity and Constitutionalism* (Oxford University Press) (forthcoming).