

VOICES IN THE POLITICAL WILDERNESS

Women in the Sydney Anglican Diocese

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The Sydney Anglican Diocese neither ordains women as parish rectors (priests) nor consecrates women as bishops. While appointment to these positions allows *male* clergy to lead a church parish or other church community, senior clergy may be voices in *political* discourse — for example, on topics such as abortion, euthanasia, religious tolerance legislation and marriage of same-sex couples. By preventing women from rising to positions from which they may contribute to such political debates, the Sydney Anglican Diocese's bans on ordaining women as rectors or consecrating them as bishops may constrain women's political speech. This article considers whether NSW anti-discrimination legislation, which supports the church subordination policies, may infringe the implied freedom of political discourse that the High Court of Australia has held exists under the Commonwealth Constitution.

Many Christian church organisations (such as the Salvation Army) allow women to be appointed to the same positions as men and to have the same leadership status in churches as males.¹ The Sydney Anglican Diocese does not allow women to be ordained as priests or consecrated as bishops, spoken of in the Sydney Anglican Diocese as positions of 'eldership'.² Its church policies exist in spite of an Australian Anglican Appellate Tribunal ruling³ allowing consecration of women bishops, and the Anglican Church in the Perth⁴ and Melbourne⁵ dioceses having ordained women as priests and consecrated women as bishops.

While women in the Sydney Anglican Diocese may be appointed deacons, this is considered a subordinate order not opening the way to be the rector (priest) of a parish. As women in the Sydney Anglican Diocese are unable to be ordained as priests or consecrated as bishops, they are not recognised in any meaningful sense as church leaders or church spokespersons (except, perhaps, to enunciate the Diocese's policies on women not being ordained or consecrated⁶). This article considers whether the church bans limit women's freedom of *political* speech.

While the church's opposition to appointing women as elders rests on (dubious) theological principles, the Sydney Anglican Diocese's anti-ordination policies are supported by exceptions in the *Anti-Discrimination Act 1977* (NSW) ('NSW anti-discrimination legislation') relating to the 'ordination or appointment of priests'.⁷ Using the Sydney Anglican bans on women's ordination to the priesthood or consecration as a reference point, the article explores whether

religious discourse might also be political discourse. It considers whether church policies preventing women's ordination (or, more precisely, the exceptions in the NSW anti-discrimination legislation that support the Sydney Anglican Diocese's bans) may constitute an unwarranted political constraint.

Whether religious speech is political speech

What is the difference between political and religious speech and how (if at all) is it possible to distinguish the two forms of expression such as might be relevant in a political sense to bans on women's ordination as priests or their consecration as bishops?

As will be seen, it can be difficult to distinguish political and religious speech. That said, political speech and religious speech may sometimes be easy to differentiate. For example, political debate about government policy on water resource management involving (say) criticism of the government's overinvestment in desalination plants, or corporate governance, or the adequacy of essential services infrastructure is *prima facie* unlikely to amount to religious speech. Conversely, while bible readings in churches and prayers are forms of religious expression, these are unlikely to amount to *political* speech.

Yet, the lines between political and religious discourse can be blurry. For example, when Pope Gregory VII excommunicated King Henry IV (a decision which purported to strip the King of his crown and to assert the Church's authority over the emperor) and King Henry IV spent three days standing barefoot in a hairshirt at the gates of Canossa pleading for the pope's absolution, were King Henry IV's pleadings political or religious expression?⁸

In general terms, political speech tends to be less constrained by theological absolutes than religious speech. Political speech is also less likely than religious speech — particularly religious speech of the evangelising or proselytising kind — to challenge a person's spiritual beliefs. What is more, while political speech points to, or assumes, human actions (including via human instrumentalities), religious speech more often focuses on, or assumes the existence of, beings, forces, powers or other things that are *beyond* human power: supernatural power. In Christian evangelical discourse, that supernatural power — *God* and more specifically the *Word* of *God* — has authority.⁹

In endeavouring to distinguish religious and political speech, we may note that the *polis* (from which the

REFERENCES

1. The International Leader of the Salvation Army, the General, may be a man or a woman: see *The Salvation Army — About Us* <salvationarmysouth.org/about.htm#doctrines> at 2 May 2009. See also Andrew Eason, *Gender and Equality in the Early Salvation Army* (2003).
2. See Archbishop Dr Peter Jensen, *Sydney Anglican Synod Presidential Address* (2006) <sydneyanglicans.net/images/uploads/missionthinking/Archbishop_Peter_Jensen_Presidential_Address_2006.pdf> at 10 August 2009.
3. *Report of the Appellate Tribunal, Reference on Women Bishops*, 26 September 2007, 3-4, para 12-13, <anglican.org.au/docs/ATWomenBishop270907.pdf> at 10 August 2009. For analysis of the Tribunal's decision, see Muriel Porter, 'Women in Purple — Women Bishops in Australia' (2008) *Voices, Quarterly Essays on Religion in Australia*.
4. See Linda Morris, 'Mum of twins becomes first female bishop' *Sydney Morning Herald* (Sydney), 12-13 April 2008, 3.
5. Canon Barbara Darling was appointed an assistant Bishop of the Anglican Diocese of Melbourne in April 2008: see Jane Still, 'First woman bishop appointed in Victoria' (Press Release, 25 April 2008) <melbourne.anglican.com.au/main.php?news_id=11328&pg=news> at 17 October 2008.
6. Archdeacon Narelle Jarrett and Archdeacon Margaret Rodgers cited in Natasha Percy, *Sydney Affirms Women's Ministry* (2008) Sydney Anglican Network <sydneyanglicans.net/sydneystories/sydney_affirms_womens_ministry/> at 18 October 2008.

word politics is derived) is the *city*. Political speech may thus be considered the speech of ordinary members of the populace; it is what citizens talk about. The polis being a *public* place (and not private), it might also be said that political discourse is not restricted to particular topics, or even to specific persons or classes of persons;¹⁰ it is the kind of expression that anyone can be involved in, any place.

However, it would be simplistic to suggest that political discourse always involves open, fair debate. Some kinds of political speech (say nationalistic hate speech by a politician) can be divisive, even exclusionary. Political speech may marginalise and alienate people; it may be dominated by a particular, prevailing social (or religious) view — one which may exclude particular beliefs or reflect a socio-political bias. The dominantly held view may permit its critics little or no voice. Further, political discourse, in the sense of referring to expression about party political machinations (say a convention of Conservative voters) may be confined to particular ‘welcomed’ participants but not to ‘outsiders’.

Even if political speech does occur in the polis, other kinds of expression, such as religious speech, also occur in the polis. For example, *religious* leaders may (and do) direct their speech, including about *religious* matters, to the polis (eg, opposing gay marriages). To make matters even more interesting, speech to (and within) religious communities — churches — may be considered *political* in the sense that it involves expression about, for example: how religious people should behave when in the polis; how they ought to relate to each other (and to other religious communities); what secular laws they should obey; and what practices are acceptable. Religious speech may even involve *divisive* speech or *tendentious* speech — the kind of speech that involves a person setting their views against someone else’s opinions and then organising to have their views adopted by others — that is, such speech may employ, or at least involve, ‘political’ methods.

Perhaps reflecting some assumptions about the separation of church and state¹¹ (or at least hinting at the language of such separation), I suggest that *political discourse is speech about matters relating to governmental decision-making, while religious speech is expression about, or associated with, spiritual life and practice.*

As a consequence of arriving at these definitions, I suggest the implied freedom of political discourse, considered in more detail later in the article, would *not* protect expression that is only about spiritual life and practice: church life. I also do not believe that the implied Constitutional freedom would protect ‘political expression’ in the sense of *political method*: rather, as will be seen, there must be some connection with representative governmental processes. Moreover, the implied freedom would not, in my view, protect political expression within a (private) church such as prayer, bible reading and the like. Later in this article, I specifically consider the implications of these definitions for the implied freedom of political discourse in relation to ordination and consecration and the NSW anti-discrimination legislation.

Holy orders, women and subordination

The Sydney Anglican Diocese’s policies against ordaining women as priests or consecrating them as bishops represent a belief held by those capable of influence in the Sydney Anglican Diocese that women are subordinate to men.

Some bible passages suggest that any subordination of women to men applies to marriage (‘Wives submit to your husbands, as is fitting in the Lord’: Col 3:18). These biblical teachings about submission within marriage do not deal with the ‘ordering’ of more general woman-man relationships, including as between: spinsters and men; widows and men; and women divorcees and men. Moreover, absent such ordering outside of marriage, there could be no a priori theological reason to, say, object to an unmarried deaconess leading a mixed sex congregation.

Those who assert a more general subordination of women with respect to men, including in relation to ordination and consecration decisions, point to more general theological principles to support their position. Described as ‘functional subordination’¹² — a notion purportedly underpinned by the relationship of the members of the Trinity and the biblical creation account¹³ — the Sydney Anglican Diocese Doctrine Commission (Doctrine Commission) holds to this view. In its 1999 Report, the Doctrine Commission refers to the Apostle Paul’s teaching that, inter alia, the ‘head of every man [is] Christ and the head of every woman [is] man’ (1 Cor 11:3).¹⁴ It suggests that such bible passages support the views of ‘those who make the claim that the subordination of the Son provides a model for that interdependence, with subordination, which is expressed in various ways in family ... and church’.¹⁵ The Doctrine Commission claims that the

ordering of the sexes appropriate to home and church is not applied to business, political or professional life ... [only to] the particular context of the concrete relationships entered into in home and church.¹⁶

The above extract from the Doctrine Commission’s 1999 Report is noteworthy for asserting that the so-called ‘ordering of the sexes’ — functional subordination — is *not* relevant to political or professional life. The Doctrine Commission also appears to have assumed that the woman-man relationship is not relevant to the *profession* of a clergywoman (ie, as indicated in the above quotation, the Doctrine Commission claims that the ‘ordering of the sexes ... is not applied to ... professional life’); and there is a further view hinted at in the above passage, but not elaborated upon, that ‘political life’, however defined, is distinct from whatever is appropriate to the ‘concrete relationships entered into in home and church’ (*emphasis added*). (Precisely what substance relationships outside of home and church are made of is not clear.)

As applied to women’s ordination and consecration, the ‘ordering’ of the relationship of the members of the Trinity, and, in particular, the eternal or perpetual subordination of Jesus to the Creator is a novel and

7. Section 56 of the *Anti-Discrimination Act 1977* (NSW) provides that ‘Nothing in this Act affects: (a) the ordination or appointment of priests, ministers of religion or members of any religious order, (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order, (c) the appointment of any other person in any capacity by a body established to propagate religion, or (d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.’ Section 56 is mirrored in s 37 (and s 38) of the *Sex Discrimination Act 1984* (Cth), which provides that the provisions of the Act (which may otherwise prohibit gender-based discrimination) do not apply to ‘the ordination or appointment of priests, ministers of religion or members of any religious order’ (sexual harassment is not exempted).

8. Pope Gregory VII eventually granted King Henry IV absolution.

9. See Mark Thompson, *Authority in the Church* (2008) <gafcon.org/resources/authority_in_the_church/> at 10 August 2009. Dr Thompson is Academic Dean and Head of Theology Moore Theological College, Sydney, and, repeatedly referencing ‘authority’, states that ‘the legacy of the rebellion in the Garden of Eden ensures that even those who have tasted God’s extraordinary generosity and mercy too readily assert their own opinions and preferences as the measure of all things. We too bear the marks of the Fall in our thinking and in our behaviour and so a re-examination of what is in fact operating as the authority in our lives together is always necessary. It is also true that the second half of the twentieth century, particularly in the West, has witnessed a more general crisis of authority.’ Evangelical Christians understand Jesus Christ to be the Word of God.

10. See John Stott, *New Issues Facing Christians Today* (1999) 14. See also Jean-Luc Nancy, ‘Church, State, Resistance’ in Hent de Vries and Lawrence Sullivan (eds), *Political Theologies — Public Religions in a Post-Secular World* (2006) 103.

... if it is accepted that senior religious (male) figures have a voice in political discourse by reason of their religious positions ... then it may also be accepted that preventing women from rising to such positions may amount to an unwarranted political constraint.

relatively recent theological retrofit to justify women's subordination.¹⁷ While in a gender context, functional subordination implies female submission to men, the Trinitarian relationships symbolise perfect respect, honour, dignity and unity. Seen in this way, the bond between the members of the Trinity represents unblemished equality: this unity may, furthermore, be a source of strength for the weak, sad, or oppressed to meditate upon, in prayer, worship, or song. Evidencing, even if symbolically, honour and love, the Triune relationships could, contrastingly, be a model for recognising basic human rights — a template for how a person might, or should, behave towards their neighbour, honouring the *other*. When the concept of subordination is applied to the Trinity, the Trinitarian love becomes clouded, even tainted, by questions of headship, authority and — implicitly — power relations. What is more, the Spirit's role is relegated to that of an unspecified 'being' somewhere at the periphery of a subordinate bond between Jesus and the Creator — no longer a comforter, but instead mysticised. The Genesis language of man and woman being made in God's image (Gen 1:27) becomes tinged with *order*. Values such as respect and honour become gender-specific variants of submissiveness and headship. Perfect relationships between the members of the Trinity seem to turn into spiritual ranks.

The theological reasons for the Sydney Anglican Diocese not supporting women's ordination and consecration reflect interpretations of passages in the bible, what theologians call *hermeneutics*. Dr Jensen's position on the topic is this:

the Bible teaches that women should not be priests or elders in the churches. If not priests and elders, then certainly not obviously bishops. Now it depends on what you think of the Bible, how important you think the Bible is, and what you think the Bible teaches. What I would say is that 99 per cent of Christians - all down through history and even today - believe that the Bible says that men are to be the heads of congregations.¹⁸

Ostensibly, the Anglican Archbishop acknowledges the possibility of Christians holding diverse opinions on the bible's teaching on women's eldership. However, it is obvious from his language that he believes there is a *proper* interpretation of the Scriptures based on 'how important you think the Bible is'. Referring to what the 'Bible says' and the Christian majority position (apparently 99 per cent), Dr Jensen claims that men 'are to be' (note the normative language) the heads of congregations.

Needless to say, many theologians disagree with this view of Scripture. Scholars claim there are credible arguments that the very same bible verses used by opponents of women's ordination to oppose women speaking in church¹⁹ (and, by extension, to ban women being ordained) have been distorted from their intended textual meaning; were actually the opposite of the Apostle Paul's position; and were rather a quotation of claims being made at Corinth which Paul then refuted.²⁰ Moreover, leading evangelicals in other parts of Australia (and elsewhere) have come to the opposite conclusion to clergy such as Dr Jensen,²¹ noting, for example, that the creation stories make the equality of the sexes the creation ideal and that the persons of the Trinity relate as equals.²² They note that Christ insisted on the equality of women, and, in the places in the bible where the Apostle Paul limits the status of women in some way, he is addressing particular problems where the contribution of women was causing offence in a patriarchal context.²³

Consider, moreover, the selective applications of biblical texts in support of the female gender subordination position. The same verse (1 Tim 2:12) in which the Apostle Paul says he does not permit a woman to 'teach or to have authority over a man' (a verse used to oppose women's ordination) requires, in the *very next part of the same verse*, that a woman 'must be silent' (emphasis added). No-one in the Sydney Anglican Diocese (at least no-one speaking with any authority) seriously contends that women must be quiet during church services — to the contrary, women in the Sydney Anglican Diocese regularly make announcements and pray; some are even licensed to preach (though not to be rectors).²⁴ If 1 Tim 2:12 has *supracontextual* significance — that is, it is relevant to modern day church relationships and not just to the historic context Paul was addressing — why are modern Sydney Anglican women permitted to speak amongst men in church, whether as bible readers, church welcomers, leaders of prayer, preachers, or makers of church announcements? It might be suggested that women in Sydney Anglican churches speak only under the authority of a male rector, but this begs the question of why women are allowed to speak amongst men in church *at all*, given the ostensible biblical requirement that they be reverently quiet. If, furthermore, the relationship between women and men reflects the biblical and Trinitarian *order* of things, is that not all the more reason why women should

11. See, eg, Noah Feldman, *Divided by God — America's church-state problem — and what we should do about it* (2005); Tom Frame, *Church and State — Australia's imaginary wall* (2006); and Richard Ely, *Unto God and Caesar — Religious Issues in the Emerging Commonwealth 1891–1906* (1976).

12. See Sydney Anglican Diocese Doctrine Commission, *The Doctrine of the Trinity and its bearing on the relationship of men and women* (1999) 19.

13. See Kevin Giles, *The Trinity and Subordinationism — The Doctrine of God & the Contemporary Gender Debate* (2002) 78ff.

14. Sydney Anglican Diocese Doctrine Commission, above n 12, 16.

15. *Ibid* 17.

16. *Ibid* 17–18. See also *Confessional Statement*, The Gospel Coalition <thegospelcoalition.org/about/foundation-documents/confessional/> at 17 July 2009, stating 'The distinctive leadership role within the church given to qualified men is grounded in creation, fall, and redemption and must not be sidelined by appeals to cultural developments'.

17. See Kevin Giles, *Jesus and the Father* (2006) 43.

18. ABC Radio, 'Sydney's new Anglican Archbishop', *PM*, 6 June 2001 <abc.net.au/pm/stories/s309195.htm> at 19 October 2008.

19. See, eg, 1 Cor 14:34–36.

20. See, eg, Laurence Iannaccone, 'Let the Women be Silent' (1982) 7 (*May–June Sunstone*), 38.

21. Personal Communication from Rev Dr Kevin Giles to the author, 20 October 2008; see Gen 1:27, 28.

22. See, eg, Millard Erickson, *God in Three Persons: A Contemporary Interpretation of the Trinity* (1995); and Shirley Guthrie, *Christian Doctrine* (1994) 92–93.

23. See, eg, 1 Cor 14:34–36.

highlight their subordinated position through symbolic muteness in church?

Perhaps even more relevantly to ordination and consecration, it can be seen how women might fulfil the biblical 'command' of submission by relinquishing (to men) any ambition they might otherwise hold to lead mixed congregations in the Sydney Anglican Diocese — women could simply forego their leadership aspirations. It is, however, more difficult to see how men can also serve women by denying all women on ostensibly theological grounds — even those women who would be the most talented as church leaders — the opportunity to serve mixed congregations in church leadership.

Of course, it might be said that a policy of not allowing women to become elders protects the religious susceptibilities of worshippers, and allowing women to become rectors or bishops might shake the faith of other believers. If, however, such beliefs rest on unstable, outdated, dubious or just debatable theological foundations, then perpetuating the status quo in a way that denies opportunity for gender diversity in senior church leadership roles (or robust debate about it) merely sustains a weak theology. Fostering a view of theology that purports to be grounded in biblical creation accounts and the hierarchical ordering of the Godhead figures, but which merely propounds an a priori view about the (functional) subordination of women to men, ultimately serves no-one, least of all women.

Political expression by male religious leaders

The ability to freely express one's own religious beliefs — not only orally, but also through clothing, wearing of religious symbols, meeting with other believers, singing, praying, worshipping, even *dreaming* — is central to the self-worth of millions, indeed billions, of people.

If, however, we confine our discussion to *oral* expression of *theist* beliefs, we may observe two broadly different kinds of religious speech. First, there is *evangelism* — persuasive speech which has the aim of encouraging a person to exercise *their own choice* to change their spiritual beliefs, with, however, the evangelist relying on a spiritual being (God/Allah/Jesus/Holy Spirit) — a deity — as the 'force' for bringing about the change. The evangelist ultimately leaves the listener with choice — to change their own mind (with or without God's help). Secondly, in contrast, there is proselytising, which tends to have a negative connotation of tactical speech strategies which aim to *force* people to change their mind. Of course, there can be both forceful evangelists and somewhat passive proselytisers, so it may sometimes be difficult to distinguish evangelists from proselytisers.

In the Sydney Anglican Diocese, men are able to evangelise (or proselytise) as church leaders. Women cannot aspire to do likewise, that is, as church leaders. The Diocese's subordination policies confine women to positions where their speech and expression — *what they may say and do* — cannot be authoritative with respect to congregations comprising men. Instead,

women are theologically relegated to a position where the highest religious authority they may exercise is over women and children. Doctrinally censored, women are also unable to occupy diocesan leadership positions (other than the subordinate order of deacon), from which they may challenge the subordination status quo.

What is more, the subordination policies of the Sydney Anglican Diocese may suppress the *political* voice of women in (or who may wish to join) the Sydney Anglican Diocese. Male religious leaders have a *political* voice in democratic discourse by reason of occupying senior religious positions.²⁵ The views of senior Christian figures — inside²⁶ and outside of Parliament — are well represented on topics which straddle religion and politics, including stem-cell research, euthanasia, equal rights of gays, abortion laws and vilification laws.

Consider this: Anglican Archbishop Dr Peter Jensen and Catholic Archbishop Cardinal Dr George Pell advised former Prime Minister John Howard on legislation about embryonic stem cell research.²⁷ Invited to give the Prime Minister counsel, the Catholic and Anglican Archbishops exercised a religious voice in politics. Dr Jensen also convened a well-attended meeting of federal MPs on the same topic.²⁸ This is not to say that these male religious leaders were immune from political criticism. For example, Senator Bob Brown, leader of the Greens, sharply criticised Cardinal Pell for threatening 'consequences' to Catholic State MPs if they voted in favour of NSW stem-cell legislation, and he urged Cardinal Pell not to make similar religious threats to Commonwealth Catholic MPs in relation to the federal legislation.²⁹

Another political topic on which male evangelical religious leaders may speak out (sometimes alongside political figures³⁰) is so-called religious tolerance legislation. Opposing religious tolerance legislation in Victoria and NSW, the Sydney Anglican Diocese has asserted that religious tolerance legislation curbs freedom of expression³¹ and inhibits rigorous religious discourse.³² While Sydney Anglican men may profess such a view, women in the Diocese are unable to occupy church leadership positions from which *they* too may shape political debate on religious tolerance legislation.

Women's ordination and the implied constitutional protection

According to the High Court of Australia, a law is invalid to the extent that it burdens communication about government or political matters and cannot be viewed as reasonably adapted to serve a legitimate end in a manner that is compatible with representative government.³³ This law, known as the implied freedom of political discourse, reflects the system of representative government which the *Constitution* creates by:

directing that the members of the House of Representatives and the Senate shall be 'directly chosen by the people' of the Commonwealth and the States respectively.³⁴

24. I regularly attended two Sydney Anglican Churches — St Matthias Centennial Park and St Paul's South Coogee — each at different intervals, for a combined period of about twenty years, until 2005. Archdeacon Reverend Narelle Jarrett, a gifted, thoughtful (licensed) speaker, preached from time to time at St Paul's.

25. Consider, eg, the Opinion Piece from Catholic Archbishop Cardinal Dr George Pell, 'Choice, not Condoms, make the difference with AIDS', *Sydney Morning Herald* (Sydney), 18 April 2009 <smh.com.au/opinion/choice-not-condoms-make-the-difference-with-aids-20090417-aa4u.html> at 18 April 2009. The strong voice of Christian leaders in Australian political discourse reflects the strength of Christian 'values' in Australia and its acceptance as a 'legitimate' religion. In the most recent Australian Census in 2006, 64% of Australians said they were Christian, 19% had no religion, and only 6% said they belonged to other religions: see Australian Bureau of Statistics, 20680-Religious Affiliation (broad groups) by Sex - Australia (2006) <censusdata.abs.gov.au> at 10 August 2009.

26. Consider, eg, Reverend Fred Nile, NSW MP, Member of Legislative Council, and National President, Christian Democratic Party (re-elected for an eight year term in 2007), who has spoken out about abortion, pornography, homosexuality and Islam.

27. See 'Howard Supports Stem Cell Research' (Transcript of Press Conference, April 4 2002) <australianpolitics.com/news/2002/04/02-04-04.shtml> at 31 December 2006.

28. ABC Radio, 'Debate over stem cell research continues' *World Today*, 19 June 2002, <abc.net.au/worldtoday/stories/s585521.htm> at 21 April 2009.

29. Bob Brown, 'Brown warns Pell "it's against the law to coerce a member of parliament"' (Press Release, 7 June 2007) <http://bob-brown.greensmps.org.au/content/media-release/brown-warns-pell-its-against-law-coerce-a-member-parliament> at 21 April 2009.

30. See 'Religious vilification laws — speak up says former Premier', Sydney Anglican Network, 22 April 2009 <sydneyanglicans.net/media/video/carr/> at 22 April 2009.

It is difficult to see how any democratic government could defend a law like s 56 of the Anti-Discrimination Act 1977 (NSW) on the basis that it ... is compatible with ... representative government.

The High Court has also held that political communication 'extends to the broad national environment in which the individual citizen exists and in which representative government must operate'³⁵ and is considered such an integral part of the Constitutional arrangements that, if political speech is stifled, the implied freedom may 'trump' federal, state and territorial powers that 'tend to impair the effective operation of the constitutional system of representative and responsible government'.³⁶ According to the High Court, a law may burden political discourse in its terms, operation, or effect.³⁷

While the case law in this area is evolving, the High Court has emphasised that the implied freedom provides protection for communication about *public affairs*,³⁸ *public* bodies and matters relevant to the holding of *public office*³⁹ — that is, the implied freedom will not disrupt laws that stifle discourse about *private* matters.

The High Court has not yet considered whether religious speech may also be part of 'political discourse' insofar as the implied freedom is concerned, at least not in any detail. In *Kruger v Commonwealth* (the 'Stolen Generations Case'),⁴⁰ Gaudron J, while indicating that the implied freedom of political discourse is not 'absolute', held that freedom of political communication is 'universal ... [operating] without restriction as to time or place'.⁴¹ Her Honour also suggested that the implied freedom of political communication may limit the states' powers to make laws in relation to religion.⁴² In the same High Court decision, however, and cautioning of the difficulties of determining what rights are constitutionally based, Gummow J emphasised the limits imposed by the constitutional text; his Honour also referred to the importance of the democratic process and hinted at the wisdom of judicial restraint.⁴³

In *APLA Limited v Legal Service Commissioner*⁴⁴ ('APLA') Callinan J noted that 'religion could ... be regarded as a political matter'.⁴⁵ Yet his Honour noted that the implied freedom of political discourse is limited by the Constitutional powers of the States to make laws for religion under s 116 of the *Constitution*.

Three important legal issues emerge from this brief consideration of the cases, insofar as is relevant to women clergy and the implied freedom of political communications. First, the High Court cases suggest that protected 'political' expression must have some connection with public bodies or public affairs. For women in the Sydney Anglican Diocese who aspire

to be church leaders (but cannot become leaders), it might be considered difficult to argue, at least in the abstract, that those women cannot engage in public political activity. Moreover, it may well be argued that church life is inherently *private* and not political. Yet, if it is accepted that senior religious (male) figures have a voice in political discourse *by reason of* their religious positions — particularly on topics that straddle religion and politics (consider abortion law reform) — then it may also be accepted that preventing women from rising to such positions may amount to an unwarranted political constraint.

Secondly; however, following the reasoning of Callinan J in *APLA*, the High Court may be reluctant to allow the implied freedom to undermine states' rights to make laws for religion (and arguably the *Anti-Discrimination Act 1977* (NSW) s 56 is such a law) as is permitted by s 116 of the *Constitution*. To put this another way, if the states make laws for religion, then *even if these laws stifle political speech*, the High Court may find that the implied Constitutional freedom cannot strike down the laws because to do so would undermine the states' rights, still left to them under s 116 of the *Constitution*, to make laws about religion.

Even so, it might be said that neither s 56 of the *Anti-Discrimination Act 1977* (NSW) nor the Act itself are laws for religion. With the reader hopefully accepting that it is more difficult to make the argument (ie, *that the law is not a law for religion*) in relation to s 56 than in respect of the entire Act itself, the contrapuntal reasoning to the states' rights argument would be that s 56 is not a law for religion. Rather, s 56 is a law about the *limits of the NSW anti-discrimination legislation* in respect of the ordination or appointment of priests.

Thirdly, to make out a case that s 56 of the *Anti-Discrimination Act 1977* (NSW) infringes the implied political freedom of political discourse, a plaintiff (assuming they have standing) would also have to establish that the law is *not* reasonable and adapted to serve a legitimate end that is compatible with representative government.⁴⁶

It would not seem difficult to prove this third point.

On the one hand, s 56 of the *Anti-Discrimination Act 1977* (NSW) has the effect of protecting the (apparent) religious susceptibilities of believers by supporting (debatable) biblical principles and Church teaching, including about women being subordinate to men. We will not dwell on *why* Christians — in particular, Sydney Anglicans — might need such a law

31. See NSW, *Parliamentary Debates*, Legislative Council, 12 October 2005 18400, David Clarke.

32. 'Pastors reject apology order of Koran comments', *ABC Online*, 22 June 2005 <abc.net.au/news/newstems/200506/s1397914.htm> at 20 April 2009.

33. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.

34. *Coleman v Power* (2004) 209 ALR 182, 206 (McHugh J), citing *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

35. *Cunliffe v Commonwealth* (1994) 182 CLR 272, 336 (Deane J).

36. See *Coleman v Power* (2004) 209 ALR 182, 207 (McHugh J).

37. Dan Meagher, 'The Protection of Political Communication under the Australian Constitution' (2005) 28(1) *UNSW Law Journal* 30, 31.

38. *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ) emphasis added.

39. *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 108 (Mason CJ, Toohey and Gaudron JJ).

40. (1997) 190 CLR 1.

41. *Ibid* 115.

42. *Ibid*.

43. *Ibid* 156.

44. (2005) 219 ALR 403.

45. *Ibid* 519.

46. See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.



to underpin any such doctrinal beliefs, particularly given that the Anglican Appellate Tribunal and the Anglican Churches in Melbourne and Perth recognise the legitimate and biblically supportable role women leaders play in the Australian Anglican Church. On the other hand, the NSW anti-discrimination legislation denies women aspiring to be church leaders in the Sydney Anglican Diocese the right to bring an action against the Church for sex discrimination. In this respect, s 56 is plainly at odds with commonly accepted secular standards of gender equality. It is difficult to see how any democratic government could defend a law like s 56 of the *Anti-Discrimination Act 1977* (NSW) on the basis that it is reasonable and adapted to serve a legitimate end that is compatible with representative government. In Australian politics, there is no doctrinal barrier to women becoming leaders — a woman can become a Premier or Prime Minister, and not only Special Minister for the Status of Women.

I believe that the implied freedom could apply to s 56 of the *Anti-Discrimination Act 1977* (NSW), which arguably serves to stifle the political voices of aspirant women clergy. The provision may, in effect, either: deter women from seeking to become senior Anglican clergy (a vantage point from which they may otherwise participate in political discourse); or shield senior (male) clergy from legal action for what would otherwise be sexual discrimination in respect of Church leadership appointment decisions. While, as suggested, the anti-discrimination legislation may not suppress specific forms of political expression, it possibly has a more insidious effect of deterring women from aspiring to become religious leaders in the Sydney Anglican Diocese, from where they may otherwise exercise a political voice.

Conclusion

Senior church leaders have a voice in political discourse. Legislation which implicitly prevents women

in the Sydney Anglican Diocese from becoming church leaders and taking part in political debate, may infringe the implied freedom of *political* expression which the High Court of Australia has said exists under Australia's Constitution.

NSW anti-discrimination legislation may not directly inhibit specific political expression. It may nevertheless stifle women's ability to rise to positions from which they may take part in political speech as religious leaders.

More specifically, by buttressing the Sydney Anglican Diocese's policies of subordinating women, the NSW anti-discrimination legislation may insulate the Diocese from actions for gender discrimination in respect of church appointments pertaining to men. If it is accepted that section 56 of the *Anti-Discrimination Act 1977* (NSW) inhibits women from rising to senior religious positions and that women in senior roles *would have* a political voice without the operation of the provision, then s 56 of the *Anti-Discrimination Act 1977* (NSW) may offend the implied freedom of political speech.

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