

THE STATUS OF SANCTUARY IN AUSTRALIAN LAW

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I INTRODUCTION

In early 2016, the High Court of Australia confirmed by majority the constitutional validity of Australia's controversial system of off-shore processing of those claiming to be refugees.¹ In the aftermath of the decision, there were media reports that some religious organisations would offer sanctuary to the families who might otherwise be sent off-shore for processing.² This reflects the reality that most asylum seekers would rather remain in Australia than be sent to an off-shore processing facility. It is also current federal government policy that those who arrive irregularly in Australia will not be entitled, even if shown to be genuine refugees, to remain in Australia, but rather will be resettled in another country. Together, the policies of off-shore processing, and that of denying residency to asylum seekers who arrive irregularly, serve to increase the likelihood that those seeking to remain in Australia will seek to pursue alternative means, other than regular legal processes, to do so. One of these means is to seek the assistance of a religious organisation in providing sanctuary to the individual who would otherwise be liable to deportation from Australia.

Part II of the article will demonstrate that principles of sanctuary are of ancient vintage. However, there is real uncertainty regarding the current legal status of such a doctrine. The lawfulness of the practice by which a religious organisation offers sanctuary to individuals has never been tested or determined in an Australian court. Clearly, sanctuary in its modern form is significantly different from sanctuary as practised in earlier times.³ While the principle was recognised as being part of English common law for centuries,⁴ it was abolished by statute in the 17th century. It will be the objective of Part III of this article to determine the

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- 1 *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42 (French CJ, Kiefel, Nettle, Bell, Gageler and Keane JJ, Gordon J dissenting).
- 2 Michael Edwards states '[o]ne of Australia's senior Anglican leaders said places of worship were entitled to offer sanctuary to those seeking refuge from brutal and oppressive forces', and quotes Anglican Dean of Brisbane the Very Reverend Dr Peter Catt as indicating an intention to offer St John's Cathedral in Brisbane to asylum seekers: Michael Edwards, 'Sanctuary Offered to Asylum Seekers Facing Removal to Offshore Detention by Churches Across Australia', *ABC News* (online), 4 February 2016 <<http://www.abc.net.au/news/2016-02-04/churches-offer-sanctuary-to-asylum-seekers/7138484>>.
- 3 Paul Wickham Schmidt, 'Refuge in the United States: The Sanctuary Movement Should Use the Legal System' (1986) 15 *Hofstra Law Review* 79, 94–5.
- 4 Trisha Olson, 'Of the Worshipful Warrior: Sanctuary and Punishment in the Middle Ages' (2004) 16 *St Thomas Law Review* 473, 474: 'Sanctuary's story sweeps nearly fourteen hundred years'.

legal basis, if any, for an assertion of principles of sanctuary, one way or another, in Australia today.

Specifically, Part III will consider questions regarding the extent, if any, to which either or both of the common law doctrine and the subsequent statutory abolition are recognised as being part of Australian law through the *Australian Courts Act 1828* (UK) and equivalent legislation in various colonies/states. In the alternative, it might be argued that the Australian common law, quite independently of law having been received under the 1828 Act, *should* recognise such a doctrine. In the further alternative, it might be argued that Commonwealth legislation which seeks to criminalise actions of religious officials providing sanctuary to those who seek out the assistance of the religious body is offensive to the ‘freedom of religion’ recognised in the *Australian Constitution*. In turn, questions regarding the interpretation of that provision will be considered. Lastly, a close reading of the section which the person offering sanctuary might be said to have breached might suggest a defence on the basis of the religious doctrine.

II SANCTUARY IN ANCIENT TIMES

Intrinsic to the Christian and Jewish faiths, at least, is the concept of providing assistance, including safety and accommodation, to others. For example, *Leviticus* 19 states that foreigners ought not to be mistreated, and must be treated as a native-born individual.⁵ *Matthew* refers to the virtue of giving the hungry something to eat, the thirsty something to drink, clothing those in need, tending to the sick, visiting the imprisoned, and ‘inviting in’ strangers.⁶ There is extensive reference to cities of refuge in *Numbers* and it is clear that it is available to those accused of unintentional killing,⁷ and that it is a protection from the principle of blood feud, by which in most cases, the family of a person killed would be entitled to exact ‘blood revenge’ on the killer.⁸ It is made clear that this principle is ‘to have the force of law for you throughout the generations to come, wherever you live’.⁹

Sanctuary was a feature of early Greek and Roman society. Trenholme writes of Grecian society that ‘[a]lmost every temple afforded protection to criminals, even to those who had committed the worst crimes, and no fugitive could be molested or dragged forth. ... Those [under sanctuary were] held sacred as being

5 *Leviticus* 19:33–34.

6 *Matthew* 25:35–36.

7 *Numbers* 35:15; *Deuteronomy* 19:3; *Joshua* 20:3.

8 *Numbers* 35:26–27; *Deuteronomy* 19:7; *Joshua* 20:5; *Exodus* 21:13; Barbara Bezdek ‘Religious Outlaws: Narratives of Legality and the Politics of Citizen Interpretation’ (1995) 62 *Tennessee Law Review* 899, 931: ‘Ecclesiastical asylum rules served, above all, to preserve the fugitive from violence and bloodshed, both during the asylum and when he left it’; Olson, above n 4, 475: ‘Sanctuary allowed an accused to gain safe haven and secure his bodily well-being against the claim of vengeance made by the injured man and his kin or against the right of the royal authority to impose an afflictive penalty’.

9 *Numbers* 35:29.

under divine protection'.¹⁰ The Romans also recognised the doctrine, though they imposed greater restrictions in terms of who was eligible, and placed time limits on its availability.¹¹

Indeed, there has long been difference of opinion, and practice, regarding whether sanctuary is to be applied only to innocents thought to have been wrongly pursued by authorities, or is to be extended to those who have clearly committed wrongdoing, whether minor or serious.¹² The general trend was to extend sanctuary from those considered wronged to anyone who committed wrongs, including very serious wrongs,¹³ although at various times, and particularly in later stages, authorities began to place stricter limits on those entitled to the benefit of the doctrine. It should also be noted that sanctuary was also applied to those outsiders in need of 'hospitality'; in other words, those who had not committed any wrong.¹⁴

There are apparent close links between concepts of asylum and concepts of sanctuary.¹⁵ Hampton notes that '[p]roviding safe haven to the stranger or foreigner was a widespread human practice throughout the ancient world', and was often sourced to religious practice.¹⁶ It relates to sanctuary; 'asylum' is 'from a Greek term meaning "safe from violence" or "inviolable"'.¹⁷ Hampton states that 'asylum in the ancient ... world meant a state of sanctuary or protection granted out of an obligation defined in religious and ethical terms'.¹⁸

The first written evidence of the doctrine is often taken to be Constantine's *Edict of Toleration* of 313. Further evidence of it appears in the *Theodosian Code* of 392.¹⁹ The Council of Sardinia of 343 stated it was necessary to rescue anyone, regardless of guilt, 'who sought "refuge in the mercy of the church" and

10 Norman Maclaren Trenholme, *The Right of Sanctuary in England: A Study in Institutional History* (University of Missouri, 1903) 301.

11 *Ibid* 303.

12 See, eg, Lance Hampton, 'Step Away from the Altar, Joab: The Failure of Religious Asylum Claims in the United States in Light of the Primacy of Asylum Within Human Rights' (2002) 12 *Transnational Law & Contemporary Problems* 453, 461: 'Sanctuary refers specifically to the protection of criminal fugitives by ecclesiastical authorities'; Trenholme says that while sanctuary 'had been designed to extend protection to the innocent maliciously pursued, to the injured, the oppressed, and the unfortunate [in time it] was so much extended that the most atrocious and guilty of malefactors could be found enjoying immunity within sacred walls and bidding defiance to the civil power: Trenholme, above n 10, 9; Matthew E Price, 'Politics or Humanitarianism? Recovering the Political Roots of Asylum' (2004) 19 *Georgetown Immigration Law Journal* 277, 290. Price contrasts asylum as viewed by the state ('asylums were meant to protect the innocent, not the guilty') and the church ('[r]ather than being an instrument of justice, it was a vehicle for mercy. Clerics pleaded for leniency not only for the wrongly accused, but for anyone who had been sentenced by Roman courts').

13 Trenholme, above n 10, 9.

14 Hampton, above n 12, 457–8.

15 *Ibid* 457.

16 *Ibid*.

17 *Ibid*.

18 *Ibid*.

19 However, heretics, apostates and Jews were denied sanctuary: Jorge Carro, 'Sanctuary: The Resurgence of an Age-Old Right or a Dangerous Misinterpretation of an Abandoned Ancient Privilege?' (1986) 54 *University of Cincinnati Law Review* 747, 752.

to “without hesitation ... solicit clemency” for them.²⁰ The Franks recognised sanctuary.²¹ This was also recognised by the Saxons;²² this is sometimes attributed to Augustine’s arrival in 597.²³ Laws of Ine, King of the West Saxons 688–725 AD, provided that a person subject to the death penalty could escape if they fled to a church and paid appropriate money.²⁴ In the 10th century sanctuary was further extended to include chartered sanctuaries. These sanctuaries extended the physical environment in which sanctuary could be claimed beyond the church and its immediate environs, applied to a broader range of offences, and provided sanctuary for a longer period.²⁵ Sanctuary was recognised by William the Conqueror.²⁶ The church continued to recognise a very broad principle of sanctuary in the 12th century.²⁷

There is some debate in the literature regarding the essence of the sanctuary process. While for some it was the place where the person entered, religious grounds, the better view might be it was the significance of what the person was doing. In other words, they were admitting they had done a wrong, and were agreeing to pay penance for their wrong, with the assistance of the religious authority. In this way, the primary objective of sanctuary was for the wrongdoer to make good with God.²⁸ This was at a time when the Almighty’s view of the conduct of individuals held much greater sway than that of secular office holders, given the use of trial by oath, trial by ordeal and trial by compurgation during this period. Failure to pass these ‘trials’ was taken to be a sign by the Almighty of an individual’s guilt. As Olson puts it, ‘[j]ust as the Deity interceded at trial by ordeal, He interceded, through the saints, to aid and enfold those who sought

20 Olson, above n 4, 480.

21 ‘If anyone takes refuge in a church, let no one presume to drive him out ... rather let him be in peace until he is brought to plead his case, and in honour of God and in reverence for the saints of that church let his life and all his members be respected’: H R Loyn and John Percival, *The Reign of Charlemagne: Documents on Carolingian Government and Administration* (Edward Arnold, 1975) 51.

22 Wayne A Logan, ‘Criminal Law Sanctuaries’ (2003) 38 *Harvard Civil Rights-Civil Liberties Law Review* 321, 325; John Johnson, *A Collection of the Laws and Canons of the Church of England* (John Henry Parker, revised ed, 1850) vol 1, 320: ‘every church hallowed by a bishop [shall] have this privilege, viz., If a foe run thither, that no man for seven nights draw him from thence; if any man do, he incurs the penalty of breaking the king’s protection, and the Church’s peace’.

23 Carro, above n 19, 753.

24 Ibid 754. A statement that sanctuary is only available for felonies which attracted the death penalty also appears in *Corone* (1580) Brook’s New Cases 47, 54; 73 ER 867, 870. A conflicting statement that it applied to all felonies, other than repeat felonies, appears in *Powtler’s Case* (1610) 11 Co Rep 28b, 31b; 77 ER 1181, 1185.

25 Logan above n 22, 326.

26 ‘And if any thief or homicide, or anyone other guilty [person] flee from fear of death to this church, let him in no way be hurt, but let them all be freely discharged’: I Thomas Rymer, *Foedera 4* (Londini A & J Churchhill, 1704) (*Charter of William I to Battle Abbey* 1087), quoted in Olson, above n 4, 499. The *Laws of William* state that ‘the protection of the holy church shall be inviolable’: Agnes J Robertson (ed), *The Laws of the Kings of England from Edmund to Henry I* (Cambridge University Press, 1925) 253; *The King v Pugh* (1779) 1 Doug 188, 189; 99 ER 123, 124.

27 The Second Lateran Council of 1139 stated that ‘nobody dare to lay hands on those who flee to a church or cemetery. If anyone does this, let him be excommunicated’. There were no exclusions: Olson, above n 4, 474.

28 Ibid 477–81.

succor by fleeing to a bishop, altar, or cemetery'.²⁹ There are references to specific places as sanctuaries, and also a statement that every church was a sanctuary.³⁰

By the 13th century, sanctuary had evolved in England into (generally) a maximum period of 40 days,³¹ during which the person was safe from authorities or any aggrieved individual. At the end of that time, the person could elect to have their matter determined by secular authorities, could try to get to another sanctuary, or leave the jurisdiction permanently.³² Those who did none of the above were generally starved until they made a choice.

For a time, the role of the monarch and of the church in making and enforcing laws and customs coexisted quite happily. Monarchs understood and typically deferred to the preachings and edicts of the church. For instance, there is a record of King Canute in the 11th century enacting a law imploring members of the judicature to be mindful of religious authority and doctrine in their decision making.³³ In some ways, the role of sanctuary complemented the objective of the monarch in preserving the peace of society. The article has alluded above to the role of sanctuary in avoiding the blood feud that might otherwise have existed between an alleged wrongdoer and their victim, or family of the victim. It was also in the monarch's interest to avoid such feuds, and shrewd monarchs thus saw the value of sanctuary in achieving these goals. It was consistent with this goal of avoiding blood feud that on some occasions, those who had been in sanctuary were sent out of the realm (abjuration). However, sometimes sanctuary was offered to those at no real risk of blood feud, in particular those who owed others debts.³⁴ Extension of sanctuary to such individuals served ultimately to weaken it.

The commonality of interests and complementarity between the monarch and the church did not last. Inevitably tensions arose because the monarch saw the church as usurping its functions, one infamous example of such tension being the murder of Thomas Beckett during the reign of Henry II in earlier times. The influence of the papacy had waned over time. People began to question its doctrine and authority.

29 Ibid 504.

30 *Corone* (1580) Brook's New Cases 47, 54; 73 ER 867, 870.

31 *Newsome v Bowyer* (1729) 3 P Wms 35, 38; 24 ER 959, 960; *Corone* (1580) Brook's New Cases 47, 54; 73 ER 867, 870. Shannon McSheffrey notes exceptions to the 40 day maximum were sometimes applied to certain categories of individual, particularly political refugees, in the 15th century: Shannon McSheffrey, 'Sanctuary and the Legal Topography of Pre-Reformation London' (2009) 27 *Law and History Review* 483, 483.

32 Victoria J Avalon, 'The Lazarus Effect: Could Florida's Religious Freedom Restoration Act Resurrect Ecclesiastical Sanctuary?' (2001) 30 *Stetson Law Review* 663, 668; *Newsome v Bowyer* (1729) 3 P Wms 35, 37; 24 ER 959, 959.

33 '[L]et judicature ... be moderate in respect to God ... let him that presides in judicature consider very seriously what he desires [of God] when he thus says "forgive us our trespasses, as we forgive them that trespass against us" ... the judicature be tempered with gentleness' (King Canute): Johnson, above n 22, 512.

34 *Betts v Lowe* (1689) Comberbach 108, 108; 90 ER 372, 372; *Herford v Winde* (1566) 3 Dyer 268a, 268a; 73 ER 595, 595

The concept of sanctuary, emphasising mercy to individuals, came to threaten the state's objective of punishing and deterring criminal behaviour.³⁵ The past view of crime as primarily an offence against God, repaired through repentance rather than earthly punishment,³⁶ was challenged. The view of wrongdoing as being private in nature, requiring compensation (*wer, wit or bot*) to be paid to the victim or their family was changing. There was a growing view that the church's role in providing sanctuary was not independently sourced in divine will, but existed because of, and to the extent of, privileges granted to them by the civil authority.³⁷ In turn, this reflected a positivistic view of law as being derived from positions of 'power and will, be it divine or human', rather than based on community values and customs, as had originally been envisaged in the common law.³⁸ Olson concludes this meant that 'the giving of shelter to the wayward came to represent not an expression of justice, but an exemption from its rigors'.³⁹ Justice had been 'unmoored from mercy'.⁴⁰ Ironically, changing views of criminal behaviour, envisaging a reduced role for the church in terms of sanctuary, and an enlarged role for the state in terms of punishment, originated from the church itself.⁴¹

Monarchs began progressively winding back the ambit of sanctuary. William I began this process. It accelerated in the time of Henry VII by, for instance, removing sanctuary for those guilty, or accused, of treason, at a time when his position, and authority, were questionable. It further increased during the time of Henry VIII, self-declared head of the English church after the schism with Rome, toughening the penalties imposed on a person seeking sanctuary. It was finally abolished in England in 1624 by James I in succinct terms: 'no sanctuary or privilege of sanctuary be hereafter admitted or allowed in any case'.⁴² This is not surprising from a ruler who aspired to an absolutist version of power, in which 'all "divine power on Earth"' was to be exercised through him.⁴³ Interestingly, despite this legislation, references to 'sanctuary' continued to be made in the case law, and these references were not merely to sanctuary as an historical doctrine

35 McSheffrey, above n 31, 507.

36 Price, above n 11, 290.

37 Olson, above n 4, 542; 'And the privileges of the church derive themselves only from the indulgence and favour of princes; and they had no foundation in the ancient common law ex gra. (sic) sanctuary, and some particular trials, that are left to them': *The Protector v Ashfield* (1656) Hardres 62, 63; 145 ER 381, 382.

38 Olson, above n 4, 547.

39 Ibid 548–9.

40 Ibid 545.

41 Price, above n 12, 291.

42 Quoted in J H Baker, 'The English Law of Sanctuary' (1990) 2 *Ecclesiastical Law Journal* 8, 13. It is conceded that abolition occurred through an Act of Parliament, rather than by executive decree, although parliament in 1624 was obviously much differently constituted than the parliaments we know today.

43 Steven Pope 'Sanctuary: The Legal Institution in England' (1987) 10 *University of Puget Sound Law Review* 677, 696.

which no longer had effect,⁴⁴ though there are also references post-1624 reflecting recognition of its abolition.⁴⁵ Thus, practically it cannot be said that the use of sanctuary principles in fact ended in 1624.

Though, concededly, the principle of sanctuary today appears very different to that of the past, there remains a connection between its provision and church teachings on obligations towards the less fortunate. Campbell sums up the position well

In many faith traditions, the obligation to care for the poor, the sick, and the elderly is a central commandment. For Christians, the duty to minister to immigrants and refugees is bound up in the biblical call to serve the poor as they would serve Jesus Christ himself. In the Catholic Worker movement, this duty extends to providing hospitality to all who seek it ... regardless of their legal or undocumented immigration status ... those affiliated with the ... Movement believe that Catholic social teaching directs Roman Catholics to show ‘mercy without borders,’ and that there are inherent human rights that transcend the laws of man.⁴⁶

This short historical survey serves to remind us of the longstanding and deep-rooted position of the principle of sanctuary in religious belief and teaching, and its acceptance for many years as a legal principle, before its abolition in English law by an absolutist monarch who would brook no division or sharing of power.

The article will now consider the legislative basis upon which someone in Australia offering sanctuary might face criminal charge.

44 *Trench v Harrison* (1849) 17 Sim 111, 113; 60 ER 1070, 1071 referred to the ‘sanctuary of St. Stephen’s in Cornwall’; *Cary v Bacchus* (1689) 1 Show K B 17, 17; 89 ER 420, 421 (reign of William and Mary) reference to the King’s writs being executed, ‘except [in] a place called the Sanctuary’; *Baillie v Grant* (1832) 6 Bli NS 459, 462; 5 ER 662, 663 states that a person ‘was not incarcerated ... as ... he had retired to the Sanctuary, the protection of which he pleaded when apprehended there’ in relation to a bankruptcy proceeding (a well-established occasion for the seeking out of sanctuary); *Raby v Rose* (1758) 2 Keny 173, 174; 96 ER 1145, 1146: ‘[A]n incapacity to pay his debts, runs through all the descriptions of a bankrupt, or something that is strong evidence of his being in such a situation; as, leaving the kingdom, taking sanctuary, ordering himself to be denied to his creditors, absconding [etc]’ (again, bankruptcy being a common motivation for sanctuary); *Attorney-General v Munro* (1848) 2 De G & Sm 122, 183; 64 ER 55, 81 refers to ‘fellow-worshippers in the same sanctuary’ (appears in a document written by witnesses or litigants and may use sanctuary in a non-legal sense); *Leonard Watson’s Case* (1839) 9 AD & El 731, 777–8; 112 ER 1389, 1409, (reference to abjuration of the realm and sanctuary in the context of criminal law, and reference to banishment in the reign of Charles II (1660–1685)).

45 See, eg, *O’Brien v R* (1849) 11 HLC 465, 487; 9 ER 1169, 1178.

46 Kristina M Campbell, ‘Humanitarian Aid is Never a Crime? The Politics of Immigration Enforcement and the Provision of Sanctuary’ (2013) 63 *Syracuse Law Review* 71, 98–9. Campbell notes that individuals, including members of the clergy, have served prison time for such acts of faith and conscience; see also Elizabeth McCormick and Patrick McCormick, ‘Hospitality: How a Biblical Virtue Could Transform United States Immigration Policy’ (2006) 83 *University of Detroit Mercy Law Review* 857.

III POSSIBLE CRIMINAL LIABILITY OF SANCTUARY PROVIDERS

Section 233E of the *Migration Act 1958* (Cth) provides the likely legal basis pursuant to which a religious official providing sanctuary to an individual without entitlement to be in Australia might be charged. Subsection (3) creates the offence of harbouring another person, where that person is an unlawful non-citizen, removee or deportee. The offence attracts a maximum penalty of 10 years' imprisonment, a fine of 1000 penalty units, or both. Intention is not an element of the offence. The concept of 'harbour' is not defined in the *Migration Act*. A religious individual would commit a separate offence if they concealed an unlawful non-citizen, intending to prevent that person from being discovered by an officer: s 233E(2). This section carries the same maximum penalty as s 233E(3).

The article should acknowledge, but will not elaborate upon, the pragmatic possibility that law enforcement officials may for policy reasons not be minded to charge religious officials with what otherwise might be a breach of the legislation. There is evidence that this has been the situation in Canada, with one empirical study spanning 20 years finding that on no occasion did authorities arrest a person in sanctuary, nor did they arrest any sanctuary providers with breaches of relevant immigration laws.⁴⁷ It is also the case in the United States.⁴⁸ The author is not aware of any case in Australia where a religious official has been so charged. Of course, this does not preclude the possibility that a religious official could in future be charged, if they do in fact engage in the conduct that some religious officials indicated they would in light of the High Court decision validating off-shore processing.⁴⁹

The article will now consider possible legal defences that might be open to an official who has been so charged.

A Does Australian Law Recognise the Principle of Sanctuary?

1 Relevant Principles

There is no Australian case law or legislation known to the author which expressly clarifies the position one way or the other. We do know that the common law

47 Randy Lippert, *Sanctuary, Sovereignty, Sacrifice: Canadian Sanctuary Incidents, Power and Law* (UBC Press, 2006) 40.

48 'Although there is no explicit law that prohibits immigration authorities from making arrests on church grounds, they have never raided a religious property suspected of harbouring illegal immigrants': Pamela Begaj 'An Analysis of Historical and Legal Sanctuary and a Cohesive Approach to the Current Movement' (2008) 42 *John Marshall Law Review* 135, 152. This is not to say that those involved in alleged harbouring have not been arrested, as the case *United States v Aguilar* 883 F 2d 662 (9th Cir, 1989) demonstrates.

49 'Tolerance is not an inevitable virtue whether in government's treatment of private citizens or of private citizens' treatment of each other.': Reid Mortensen, 'Rendering to God and Caesar: Religion in Australian Discrimination Law' (1995) 18 *University of Queensland Law Journal* 208, 217.

recognised the existence of the principle for many centuries, until it was abolished by statute during the reign of James I in 1624. The first question is the impact of the existence of the common law principle in England, and its subsequent abolition by statute, if any, on Australian law. This involves questions regarding the reception of English law into Australia, and legislation such as the *Australian Courts Act 1828* (UK). Section 24 of that Act, as an example, states that the ‘laws and statutes’ of England ‘in force’ at the time of the passing of the Act shall be applied to New South Wales ‘so far as the same can be applied’ within the colony.⁵⁰ This does not mean the Court considers whether adoption of the English law would be suitable or beneficial.⁵¹ Consideration of the status of United Kingdom legislation passed after these reception dates is beyond what is necessary in this context. As we will see, there is some suggestion in the case law that Australian law treats common law and statute slightly differently for purposes of reception, suggesting the possibility that whilst the common law doctrine was received, its statutory abolition was not.

The law has traditionally drawn a distinction in this regard between ‘settled colonies’, where so much of English law as was applicable to the situation of the colonists and the condition of the colony was received and accepted as part of colonial law, and ‘conquered territory’, where the laws of the conquered territory continue in force unless and until altered by the government.⁵² For much of our history, it was believed that the Australian continent was terra nullius, however this was overturned in the landmark High Court decision of *Mabo v Queensland [No 2]* (*Mabo*).⁵³ However, the case did not decide that all of the common law that had been received into the Australian colonies by virtue of the prior belief that the Australian colonies were ‘settled’ was now no longer to be applied. Obviously, such a finding would have been disruptive to the fabric of Australian law. As a result, it remains relevant to consider how much of English law was received into Australian colonies.

Blackstone’s own view of this was that it was primarily up to the local judicature to determine which laws were sufficiently applicable to the new colony so as to be part of colonial law. However, he provided examples, stating that general rules of inheritance and tort would be applicable. In contrast, laws regarding property, police, revenue, ‘mode of maintenance for the established clergy, the jurisdiction of spiritual courts’ and other laws would not be necessary or convenient for the new colony, and so would not be in force.⁵⁴ Blackstone did not elaborate upon his examples so it is not entirely clear why he believed that certain areas of law would or would not be applicable. One possible reason for his hesitation in applying

50 Due to the way in which the states of Victoria and Queensland were created, 1828 is also the reception date for those states. It is also the reception date in Tasmania. The reception date for South Australia is 1836 and Western Australia 1829.

51 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, 634 (Mason J, with whom Barwick CJ, Gibbs, Stephen and Aickin JJ agreed).

52 Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) vol 1, 4; *Cooper v Stuart* (1889) 14 App Cas 286.

53 (1992) 175 CLR 1.

54 Blackstone, above n 52.

English rules relating to the ‘mode of maintenance’ of the established church or jurisdiction of spiritual courts may have been that England had an established state church, which may not have been the position in colonies to which its law might be considered for application.⁵⁵ Obviously, Australia does not have a state church. However, his examples do not deal with the precise issue of sanctuary.

The High Court has considered the question of the applicability of English law to Australia on a number of occasions. In *Delohery v Permanent Trustee Co of New South Wales* (*‘Delohery’*),⁵⁶ the High Court adopted and applied a test which considered whether the law being considered for application was ‘adapted solely to the country in which it was made’ or was of more general application.⁵⁷ In considering the application of English law, the Court there said that in principle there was no difference between applying English common law relating to the substantive legal principle, and English statute law.⁵⁸

Shortly afterwards, the High Court considered a similar issue in the case of *Quan Yick v Hinds*,⁵⁹ except that while *Delohery* had involved the question of a common law principle, this case considered the applicability of English lottery legislation to the New South Wales colony. Here the Court found that the legislation could not be applied to the colony. Many of the Act’s provisions were inapplicable because they referred to concepts, such as parishes, and particular courts, that did not exist in the colony.⁶⁰ Barton J said the test was whether the English legislation could ‘reasonably be applied’ in the colony and found it could not for the reasons given by Griffith CJ.⁶¹

These early cases seem to suggest that a similar approach should be taken to questions of whether English common law or English statute was applicable in the country. This view is reinforced by the literal wording of the Australian

55 Indeed, Bruce McPherson notes other examples where English religious statutes were not applied overseas on the basis they were ‘too closely related’ to Church establishment: B H McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library, 2007) 403.

56 (1904) 1 CLR 283 (Griffith CJ).

57 Ibid 310 (citations omitted).

58 Ibid.

59 (1905) 2 CLR 345.

60 Ibid 362–4 (Griffith CJ).

61 Ibid 368–72; O’Connor J found to like effect at 381–2. Another example is the United Kingdom marriage legislation of 1751 and 1823, held not applicable to the New South Wales colony due to its terms, specifically referring to England, and because there were in existence local provisions on the same topic: Sir Garfield Barwick, ‘The Commonwealth Marriage Act’ (1962) 3 *Melbourne University Law Review* 277, 280.

Courts Act which refers compendiously to the ‘laws and statutes’ of England and seems to suggest a common test of ‘applicability’.⁶²

However, in a later case a different view was been taken. In *State Government Insurance Commission v Trigwell* (*‘Trigwell’*),⁶³ the court considered the question of the applicability in Australia of old English common law rules regarding highway immunity. In so doing, Gibbs J suggested a differential approach was taken to the reception of English common law principles, as opposed to English statutes. He said that while, in the case of a question of the applicability of an English *statute*, questions of the objectives and policy of the legislation were relevant

A rather more liberal approach is taken when the adoption of a rule of the common law is under consideration. The reasons for the rule are then less important than the nature of the rule itself, and the rule will only be held not to have been imported into the territory if there is some ‘solid ground’ to establish that it was inapplicable to the conditions there.⁶⁴

Gibbs J pointed out there were ‘comparatively few’ situations where ‘the common law [had] been held inapplicable to a settled colony’.⁶⁵ These comments were obiter dicta, and no other member of the Court in *Trigwell* considered the matter. However, they raise the possibility, at least, that an Australian court might find that the common law regarding sanctuary was applicable to Australian colonies, but that its abolition by statute by James I was not. The Court in *Trigwell* considered that the fact United Kingdom legislation had abolished the rule did not affect the issue of whether it was applicable to Australia,⁶⁶ although this finding is of less importance to the current context than might otherwise have been the case, given that the relevant United Kingdom legislation was passed well *after* the reception date of English law, in contrast with the current context where the English legislation at issue was passed well *before* the reception date. In dissent, Murphy J took a different view on the reception question. He concluded that a common law rule could now be ‘accepted or rejected irrespective of whether it was suitable or applicable at settlement’.⁶⁷

62 This was also noted by McPherson, above n 55, who, talking of the reception process in relation to common law and statute, said that ‘[g]iven that they are often the subject of a single reception rule expressed in general terms, it is to be expected that the same principles would apply to both’: at 335. He went on to observe that, in practice, the judges were more receptive to the application of common law principle than they had been to statute law, ‘[p]erhaps because of innate judicial suspicion of legislative innovations’. Later he suggests the old declaratory theory of law that the common law was a kind of natural law just waiting to be discovered by the judges may also have played a part, as did the fact English law knew no principle of lapse, whereby very old statutes automatically expired: at 398–9, and that ‘[b]ecause English statutes generally disclose the mark of the times in which they were enacted, and are more specific and less judicially malleable than the common law, they are inevitably more vulnerable to rejection abroad than other elements of English law’: at 404.

63 (1979) 142 CLR 617.

64 Ibid 626, citing *Leong v Chye* [1955] AC 648, 665.

65 *Trigwell* (1979) 142 CLR 617, 626.

66 Ibid 636 (Mason J, with whom Barwick CJ, Gibbs, Stephen and Aickin JJ agreed).

67 Ibid 652.

Further on the differential treatment of English common law, on the one hand, and English statute on the other, Zines noted two other differences. Firstly, that in respect of statutes, the question was asked as at the relevant date of reception. If the statute was not applicable at that time, that was the end of the matter. In contrast, principles of common law deemed inapplicable at that time lay ‘dormant’, ready to be picked up if and when colonial conditions altered to make them appropriate. Further, whilst it was the form of the legislation at the reception date that mattered, in respect of the common law it was the status of its principles ‘from time to time’ that mattered, not what was understood of the common law as at the reception date.⁶⁸ Castles concludes that while there was little difficulty in applying English common law in the Australian colonies, with English common law principles being accepted and applied as ‘applicable’ in the vast majority of cases, reception of English statute was fraught with significant difficulties given the strict rules regarding timing mentioned above, and stronger arguments regarding the applicability of statutes that may have been created to respond to specific difficulties in English society.⁶⁹

The High Court also found during this period that the English common law concept of civil death as applied to those convicted of a capital crime (attainder) could be applied in the Australian colonies.⁷⁰ Barwick CJ, with whom Stephen J agreed, noted the question was not whether the law was a convenient one.⁷¹ Gibbs J said it was not about whether the law being considered now appears to be ‘inconvenient or unjust’.⁷² A law would fail the test if it related to matters ‘peculiar to the local condition of England’.⁷³ The Court did take into account an English statute on point prior to 1828, which is the same issue as the one currently under discussion, but again there was a key point of difference — that legislation specifically referred to New South Wales, unlike the statute by which James I abolished sanctuary. Murphy J, dissenting, left open the question as to whether the common law rules of attainder had been received in 1828 as being ‘applicable’ to the colony, but found that the Australian common law should not recognise the doctrine.⁷⁴

It must be noted at this point that the High Court has recognised there is one integrated common law of Australia, rather than different common law in different states.⁷⁵

68 Leslie Zines, ‘The Common Law in Australia: Its Nature and Constitutional Significance’ (2004) 32 *Federal Law Review* 337, 339, quoting *Trigwell* (1979) 142 CLR 617, 625; see also Alex C Castles, ‘The Reception and Status of English Law in Australia’ (1963) 2 *Adelaide Law Review* 1.

69 Castles, above n 68, 7–11, 13–14.

70 *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583.

71 *Ibid* 587.

72 *Ibid* 591.

73 *Ibid*, quoting *Nelan v Downes* (1917) 23 CLR 546, 551.

74 *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583, 611.

75 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); Leslie Zines, ‘The Common Law in Australia: Its Nature and Constitutional Significance’ (2004) 32 *Federal Law Review* 337, 338.

As indicated above, though the High Court in *Mabo [No 2]* rejected the conception of Australia as having been terra nullius, it did not reject, and in fact continued to apply, the test of ‘reasonable applicability’,⁷⁶ although that test had been posited on the basis that the territory was terra nullius, in accordance with Blackstone’s expressed view. It did not reclassify Australia as having been ‘conquered or ceded’.⁷⁷

Another important question concerns the reference in s 24 of the *Australian Courts Act 1828* (UK) to the reception of laws that were ‘in force’ within England at the time of passage of the Act. A literal interpretation of this phrase might suggest that the common law principle of sanctuary was not received. It was not ‘in force’ in England at the reception date, because it had been repealed by the 1624 Act. However, this could be counteracted with a seemingly more flexible approach to the reception of the common law. This is reflected, for example, in the judgment of Gibbs J in *Trigwell* where he found that the common law inherited was not frozen in the form that it was in at the reception date,⁷⁸ as a literal interpretation of s 24 might suggest. Clearly, if developments in the common law subsequent to the reception date could be taken to have been received, it might also be possible to argue by analogy that common law developments prior to the reception date might be taken to have been received. In the case of neither could it be strictly said that those latter (or earlier) principles were ‘in force’ as at the reception date.

Section 3(2) of the *Australia Act 1986* (Cth) confirmed the ability of states to repeal any Act of the United Kingdom Parliament, a power conferred on the Commonwealth by the *Statute of Westminster 1931* (Imp) 22 & 23 Geo 5 (this would probably stretch to ‘English’ laws of pre-1707 vintage). States and territories have enacted legislation to repeal (subject to exceptions not relevant to the current context) imperial legislation dated 1235 or later in force at the time of reception of English law.⁷⁹ Western Australia passed legislation outlining which imperial statutes it had adopted.⁸⁰ There is no specific legislative provision in South Australia, Western Australia or the Northern Territory.

2 Consideration

Regarding the common law, unaffected by the James I statute for now, there is a strong argument that the common law doctrine of sanctuary was received into the law of the colonies. As indicated above, there are very few instances in

76 *Mabo [No 2]* (1992) 175 CLR 1, 38, 47 (Brennan J, with whom Mason CJ and McHugh J agreed), 80–1 (Deane and Gaudron JJ), 206–7 (Toohey J).

77 Ulla Secher, ‘The Reception of Land Law into the Australian Colonies Post-*Mabo*: The Continuity and Recognition Doctrines Revisited and the Emergence of the Doctrine of Continuity Pro-Tempore’ (2004) 27 *University of New South Wales Law Journal* 703, 704.

78 *Trigwell* (1979) 142 CLR 617, 625.

79 *Imperial Acts Application Act 1969* (NSW) s 8(1); *Imperial Acts Application Act 1980* (Vic) s 5; *Imperial Acts Application Act 1984* (Qld) s 7; *Imperial Acts (Repeal) Ordinance 1988* (ACT) s 3(2). See for discussion Peter M McDermott, ‘Imperial Statutes in Australia and New Zealand’ (1990) 2(2) *Bond Law Review* 162.

80 *Imperial Acts Adopting Act 1844* (WA).

which common law doctrines were held not to be applicable to the colonies.⁸¹ The doctrine can be applied sensibly. As indicated, it is not for the courts to determine the issue of whether the doctrine is suitable or beneficial. There is no sense that the common law doctrine of sanctuary was peculiarly adapted and appropriate to English conditions or culture, as demonstrated by the fact it was in widespread use throughout Europe for many centuries. Nothing turns on the fact that England had a state church while the general view is that Australia never did;⁸² the doctrine was developed at a time and in societies where there was no state church, there is no logical coherent link between whether a nation has a state church and whether it recognises, or recognised, the doctrine of sanctuary.

The next question is whether this position is affected by the statutory abolition of the doctrine in England in 1624. This is somewhat complicated. First, as has been explained above, the courts took a different view of the applicability of English statute to the Australian colonies, compared with English common law. It cannot be automatically assumed that if the English common law doctrine of sanctuary was received, a statute on the same topic was also received. According to the authorities, which have more readily denied the applicability of English statute to Australia than English common law, we must consider the ‘objects and policy’ of the relevant statute in determining its applicability to the Australian colonies.⁸³

While, understandably, there is scant detail on James I’s 1624 statute formally abolishing sanctuary, we have some knowledge of the prevailing culture at this time. This was an absolutist monarch interested in absolute power, who believed that the law did not apply to him, and that he was the highest repository of divine power. In that light, it is not surprising he was not willing, as previous monarchs had been, to share power with the church and to permit churches to obviate the sometimes harsh application of secular law which he himself presumed to declare and apply. Clearly, by the time of the early 19th century in the Australian colonies, the idea of an absolutist monarch was passé and would have been anathema to the Australian colonists. The colonies were respectful of religious freedoms, and anxious to preserve them, leading to the insertion of s 116 of the *Australian Constitution*, seeking to prevent the new federal government from passing religious laws, from denying people office for religious reasons, and generally seeking to preserve religious freedom. On the other hand, the 1624 Act does not

81 In reflecting upon the reception of English common law into Australia, Windeyer J stated that it should be thought of not as ‘a number of specific legacies’, but that Australia was a ‘universal legatee’ that inherited a body of law, principle and method: *Skelton v Collins* (1966) 115 CLR 94, 135; see also McPherson, above n 55, ch 10, where a number of specific examples are mentioned. McPherson notes the competing theories regarding reception of English law — (a) that the whole of English law is received, subject to exceptional cases where the law cannot reasonably be applied, and (b) only those reasonably applicable principles are applied: at 374–5, noting that Australia generally favoured the former approach: *Quan Yick v Hinds* (1905) 2 CLR 345, 367, 378.

82 *Fielding v Houison* (1908) 7 CLR 393, 402 (Griffith CJ, with whom O’Connor J agreed at 428), 419 (Barton J), 438 (Isaacs J); ‘[T]he judiciary has generally adopted the position that no religious establishment was ever received’: Reid Mortensen, *The Secular Commonwealth: Constitutional Government, Law and Religion* (PhD Thesis, The University of Queensland, 1995) 111.

83 *Delohery* (1904) 1 CLR 283, 310; *Trigwell* (1979) 142 CLR 617.

express a territorial limitation, or refer to English localities or institutions, as was the case with some of the other English statutes deemed not received.

On balance, there is a reasonable argument that James I's 1624 Act abolishing sanctuary was not applicable to the Australian colonies, and so was not inherited through the colonial legislation of the early 19th century. This is the answer for those jurisdictions in Australia, including South Australia, Tasmania, and Northern Territory, which have not passed imperial repeal legislation. The position of Western Australia is not entirely clear, since it has passed laws expressly embracing some of the old English legislation on the basis it was considered 'applicable' to the colony. This asks the question of whether this demonstrates a belief that other legislation that was not specifically noted, including James I's law, was not considered applicable, and thus not part of received law. Four of the eight sub-national jurisdictions have enacted legislation repealing all English legislation, with exceptions not presently relevant, from the year 1235. This legislation clearly would apply to James I's repeal of sanctuary in 1624. However, the position in these four jurisdictions is that repeal of the imperial legislation 'does not revive anything not in force or existing at the time of commencement of [the] Act'.⁸⁴

Given that the High Court has strongly asserted the existence of one common law in Australia, it would likely be very uncomfortable with a situation whereby the effect of James I's statute was to be applied in some jurisdictions and not others. As a result, it is likely to find either that (a) James I's statute was applicable and was received in all jurisdictions, so sanctuary is not part of the common law of Australia, or (b) that it was not applicable to the colonies and ought not to be recognised as affecting the law in Australia, so the common law may recognise the concept of sanctuary in Australia. In other words, the question must be answered in an all-or-nothing fashion.

There is at least an argument that, due to the nature of the regime over which James I presided, and in particular his version of absolutism of power, which connects with and partly explains his move to abolish sanctuary, that such a version of political power is sufficiently antithetical to political institutions in the colonies prior to federation, and to today's constitutional values and structure, and to religious freedom which characterised both the colonies and Australia since federation, that it ought be held not applicable and received. In saying so, it is acknowledged that such an argument does not easily fit the pattern of other statutes that were held not received, in other words statutes that had specific territorial reference or which referred to English localities or institutions.

84 *Imperial Acts Application Act 1969* (NSW) s 9(1)(a); *Imperial Acts Application Act 1980* (Vic) s 5; *Acts Interpretation Act 1954* (Qld) s 20(2)(a); *Imperial Acts (Repeal) Ordinance 1988* (ACT) s 7(1). As to the common law principle, see *Mathieson v Burton* (1971) 124 CLR 1, 14–15 (Windeyer J).

B Should Australian Law Recognise the Principle of Sanctuary?

In the alternative, if the argument that the common law principle of sanctuary was received in the Australian colonies in the early 19th century is not accepted, a different argument can be made. This argument is that it is emphatically the role of the High Court to declare what is the common law of Australia, so that even if sanctuary was not part of the common law in the early 19th century, it is, or should be, part of the common law in Australia in the 21st. The article will not dwell on such an argument here, since it has been clear in Australia, at least since the 1980s, that the Australian High Court is the ultimate arbiter of what the common law of Australia is, recognition of this commencing with High Court decisions in the 1960s,⁸⁵ and ending with subsequent statutory changes.⁸⁶ One of the best articulations of this position was by Windeyer J

Our ancestors brought the common law of England to this land. Its doctrines and principles are the inheritance of the British race, and as such they became the common law of Australia. To suppose that this was a body of rules waiting always to be declared and applied may be for some people satisfying as an abstract theory. But it is simply not true in fact. It overlooks the creative element in the work of courts. ... In a system based ... on case law and precedent there is both an inductive and a deductive element in judicial reasoning, especially in a court of final appeal for a particular realm or territory. ... But how far the reasoning of judgments in a particular case in England accords with common law principles that are Australia's inheritance is a matter that this Court may have sometimes to consider for itself. This Court is the guardian for all Australia of the corpus iuris committed to its care by the Imperial Parliament.⁸⁷

Upon first principles, then, should Australian common law recognise the right to sanctuary? This is largely a normative question about which reasonable minds will differ. It might be worthwhile canvassing for and against arguments regarding this. Before doing so, it must be acknowledged that Australian statutory law currently criminalises the harbouring of unlawful non-citizens, and that this offence is not expressly subject to a common law defence of sanctuary. It is, however, an accepted principle of statutory construction that a statute will be interpreted where possible in a manner that does not trample upon fundamental human rights.⁸⁸ As a result, it might be possible for a court to use this doctrine to find that s 233E of the *Migration Act 1958* (Cth) is not to be interpreted so as to remove the common law right of sanctuary, in the absence of express words to the contrary. Or alternatively, that the principle of sanctuary might be relevant to one

85 *Parker v The Queen* (1963) 111 CLR 610, 632 (Dixon CJ, with whom all other judges agreed) (High Court announcement it no longer considered itself by decisions of the House of Lords); *Skelton v Collins* (1966) 115 CLR 94, 104 (Kitto J), 135 (Windeyer J), 138–9 (Owen J) (with whom Taylor J agreed at 122).

86 *Privy Council (Limitation of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth); *Australia Act 1986* (Cth) and (UK).

87 *Skelton v Collins* (1966) 115 CLR 94, 134.

88 *Momcilovic v The Queen* (2011) 245 CLR 1, 46–7 (French CJ); *Potter v Minahan* (1908) 7 CLR 277.

of the elements of the offence under which a person offering sanctuary is likely to be charged. This will be discussed later.

1 Normative Arguments in Favour of Sanctuary Principle in Law

Some may argue that Australia's approach to those who claim refugee status here is unfair. They might point to the excision of islands and declarations that such islands are not considered part of Australia for migration law purposes, off-shore detention, conditions in off-shore detention processing facilities, refusal to settle in Australia anyone who enters Australia irregularly, regardless of their actual refugee status, and children in detention, although mercifully this has become less common. They might point to legislative attempts to curb the legal rights of individuals to challenge negative decisions made about their application for refugee status. For these reasons, some might think that s 233E, criminalising the harbouring of someone deemed an 'unlawful non-citizen' under the above regime and imposing a possible 10-year jail term for someone who does, is an unfair law. Clearly, some believe that Australia's legal rules around asylum seekers are unfair, and may not comply with the spirit (at least) of the *Refugee Convention* to which Australia is a signatory.⁸⁹

If it is accepted that Australia's laws are unfair, the next question for the legal philosopher is the extent to which there is a duty to obey an unfair law.⁹⁰ There is no easy answer to that question, and it is not considered necessary to provide one here. Reasonable minds will differ. However, someone who believed that the existing (secular) refugee laws were leading to unfairness might, for that reason, argue that the common law should recognise the principle of sanctuary.⁹¹ There is also recognition of a more general religious position regarding unfair laws.⁹²

Outside purely legal argument, it may be argued by some that it is morally right, or morally incumbent, on individuals with religious beliefs to assist those who are in need. This article has alluded above to several passages of Biblical and other text that could be used to support an argument that, morally, individuals should or must assist those in need. A further argument would then need to be accepted, that this possible moral obligation that at least some feel should be recognised in

89 *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) ('*Refugee Convention*').

90 See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, 1979) 233–89; Joseph Raz, 'The Obligation to Obey: Revision and Tradition' (1984) 1 *Notre Dame Journal of Law, Ethics and Public Policy* 139; M B E Smith, 'Is There a Prima Facie Obligation to Obey the Law?' (1973) 82 *Yale Law Journal* 950; Tony Honoré, 'Must we Obey? Necessity as a Ground of Obligation' (1981) 67 *Virginia Law Review* 39; William Edmundson (ed), *The Duty to Obey the Law: Selected Philosophical Readings* (Rowman & Littlefield Publishers, 1999).

91 Sean Rehaag, 'Bordering on Legality: Canadian Church Sanctuary and the Rule of Law' (2004) 26(1) *Refugee* 43, 47 states that sanctuary providers 'often present sanctuary as an extra-legal means through which marginalized migrants may avoid coercive deportation that flows from what they consider to be arbitrary and oppressive immigration laws. From this perspective, sanctuary is a form of civil disobedience to purportedly unjust laws'.

92 Campbell, above n 46, 76: 'civil disobedience in the face of unjust and inhumane law is a central precept of many faiths, including Christianity'.

the form of a legal rule, specifically one which recognised the right of a religious institution to offer legal sanctuary, within recognised limits. Clearly, freedom of religion is recognised as a fundamental legal right by various international human rights instruments. It can be argued that the provision of sanctuary is an exercise of the religious freedom of the person offering it.

One scholar has articulated a position that church and state should be ‘sovereign in their own spheres’.⁹³ He believes that ‘religious bodies should be largely autonomous, governed by their own law in their internal affairs’.⁹⁴ Rivers says that ‘dual jurisdiction (Church and state as autonomous spheres of law) is characteristic of the Christian political tradition’.⁹⁵ Rivers, together with other scholars,⁹⁶ calls for the recognition of a ‘quintessentially religious domain — a core field — which is important enough to be immune from state interference. It requires religions and the state to be thought of, in some sense, as coequal in law’.⁹⁷ Rivers is not as forthcoming in precisely identifying the contours of the ‘core field’ which is immune from state interference, and he himself acknowledges the difficulties in doing so. However, he suggests matters of doctrine, worship, discipline, governance, membership, religious teaching, and the conduct of worship could be within the core.⁹⁸ He contrasts this core area with ‘peripheral’ areas which have ‘both religious and secular significance’, and matters connected with public institutions, such as education and social welfare, where there needs to be a negotiated compromise on regulation between the church and the state.⁹⁹ Rivers does not specifically identify sanctuary as being within either his identified ‘core’ or ‘periphery’, but acknowledges sanctuary as an ‘[aspect] of worship and ritual’.¹⁰⁰ Presumably then, Rivers would place it within his identified ‘core’ of

93 Julian Rivers, ‘The Secularisation of the British Constitution’ (2012) 14 *Ecclesiastical Law Journal* 371, 374; Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 318; likewise, Perry Dane, ‘The Varieties of Religious Autonomy’ in Gerhard Robbers (ed) *Church Autonomy: A Comparative Survey* (Peter Lang Publishing, 2001) 122 suggests ‘multiple sovereignties’.

94 Rivers, ‘The Secularisation of the British Constitution’, above n 93, 375–6.

95 Ibid 376.

96 Ian Leigh, ‘Balancing Religious Autonomy and Other Human Rights under the European Convention’ (2012) 1(1) *Oxford Journal of Law and Religion* 109, 111: ‘pluralism requires the recognition of a non-state sphere where religious bodies and individuals are free to apply their own standards (or to do so within limits) in a way that departs from the prevailing social ethos. ... [T]he state should remain separate from religious bodies’; Rex Ahdar and Ian Leigh refer to a ‘longstanding theological assumption, ... the spiritual realm takes precedence over the temporal’: *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013) 49; in the context of secular discrimination law, Shelley K Wessels, ‘The Collision of Religious Exercise and Governmental Nondiscrimination Policies’ (1989) 41 *Stanford Law Review* 1201, 1219: ‘Courts ... should exempt religious groups, when their actions occur within the context of the religious community, from government nondiscrimination policy requirements’; Alvin Esau, ‘“Islands of Exclusivity”: Religious Organizations and Employment Discrimination’ (2000) 33 *University of British Columbia Law Review* 719.

97 Rivers, ‘The Secularisation of the British Constitution’, above n 93, 399.

98 This idea has some support in the case law. For instance, in *Kedroff v Saint Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 US 94, 116 (1952) the United States Supreme Court found that churches were immune from secular control on ‘matters of church government ... faith and doctrine’; see also *Watson v Jones*, 80 US 679, 727 (1872).

99 Rivers, *The Law of Organized Religions*, above n 93, 337–8.

100 Ibid 182.

religious activity which on his thesis would be entirely regulated by church, not secular, doctrine.

Leading religious scholars Ahdar and Leigh believe that the

state ought to be solicitous towards the believer who is suffering ‘anguish’ or ‘special mental torment’ in those situations where the demands of the state conflict with divine norms, where the faithful are forced to say, ‘we ought to obey God rather than men’. Such a person is ‘caught between the inconsistent demands of two rightful authorities, through no fault of his own’.¹⁰¹

Hence, there are sound arguments for the recognition of the sanctuary principle in law, given its strong ethical and moral basis. It is part of a broader debate about the extent, if any, to which religious organisations should be ‘sovereign in their own sphere’ and, if so, what the scope of the sphere is.

2 Normative Arguments Against Sanctuary Principle in Law

The author is not aware of another country which, by legislation, recognises the legal principle of sanctuary in the form of an exception to the general application of the criminal law. Thus, Australian law would be exceptional if it were to embrace such a principle. Of course, this does not necessarily mean it would be ‘wrong’ or a bad idea, though it may give one pause, at the very least, before adopting such a position. It should be acknowledged that some nations, such as Canada and the United States, appear to have adopted a *de facto* system of sanctuary, with law enforcement authorities not entering religious grounds in an effort to remove failed asylum seekers, for instance. Clearly, however, this is at the level of enforcement discretion, rather than acceptance of legal principle.

Perhaps the most fundamental objection to recognition of such a principle would be that it seems inconsistent with the rule of law. We believe fundamentally in a legal system governed by the rule of law. A critical aspect of the rule of law is the notion that the law applies equally to all. This fits Australia’s egalitarian culture particularly well. It is strongly challenged by acceptance of a principle that if a person goes to a particular place within a country, that the law of that country somehow does not reach to that place. In such cases, the law would not in fact apply equally to all, and arbitrary and anomalous results would follow, with possible immunity from law enforcement when a person is on one premises, but not another, immunity offered to those who can get to religious premises, but not to those who cannot. There would also be significant challenges in making clear which persons were entitled to sanctuary. Some might be in favour of sanctuary, for instance, if it were limited to failed asylum seekers; they are likely to be less sympathetic to the claims of someone who has escaped from prison, or someone who has killed or raped another, but who wishes to avoid the ordinary application of the criminal law by escaping to religious grounds.

101 Ahdar and Leigh, above n 96, 47 (citations omitted).

Further, whilst it is true that religious freedom is recognised as being fundamental in nature, it is not absolute, and needs to yield to assessments by secular authorities of the balance between such freedoms and other important values, such as the right of individuals to feel safe and secure in their societies, the right of a sovereign nation to secure its borders, etc.

It is generally not accepted in Australia that the church and the state are, or should be, coequal in law, ‘sovereign in their own spheres’,¹⁰² as suggested by Rivers and other scholars. The validity of state and Commonwealth laws is tested according to the *Australian Constitution*. The possible application of s 116 of the *Constitution* in respect of Commonwealth laws will be discussed below. State laws are not subject to any recognised restraint in terms of dealing with religious matters.¹⁰³ They are legally free to limit religious freedoms. An example is the state anti-discrimination laws, containing limited exemptions from anti-discrimination norms in the area of religion. Implicit in such regulation is the notion that states and territories in Australia are legally free to regulate religion in whatever manner they wish; they are not constrained by the *Australian Constitution* in doing so (subject to any inconsistency with a federal law under s 109), and they are not constrained by notions of religious sovereignty in doing so.¹⁰⁴

Writing of the United Kingdom position, but in terms considered equally applicable in Australia, Laws LJ stated that

The Judea-Christian tradition, stretching over many centuries, has ... exerted a profound influence upon the judgment of law-makers as to the objective merits of this or that social policy, and the liturgy and practice of the established church are to some extent prescribed by law. But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled; it imposes compulsory law not to advance the general good on objective grounds, but to give effect to ... subjective opinion. ... The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified; it is irrational, [and] divisive, capricious and arbitrary.¹⁰⁵

If Australian law were to recognise the common law principle of sanctuary, one way or the other, it would also need to clarify positions on issues that proved

102 Rivers, ‘The Secularisation of the British Constitution’, above n 93, 374.

103 The author acknowledges s 46 of the *Constitution Act 1934* (Tas), but this provision is only singly entrenched and thus liable to be amended by an ordinary Act of Parliament.

104 ‘The state is not obliged, ... to accept a religious believer’s judgment about the importance of her religious interests as compared to the legitimate secular interests of the state.’; Christopher L Eisgruber and Lawrence G Sager, ‘The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct’ (1994) 61 *University of Chicago Law Review* 1245, 1286; ‘Religious conviction is not a solvent of legal obligation.’: *Church of the New Faith v Commissioner of Payroll Tax (Vic)* (1983) 154 CLR 120, 136 (Mason ACJ and Brennan J) (*‘Scientology Case’*); Jürgen Habermas, ‘Religion in the Public Sphere’ (2006) 14 *European Journal of Philosophy* 1, 9 concluding that religious citizens ‘no longer live as a member of a religiously homogeneous population within a religiously legitimated state. And therefore certainties of faith are always already networked with fallible beliefs of a secular nature; they have long since lost — in the form of “unmoved” but not “unmovable” movers — their purported immunity to the impositions of modern reflexivity’.

105 *McFarlane v Relate Avon Ltd* [2010] EWCA Civ 880 (29 April 2010) [21].

contentious in the years when sanctuary was recognised in English law. For instance, the duration of sanctuary; whether it applied to only those suspected of criminal wrongdoing or could extend to those accused of a mere civil wrong; if it were confined to those accused of crime; whether it would apply to all crimes or only some; whether it would apply to all religious grounds (and religions) or only some, etc.¹⁰⁶ It would be very difficult to apply concepts of ‘abjuring the realm’ to the specific current context.

The article will now consider the extent to which a representative of a religious organisation might be able to rely on s 116 of the *Australian Constitution* to avoid the application of s 233E of the *Migration Act 1958* (Cth).

C Section 116 of the Australian Constitution

This section outlines several restrictions on the Commonwealth with respect to lawmaking in the area of religion. The only one of possible relevance here is the provision forbidding the Commonwealth from legislating to prohibit the free exercise of religion. It should be observed at the outset that this will be a very difficult argument to make. Whilst the High Court will not judge, or doubt, that the religious view of some is that sanctuary ought to be offered to individuals who seek it,¹⁰⁷ on no occasion as yet has the Court ever invalidated a law as being contrary to the requirements of s 116, despite several challenges being brought. Consistently with its interpretation of other express rights in the *Australian Constitution*, it has interpreted the ‘religious freedom’ apparently conferred by the section very narrowly.

The jurisprudence on s 116 can be summarised succinctly.¹⁰⁸ A plaintiff who argued that his religious beliefs prevented him from being involved in compulsory military training was given short shrift on the basis that ‘[t]o require a man to do a thing which has nothing at all to do with religion is not prohibiting him from a free exercise of religion’.¹⁰⁹ Following this logic, a law preventing the harbouring of unlawful non-citizens would similarly have nothing to do with religion either.

106 Certainly, if sanctuary were confined to the received common law and not now recognised as a general principle of Australian common law, there is an argument it should be confined to the Anglican Church. It is considered unlikely a modern court would limit sanctuary in this manner.

107 *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 123–4 (Latham CJ) (*Jehovah’s Witnesses Case*); *Scientology Case* (1983) 154 CLR 120, 134–5 (Mason ACJ and Brennan J), 150 (Murphy J), 176 (Wilson and Deane JJ); and similarly in the American context, *Thomas v Review Board of the Indiana Employment Security Division*, 450 US 707, 714–15 (Burger CJ for Burger CJ, Brennan, Stewart, White, Marshall, Powell, Blackmun and Steven JJ) (1981).

108 For an extended treatment of the case law, see Nicholas Aroney, ‘Freedom of Religion as an Associational Right’ (2014) 33 *University of Queensland Law Journal* 153; see also Wojciech Sadurski, ‘Neutrality of Law Towards Religion’ (1990) 12 *Sydney Law Review* 420; Joshua Puls, ‘The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees’ (1998) 26 *Federal Law Review* 139.

109 *Krygger v Williams* (1912) 15 CLR 366, 369 (Griffith CJ). The plaintiff had testified in evidence that military service was opposed to God’s will, and compulsory military training was ‘anti-Christ’ and a sin: at 367.

The High Court has made clear that the freedom of religion enshrined in s 116 is not absolute. For example, it is consistent with that freedom for the state to criminalise activities considered ‘inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community’.¹¹⁰

The Court has placed great significance on the use of the word ‘for’ in the phrase describing each of the types of law proscribed by s 116. It has used this to distinguish American precedents concerning the First Amendment, which differs in wording. Specifically, the High Court has found the use of the word ‘for’ means that only laws with the purpose, or objective, of infringing religious freedom can be held to breach s 116.¹¹¹ The majority view is thus that laws which simply have that effect, but not purpose, will not then breach the section. There have been dissentients to that view.¹¹² Obviously, it is much easier to find that a law in effect prohibits the free exercise of religion than it is to find that a law had the purpose of doing so. As a result, this interpretation of s 116 has in particular served to severely limit the ambit of religious freedom protected by s 116.

If this interpretation of s 116 were to continue, a religious organisation would find it impossible to argue that s 233E, at least as applied to their provision of sanctuary, prohibited the free exercise of their religion. The Commonwealth would argue that the purpose of the law was to secure Australia’s borders, and to make the Australian community safer. It would argue the law did not have a *purpose* (or *the purpose*) of prohibiting or restricting the free exercise of religion. The fact that the law may have this incidental *effect* would not, according to the authorities as they currently stand, be sufficient. The High Court has recognised the federal government’s legitimate interest in protecting public safety, and even if the threat posed by those who overstay their visas or who arrive unlawfully and cannot show a right to asylum may not be at the existential level discussed in *Jehovah’s Witness*, it is very unlikely that the High Court would uphold religious freedoms as against government claims of national security and border protection.

110 *Jehovah’s Witnesses Case* (1943) 67 CLR 116, 131 (Latham CJ), 149 (Rich J) (‘essential to the preservation of the community’), 155 (Starke J) (‘reasonably necessary for the protection of the community and in the interests of social order’), 157 (McTiernan J) (stating that s 116 was limited by ‘necessity’ and subject to the ability of the Commonwealth to defend itself against invasion), 160 (Williams J) (stating that s 116 freedoms were limited ‘where ... the safety of the nation is in jeopardy’).

111 *A-G (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, 579 (‘*DOGS Case*’) (Barwick CJ said it would have to be the single or sole purpose of the law); 609 (Stephen J), 615–16 (Mason J), 653 (Wilson J); *Kruger v Commonwealth* (1997) 190 CLR 1, 40 (Brennan CJ), 132 (Gaudron J), 160 (Gummow J), with whom Dawson J agreed at 60–1. Some have expressed the slightly different view that the question of purpose is relevant when considering s 116; in *Jehovah’s Witnesses Case* (1943) 67 CLR 116, 132 Latham CJ had said merely that the purpose of the legislation was relevant (not determinative) in assessing whether it was offensive to s 116; see also *Kruger v Commonwealth* (1997) 190 CLR 1, 86, 133: both Toohey and Gaudron JJ (at 133) said that the law would have to have at least a purpose of infringing religious freedom. The issue was not discussed in *Williams v Commonwealth* (2012) 248 CLR 156 or *Williams v Commonwealth* (2014) 252 CLR 416.

112 *DOGS Case* (1981) 146 CLR 559, 604 where Gibbs J spoke of s 116 regarding laws with a particular ‘purpose or effect’, and Murphy J said ‘for’ in s 116 meant ‘with respect to’: at 622. Aickin J expressed agreement with both Mason and Gibbs JJ. Since they reached different positions on this issue, the view of Aickin J on this point is not known. The United States Supreme Court considers the ‘purpose or effect’ of the law challenged on *First Amendment* religious freedom grounds: *Sherbert v Verner*, 374 US 398, 404 (Brennan J, for Warren CJ, Brennan, Black, Clark and Goldberg JJ) (1963).

The main hope for the challengers on the current s 116 authorities would be to try to have the High Court accept the views of Gibbs and Murphy JJ in the *DOGS Case* that purpose was not determinative; recalling that for Gibbs J, ‘purpose or effect’ was relevant, and for Murphy J, it was enough that the law was with respect to a prohibition on the free exercise of religion, and accepting multiple characterisation of laws as axiomatic.¹¹³ Perhaps the view of Latham CJ in *Jehovah’s Witnesses*, that the purpose of the law was ‘relevant’ (but, presumably not determinative) could assist them. However, the chances of this argument being successful would remain very slim.

Comparative law may not be of much assistance. The use of comparative law when discussing s 116 is itself contentious. Views have ranged sharply, from strong endorsement of use of American *First Amendment* precedent when considering how s 116 should be interpreted,¹¹⁴ to emphasis of the different wording used in s 116 and the *First Amendment*, such that American precedent is of limited utility.¹¹⁵ The particular context of the latter statement must also be borne in mind, specifically the use of the word ‘for’ in several places in s 116, compared with the more general wording of *First Amendment* religious freedom protection, leading to the focus on the purpose of the impugned provision in the Australian context. Clearly, this does not mean that nothing useful can be gleaned from the American cases. The article will now briefly consider that jurisprudence.

The American courts have generally been more protective of religious freedom than the Australian courts. At times, the United States Supreme Court has found that, once it is established that a person has genuinely held religious beliefs, or acted pursuant to those beliefs in conflict with a law, the state must show a ‘compelling interest’ to support the law and override the religious freedom,¹¹⁶ and that the law was ‘the least restrictive means of’ furthering that objective.¹¹⁷ This was usually limited to cases where the ‘conduct or actions ... regulated ... posed [a] substantial threat to public safety, peace or order’.¹¹⁸ It must be said that the Supreme Court later discarded the compelling interest test as being too narrow, thus permitting greater state interference with religious freedoms.¹¹⁹ The Supreme Court in that case suggested that laws of general application, which did

113 In the alternative, Neil Foster develops an argument that the High Court should apply the proportionality analysis it applied in the context of an implied constitutional freedom recently in *McCloy v New South Wales* (2015) 257 CLR 178 — to interpretation of s 116: *Places of Refuge: What Legal Basis for the Churches’ Offer of ‘Sanctuary’?* (9 February 2016) ABC Religion and Ethics <<http://www.abc.net.au/religion/articles/2016/02/09/4403093.htm>>. This is considered to be an interesting but remote possibility.

114 ‘There is, therefore, full legal justification for adopting in Australia an interpretation of s 116 which had, before the enactment of the Commonwealth Constitution, already been given to similar words in the United States’: *Jehovah’s Witnesses Case* (1943) 67 CLR 116, 131.

115 See, eg, *DOGS Case* (1981) 146 CLR 559, 578–9 (Barwick CJ), 603 (Gibbs J), 609 (Stephen J), 615–16 (Mason J), 652–3 (Wilson J); Aickin J agreed with Gibbs and Mason JJ.

116 *Wisconsin v Yoder*, 406 US 205 (1972); *Sherbert v Verner*, 374 US 398 (1963).

117 *Thomas v Review Board of the Indiana Employment Security Division*, 450 US 707, 718 (1981).

118 *Sherbert v Verner*, 374 US 398, 403 (Brennan J, for Warren CJ, Brennan, Black, Clark and Goldberg JJ) (1963).

119 *Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872, 885 (Scalia J, for Rehnquist CJ, Scalia, White, Stevens and Kennedy JJ) (1990) (*Smith*).

not specifically target religious freedoms, would be constitutionally valid.¹²⁰ This was a departure from previous case law, which had held that facially neutral law could still be found unconstitutional due to infringement of *First Amendment* religious freedoms.¹²¹ Further, some state legislatures have sought to re-enshrine it in legislation, to provide stronger protection for religious freedom than the *Smith* test.¹²²

It may thus be conceded that, at least at one time in the Supreme Court case law and (still today) at least in the legislation of some states, United States law protected religious freedom to a greater extent than Australian law. However, even so, the case law has not generally accepted sanctuary arguments in terms of the *First Amendment*.¹²³ This is so despite the long history of sanctuary provision in that country. Particular examples include the so-called Underground Railroad to shepherd escaped slaves from enforcement of the *Fugitive Slaves Act 1850*,¹²⁴ those resisting conscription, and more recently to unsuccessful refugee claimants, particularly from Central America. They may be utilised in response to policies of the new Trump administration. Examples include the United States Court of Appeals (Ninth Circuit) decision in *United States v Aguilar*,¹²⁵ where defendants were convicted of immigration offences such as transporting and harbouring illegal immigrants who had been refused refugee status. There the Court noted there was no evidence that devout religious belief ‘mandate[d] participation in the sanctuary movement’.¹²⁶ Even if the immigration law did infringe religious belief, the Court found that border protection was a compelling state interest, applying the *Yoder First Amendment* test. Practically, recognition of a sanctuary defence would seriously inhibit the government’s ability to control

120 Ibid 878–81 (Scalia J, for Rehnquist CJ, Scalia, White, Stevens and Kennedy JJ) (1990). Scalia J seemed to suggest the object of the law would need to be shown to be to prohibit the free exercise of religion in order that the law be invalid due to the *First Amendment*: at 878. This view is shared by O’Connor J, who in an opinion joined by Brennan, Marshall and Blackmun JJ, rejected the suggestion: ‘If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice’: at 894.

121 In *Sherbert v Verner*, 374 US 398, 404 (1963) the Court found a law which ‘indirectly’ burdened religious freedoms could be constitutionally invalid (Brennan J, for Warren CJ, Brennan, Black, Clark and Goldberg JJ); *Thomas v Review Board of the Indiana Employment Security Division*, 450 US 707, 717 (1981).

122 This followed the United States Supreme Court finding that Congress’ attempt to reverse *Smith* (via the *Religious Freedom Restoration Act*, 42 USC § 2000bb (1993)) was inapplicable to the States: *City of Boerne v Flores*, 521 US 507 (1997).

123 One bare reference to the concept by a Supreme Court justice occurred in *Warden, Md Penitentiary v Hayden*, 387 US 294, 321 (1967) where Douglas J (dissenting) referred to the fact that sanctuaries existed around the world, but contrasted that with the United States: ‘A mosque in Fez, Morocco, that I have visited, is by custom a sanctuary where any refugee may hide, safe from police intrusion. We have no sanctuaries here.’; Begaj, above n 48, 161: ‘the legal question of whether sanctuary is protected by the Free Exercise Clause of the First Amendment remains an unresolved legal question’.

124 Kathleen L Villarruel, ‘The Underground Railroad and the Sanctuary Movement: A Comparison of History, Litigation, and Values’ (1987) 60 *Southern California Law Review* 1429.

125 883 F 2d 662 (9th Cir, 1989).

126 Ibid 694 (Hall J, for the Court), quoting *United States v Merkt*, 794 F 2d 950, 956 (Jones J, for the Court) (5th Cir, 1986).

immigration.¹²⁷ Since many religions required their followers to be charitable and to assist the needy and persecuted, any religious-based exception to immigration laws would be unworkable.¹²⁸ Notwithstanding this, courts have dealt with cases recently where individuals were providing sanctuary to failed asylum seekers on religious grounds.¹²⁹ Churches have openly opposed state laws criminalising the provision of assistance to undocumented immigrants.¹³⁰ Further, some cities have ‘sanctuary policies’ by which state employees agree not to assist federal law enforcement authorities in relation to those illegally residing in the city.¹³¹ Scholars are divided on the extent to which the *First Amendment* should protect the principle and practice of sanctuary.¹³²

In summary, even if relevant, the American *First Amendment* jurisprudence does not provide much support for a religious individual in Australia to argue that their provision of sanctuary be constitutionally protected.

D The Interpretation Argument — Harboursing Offence

One remaining argument for an individual charged under s 233E(3) would be for them to argue they were not ‘harbouring’ unlawful non-citizens within the meaning of the Act. That word is not defined in the *Migration Act 1958* (Cth) or the *Criminal Code 1995* (Cth). Nor is it entirely clear whether intention, and/or knowledge that the person is an unlawful non-citizen, is required in order that the offence be committed. It is noteworthy that in both s 233E(1) and s 233E(2) (creating the offences of concealing another in relation to entry into Australia and whilst a person is in Australia, to evade authorities), intention is a specific element of the offence. However, neither intention nor knowledge is mentioned in s 233E(3) (the harbouring offence). On the other hand, each of them carries a maximum penalty of 10 years’ imprisonment or 1000 penalty units, or both.

127 *United States v Aguilar*, 883 F 2d 662, 695 (Hall J, for the Court) (9th Cir, 1989); *United States v Merkt* 794 F2d 950, 956 (Jones J, for the Court) (5th Cir, 1986).

128 *United States v Aguilar*, 883 F 2d 662, 696 (Hall J, for the Court) (9th Cir, 1989).

129 *Valle Del Sol Inc v Whiting*, 732 F 3d 1006 (9th Cir, 2013) (case decided there and on appeal to the Supreme Court on other grounds); *Arizona v United States*, 132 S Ct 2492 (2012).

130 Campbell, above n 46, 85–7.

131 See also Bill Ong Hing, ‘Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy’ (2012) 2 *University of California Irvine Law Review* 247; Orde F Kittrie, ‘Federalism, Deportation, and Crime Victims Afraid to Call the Police’ (2006) 91 *Iowa Law Review* 1449. Detailed consideration of these policies is beyond the scope of the current work.

132 For an argument in favour of the law as it currently stands, see Carro, above n 19; for an argument that sanctuary might be legally defensible, see Joseph Darrow, ‘Criminalizing Love of Thy Immigrant Neighbor? The Conflict between Religious Exercise and Alabama’s Immigration Laws’ (2012) 26 *Georgetown Immigration Law Journal* 161. Barbara Bezdek offers a compelling critique of the Supreme Court’s *First Amendment* religious freedom jurisprudence, on the basis it is unduly narrow, focused too much on clearly definable religious groups as opposed to pan-religious movements (like the sanctuary movement), overly legalistic and ignorant of the ‘narratives’ involved in the sanctuary cases: Bezdek, above n 8; see also Avalon, above n 32. McCormick and McCormick, while not specifically addressing sanctuary, conclude that ‘it is hard to imagine that there would be much debate or disagreement about a law that punished a person who actually chose to help his neighbor. Most would agree that such a law would be absurd’ (as criminalising the Good Samaritan): McCormick and McCormick, above n 46, 895 (emphasis in original).

Clarity is provided by the *Criminal Code Act 1995* (Cth), which sets out general principles with respect to Commonwealth offences. Section 3.1 establishes that an offence consists of physical elements and fault elements. Section 4.1 states that a physical element includes conduct, a result of conduct, or a circumstance in which conduct occurs. As applied to the offence contained in s 233E(3), sub-s (a), dealing with the alleged offender harbouring another, this is a physical element involving conduct. In relation to sub-s (b), which requires that the other person be an unlawful non-citizen, this is considered to be a circumstance in which conduct occurs. In other words, the section contains two physical elements, which are of different nature.

This is important with respect to the ‘fault element’ because s 5.6 deals with the situation where a section does not prescribe a fault element. Section 233E(3) falls into this category. In this case, s 5.6 states that in such a case, the fault element for a physical element involving conduct is intention,¹³³ and the fault element for a physical element involving a circumstance in which conduct occurs is recklessness.¹³⁴ In other words, the prosecution would have to show beyond reasonable doubt¹³⁵ that the religious individual being prosecuted meant to harbour the other person (in other words, they invited or encouraged or transported the person to the premises, or (perhaps) were merely aware of the person’s presence within the church facility and did nothing to remove the person), and that the religious individual was aware of a substantial risk that the person being harboured was an unlawful non-citizen, and that in the circumstances, it was unjustifiable to take that risk. Here, the common law principle of sanctuary may be utilised. It would be open to the religious individual to argue that, given the long history of religious organisations in protecting the oppressed and homeless, that it was in fact ‘justifiable’ to take the risk that they took.

In the United States the word ‘harbor’ has been defined broadly to mean ‘afford shelter to’; intent has sometimes not been required.¹³⁶ Those providing shelter to undocumented immigrants have been held to have been engaged in harbouring.¹³⁷

133 Intention is defined for the purposes of conduct as when a person ‘means to engage in’ such conduct: *Criminal Code Act 1995* (Cth) s 5.2(1).

134 Recklessness is defined for the purposes of circumstances as being that the person ‘is aware of a substantial risk that the circumstance exists’ and ‘having regard to the circumstances ... it is unjustifiable to take the risk’: *ibid* ss 5.4(1)(a)–(b).

135 *Ibid* s 13.1.

136 *United States v Aguilar*, 883 F 2d 662, 690 (Hall J, for the Court) (9th Cir, 1989); although on some occasions, courts have insisted that knowledge is a required element of the harbouring offence: *United States v Lopez*, 521 F 2d 437 (2nd Cir, 1975).

137 *United States v Balderas* 91 F Appx 354 (5th Cir, No 03-50249, March 26 2004) petition for writ of certiorari denied: *United States v Balderas* 543 US 910 (5th Cir, 2004). For further elaboration on the meaning of harbouring in the United States, see *Susnjar v United States*, 27 F 2d 223 (6th Cir, 1928); *United States v Lopez* 521 F 2d 437 (2nd Cir, 1975); *United States v Rushing*, 313 F 3d 428 (8th Cir, 2002); *United States v de Evans*, 531 F 2d 428 (9th Cir, 1976).

IV CONCLUSION

This article has documented the longstanding legal principle of sanctuary in the context of religious organisations, and considered its possible application today in the context that a religious individual may face serious criminal charges for harbouring an unlawful non-citizen. It has found that there is a respectable legal argument to say that the doctrine was part of received common law from England, and that the English statute abolishing it was not part of received law. Alternatively, the court might now find that it should be recognised as a doctrine of Australian common law. That having been said, in terms of whether the Courts today will or should accept the doctrine, it is considered unlikely that the courts would so depart from the rule of law by creating an island of immunity from state legislation which on its face applies to all. Thus, it is likely that if asked, the Court would not find the doctrine to be part of Australian common law. Further, a s 116 challenge to the relevant section of the federal *Migration Act* would be most unlikely to succeed, given the existing approach to interpretation of that section. American case law on the broader religious freedom protection granted by the *First Amendment* is unavailing.

The strongest legal defences for those offering sanctuary in defiance of s 233 of the *Migration Act 1958* (Cth) appear to rest on the fact that immigration authorities may, as a policy, decline to enter a religious precinct to detain someone suspected of being an unlawful non-citizen, as appears to be the situation in Canada and United States. Failing this, there is an argument on the basis of the principle of legality that the provision ought not to be interpreted as abrogating the common law ‘right to sanctuary’, or that the fault element of recklessness is not met in relation to the harbouring of the unlawful non-citizen.