

THE RECONCILIATION OF FREEDOM OF RELIGION WITH ANTI-DISCRIMINATION RIGHTS

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Freedom of religion is commonly regarded as one of the most fundamental and longstanding human rights, and is reflected in a range of international and domestic human rights instruments. More recently, the law has become concerned to enshrine rights to equality, including a right not to be discriminated against on various grounds. Sometimes, the right to freedom of religion is in conflict with the right to equality. Difficult questions arise regarding how such conflict is resolved. Recent decisions in a range of jurisdictions have grappled with such an issue. This article will discuss recent developments in a range of jurisdictions in this context, before considering some of the issues in the literature. This is a vast area.¹ For manageability, the article will focus on the conflict between religion rights and anti-discrimination law in the particular context of accommodation, though many of the points made are equally applicable to the conflict between such rights in other contexts. As it happens, since many of the cases have involved discrimination on the basis of sexuality, that is the chosen exemplar of discrimination on ‘prohibited grounds’ used here.

In Part I of the article, I document the strong historic links between law and religion, to provide context for the discussion that follows. In Part II, I consider recent developments in this area across a range of jurisdictions, including Australia, Europe, United States and Canada. Part III considers some of the issues of debate from the case law and the academic literature. Specifically, it critically considers the existing religious exemptions to general anti-discrimination provisions, considers arguments that the law ought to protect religious freedom to a greater extent than is currently the case, and the viability of the distinction between belief and manifestation of that belief.

I LINKS BETWEEN LAW AND RELIGION

Law and religion have been entwined for many centuries. A detailed study of the historical links is beyond the scope of the current article, so the relationship is tightly summarised here. The influence of religion upon law was, and remains, substantial. The very idea of a common law, including the sense of a united set of principles sourced from a range of jurisdictions, and the idea of precedent was derived from the practice of collecting a series of rules applied in a range

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1 Sincere thanks to Rex Ahdar and Ian Leigh for their work *Religious Freedom in the Liberal State* (Oxford University Press, 2nd ed, 2013). Whilst it will be clear that I disagree with some of the views they have expressed, I found their recent book in this area a valuable resource in assisting to clarify my thinking on these matters.

of jurisdictions (churches) in one place, to express those rules, and apply them to future cases.² Many civil law systems, such as the Germanic Codes, closely parallel Roman law. Many legal doctrines were and are influenced, expressly or implicitly, by notions of morality. Examples include good faith,³ unconscionable conduct,⁴ and negligence.⁵ Pollock and Maitland note English ecclesiastical courts were very often carrying out the written instructions of the church and under the supervision of the Pope, dealing with a broad range of matters and a large volume of litigation.⁶ This strong position of the church was recognised by art 1 of the *Magna Carta*.

Difficulties have arisen regarding application of the law to those with religious positions. This prefaces today's arguments about conflict between the law and religious conviction generally. Originally difficulties arose in relation to the proxy situation of the monarch as church head. Bracton stated the monarch was 'under God and under the law'.⁷ James I claimed

Kings are properly [J]udges, and [J]udgment properly belongs to them from God: for Kings sit in the Throne of God, and thence all [J]udgment is deri[v]ed. ... As Kings borrow their power from God, so [J]udges from Kings: And as Kings are to acco[un]t to God, so [J]udges [u]nto God and Kings.⁸

Whilst some monarchs claimed immunity from law, as representatives of the deity, 1688 settled the supremacy of Parliament over the monarch.⁹ Later, case law confirmed the monarch was generally bound by statute,¹⁰ and legislation

- 2 Sir Frederick Pollock and Frederic William Maitland, *The History of English Law: Before the Time of Edward I* (Cambridge University Press, 2nd revised ed, 1968) vol 1, 115. Pollock and Maitland write that '[i]t is by "popish clergymen" that our English common law is converted from a rude mass of customs into an articulate system': at 133.
- 3 [I]t was conceived that obedience to these laws was the duty of man as a moral agent. There was a filling out of this idea with reference to the formula in an action *bonae fidei*, in which the *iudex* was directed to condemn the defendant to ... whatever, in view of the transaction or the state of facts set up, he ought in good faith to give to or do for the plaintiff. This is the historical legal starting point of our conception of legal duty.
Roscoe Pound, *Jurisprudence* (West Publishing, 1959) vol 1, 409, citing Gaius, *The Institutes of Gaius* (Francis De Zulueta trans, Oxford University Press, 1946) vol 1, 253 [47], 261 [61]–[63], 279 [114] [trans of: *Institutiones*]. See generally A F Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 *Law Quarterly Review* 66.
- 4 Spigelman CJ described this doctrine as involving 'moral obloquy': *A-G (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583 [121].
- 5 *Donoghue v Stevenson* [1932] AC 562, 580.
- 6 Pollock and Maitland, above n 2, 114.
- 7 'The king must not be under man but under God and under the law': Henry de Bracton, *On the Laws and Customs of England* (Samuel E Thorne trans, Harvard University Press, 1968) vol 2, 33 [trans of: *De Legibus et Consuetudinibus Angliae*].
- 8 King James I, 'A Speech in the Starre-Chamber, the XX of JVNE ANNO 1616' in Johann P Sommerville (ed), *King James VI and I: Political Writings* (Cambridge University Press, 1994) 204, 205–6. See also J P Kenyon, *The Stuart Constitution 1603–1688: Documents and Commentary* (Cambridge University Press, 2nd ed, 1986) 84.
- 9 In the *Second Treatise of Government* Locke criticises the notion that the monarch is above the law: John Locke, *Two Treatises of Government* (Cambridge University Press, 2nd ed, 1967) 346 [93]. In the *First Treatise*, Locke criticises the notion of a '[d]ivine [r]ight to absolute [p]ower': at 160–1 [3]–[5].
- 10 See, eg, *Willion v Berkley* (1561) 1 Plow 223; 75 ER 339; *Magdalen College Case* (1615) 11 Co Rep 66, 72a; 77 ER 1235, 1243.

confirmed common law could be applied to the monarch.¹¹ This is important because these protections from secular law were claimed not just by the monarch, but church members. Sommerville notes ‘Presbyterians claimed their system of church government was immediately ... ordained by God ... to exempt themselves from control by Parliament’.¹² Given many early ecclesiastical rules were enforced as laws and influenced secular law, the church might have been seen as a sovereign, not subject or only partly subject to, secular laws.¹³

We have seen moves towards state neutrality to religion. Many western states have no established state religion. Most western states do not ostensibly, or actually, favour one religion over another; nor religion over non-religion, or vice versa. Largely the goalposts have moved, in terms of current legal controversy regarding religion in the West. Conflict now arises regarding the extent to which the right to manifest religious belief (free exercise) can and should be limited by the state. This conflict is felt more keenly as the size of the state grows, including into areas once the exclusive domain of the church.

One aspect of the law-religion relation concerns sexuality. The law regarding homosexuality has been transformed.¹⁴ Presumably taking its lead from *Leviticus*,¹⁵ the *Buggery Act 1533* prescribed the death penalty for ‘sodomy’,¹⁶ which remained until 1861.¹⁷ Homosexual acts remained criminal until 1967. In Australia, the last offence criminalising homosexuality was removed from the statute books in the late 1990s.¹⁸ In 2003, the Supreme Court of the United States declared an anti-sodomy law unconstitutional,¹⁹ and in 2015 overturned state bans on gay marriage.²⁰ The European Court has emphasised those defending legislation discriminating on the basis of sexual orientation bear a particular onus in justifying the law under the ‘margin of appreciation’ granted

11 *Petitions of Right Act 1860*, 23 & 24 Vict I, c 34; *Crown Proceedings Act 1947*, 10 & 11 Geo 6, c 44. Overcoming past case law suggesting no claim could be made against the monarch: *Case of Prohibitions* (1607) 12 Co Rep 63; 77 ER 1342.

12 Johann P Sommerville, ‘English and European Political Ideas in the Early Seventeenth Century: Revisionism and the Case of Absolutism’ (1996) 35 *Journal of British Studies* 168, 187. John Selden commented ‘the Church runs to Jus divinum’: Sir Frederick Pollock (ed), *Table Talk of John Selden* (Bernard Quaritch, 1927) 61.

13 ‘Church and state are separate entities, sovereign in their own spheres’: Julian Rivers, ‘The Secularisation of the British Constitution’ (2012) 14 *Ecclesiastical Law Journal* 371, 374. This is explored further later.

14 See Sir Terence Etherton, ‘Religion, the Rule of Law and Discrimination’ (2014) 16 *Ecclesiastical Law Journal* 265.

15 ‘If a man also lie with mankind, as he lieth with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them’: *Leviticus 20:13* (King James Bible) (emphasis in original).

16 25 Hen 8, c 6. The word ‘sodomy’ itself is contentious. Clearly, it has links with the Bible’s Sodom and Gomorrah and *Genesis 19*. While the orthodox view is that this story rails against homosexuality, others see it as a story about ‘same-sex rape and inhospitality’: Jeffrey S Siker, ‘The Bible’ in Jeffrey S Siker (ed), *Homosexuality and Religion: An Encyclopedia* (Greenwood Press, 2007) 64, 66.

17 *Offences Against the Person Act 1861*, 24 & 25 Vict 1, c 100, s 61.

18 *Criminal Code Amendment Act 1997* (Tas) items 4–5, repealing *Criminal Code Act 1924* (Tas) ss 122–3. See also *Croome v Tasmania* (1997) 191 CLR 119.

19 *Lawrence v Texas*, 539 US 558, 579 (O’Connor J) (2003).

20 *Obergefell v Hodges*, 135 S Ct 2584 (2015).

to enacting states.²¹ Discrimination laws now generally prohibit discrimination on the grounds of sexuality.²² Gay marriage is legally recognised in the United Kingdom,²³ Canada²⁴ and Ireland.²⁵ Australian voters will have the chance to vote for change.²⁶ Notwithstanding these radical changes in secular law, some religions still believe that homosexuality, or homosexual activity, is immoral, setting up a clash between legitimate interests.

As the state has grown, it has entered fields once the exclusive province of churches. However, religious freedoms continue to be recognised as fundamental human rights. Many instruments protect freedom of thought, conscience and religion, and the freedom to manifest religion or belief.²⁷ As will be discussed later, generally, the former is absolute; the latter limited.²⁸ Difficulty arises when freedom of religion conflicts with other rights, like the right to equality, or

- 21 *EB v France* (2008) 47 EHRR 21, 509, 528–9 [70], 532 [90]–[91]; *Salgueiro da Silva Mouta v Portugal* [1999] IX Eur Court HR 309, 326.
- 22 Sexuality is generally a protected attribute or characteristic, upon which discrimination is generally unlawful: *Fair Work Act 2009* (Cth) s 772(1)(f); *Sex Discrimination Act 1984* (Cth) s 5A; *Discrimination Act 1991* (ACT) s 7(1)(b); *Anti-Discrimination Act 1977* (NSW) pt 4C; *Anti-Discrimination Act 1996* (NT) s 19(1)(c); *Anti-Discrimination Act 1991* (Qld) s 7(n); *Equal Opportunity Act 1984* (SA) pt 3; *Equal Opportunity Act 2010* (Vic) s 6(p); *Anti-Discrimination Act 1998* (Tas) s 16(c); *Equal Opportunity Act 1984* (WA) pt 2B; *Equality Act 2010* (UK) c 15, s 12.
- 23 *Marriage (Same Sex Couples) Act 2013* (UK) c 30.
- 24 *Reference Re Same-Sex Marriage* [2004] 3 SCR 698.
- 25 In May 2015 Irish voters agreed to change that country's *Constitution* to permit same-sex marriage.
- 26 The Australian Government has agreed on a future plebiscite of the Australian people on the issue. In *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 the High Court, while striking down Australian Capital Territory marriage laws, affirmed the Australian Parliament had constitutional power to legislate same-sex marriage: at 463 [38] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).
- 27 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 18 ('UDHR'); *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18 ('ICCPR'); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 9(1) ('ECHR'); *Canada Act 1982* (UK) c 11, sch B pt 1 s 2(a) ('Canadian Charter of Rights and Freedoms'); *New Zealand Bill of Rights Act 1990* (NZ) s 13; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14; *Human Rights Act 2004* (ACT) s 14. The First Amendment to the *United States Constitution* prohibits laws abridging free exercise of religion, and prohibits Congress establishing a religion. These prohibitions also apply to state laws. Section 116 of the *Australian Constitution* prohibits the Australian Parliament from passing a law establishing a religion, imposing a religious observance, prohibiting the free exercise of religion, or imposing a religious test as a condition of Commonwealth office.
- 28 For example, art 18(3) of the *ICCPR* states that the right to manifest religion 'may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. *ECHR* art 9(2) is to like effect. Section 1 of the *Canadian Charter of Rights and Freedoms* permits derogations from fundamental rights as are reasonable and justifiable in a 'free and democratic society'. See also *New Zealand Bill of Rights Act 1990* (NZ) s 5.

freedom from discrimination,²⁹ or the right to respect for private and family life.³⁰ Some human rights instruments do not resolve possible conflict between rights, including the one here.³¹ For example, the *UDHR* recognises both rights, but does not offer any means by which conflicts between rights are to be reconciled. Similarly, the *United States Constitution* offers no reconciliation between the right to free exercise of religion in the First Amendment, and the right to equal protection in the Fourteenth.

This vacuum primarily allows legislators to resolve such conflict, by imposing limits on rights. This is expressed in two broad ways: either a limit prescribed by law and necessary to protect public safety, order, health or morality or based on the fundamental freedoms of others,³² or reasonable limits ‘demonstrably justified in a free and democratic society’.³³ Parliament, rather than courts, reconciles these competing fundamental human rights in legislation, subject to a proportionality/justification appeal to the courts, and court interpretation of the legislation. Thus the court’s role here is not to conduct the balancing (or prioritising) themselves, but to make a judgment about the balancing (prioritising) done by Parliament in terms of the human rights instruments, and to interpret and apply the balancing done by Parliament, if valid. It is essential to bear in mind the respective roles of Parliament and courts in such matters.

I turn now to consider recent case law developments in a range of jurisdictions. As indicated above, there is a large literature and case law on conflict between the right to religion, and other rights, such as anti-discrimination. I will use the specific focus of refusal of accommodation for the discussion, with limited discussion of other contexts. However, many of the points that will be made below will obviously relate to resolution of the conflict between these rights in other contexts. I will use sexual orientation as the example of the ‘prohibited ground’ upon which action argued to be discriminatory is taken, again noting that points made will be relevant, albeit not automatically applicable, to discrimination upon religious grounds in other contexts.

The question of provision of accommodation features prominently in past case law. In *White’s Case*, the Court found that innkeepers had a duty to admit would-

29 *UDHR*, UN Doc A/810 (10 December 1948) art 7; *ICCPR* art 26; *ECHR* art 14; *Equality Act 2010* (UK) c 15, ch 2; *United States Constitution* amend XIV (equal protection); *Canadian Charter of Rights and Freedoms* s 15; *New Zealand Bill of Rights Act 1990* (NZ) s 19; *Human Rights Act 1993* (NZ) s 21; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8; *Human Rights Act 2004* (ACT) s 8; *Sex Discrimination Act 1984* (Cth) ss 5–7A and equivalents such as *Anti-Discrimination Act 1977* (NSW) pts 3–4; *Equal Opportunity Act 2010* (Vic) pt 4; *Anti-Discrimination Act 1991* (Qld) ch 2; *Equal Opportunity Act 1984* (SA) pt 3; *Equal Opportunity Act 1984* (WA) pt 2; *Anti-Discrimination Act 1998* (Tas) pt 4; *Discrimination Act 1991* (ACT) pt 3; *Anti-Discrimination Act* (NT) pt 4. Three members of the High Court accepted that equal justice or equality is inherent in the *Constitution* in *Leeth v Commonwealth* (1992) 174 CLR 455, 486 (Deane and Toohey JJ), 503 (Gaudron J).

30 *UDHR*, UN Doc A/810 (10 December 1948) art 12; *ICCPR* art 17; *ECHR* art 8.

31 Carolyn Evans and Beth Gaze, ‘Between Religious Freedom and Equality: Complexity and Context’ (2008) 49 *Harvard International Law Journal Online* 40, 40.

32 *ICCPR* art 18(3); *ECHR* art 9(2).

33 *Canadian Charter of Rights and Freedoms* s 1; *New Zealand Bill of Rights Act 1990* (NZ) s 5; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2); *Human Rights Act 2004* (ACT) s 28.

be guests if there was room at the inn.³⁴ While clearly the Court did not phrase such an obligation in the language of discrimination, importantly the Court explained the obligation on the basis that provision of such accommodation was part of a business for the public good.³⁵ This should be borne in mind here later, when the question arises as to the extent to which there is, or should be, a private sphere of religion to which ordinary civil law, including discrimination, ought not apply.

II RECENT DEVELOPMENTS

A Australia: Christian Youth Camps Case

Prior to discussing *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*,³⁶ some essentials about the Australian legal environment must be noted. Australia lacks provisions enshrining freedom of religion like art 18 of the ICCPR and art 9 of the ECHR.³⁷ Largely, religious freedoms in Australia are protected in a negative way in the traditional common law approach to human rights, through some specific limits on Commonwealth laws in this area,³⁸ and through state and territory legislatures which, by and large, in fact allow religious bodies to order their affairs as they see fit, subject to laws of general application including anti-discrimination laws and their exceptions.³⁹

Cobaw Community Health Services was an organisation concerned with youth suicide prevention. Its main focus was same-sex attracted young people. It sought to raise awareness of these young people and the effects of homophobia and discrimination on young people, particularly in rural and regional Australia.

34 (1557) 2 Dyer 158b, 159a; 73 ER 343, 344.

35 Ibid. See also *Lane v Cotton* (1706) 12 Mod 473, 484–5; 88 ER 1458, 1464–5 (Holt CJ dissenting). Blackstone agreed the obligation applied to those who ‘hang out a sign’ to indicate they were in business: Sir William Blackstone, *Commentaries on the Laws of England* (T Cadell and W Davies, 15th ed, 1809) vol 3, 165. Frederick Moncreiff referred to liability if the innkeeper ‘induce[s] people to think that he is a common innkeeper, he is bound as such to receive those who offer themselves’: Frederick Moncreiff, *The Liability of Innkeepers* (W Maxwell & Son, 1874) 18.

36 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615 (‘Cobaw’).

37 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14 and *Human Rights Act 2004* (ACT) s 14 recognise freedom of religion rights.

38 *Australian Constitution* s 116.

39 Whilst sexual orientation is typically one of the prohibited grounds upon which organisations and individuals cannot discriminate, legislation typically provides an exception in the area of religion, permitting discrimination upon what are generally prohibited grounds. The exception is typically phrased in the context of the ordination of priests, ministers and members of a religious order, training of such individuals, the selection of individuals to perform functions or participate in religious observances and, with respect to organisations established for religious purposes, acts done in accordance with that religion and its doctrines, and necessary to avoid offending the religious sensitivities/susceptibilities of adherents: see *Sex Discrimination Act 1984* (Cth) s 37; *Discrimination Act 1991* (ACT) s 32; *Anti-Discrimination Act 1977* (NSW) s 56; *Anti-Discrimination Act 1996* (NT) s 51; *Anti-Discrimination Act 1991* (Qld) s 109; *Equal Opportunity Act 1984* (SA) s 50; *Anti-Discrimination Act 1998* (Tas) s 52; *Equal Opportunity Act 2010* (Vic) s 82; *Equal Opportunity Act 1984* (WA) s 72.

Christian Youth Camps (“CYC”) was established by the Christian Brethren Trust, connected with the Christian Brethren Church. CYC operated premises that were available for hire. Its homepage described services offered for ‘church camps, youth camps, school camps, conferences, corporate groups and international groups’.⁴⁰

A representative of Cobaw (‘H’) contacted a representative of CYC (‘R’). H explained she wished to book one of CYC’s resorts for the weekend. R asked about the nature of the group and the activities to be conducted. H explained that Cobaw was a ‘youth suicide prevention initiative’ supporting same-sex attracted young people.⁴¹ Mr R replied the resort was a Christian youth camp which had to be “mindful of the aims and beliefs of groups that used their facilities”, and ‘he did not know how “the Board” would feel’ about renting the resort to Cobaw.⁴² H replied that Cobaw’s view was that ‘homosexuality or same sex attraction [was] a natural part of the range of human sexualities’, and that planned workshops over the weekend would raise awareness.⁴³ R replied the Board “would have difficulties” renting to Cobaw, and they should investigate other options, because CYC was “a Christian organisation that supports young people”.⁴⁴

The *Equal Opportunity Act 2010* (Vic) generally prohibits discrimination relating to the provision of goods and services and accommodation.⁴⁵ Relevantly, discrimination occurs when one person treats another person unfavourably because of an ‘attribute’,⁴⁶ or imposes a requirement likely to disadvantage a person with an attribute, where that is not reasonable.⁴⁷ Relevantly, ‘attributes’ include sexual orientation and lawful sexual activity.⁴⁸ Part V contains exceptions to the general anti-discrimination rules. Relevantly, s 82(2) exempts things done on the basis of a person’s religious belief or activity by a religious body that ‘conforms with the doctrines, beliefs or principles of the religion’, or ‘is reasonably necessary to avoid injury to the religious sensitivities of adherents [to] the religion’. Section 84 contains an exemption if ‘the discrimination is reasonably necessary for the [person discriminating] to comply with the doctrines, beliefs or principles of their religion’. The main questions for the Victorian Court of Appeal in *Cobaw* were whether unlawful discrimination contrary to pt 4 of the Act had occurred, and if so, whether an exemption under pt 5 applied.⁴⁹ Other issues considered peripheral for current purposes will not be explored further.⁵⁰

40 *Cobaw* (2014) 308 ALR 615, 661 [212].

41 *Ibid* 623 [26].

42 *Ibid* 623 [27].

43 *Ibid* 623 [28].

44 *Ibid* 623 [29].

45 *Equal Opportunity Act 2010* (Vic) ss 44, 52.

46 *Ibid* s 8.

47 *Ibid* s 9.

48 *Ibid* ss 6(g), (p).

49 *Cobaw* (2014) 308 ALR 615, 620 [11].

50 For instance, the Court decided the *Charter of Human Rights and Responsibilities Act 2006* (Vic) was not applicable since it became effective after the events complained about: *Cobaw* (2014) 308 ALR 615, 653–4.

1 Whether There Was Unlawful Discrimination Contrary to Pt 4

CYC denied it had discriminated against Cobaw, or individuals who would have attended the workshop run by Cobaw, on the basis of the sexual orientation of individuals attending. It claimed R was voicing an objection to premarital sex, and Cobaw's advocacy of premarital sex, not sexual orientation per se.⁵¹ CYC argued it objected to the workshop because of its intended message — that homosexuality was part of a 'normal' range of sexual activity, rather than sexual orientation per se.⁵² This, it argued, was not unlawful discrimination.

The Court of Appeal dismissed both arguments. Maxwell P said it was clear on the evidence that the refusal to provide accommodation was unrelated to premarital sex, but what R saw as the 'promotion of homosexuality' to occur at the workshops.⁵³ Sexual orientation was a key part of a person's identity. It was artificial to separate sexual orientation and sexual attraction to argue that refusal to lease premises for a workshop that would affirm sexual attraction was separate from a person's sexual orientation.⁵⁴

2 Whether Religious Exemptions Applied

The religious exemptions explained above were in the legislation at the time of the events. Broadly, they protect things done by a religious body⁵⁵ (or, in Victoria and Tasmania only, an individual)⁵⁶ in conformity with religious doctrines or 'necessary to avoid injury to religious sensitivities of people of the religion', and things individuals did by way of discrimination that were 'necessary for [that] person to comply with [their] ... religious beliefs or principles'.⁵⁷ One important difference is that, at the time, the religious defences did not contain a requirement

51 *Cobaw* (2014) 308 ALR 615, 627 [47].

52 *Ibid* 627 [49].

53 *Ibid* 627 [48]–[49], quoting *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2010] VCAT 1613 (8 October 2010) [178] (Hampel J). Neave JA expressed general agreement with the reasons of Maxwell P supplementing those reasons in some respects as indicated below: at 690.

54 *Cobaw* (2014) 308 ALR 615, 630–1 [57]–[61], 714 [440] (Redlich JA agreeing). Neil Foster is critical of this aspect of the Court's judgment: 'while it seems consistent with international decisions on the matter such as the *Bull v Hall* case, it will still be of some concern that a policy based on upholding traditional Christian views about human sexuality, based on *behaviour*, is being interpreted as ... discrimination': Neil J Foster, 'Australia: Christian Youth Camp Liable for Declining Booking from Gay Support Group' on Frank Cranmer and David Pocklington, *Law & Religion UK: Issues of Law and Religion in the United Kingdom — With Occasional Forays Further Afield* (24 April 2014) <<http://www.lawandreligionuk.com/2014/04/24/australia-christian-youth-camp-liable-for-declining-booking-from-gay-support-group/>> (emphasis in original).

55 Or, in other words, 'a body established for a religious purpose': *Equal Opportunity Act 2010* (Vic) s 81.

56 *Ibid* s 84; *Anti-Discrimination Act 1998* (Tas) s 52.

57 *Equal Opportunity Act 1995* (Vic) ss 75, 77. *Equal Opportunity Act 1995* (Vic) s 75 exempted from pt 3, amongst other things, 'anything done by a body established for religious purposes that conform[ed] with the doctrines of the religion; or [was] necessary to avoid injury to the religious sensitivities of people of the religion'. Section 77 exempted 'discrimination by a person against another person if the discrimination [was] necessary for the first person to comply with the person's genuine religious beliefs or principles'. These sections are now *Equal Opportunity Act 2010* (Vic) ss 82, 84 respectively.

of ‘reasonableness’ regarding whether discrimination was necessary to avoid injury to religious sensitivities, or comply with the doctrines, beliefs or principles of the religion. The Act at the time also required a religious belief be ‘genuine’, which no longer appears in the text.⁵⁸

The Court found CYC was not entitled to the s 75 defence, because it was not a ‘body established for a religious purpose’ within the section. While some of the organisation’s objects referred to Christian doctrine and belief, its marketing material was directed to both secular camping activities and those with religious connections.⁵⁹ Many of its web pages did not explicitly refer to the Christian Brethren religion. There was no mention of a religious component to the camps, or that facilities would only be offered to those with religious connections.⁶⁰ Oral evidence from CYC indicated no religious affiliation was required in order to book the facilities; it often rented premises to secular corporate groups and schools.⁶¹

Maxwell P said that in order to be a ‘body established for religious purposes’, its purposes as a whole must be religious.⁶² He said that ‘the purpose(s) must have an essentially religious character’.⁶³ He referred to authority from another context indicating that an activity in itself secular does not take on a religious character merely because it is done for a religious purpose.⁶⁴ He conceded that ‘[t]he position might have been different if CYC existed for the sole purpose of providing facilities for camps and conferences which were avowedly religious in character’.⁶⁵

The Court rejected an argument that the discriminatory act was done in conformity with religious doctrines.⁶⁶ First, this was because it disagreed that same-sex sexual activity was against God’s will. Many religious observants accepted passages in the Bible ought not to be taken literally, and needed to be understood in their historical context.⁶⁷ While some religious adherents did believe that homosexuality, or homosexual activity, was prohibited by the scriptures, others did not. Maxwell P found the activity would need to ‘have an intrinsically religious character’ to be in conformity with the doctrines of the religion.⁶⁸ He accepted the Tribunal finding that the beliefs of the Christian Brethren concerning marriage, sexual relationships or homosexuality were not

58 *Equal Opportunity Act 1995* (Vic) s 77.

59 *Cobaw* (2014) 308 ALR 615, 660 [210].

60 *Ibid* 661 [212].

61 *Ibid* 661 [214].

62 *Ibid* 665 [229].

63 *Ibid*.

64 *Ibid* 665 [231], quoting *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1, 32.

65 *Cobaw* (2014) 308 ALR 615, 668 [248].

66 This requirement now appears in the *Equal Opportunity Act 2010* (Vic) s 82.

67 *Cobaw* (2014) 308 ALR 615, 672–3 [273]–[275], quoting *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2010] VCAT 1613 (8 October 2010) [304]–[307].

68 *Ibid* 671 [264].

‘fundamental doctrines’ of the religion.⁶⁹ As a result, it could not be said such a belief was a ‘religious doctrine’.⁷⁰

Even if it was a ‘religious doctrine’, there was no evidence the act done (refusing accommodation) was ‘in conformity’ with such a doctrine.⁷¹ None of the experts giving evidence suggested the prohibition on homosexual sexual activity included an obligation to ‘interfere with ... or discourage the expression by others of their sexual preferences.’⁷² In fact, parts of the New Testament ‘require adherents of the Christian Brethren religion to be tolerant of difference’, including ‘sinners’.⁷³ The phrase ‘conforms with the doctrines of the religion’⁷⁴ required the person to have no alternative other than ‘to act (or refrain from acting) in the particular way’.⁷⁵

Regarding that part of the exception relating to discrimination being ‘necessary to avoid injury to the religious sensitivities’ of people of religion,⁷⁶ a majority of the Court was not satisfied this was the case. Maxwell P interpreted this phrase narrowly to mean that to not permit the discrimination would have a ‘real and direct impact on the *religious* sensitivities of the members of the relevant religion’ and ‘be an affront to the reasonable expectation[s] of adherents’.⁷⁷ This was not the case here. There was no evidence the Christian Brethren had previously tried to prevent any individuals other than married couples from engaging in sexual activity at the camp. They had not asked previous renters if they were homosexual.⁷⁸

Redlich JA dissented on this issue, finding the religious exemptions were available to CYC and R. His Honour interpreted the concept of what was ‘necessary’ in then *Equal Opportunity Act 1995* (Vic) ss 75, 77 (now *Equal Opportunity Act 2010* (Vic) ss 82, 84) as something a person of faith did to ‘maintain consistency with the canons of conduct associated with their religious beliefs’.⁷⁹ The question

69 Ibid 673 [275]–[276].

70 Ibid 674 [277]–[278].

71 Ibid 674 [279].

72 Ibid 674 [283]. This also meant that the individual defence provided for in *Equal Opportunity Act 1995* (Vic) s 77 relating to ‘discrimination [which was] necessary ... to comply with [a] person’s genuine religious beliefs or principles’, was not applicable. R’s religious beliefs did not require him to convince others to live by the same rules or prevent others from acting according to different rules: *Cobaw* (2014) 308 ALR 615, 684 [329]. Neave JA specifically adopted an objective test in relation to the s 77 requirement of ‘necessity’ and would presumably have applied the same approach to s 75 had she considered the section in detail: at 709 [423]. Her Honour also found that s 77 did not apply because refusing to rent the resort to Cobaw was not ‘necessary’ for R to comply with his beliefs. It was peripheral, rather than central, to his religious beliefs: at 711 [433]. Again, Neave JA would probably have applied the same reasoning to the concept of ‘necessary’ in s 75 had it been necessary for her Honour to consider that section. Subsequently the legislation was amended by the introduction of a ‘reasonableness’ (objective) standard in relation to these religious defences.

73 *Cobaw* (2014) 308 ALR 615, 674–5 [283].

74 *Equal Opportunity Act 1995* (Vic) s 75(2)(a).

75 *Cobaw* (2014) 308 ALR 615, 675 [286].

76 This requirement now appears in the *Equal Opportunity Act 2010* (Vic) s 82(2)(b).

77 *Cobaw* (2014) 308 ALR 615, 678–9 [300] (emphasis in original).

78 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2010] VCAT 1613 (8 October 2010) [344].

79 *Cobaw* (2014) 308 ALR 615, 732 [518].

of what a particular religion required was vast. It was not appropriate for ‘a secular tribunal to ... assess theological propriety’.⁸⁰ Contrary to the majority view, he found a subjective test was to be applied to questions of what was ‘necessary’.⁸¹ The exemption was applicable because the applicants believed ‘acceptance of the booking would have made them morally complicit in the message ... to be conveyed at the forum and ... the community’.⁸² He found the religious exemption did not contemplate a court inquiring whether the applicants had ‘properly interpreted the belief or principle’ upon which they had relied, or ‘whether compliance with it was unreasonable’.⁸³

There was a difference of opinion among the judges regarding the use of international materials in interpreting the Victorian Act. Maxwell P found it unnecessary to resolve the issue,⁸⁴ but noted the ‘common ground’ between the parties that ‘courts should favour a construction of legislation which accord[ed] with Australia’s obligations in international law’, to the extent consistent with the Act.⁸⁵ Neave JA relied on European case law to justify her views that the ‘necessity’ for discrimination on religious grounds had to be objective,⁸⁶ and noted that internationally, protection of religious freedom was generally weaker in a commercial context like here.⁸⁷ This was partly because the activity was likely to be peripheral (at best) to manifestation of religion, not central to it. Relatedly, where a person had voluntarily chosen to engage in activity, it was less likely they could convincingly argue something related to it should be exempt from anti-discrimination provisions.⁸⁸

In contrast Redlich JA said the legislature had resolved the conflict between religious freedoms and anti-discrimination norms in its legislation, which set out general principles and specific religious exemptions. This left no room for the balancing contemplated by other human rights instruments — the Court was required to construe the text of the relevant provisions.⁸⁹

Specifically, Redlich JA rejected the approach to freedom of religion internationally which took into account whether the acts complained of occurred in a commercial setting. The European Court of Human Rights had found that freedom of religion may be of lesser significance when the body or individual claiming it was operating in a commercial setting.⁹⁰ Redlich JA rejected this

80 Ibid 733 [523] (citations omitted).

81 Ibid 734 [529]–[530]. These provisions were subsequently amended to make clear that an objective test should be applied to questions of necessity.

82 Ibid 745 [565].

83 Ibid 744 [564]. As indicated, the provisions were subsequently amended to incorporate a ‘reasonableness’ requirement.

84 Ibid 657 [193].

85 Ibid 656–7 [191], citing *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

86 *Cobaw* (2014) 308 ALR 615, 708–9 [422], quoting *Bull v Hall* [2013] 1 WLR 3741, 3752 [37].

87 *Cobaw* (2014) 308 ALR 615, 710 [428].

88 Ibid 710–11 [431]–[435].

89 *Cobaw* (2014) 308 ALR 615, 731 [513]–[514].

90 *Eweida v United Kingdom* [2013] I Eur Court HR 215, 261–2 [109].

position because the Victorian legislation did not contemplate such a distinction.⁹¹ Leave to appeal to the High Court was refused.⁹²

B Europe

European law has evolved substantially on this question. In 1867, an English court found a contract to rent a room to a secular society to deliver a lecture critical of Christian thought was unenforceable, as contrary to public policy.⁹³

Contrast the recent United Kingdom Supreme Court decision of *Bull v Hall*.⁹⁴ The Bulls were a married couple who owned a hotel. They were devout Christians who believed ‘that the only divinely ordained sexual relationship’ was between husband and wife.⁹⁵ The online booking form for the hotel stated that they preferred to rent double accommodation to heterosexual married couples only. They would rent twin bedded and single rooms to anyone, regardless of marital status or sexual orientation. Mr Preddy booked a double room over the phone. When he arrived with his male partner Hall, he was told the double rooms were for married couples only, and the booking was dishonoured. Other guests heard this conversation.⁹⁶ The Equality and Human Rights Commission alleged the Bulls were in breach of equality provisions which generally forbade discrimination based on sexual orientation.⁹⁷ The Bulls argued they were manifesting their sincerely held religious views. The Supreme Court upheld the complaint unanimously.

Baroness Hale rejected the argument based on the Bulls’ religious beliefs. If a person could avoid the legal obligation not to discriminate on the basis of sexual orientation because they believed gay people should not be treated equally, it would ‘create a class of people who were exempt from the discrimination legislation’.⁹⁸ Moral objections to a law were not usually sufficient to refuse to follow it.⁹⁹ The right to manifest one’s religious views, fundamental in art 9(2) of the *ECHR*, was subject to legal limits considered necessary in a democratic society, including to protect the freedoms and rights of others. Undertaking proportionality analysis, Baroness Hale noted ‘[s]exual orientation [was] a core component of a person’s

91 *Cobaw* (2014) 308 ALR 615, 744 [562].

92 Transcript of Proceedings, *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] HCATrans 289 (12 December 2014) 20 [800] (Crennan, Kiefel and Bell JJ).

93 *Cowan v Milbourn* (1867) LR 2 Ex 230, 235–6. This was overruled in *Bowman v Secular Society Ltd* [1917] AC 406, where the Court ruled that a gift to the same organisation did not subvert morality.

94 [2013] 1 WLR 3741.

95 *Ibid* 3746 [9].

96 *Ibid* 3746 [9]–[10].

97 At the relevant time, this was the *Equality Act (Sexual Orientation) Regulations 2007* (UK) SI 2007/1263, reg 3, which defined direct and indirect discrimination on the basis of sexual orientation. Regulation 4 prohibited a person in relation to the provision of goods and services (including accommodation) from discriminating against a person by refusing to provide services. Limited exemptions applied to those taking boarders into their own homes, and organisations with particular religious beliefs, neither of which applied here: at reg 14. These regulations were subsequently replaced by the *Equality Act 2010* (UK) c 15.

98 *Bull v Hall* [2013] 1 WLR 3741, 3752 [37].

99 *Ibid*.

identity which require[d] fulfilment through relationships with others'.¹⁰⁰ Weighty reasons would be required to justify discrimination on the basis of sexual orientation.¹⁰¹

The court is wary about making a judgment regarding a person's religious beliefs,¹⁰² at least provided the beliefs have a minimum level of 'cogency, seriousness, cohesion and importance',¹⁰³ and are consistent with 'human dignity' and 'integrity'.¹⁰⁴ Not every act 'inspired' or 'motivated' by religion is a 'manifestation' of that belief, protected by art 9.¹⁰⁵ The article does not confer a right upon an individual to manifest their religion 'at any time and place of [their] choosing'.¹⁰⁶ The court will consider whether a particular act is 'sufficiently intimately linked' with a person's religious belief to 'amount to a manifestation of it'.¹⁰⁷ Even if it is, the court will consider how the legislature has balanced different rights, according the legislature a wide margin of appreciation in doing so.¹⁰⁸ In *Black v Wilkinson*,¹⁰⁹ where another accommodation provider refused to rent double rooms to a homosexual couple, the Court emphasised the balance between equality and religious freedom in the regulations, particularly the very limited grounds upon which they permitted discrimination due to religious beliefs.¹¹⁰ The Court also took into account that the accommodation provider had not shown she would suffer serious damage if required to rent double rooms to homosexual couples.

Currently the *Equality Act 2010* (UK) c 15 reflects Parliament's balancing of religious freedom with the right to equality. Section 4 recognises sexual orientation as a 'protected characteristic', and ss 13 and 19 respectively define direct and

100 Ibid 3755 [52].

101 Ibid 3756 [53]; *EB v France* (European Court of Human Rights, Grand Chamber, Application No 43546/02, 22 January 2008) [91]; *Salgueiro da Silva Mouta v Portugal* [1999] IX Eur Court HR 309.

102 *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, 258 [22] (Lord Nicholls), 267 [57] (Lord Walker); *Eweida v United Kingdom* [2013] I Eur Court HR 215, 252 [81].

103 *Eweida v United Kingdom* [2013] I Eur Court HR 215, 252 [81].

104 *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, 259 [23] (Lord Nicholls).

105 *Eweida v United Kingdom* [2013] I Eur Court HR 215, 252–3 [82]; *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, 260–1 [30] (Lord Nicholls), 269 [63] (Lord Walker).

106 *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, 120 [50] (Lord Hoffmann).

107 *Black v Wilkinson* [2013] 1 WLR 2490, 2510 [53] (Lord Dyson MR, with Arden and McCombe LJJ agreeing). The 'act ... must be intimately linked to the religion or belief. ... [T]he existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts ... there is no requirement ... to establish that he or she acted in fulfilment of a duty mandated by the religion': *Eweida v United Kingdom* [2013] I Eur Court HR 215, 252–3 [82].

108 *Islington London Borough Council v Ladele* [2010] 1 WLR 955, 974 [73] (Lord Neuberger MR, with Dyson and Smith LJJ agreeing). The Court of Appeal rejected an argument that the *Equality Act (Sexual Orientation) Regulations 2007* (UK) SI 2007/1263 infringed the claimant's right to freedom of religion in art 9 of the *ECHR*. The Court found a London council had not infringed the claimant's right to freedom of religion by requiring her to register civil partnerships of gay couples, as a council registrar. The Court concluded that 'the legislature has decided that the requirements of a modern liberal democracy, such as the United Kingdom, include outlawing discrimination in the provision of goods, facilities and services on grounds of sexual orientation, subject only to very limited exceptions'.

109 [2013] 1 WLR 2490.

110 Ibid 2507–8 [46]–[49], 2510 [54] (Lord Dyson MR, with Arden and McCombe LJJ agreeing).

indirect discrimination with respect to protected characteristics. Section 29(1) generally prohibits such discrimination in relation to the supply of services. Schedule 23 sets out a religious exemption. It applies only to organisations with the purpose of practising, advancing, teaching, enabling benefits, engaging in activities associated with religion, or fostering good relations between members of different religions. It ‘does not apply to organisations whose sole or main purpose is commercial’.¹¹¹ Schedule 23 para 2(3) permits such an organisation to discriminate with respect to sexual orientation in relation to membership of the association, participation in its activities, provision of goods, facilities or services, and/or use or disposal of premises under its control. This is permissible only where necessary to comply with the association’s doctrines, or avoid conflict with strongly held convictions of a significant number of the religion’s followers.¹¹²

C United States

As indicated above, the *United States Constitution* explicitly recognises the right to freely exercise religion,¹¹³ and the right to equal protection of a state’s laws.¹¹⁴ It precludes establishment of a state religion.¹¹⁵ In addition, civil rights legislation enshrines and protects particular fundamental rights.¹¹⁶ Refusal of accommodation on illegitimate, discriminatory grounds has a particularly unedifying history in the United States, as part of broader Jim Crow issues.¹¹⁷ While an 1857 treatise claimed that, for example, a railway provider could not ‘make unreasonable discriminations’ in relation to, among others things, race or religion,¹¹⁸ even after the Civil War, and after passage of the Fourteenth Amendment, state legislatures specifically permitted innkeepers to refuse accommodation as they saw fit, contrary to the earlier common law position, and specifically permitted

111 *Equality Act 2010* (UK) c 15, sch 23 para 2(2).

112 Ibid sch 23 para 2(9). In the United Kingdom Supreme Court decision in *Bull v Hall* [2013] 1 WLR 3741, the Court rejected an argument that equality provisions there violated the complainants’ right to religious freedom in art 9 of the *ECHR*. While the context there was the *Equality Act (Sexual Orientation) Regulations 2007* (UK) SI 2007/1263, Baroness Hale stated that the ‘principles, concepts and provisions’ were substantially equivalent to those found in the *Equality Act 2010* (UK) c 15: 3744 [3]. Regulation 14 of the 2007 *Regulations* contained a similar exemption to the discrimination laws to that found in the *Equality Act 2010* (UK) c 15 sch 23.

113 *United States Constitution* amend I. Similarly, the *Australian Constitution* s 116 prohibits the Australian government from, amongst other things, passing a law ‘prohibiting the free exercise of any religion’.

114 *United States Constitution* amend XIV.

115 *United States Constitution* amend I, mirrored in the *Australian Constitution* s 116.

116 For example, *Civil Rights Act of 1964*, 42 USC § 2000a (2009) enshrines ‘full and equal enjoyment of the goods, services, facilities ... and accommodations of any place of public accommodation ... without discrimination or segregation on the ground of race, color, religion or national origin’.

117 Joseph William Singer, ‘No Right to Exclude: Public Accommodations and Private Property’ (1996) 90 *Northwestern University Law Review* 1283, 1294.

118 Edward L Pierce, *A Treatise on American Railroad Law* (John S Voorhies, 1857) 489.

innkeepers and other service providers to segregate based on race.¹¹⁹ Religion was called in aid to support these ideas that we now find so unpalatable.¹²⁰

A range of approaches have been taken by American courts to cases where the above rights are in conflict. Initially, the court sought to reconcile these rights by stating that government actions that substantially burdened a religious practice had to be justified by a ‘compelling’ government interest.¹²¹ Later, it acknowledged sometimes religious practices had to yield to the ‘common good’.¹²² In the commercial sphere, the law might restrict religious freedom more strongly.¹²³

In *Employment Division, Department of Human Resources of Oregon v Smith*,¹²⁴ the Court considered a drug rehabilitation organisation dismissing employees who had ingested peyote, a hallucinogenic drug, during a ceremony at their Native American church. Because they were dismissed for misconduct, they lost welfare. They argued unsuccessfully that denial of welfare to them for such a reason breached their First Amendment rights.

The Court found First Amendment rights did not exempt individuals from laws of general application ‘not aimed at the promotion or restriction of religious beliefs’.¹²⁵ The government’s ability to enforce laws of general application could not depend on measuring the impacts on an individual’s spiritual development.¹²⁶ It was not the Court’s role to determine the place of a particular belief within a religion.¹²⁷ The Court rejected as unworkable the ‘compelling interest’ requirement that had been applied to laws infringing upon religious freedom.¹²⁸ It recognised the danger in permitting a person’s legal obligations to be effectively determined by the person’s individual assessment of what their religious beliefs required — this would permit an individual to ‘become a law unto himself’.¹²⁹

119 Singer, above n 117, 1354–6.

120 *West Chester and Philadelphia Railroad Co v Miles*, 55 Pa 209, 212–13 (1867):

following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations ... and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.

121 *Sherbert v Verner*, 374 US 398, 406 (1963); *Wisconsin v Yoder*, 406 US 205, 221 (1972).

122 *United States v Lee*, 455 US 252, 259 (1982).

123 Ibid 261: ‘When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity’.

124 494 US 872 (1990) (‘*Smith*’).

125 Ibid 879 (Scalia J, with Rehnquist CJ, White, Stevens and Kennedy JJ agreeing).

126 Ibid 885, quoting *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439, 451 (1988).

127 *Smith*, 494 US 872, 887 (1990).

128 Ibid 888, overruling the approach taken in cases such as *Sherbert v Verner*, 374 US 398 (1963).

129 *Smith*, 494 US 872, 885 (1990), quoting *Reynolds v United States*, 98 US 145, 168 (1878). The ‘absolute protection of every conceivable type of religious expression in the marketplace is simply untenable’: Maureen E Markey, ‘The Landlord/Tenant Free Exercise Conflict in a Post-RFRA World’ (1998) 29 *Rutgers Law Journal* 487, 532

Congress responded with the *Religious Freedom Restoration Act of 1993* ('*RFRA*').¹³⁰ That legislation restored and extended the pre-*Smith* position. It prohibited governments 'substantially burden[ing] a person's exercise of religion', even laws of general application, unless they could show application of the burden to the person served a 'compelling government interest', and was the 'least restrictive means of furthering [the] compelling interest'.¹³¹ Some courts interpreted these provisions not to apply where religious adherents wished to refuse to rent accommodation to non-married couples for religious reasons. Some courts found such refusals to be a breach of relevant non-discrimination laws. They may not be saved by the *RFRA*. In one case, the Court found such a law did not 'substantially burden' religion, since the complainant could choose not to rent her premises to anyone or sell the premises.¹³² The Court took account of the fact that if the complainant's religious views were accommodated, they would substantially affect the rights of third parties to 'equal access to public accommodations', contrary to the intent of civil rights legislation (and the Fourteenth Amendment).¹³³ Courts have recognised discrimination can cause great harm to the dignity of victims, which may provide the required 'compelling' government interest.¹³⁴ This includes discrimination on the basis of sexual orientation.¹³⁵

130 *Religious Freedom Restoration Act of 1993*, 42 USC §§ 2000bb–2000bb-4 (1993). See also Religious and Parental Rights Defense Act of 2011, HR 2400, 112th Congress (2011), prohibiting states or local governments from attempting to prohibit or regulate circumcision of males under 18 where a parent or guardian provides consent, unless such law 'applies to all such circumcisions performed in the State' and measures ensuring the circumcision is 'performed in a hygienic manner'. This proposal was partly justified on religious grounds.

131 *RFRA*, 42 USC § 2000bb–1 (1993). The legislation was ruled unconstitutional in its application to the states in *City of Boerne v Flores*, *Archbishop of San Antonio*, 521 US 507 (1997). Some states then introduced their own version of the legislation. The 'compelling justification' test has been criticised in this context:

The state should not be required — every time someone claims a religious exemption to a law ... to prove the state has a compelling interest in the enforcement of the law in order to prevent an exemption. Uniform application of a compelling state interest standard ... without limits as to who or what can hide behind religion, encourages widespread fraud and a wanton flouting of valuable and legitimate laws.

Markey, above n 129, 552.

132 *Smith v Fair Employment and Housing Commission*, 913 P 2d 909, 925 (Cal, 1996).

133 *Ibid*. A similar position was reached in *Swanner v Anchorage Equal Rights Commission*, 874 P 2d 274 (Alaska, 1994), *Swanner v Anchorage Equal Rights Commission*, 513 US 979 (1994) and *Jasniowski v Rushing*, 678 NE 2d 743 (Ill Ct App, 1997).

134 *Swanner v Anchorage Equal Rights Commission*, 874 P 2d 274, 283 (Alaska, 1994). The Court noted that discrimination upon irrelevant grounds 'degrades individuals, affronts human dignity, and limits one's opportunities'. See also *Brown v Board of Education of Topeka*, 347 US 483, 494 (1954) where the Court noted that racial segregation policies created a belief in those discriminated against that they had an inferior status that could 'affect their hearts and minds' permanently. The notion of a 'dignity' justification for anti-discrimination law more generally is developed in Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society' (2014) 40 *Monash University Law Review* 413, 424–7; Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41 *Metaphilosophy* 464, 469.

135 *Gay Rights Coalition of Georgetown University Law Centre v Georgetown University*, 536 A 2d 1, 38–9 (DC Cir, 1987).

Courts have clarified business practices fall within the free exercise clause, and religious freedoms may be claimed by corporations.¹³⁶ Still, the fact that the question of religious freedom occurs in the context of business, rather than a more direct practising of religion, is relevant in assessing whether the law ‘substantially burdens’ religious practice.¹³⁷

D Canada

Section 2(a) of the *Canadian Charter of Rights and Freedoms* recognises ‘freedom of conscience and religion’. This is subject to s 1, permitting ‘reasonable limits’ on rights, including that one, imposed by law and ‘demonstrably justified in a free and democratic society’. The potential for conflict between religious freedom and other rights was seen early in the life of the *Canadian Charter of Rights and Freedoms*. In *R v Big M Drug Mart Ltd*, Dickson J confirmed individuals were free to hold and manifest religious views and beliefs, provided that to do so did not injure their neighbours or their rights to hold and manifest their own beliefs.¹³⁸ A multi-stage approach was favoured in *Syndicat Northcrest v Amselem*, considering, first, whether the claimant has a ‘practice or belief having a nexus with religion’ calling for ‘a particular line of conduct’, objectively or subjectively customary or subjectively connecting with the person’s faith.¹³⁹ The belief need not reflect a mandatory religious requirement or belief. Secondly, the belief had to be sincerely held.¹⁴⁰ Thirdly, the interference complained of could not be ‘trivial or insubstantial’.¹⁴¹ Religious freedom could be overridden where it could cause harm to others — ie, it was subject to ‘overriding societal concerns’.¹⁴²

Where the law infringes freedom of religion, and the court considers whether it is saved under s 1, the court will consider whether the law is aimed at an important legitimate objective, the extent to which the law is sufficiently connected with that objective, including proportionality, and whether the law ‘minimally impair[s]’ the freedom.¹⁴³ It need not be the ‘least intrusive’ option with respect to the right.¹⁴⁴ Equality and human rights are recognised as legitimate interests for

136 *Secretary of Health and Human Services v Hobby Lobby Stores Inc*, 134 S Ct 2751 (2014).

137 *Swanner v Anchorage Equal Rights Commission*, 874 P 2d 274, 283 (Alaska, 1994).

138 [1985] 1 SCR 295, 346 (Dickson J, for Beetz, McIntyre, Chouinard and Lamer JJ). See also *Loyola High School v A-G (Quebec)* [2015] 1 SCR 613, 617 [43]: ‘a secular state does not — and cannot — interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests’ (LeBel, Abella, Cromwell and Karakatsanis JJ).

139 [2004] 2 SCR 551, 583 (Iacobucci J, for McLachlin CJ, Major, Arbour and Fish JJ).

140 *Ibid*.

141 *Ibid* 585. The Ontario Superior Court of Justice found that a requirement that a Christian printer print letterhead, envelopes and business cards for a gay rights archive organisation was not substantially offensive to the printer’s religious beliefs such as to legally warrant his refusal to provide the service because he did not support the beliefs of the client organisation: *Ontario Human Rights Commission v Brockie* (2002) 222 DLR (4th) 174 (Ontario Superior Court of Justice).

142 *Syndicat Northcrest v Amselem* [2004] 2 SCR 551, 586.

143 *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, 282–5 (Charron J).

144 *Ibid* 285.

states to promote.¹⁴⁵ Religious rights can apply to corporations.¹⁴⁶ Governments must remain neutral as to religion — they must not ‘favour nor hinder’ belief or non-belief.¹⁴⁷

E Summary: Common Principles, Areas of Divergence

All jurisdictions studied recognise freedom of belief as an absolute, fundamental right. The courts are wary about judging the validity or propriety of a person’s religious views. Each jurisdiction is neutral towards religion. They treat the manifestation of belief more carefully, permitting, to a greater or lesser extent, interferences with that freedom in pursuit of legitimate state objectives. Religious freedom is protected most strongly in the United States, where any law that ‘substantially burdens’ a person’s religion must be justified by ‘compelling government interest’.¹⁴⁸ No other jurisdiction studied places the bar for valid state legislative interference with religious freedom as high as this. Further, any such interference must be the ‘least restrictive means’ of obtaining the legitimate objective,¹⁴⁹ again not replicated elsewhere.

A much greater margin of appreciation is given to government in Europe generally, the United Kingdom specifically, and Australia and Canada in relation to legislation impinging on the manifestation of religious belief. United Kingdom courts have required the belief to be ‘sufficiently intimately linked’ with the religion to qualify for consideration,¹⁵⁰ a requirement not found elsewhere, although Canada requires some nexus between belief and religion.¹⁵¹ Even if that link exists, the courts will often be deferential to state legislation infringing such interest, provided it furthers a legitimate state objective and is proportionate to such an objective. This approach finds support in the text of art 9(2) of the *ECHR* and art 18(3) of the *ICCPR*.

As discussed, United Kingdom legislation recognises a specific religious exemption in relation to discrimination legislation,¹⁵² as does the law in Australia.¹⁵³ However, the exceptions are narrowly cast, insisting the discrimination be *necessary* to comply with the doctrines of the religious association and/or *necessary* to avoid conflict with the strongly held convictions of adherents to that religion. It has proven difficult for organisations to fall within these exemptions.

145 *Loyola High School v A-G (Quebec)* [2015] 1 SCR 613, 643 [47] (LeBel, Abella, Cromwell and Karakatsanis JJ).

146 *Ibid* 661 [95] (citations omitted).

147 *Mouvement Laïque Québécois v Saguenay* [2015] 2 SCR 3, 6.

148 *RFRA*, 42 USC § 2000bb–1 (1993).

149 *Ibid*.

150 *Black v Wilkinson* [2013] 1 WLR 2490, 2510 [53].

151 *Syndicat Northerest v Amselem* [2004] 2 SCR 551, 583.

152 *Equality Act 2010* (UK) c 15, sch 23.

153 *Sex Discrimination Act 1984* (Cth) s 37; *Discrimination Act 1991* (ACT) s 32; *Anti-Discrimination Act 1977* (NSW) s 56; *Anti-Discrimination Act 1996* (NT) s 51; *Anti-Discrimination Act 1991* (Qld) s 109; *Equal Opportunity Act 1984* (SA) s 50; *Anti-Discrimination Act 1998* (Tas) s 52; *Equal Opportunity Act 2010* (Vic) ss 82, 84; *Equal Opportunity Act 1984* (WA) s 72.

These exemptions are limited in the United Kingdom and in the legislation of all Australian jurisdictions other than Victoria and Tasmania,¹⁵⁴ to religious organisations. Individuals cannot use them. The United States position is in sharp contrast, with a recent case accepting business organisations may legitimately challenge laws for interfering with that body's religious beliefs.¹⁵⁵ Individuals have also successfully challenged legislation in the United States on the basis of infringement of personal religious rights.

Religious freedom in Europe, including the United Kingdom, is precarious, in that whilst such a right is recognised, the courts have granted Parliaments a wide margin of appreciation in passing legislation interfering with such rights to meet a legitimate objective, subject to proportionality analysis. The United Kingdom Parliament is a sovereign law making authority and can pass any laws it wishes, including laws infringing religious freedoms. Currently, it provides a very limited exception to its discrimination legislation in favour of religious freedom, but that protection exists at the whim of Parliament and may be changed at any time. Religious freedom is also precarious in Australia in the absence of an entrenched bill of rights. State legislatures have very broad lawmaking power,¹⁵⁶ and could pass valid legislation highly restrictive of religious practice if they wished.¹⁵⁷ Existing exemptions in the discrimination legislation in favour of religious bodies are already narrowly cast, and could be removed altogether. Religious freedom is also precarious in Canada, given a complainant must show the legislation 'substantially' burdens their religious freedoms; even if it does, the state can claim the legislation is proportionate to the attainment of a legitimate objective, an argument the court has usually accepted.¹⁵⁸

From this survey of the current landscape, I propose to consider three questions in greater detail in Part III:

- (a) How should existing exemptions, broadly permitting religious organisations to practice discrimination if necessary to comply with doctrines of a religious organisation and/or avoid conflict with strongly held convictions, be interpreted?
- (b) Does the current law appropriately balance religious freedom with the right to equality/freedom from discrimination?
- (c) Should the law maintain a distinction between religious belief, and manifestation of that belief?

154 *Equal Opportunity Act 2010* (Vic) s 84; *Anti-Discrimination Act 1998* (Tas) s 52.

155 *Secretary of Health and Human Services v Hobby Lobby Stores Inc*, 134 S Ct 2751 (2014).

156 *Constitution Act 1902* (NSW) s 5; *Constitution Act 1867* (Qld) s 2; *Constitution Act 1934* (SA) s 5; *Constitution Act 1975* (Vic) s 16; *Constitution Act 1889* (WA) s 2. There is no specific provision in the *Tasmanian Constitution*.

157 *Constitution Act 1934* (Tas) s 46 expressly protects freedom of religion, however the provision is not doubly entrenched and could be amended at any time. The ability of the Australian Parliament to do so is practically constrained by the need for a constitutional head of power to support the legislation, and by the *Australian Constitution* s 116.

158 See, eg, *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, 282–5.

III ISSUES IN THE LITERATURE — RELIGIOUS FREEDOM

A Interpretation of Existing Religious Exemptions

As discussed above, sch 23 of the *Equality Act 2010* (UK) c 15 permits discrimination on the basis of sexual orientation, with respect to services, premises or associations, if necessary to comply with doctrines of a religious organisation, or avoid conflict with strongly held convictions. This mirrors equivalent, though not identical, provisions in Australian discrimination legislation.¹⁵⁹ Sometimes, this exemption is limited to organisations established for religious purposes, so questions can arise about whether the body concerned was established for such purposes, for example in *Cobaw*. Sometimes, the exemption can apply to individuals.¹⁶⁰ Sometimes, specific exemptions are granted to religious schools.¹⁶¹ The United Kingdom legislation specifically excludes from the exemption organisations ‘whose sole or main purpose is commercial’.¹⁶² Its religious exemption applies only to bodies established for religious purposes, as do most of the Australian exemptions.¹⁶³ The questions are how such exemptions should be interpreted. As noted above some legislation in three Australian jurisdictions requires both of these elements be established in order that the exemption apply;¹⁶⁴ in other jurisdictions, they are alternative requirements.¹⁶⁵

159 The various formulations include: an ‘act or practice that conforms to the doctrines, tenets or beliefs of that religion’ or ‘is necessary to avoid injury to the religious susceptibilities of adherents of that religion’: *Sex Discrimination Act 1984* (Cth) s 37(1)(d) (with some exception in the aged care area: s 37(2)); acts or practices done ‘conform[ing] to the doctrines, tenets or beliefs of that religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion’: *Discrimination Act 1991* (ACT) s 32(d); an act or practice ‘that conforms to the doctrines of that religion’ or ‘is necessary to avoid injury to the religious susceptibilities of [its] adherents’: *Anti-Discrimination Act 1977* (NSW) s 56(d); acts ‘done as part of any religious observance or practice’: *Anti-Discrimination Act 1996* (NT) s 51(d); acts done ‘in accordance with the doctrine of the religion concerned’ and ‘necessary to avoid offending the religious sensitivities of people of the religion’ (though not in the work or education area): *Anti-Discrimination Act 1991* (Qld) s 109(1)(d); an act ‘that conforms with the precepts of that religion’ or ‘is necessary to avoid injury to the religious susceptibilities of [its] adherents’: *Equal Opportunity Act 1984* (SA) s 50; an act ‘carried out in accordance with the doctrine of a particular religion’ and ‘is necessary to avoid offending the religious sensitivities of any person of that religion’: *Anti-Discrimination Act 1998* (Tas) s 52(d); ‘anything done on the basis of a person’s ... sexual orientation ... that conforms with the doctrines, beliefs or principles of the religion’ or ‘is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion’: *Equal Opportunity Act 2010* (Vic) s 82(2); an ‘act or practice that conforms to the doctrines, tenets or beliefs of that religion’ or ‘is necessary to avoid injury to the religious susceptibilities of [its] adherents’: *Equal Opportunity Act 1984* (WA) s 72(d).

160 *Equal Opportunity Act 2010* (Vic) s 84 protects religious beliefs of individuals, as does the *Anti-Discrimination Act 1998* (Tas) s 52.

161 *Sex Discrimination Act 1984* (Cth) s 38; *Anti-Discrimination Act 1998* (Tas) s 51(2); *Equal Opportunity Act 2010* (Vic) s 83; *Equal Opportunity Act 1984* (WA) s 73.

162 *Equality Act 2010* (UK) c 15, sch 23 item 2(2).

163 *Sex Discrimination Act 1984* (Cth) s 37; *Anti-Discrimination Act 1977* (NSW) s 56; *Anti-Discrimination Act 1991* (Qld) s 109; *Equal Opportunity Act 1984* (SA) s 50; *Equal Opportunity Act 2010* (Vic) s 81; *Equal Opportunity Act 1984* (WA) s 72.

164 This is the case in the Australian Capital Territory: *Discrimination Act 1991* (ACT) s 32; Queensland: *Anti-Discrimination Act 1991* (Qld) ss 90, 109 and Tasmania: *Anti-Discrimination Act 1998* (Tas) s 52.

165 This is the case in the Commonwealth legislation: *Sex Discrimination Act 1984* (Cth) s 37; New South Wales: *Anti-Discrimination Act 1977* (NSW) s 56; South Australia: *Equal Opportunity Act 1984* (SA) s 50; Victoria: *Equal Opportunity Act 2010* (Vic) s 82; Western Australia: *Equal Opportunity Act 1984* (WA) s 72; and the United Kingdom: *Equality Act 2010* (UK) c 15, sch 23 para 2(7)).

1 Act that Conforms with the Doctrines of the Religion or in Accordance with the Doctrines of the Religion

Concepts such as conformity with religious doctrine¹⁶⁶ and determination of what is in accordance with religious doctrine¹⁶⁷ are very difficult provisions for courts to interpret and apply. We must bear in mind here the court will not second guess the ‘doctrines of the religion’ themselves. The courts are not equipped to do so, and have rightly rejected invitations to enter that debate.

Notwithstanding this, it can be very difficult to determine what the ‘doctrines of the religion’ are. Taking the Bible as one example, it contains thousands of passages. It contains contradictions. Some discard the Old Testament and focus on the New. Some do the opposite. Others purport to act on both. Many would say its provisions ought not be taken literally. Christian religions differ in how they interpret the same text — the words can be read by different people to mean different things. Some views expressed in the Bible are clearly unacceptable to the standards of today. That is not surprising; it was written several thousand years ago. Regarding homosexuality specifically, the Uniting Church is very accepting,¹⁶⁸ and the Anglican Church quite so.¹⁶⁹ The Catholic Church is more conservative here, though the current Pope has expressed views conciliatory towards homosexuality.¹⁷⁰ Some religions distinguish between homosexual orientation, and homosexual acts.

166 The word ‘conforms’ is used in the relevant section of legislation of the Commonwealth: *Sex Discrimination Act 1984* (Cth) s 37; Australian Capital Territory: *Discrimination Act 1991* (ACT) s 32; New South Wales: *Anti-Discrimination Act 1977* (NSW) s 56; South Australia: *Equal Opportunity Act 1984* (SA) s 50; Victoria: *Equal Opportunity Act 2010* (Vic) s 82; Western Australia: *Equal Opportunity Act 1984* (WA) s 72.

167 The phrase ‘in accordance with’ is used in the relevant section of legislation of Queensland: *Anti-Discrimination Act 1991* (Qld) ss 90, 109; Tasmania: *Anti-Discrimination Act 1998* (Tas) s 52. In the Northern Territory the equivalent is an act done ‘as part of’ any religious observance or practice: *Anti-Discrimination Act 1996* (NT) s 51.

168 Some Ministers of the Uniting Church of Australia are in openly same-sex relationships. Uniting Network NSW/ACT, ‘Gay and Lesbian Couples: Prayers and Blessings?’ (Uniting Network Australia, August 2009) <<http://www.unitingnetworkaustralia.org.au/wp-content/uploads/2013/06/UN-NSW-Gay-and-Lesbian-Couples.pdf>>: ‘Homosexuality is a good part of God’s diverse creation ... heterosexual marriage is not the exclusive pattern for human relationships’. The Assembly Task Group on Sexuality rejected suggestions that the only option available to homosexually oriented people was lifelong chastity and found that ‘the same expectation is required of homosexual and heterosexual Christians alike; namely, living in right and just relationship before God’: Assembly Task Group on Sexuality, ‘Uniting Sexuality and Faith’ (Final Report, Uniting Church in Australia, April 1997) 42 [5.38]. It also rejected discrimination, ‘silencing and oppression of lesbian, gay, bisexual and transgender people’: at 45 [5.72].

169 The 13th General Synod meeting in 2004 passed resolutions stating that the Church did not ‘condone the ordination of people in ... committed same-sex relationships’ and did not ‘condone the liturgical blessing’ of same-sex couples: Anglican Church of Australia, ‘Proceedings of the Thirteenth General Synod’ (Freemantle, 2–8 October 2004) 56.

170 In 2013, Pope Francis said: ‘If someone is gay and seeks the Lord with good will, who am I to judge him?’. Pope Francis, ‘Press Conference of Pope Francis During the Return Flight: Apostolic Journey to Rio de Janeiro on the Occasion of the XXVIII World Youth Day’ (28 July 2013) <http://w2.vatican.va/content/francesco/en/speeches/2013/july/documents/papa-francesco_20130728_gmg-conferenza-stampa.html>. Cf Catholic Answers, *Homosexuality* (10 August 2004) <www.catholic.com/tracts/homosexuality>: ‘we must reject sin, including homosexual behaviour ... The Catholic Church teaches that such acts are always violations of divine and natural law’; Harrison and Parkinson, above n 134: ‘the traditionalist view that homosexual conduct is inconsistent with a moral life [holds] ... amongst Pentecostal churches, Orthodox churches, the Roman Catholic Church, and evangelical denominations’: 418–19 (citations omitted).

In the current context of accommodation, it is very difficult for a religious organisation to legally refuse leasing of premises to an organisation which positively supports homosexual people, or gay individuals or couples, pursuant to this exemption. No Christian scripture calls for religious organisation property owners to refuse to rent premises to gay individuals or organisations supporting gay people. Indeed, such an attitude can seem at odds with the kind of tolerance and ‘love thy neighbour’ ideals espoused by the Bible.

If a religious organisation cannot generally turn away an organisation or individual wishing to rent their premises for this reason, because such a refusal is not in conformity with the religion, another, more limited question arises. Does it matter whether those renting the premises intend to use the premises for sexual purposes? This might be relevant because, as noted above, some religious interpretations distinguish between homosexual orientation, generally (in Christian circles) unobjectionable, and homosexual acts, which some regard as sinful.¹⁷¹ It can be argued, in theory at least, that preventing use of premises for homosexual activity is closer to being ‘in conformity’ with the religion.

However, practically this becomes very difficult. A religious organisation can hardly ask renters whether they are planning sexual relations offensive to some interpretations of the Bible on the premises, prior to deciding whether to rent the premises to them. It is practically inconceivable that a religious organisation cannot generally refuse to lease premises to a gay group or gay individuals, but can do so upon evidence of homosexual sexual activity on site. So while, on paper, the distinction between orientation and practice could justify some restrictions on religious organisations having to lease their premises to gay groups or individuals, in practice this is virtually impossible.

In *Cobaw*, Maxwell P dealt with this issue by concluding no-one had submitted that, even if homosexual activity was contrary to relevant religious doctrines, followers of such doctrines were required to stop others engaging in homosexual practices.¹⁷² It is submitted that on paper the religious organisation would have had a stronger argument for saying that acting to prevent homosexual activity was closer to an action taken in conformity with their religion, than an action simply banning a group from being on their premises. I respectfully disagree with the majority position in *Cobaw* interpreting the word ‘conformity’ here very narrowly, meaning where the religion gave the adherent ‘no alternative but to act (or refrain from acting) in the particular way’.¹⁷³ I prefer the view of the European Court in *Eweida v United Kingdom* denying the necessity that the religion mandate the practice.¹⁷⁴ The natural meaning of the word ‘conformity’ in this context does not, in my view, contemplate compulsion.

171 Harrison and Parkinson, above n 134, 418.

172 (2014) 308 ALR 615, 674–5 [283]–[284].

173 Ibid 675 [286].

174 *Eweida v United Kingdom* [2013] I Eur Court HR 215, 252 [82].

2 Act is Necessary to Avoid Conflict with Religious Sensitivities or Imposed to Avoid Conflict with Strongly Held Religious Convictions

Before considering the meaning of ‘necessary to avoid conflict with religious sensitivities’¹⁷⁵ and ‘imposed to avoid conflict with religious convictions’,¹⁷⁶ we must emphasise important rules of statutory interpretation. Relevantly here, they include that in an interpretation of a provision, one that would better/best achieve its purpose is preferred.¹⁷⁷ Further, in the event of ambiguity, legislation is generally presumed to not trample upon fundamental human rights.¹⁷⁸ Human rights instruments expressly provide that ‘[s]o far as is possible to do so consistently with their purpose’, a statutory provision is to be ‘interpreted in a way that is compatible with human rights’.¹⁷⁹ International human rights law may also be relevant.¹⁸⁰

Having acknowledged this, difficulties in the interpretation of the wording of this limb are evident. The formulations in the Australian states, on the one hand, and the United Kingdom on the other, are different. The Australian version applies a requirement of ‘necessity’¹⁸¹ which does not appear in the United Kingdom legislation. The United Kingdom legislation attempts to provide an evidentiary basis for a finding regarding the existence of such convictions.¹⁸²

The first interpretive difficulty in the Australian context concerns the meaning of ‘necessary’, particularly whether an objective or subjective approach is to be taken. This is not stated in any of the Australian legislation; as discussed above

175 The wording differs slightly: ‘necessary to avoid injury to the religious susceptibilities of adherents of that religion’: *Sex Discrimination Act 1984* (Cth) s 37(d); ‘necessary to avoid injury to the religious susceptibilities of adherents of that religion’: *Discrimination Act 1991* (ACT) s 32(d); ‘necessary to avoid injury to the religious susceptibilities of the adherents’: *Anti-Discrimination Act 1977* (NSW) s 56(d); ‘act is done as part of any religious observance or practice’: *Anti-Discrimination Act 1996* (NT) s 51(d); ‘necessary to avoid offending the religious sensitivities of people of the religion’: *Anti-Discrimination Act 1991* (Qld) ss 90(b)(ii), 109(1)(d)(ii); ‘necessary to avoid injury to the religious susceptibilities of adherents of that religion’: *Equal Opportunity Act 1984* (SA) s 50(1)(c); ‘necessary to avoid offending the religious sensitivities of any person of that religion’: *Anti-Discrimination Act 1998* (Tas) s 52(d)(ii); ‘reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion’: *Equal Opportunity Act 2010* (Vic) s 82(2)(b); ‘necessary to avoid injury to the religious susceptibilities of adherents of that religion’: *Equal Opportunity Act 1984* (WA) s 72(d).

176 This is the wording in *Equality Act 2010* (UK) c 15, sch 23. Paragraph 2(9) of the schedule clarifies that the ‘strongly held convictions’ must be of a significant number of adherents to that particular religion.

177 *Acts Interpretation Act 1901* (Cth) s 15AA; *Legislation Act 2001* (ACT) s 139; *Interpretation Act 1987* (NSW) s 33; *Interpretation Act 1978* (NT) s 62A; *Acts Interpretation Act 1954* (Qld) s 14A; *Acts Interpretation Act 1915* (SA) s 22; *Acts Interpretation Act 1931* (Tas) s 8A; *Interpretation of Legislation Act 1984* (Vic) s 35; *Interpretation Act 1984* (WA) s 18; *R v Secretary of State for Health; Ex parte Quintavalle* [2003] 2 AC 687, 695 [8] (Lord Bingham, with Lord Hoffman agreeing); 700 [21] (Lord Steyn, with Lord Scott agreeing); 705–6 [38] (Lord Millett).

178 *X7 v Australian Crime Commission* (2013) 248 CLR 92, 109–10 [24] (French CJ and Crennan J), 131–2 [86] (Hayne and Bell JJ), 153 [158] (Kiefel J), citing *Potter v Minahan* (1908) 7 CLR 277, 304.

179 *Human Rights Act 2004* (ACT) s 30; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1); *Human Rights Act 1998* (UK) c 42, s 3 (no reference to the Act’s purpose). The Victorian *Charter* was not in force at the time of the actions in question in *Cobaw* (2014) 308 ALR 615.

180 *Charter of Rights and Responsibilities Act 2006* (Vic) s 32(2); *Human Rights Act 2004* (ACT) s 31(2).

181 See above n 176 for detail.

182 *Equality Act 2010* (UK) c 15, sch 23 s 2(9).

a majority of the Court in *Cobaw* applied an objective test to the question of necessity. The Victorian legislation, but not legislation in other states, had been amended (after the decision at first instance in *Cobaw*) to make clear Parliament intends an objective approach.¹⁸³ This is ambiguous. It could be interpreted to mean that, originally, the intent was to apply the test subjectively, hence the need for express amendment, which was the conclusion of Redlich JA in *Cobaw*.¹⁸⁴ Alternatively, it could mean Parliament wanted to express what was always intended, that an objective approach should be taken.

An objective approach to the question of ‘necessity’ is favoured.¹⁸⁵ It cannot be sufficient, in order to enliven a religion based exemption to generally applicable law, that someone merely asserting their religious belief requires them to discriminate. Acceptance of a subjective view would inevitably weaken the foundations of the discrimination legislation, where anyone could avoid the law by claiming their religious beliefs require that they discriminate, however bizarre the claim. There must be some basis in the religious text, or religious doctrine from an objective source, linking the claimant’s belief with religion.

In *Cobaw*, it was easy to conclude it was not necessary to refuse to rent the premises to avoid conflict with religious sensitivities. This was because there was no evidence CYC had asked previous individuals or groups booking the venue whether they were planning on engaging in sex outside marriage or homosexual sex.¹⁸⁶ This undermined their claim that use of the premises by Cobaw would conflict with their religious sensitivities. However, one could imagine cases where the conflict was more serious. Consider a religious organisation which believes that only men, or only women, should access a particular area under their control. Would such an organisation be within its rights to refuse a request from an organisation to rent the area on this basis? Or would this be unlawful discrimination on the basis of gender? The issues in *Kartinyeri v Commonwealth*¹⁸⁷ raise one such instance, where it was said that a certain area upon which secret women’s business was conducted was sacred.

I accept the majority view in *Cobaw* that the act in question would need to have a ‘real and direct impact on the *religious* sensitivities of the members of the relevant religion’, such that it ‘would be an affront to the reasonable expectation of adherents that the body’ be required not to discriminate.¹⁸⁸ If the relevant religious body could show that permitting women, or men, access to a particular site would have such an impact, the way that Parliament has balanced these rights here is to permit what would otherwise be unlawful discrimination.

This does not deny the practical difficulty in ascertaining what would impact religious sensitivities, given lack of homogeneity in what religious adherents believe, even those of the same faith. In the context of the current discussion,

183 The word ‘reasonably’ was inserted in ss 82, 84 of the *Equal Opportunity Act 2010* (Vic).

184 *Cobaw* (2014) 308 ALR 615, 734.

185 This was the view of Maxwell P and Neave JA in *Cobaw* (2014) 308 ALR 615, 678 [291], 709 [423]–[425]. In dissent, Redlich JA favoured a subjective view: at 733 [524].

186 *Cobaw* (2014) 308 ALR 615, 677 [293], quoting *Cobaw Community Health Service v Christian Youth Camps Ltd* [2010] VCAT 1613 (8 October 2010) [344].

187 (1998) 195 CLR 337.

188 *Cobaw* (2014) 308 ALR 615, 678–9 [300] (Maxwell P, with Neave JA agreeing) (emphasis in original).

and without intending to oversimplify, some Christians believe homosexuality is morally wrong, others distinguish between orientation and practice, and others believe in tolerance and ‘love thy neighbour’. On other ‘moral’ questions, such as abortion and pre-marital sexual intercourse, there would also be divergent views. Some believed, and may still believe, that religion does not frown upon slavery. Southern slaveholders in the United States in the mid-19th century did not believe they were acting immorally.

With respect, little is added when the *Equality Act 2010* (UK) requires that the religious views sought to be protected must be ‘strongly held’.¹⁸⁹ How does one distinguish between a view that is strongly held, and one that is weakly held? Presumably, if the complainant is going to court to argue they should be permitted to discriminate on this basis, they hold that view strongly. The fact the ‘strongly held’ view must be held by a ‘significant number’ of the religion’s followers does not assist,¹⁹⁰ with no guidance on what a significant number is. It is appreciated that the requirement of ‘significant number’ has been added to avoid an individual with a twisted interpretation of religious text from using such a view to justify what would otherwise be prohibited discrimination.¹⁹¹ However, this can be better achieved by inclusion of the concept of ‘necessary’, objectively interpreted, as in *Cobaw*. In conclusion, whilst there are drafting issues with some of the existing exemptions, the difficulty of drafting exemptions that will satisfy all relevant parties, and be practically workable, is appreciated.

B Ought Religious Freedoms be (Legally) Privileged More than Currently?

Therefore render to Caesar the things that are Caesar’s; and to God the things that are God’s.¹⁹²

Moving from the positivistic outline of how various human rights instruments, legislation and case law balances competing human rights involving religion, we must consider the normative question of whether, and if so why, religious freedoms ought be legally privileged, more so than the above summary reflects. For the purposes of argument, let us take the existing European situation as the baseline — with protection of freedom of religion including an absolute freedom of belief, and rights to manifest religious belief subject to justified and proportional interferences by the state. Religious organisations have limited exemptions from anti-discrimination legislation.

189 *Equality Act 2010* (UK) c 15, sch 23 items 2(7)(b), 2(9).

190 *Ibid* sch 23 para 2(9).

191 And, sometimes, the number of followers is very small: In *Re Nelson v M Fish and R Morgan* [1990] FCA 28 (9 February 1990), the applicant, in respect of a religious organisation styled ‘Gods [sic] Kingdom Managed by his Priest and Lord’: at [4].

192 *Matthew 22:21* (English Standard Version); Joseph Lecler, *Toleration and the Reformation* (T R Westow trans, Association Press, 1960) vol 1, 21 [trans of: *Histoire de la Tolérance au Siècle de la Réforme* (first published 1955)]: ‘Since Christ ... there were henceforward on this earth two levels of sovereignty’. For Martin Luther’s ‘two kingdoms’ theory, see John Witte Jr, *Law and Protestantism: The Legal Teaching of the Lutheran Reformation* (Cambridge University Press, 2002) ch 3. Ahdar and Leigh, above n 1, acknowledge a ‘longstanding theological assumption ... that the spiritual realm takes precedence over the temporal’: at 49.

Typical justifications for arguments that religious freedoms ought be accorded a privileged position in the pantheon of rights include that religion is not simply a belief; it is, for some, a core tenet that regulates all they do, and may for some be a higher source of authority than state law.¹⁹³ Such people may consider their religious views as a core part of their identity.¹⁹⁴ This is a view expressed by, amongst others, Julian Rivers,¹⁹⁵ and it is sensible to outline Professor Rivers' position before responding.

Rivers documents, and laments, secularisation of British constitutionalism. He chronicles key periods in British history where the previous strong bond between religion and law loosened. He uses the word 'sovereign' to describe the position of the Church of Scotland, and insists religious bodies enjoy, and ought enjoy, autonomy or part-autonomy with respect to certain functions.¹⁹⁶ Specifically:

the idea that religions command respect on the part of secular governmental institutions because they consist of, or contain, autonomous systems of law is being lost in the inexorable rise of a dominant state–individual paradigm and the embrace of state regulation.¹⁹⁷

He suggests, as do others,¹⁹⁸ 'recognition of a quintessentially religious domain — a core field — which is ... immune from state interference'.¹⁹⁹ State interference in

193 Michael W McConnell, 'The Origins and Historical Understanding of Free Exercise of Religion' (1990) 103 *Harvard Law Review* 1409, 1516.

194 See, eg, Lucy Vickers, 'Promoting Equality or Fostering Resentment? The Public Sector Equality Duty and Religion and Belief' (2011) 31 *Legal Studies* 135, 138; Timothy Macklem, 'Faith as a Secular Value' (2000) 45 *McGill Law Journal* 1.

195 Julian Rivers, 'The Secularisation of the British *Constitution*', above n 13; Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010).

196 'Religious liberty is not only individual but requires self-government by the church within a sphere defined as internal to the religion': Rivers, *The Law of Organized Religions*, above n 195, 317–18. He calls the provisions of the Scottish legislation the 'idealized model': at 318.

197 Rivers, 'The Secularisation of the British *Constitution*', above n 13, 394.

198 Ian Leigh, 'Balancing Religious Autonomy and Other Human Rights Under the European Convention' (2012) 1 *Oxford Journal of Law and Religion* 109, 110: '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 societal ethos. ... [T]he state should remain separate from religious bodies'. Ahdar and Leigh argue that 'the state's attempt to mould religious entities into their own image is short-sighted' and suggest churches be left alone to 'quietly organically ... develop along more egalitarian lines': Ahdar and Leigh, above n 1, 390–1. 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, even if the state abhors their religious beliefs. The state's interest in preventing discrimination should not be permitted to infringe upon religious freedom where the group looks 'inward' to itself as a religious community. People acting within this context, as a community of believers in a recognised religion, should be able to engage in discrimination, regardless of the state's interest in preventing it.

199 Rivers, 'The Secularisation of the British *Constitution*', above n 13, 399. Others have used the expression 'islands of exclusivity' to refer to religious matters that it is argued should be beyond state law: see Alvin J Esau, "'Islands of Exclusivity": Religious Organizations and Employment Discrimination' (2000) 33 *University of British Columbia Law Review* 719. See also Caldwell v Stuart [1984] 2 SCR 603, 618–620.

this field is resented and discouraged.²⁰⁰ His view is normative; it does not describe the current United Kingdom or Australian picture where generally law applies to all that a religious institution does, both internal and external matters, unless subject to express exemptions.²⁰¹ This situation implies that, without such specific exemptions, the state could apply its anti-discrimination legislation in all areas it sees fit, including religious areas, internal or external. In other words, the current law does not reflect a sacred ground upon which secular law must not tread.

Rivers' thesis requires religions and the state to be thought of as 'coequal in law'.²⁰² It is not entirely clear what the scope of this core field would be, though he says the distinction between core and periphery 'roughly' reflects the distinction between, respectively, the private and public realm.²⁰³ Rivers acknowledges the difficulty in neatly dividing the private and public realm.²⁰⁴

He disagrees²⁰⁵ with the House of Lords decision in *Percy v Church of Scotland Board of National Mission* where a majority of the Court found a minister of religion could bring a claim in workplace sexual discrimination because the parties had entered into a contract of employment.²⁰⁶ Article IV of the schedule to the *Church of Scotland Act 1921*,²⁰⁷ purported to give the church *exclusive* jurisdiction to 'legislate, and to adjudicate finally' on 'doctrine, worship, government, and discipline in the Church', including 'membership and office'. The Church's claim in *Percy* that this precluded civil action for sexual discrimination against

200 'It is not the role of the state ... to make church doctrine palatable to as wide a range of observers as possible': David Schneiderman, 'Associational Rights, Religion and the *Charter*' in Richard Moon (ed), *Law and Religious Pluralism in Canada* (University of British Columbia Press, 2008) 65, 75.

201 For example, the *Equality Act 2010* (UK) c 15, pt 2 sets out general non-discrimination principles. Schedule 23 then provides limited exemptions for religious organisations, including 'membership of the [religious] organisation', 'participation in activities undertaken by the organisation' pursuant to its religious purposes, and 'provision of goods, facilities or services in the course of activities undertaken by the organisation ... under its auspices': at para 2(3). The Australian anti-discrimination legislation outlines general discrimination principles before largely exempting the ordination of priests and ministers, training of such individuals, selection of individuals to perform particular functions or participate in particular religious observances, as well as acts done in conformity with the religion or necessary to avoid injury to religious sensitivities: *Sex Discrimination Act 1984* (Cth) s 37; *Discrimination Act 1991* (ACT) s 32; *Anti-Discrimination Act 1977* (NSW) s 56; *Anti-Discrimination Act 1996* (NT) s 51; *Anti-Discrimination Act 1991* (Qld) s 109; *Equal Opportunity Act 1984* (SA) s 50; *Anti-Discrimination Act 1998* (Tas) s 52; *Equal Opportunity Act 2010* (Vic) s 82; *Equal Opportunity Act 1984* (WA) s 72.

202 Rivers, 'The Secularisation of the British *Constitution*', above n 13, 399. Rivers references a model requiring that 'State and Church mutually ... recognize each other's sovereignties', adding that this is 'the appropriate direction of travel': Rivers, *The Law of Organized Religions*, above n 195, 318. See also Perry Dane, 'The Varieties of Religious Autonomy' in Gerhard Robbers (ed), *Church Autonomy: A Comparative Survey* (Peter Lang, 2001) 117, 122.

203 Rivers, *The Law of Organized Religions*, above n 13, 338: 'The distinction between core and periphery is broadly that between private and public law'.

204 Ibid 332: 'the assumption that law can so neatly be divided into public and private is increasingly problematic'. Acceptance of inequality in the private sphere can impair the effectiveness of equality norms in the public sphere: Reid Mortensen, 'Rendering to God and Caesar: Religion in Australian Discrimination Law' (1995) 18 *University of Queensland Law Journal* 208, 220–1.

205 Rivers, *The Law of Organized Religions*, above n 13, 116–18; Ahdar and Leigh would also disagree with the decision: 'Religious bodies have the right to reject candidates for ministry or discipline or expel an existing pastoral minister even if the grounds for doing so appear to liberals (and others) to be archaic, illiberal or bigoted. The grounds for selection or dismissal are matters within the [exclusive] province of the religious community': Ahdar and Leigh, above n 1, 395.

206 [2006] 2 AC 28, 44 [41] (Lord Nicholls), 69 [136] (Lord Hope), 39 [137] (Lord Scott), 70 [140] (Baroness Hale), 50–1 (Lord Hoffman dissenting) ('*Percy*').

207 11 & 12 Geo 5, c 29.

a minister was rejected.²⁰⁸ United Kingdom legislation since 1921, and recent European Commission directives applicable in the United Kingdom, reflected Parliament's commitment to equality in employment, without regard to gender.²⁰⁹

Rivers claims religious bodies should be largely autonomous. He argues they would be 'governed by their own law in their internal affairs', but acknowledges areas of 'concurrent jurisdiction' including 'rites with civil significance, chaplaincies, schools, social welfare provision and participation in ... public discourse'.²¹⁰ He laments that the deference which secular law once showed to 'religious law affecting civil interests' has been lost.²¹¹ He is critical of the protection of religion reflected in documents such as the *ECHR* because religion is treated as an individual, rather than collective, right. He believes this weakens the claim of religion, making it subject to the balancing, proportionate margin of appreciation approach which usually leads to the religious freedom being ceded to the state interest.²¹²

Rivers says the 'rational rejection' of religious influence over the law is virtually complete:

The effect is to turn religion into another hobby. One can devote one's spare time, energy and money to it; one can meet with other like-minded people, set up clubs and societies, network, produce literature, employ people, buy property, try to persuade others how wonderful it is, introduce one's children to it, run holiday camps promoting it; and the law will even treat all this activity as publicly beneficial. One can be very religious, if one feels like it. But the law need make no space for the idea that there might actually be a God, who might really be calling people into relationship with himself, who might make real demands on his worshippers. Religion thus acquires all the moral weight of stamp-collecting or train-spotting.²¹³

There are several points one might make by way of (respectful) response.

First, a suggestion that the law as it currently stands has reduced the status of religion to a hobby is incorrect.²¹⁴ In each jurisdiction studied, freedom of religious *belief*²¹⁵ is absolute. The law also recognises manifestation of religious belief as important, but provides the legislature with a margin of appreciation to weigh that

208 [2006] 2 AC 28, 67 [128] (Lord Hope). Lord Scott agreed: 'provision of a remedy for unlawful discrimination is a civil matter, not a spiritual one': at 68 [133]. Lord Scott found dismissal on allegedly discriminatory grounds was not a 'matter of ... discipline' within the Act. The minister was accused of having an affair with a married man and was dismissed on that basis. The minister claimed male ministers who had done the same thing had not been dismissed: at 70 [138].

209 Ibid 67 [128] (Lord Hope), 74–5 [152] (Baroness Hale).

210 Rivers, 'The Secularisation of the British *Constitution*', above n 13, 375–6. He clearly objects to values of the state, such as equality and non-discrimination, being applied to religious education and social welfare provision: at 395.

211 Ibid 393.

212 Rivers, *The Law of Organized Religions*, above n 195, 320–2. He laments religion has been sidelined to a role of filling 'gaps left by the law': at 332.

213 Rivers, 'The Secularisation of the British *Constitution*', above n 13, 398.

214 Lucy Vickers notes European Convention and United Kingdom case law 'does not ignore religious interests nor accord them insignificant weight': 'Twin Approaches to Secularism: Organized Religion and Society' (2012) 32 *Oxford Journal of Legal Studies* 197, 209.

215 This is obviously distinguished from the expression of belief, or its manifestation.

important interest with other interests, effecting a compromise broadly reflective of that society's values. Reflecting this balancing, legislation in several of the jurisdictions studied exempt religious institutions and/or adherents from aspects of discrimination legislation.²¹⁶ None of the human rights instruments recognise a mere hobby as a fundamental right; none of the legislation considered above exempts hobbies from discrimination legislation. So, while individuals may have legitimate concerns with how legislatures or human rights bodies have balanced religious freedoms and other freedoms, it is not accurate or helpful to suggest religion has been sidelined as a hobby. There are recorded cases where courts have found legislation is disproportionate in its impact on religious freedoms. The protection given to religious freedom may not be as strong as some would like, but it is an exaggeration to claim religion has been reduced to the status of a hobby, or imply that religious freedoms will *inevitably* cede to state claims that laws are justified by the public interest.

Secondly, it is problematic to argue that the church is 'co-equal' with the Parliament in terms of law making, and as a sovereign body 'within its own sphere'. The Glorious Revolution established the supremacy of Parliament over the monarch, the figurative head of the Anglican Church. It is hard to square acceptance in the United Kingdom of parliamentary sovereignty with the notion of another body sovereign in its own sphere.²¹⁷ It makes no sense in Australia, where as discussed above, the ability of a state legislature to pass laws impacting on religion is extremely broad. The precise contours of the suggested 'sphere' were not fully articulated, but seem to travel beyond internal church matters to include education, social welfare and contribution to public debate. Is not 'shared sovereignty' a contradiction in terms?²¹⁸ If the United Kingdom Parliament can make and unmake whatever law it wishes, how can it be seriously asserted that there is a co-equal law making body sovereign in its (ill-defined) sphere? By what authority could a court declare a law of the United Kingdom Parliament invalid because it purports to enter that sphere?

Modern adherents of the view that religion ought to be legally privileged more so than currently occurs can struggle to articulate justification for this. In so saying, I do not wish to downplay the importance of religion in the lives of some, or dispute that religion can play, and has played, a fundamentally positive role in the development of human society, although it must be acknowledged that terrible persecution has been, and continues to be, committed in its name.

216 See, eg, *Equality Act 2010* (UK) c 15, sch 23.

217 'There is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament': A V Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, first published 1885, 1915 ed) 4.

218 Jean-Jacques Rousseau stated that sovereignty was 'indivisible': Jean-Jacques Rousseau, *The Social Contract* (Maurice Cranston trans, Penguin Books, 1968) 70 [trans of *Du Contrat Social ou Principes du Droit Politique* (first published 1762)].

Some argue, for instance, that religion plays a fundamental role in the life of some, and that it regulates all or most of what some do daily, central to their identity.²¹⁹ Religious liberty has also been credited with making society more peaceful,²²⁰ and fostering civic virtues like obedience with the law, concern for others, honesty and thrift.²²¹ No doubt, this is true. But it is difficult to see why this fact justifies placing religious practices beyond the reach of state regulation. Others may also have fundamental non-religious beliefs by which they live their lives.²²² People may wage war for reasons other than religion. People might be concerned for others or be honest because they are a ‘good’ person; their decency may not be sourced from religion. The fervency by which some people believe in religion cannot of itself justify reifying this right above other fundamental human rights, like equality and dignity. It is highly dangerous for a person or organisation to effectively be able to opt out of laws of general application by claiming such a law is contrary to a subjective belief, when that claim is effectively not justiciable.²²³

The claims of religion to legal superiority²²⁴ or immunity²²⁵ are also weakened by the fact that law, particularly in liberal society, values evidence-based enquiry.

- 219 Richard Moon, ‘Freedom of Religion Under the *Charter of Rights*: The Limits of State Neutrality’ (2012) 45 *University of British Columbia Law Review* 497, 499; Benjamin Berger, ‘The Limits of Belief: Freedom of Religion, Secularism and the Liberal State’ (2002) 17(1) *Canadian Journal of Law and Society* 39, 47. See generally *R (Williamson) v Secretary of State for Education* [2005] 2 AC 246 (Lord Nicholls).
- 220 John Locke, *A Letter Concerning Toleration* (William Popple trans, Martinus Nijhoff, 1963) 20 [trans of: *epistola de tolerantia* (first published 1689)].
- 221 Sanford Kessler, ‘John Locke’s Legacy of Religious Freedom’ (1985) 17 *Polity* 484, 495.
- 222 ‘A distinctive ... feature of liberalism is its commitment to neutrality or impartiality between competing conceptions of what constitutes a good or worthwhile life. Religions are but one of a number of conceptions of “the good” which citizens may adopt alongside secular philosophies and ideologies in a neutral framework provided by the state’: Ahdar and Leigh, above n 1, 56.
- 223 ‘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 (emphasis in original). ‘Religious conviction is not a solvent of legal obligation’: *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 136 (Mason ACJ and Brennan J).
- 224 Ahdar and Leigh refer to a ‘longstanding theological assumption ... the spiritual realm takes precedence over the temporal’: Ahdar and Leigh, above n 1, 49. Wojciech Sadurski says the suggestion infringes neutrality: ‘It is inherently non-neutral to provide a higher level of protection to religious beliefs than to deeply held and ethically argued secular moral views, in granting exemptions from shared burdens and duties in a society’: Wojciech Sadurski, ‘Neutrality of Law towards Religion’ (1990) 12 *Sydney Law Review* 420, 451.
- 225 Ahdar and Leigh fear ‘[t]he things we treasure from ... religious groups ... — new ways of thinking, the development of concepts of the good life, the inculcation of virtue, respect, loyalty, sacrifice, and so on — may be jeopardized by state conformity to public juridical norms of behaviour’: Ahdar and Leigh, above n 1, 390. They conclude ‘restrictions on religious group autonomy must be narrow and limited’: at 391, quoting Kathleen A Brady, ‘Religious Group Autonomy: Further Reflections about What is at Stake’ [2006–07] 22 *Journal of Law and Religion* 153, 173. They suggest if a church is seen to be too hierarchical, patriarchal, sexist, homophobic and/or unequalitarian, the better solution is not the coercive force of the state, but organic development of the members of the organisation, and disaffected individuals to leave the organisation: at 390. This suggestion (in that case, that a person’s religious freedom could be retained if the person left the environment in which their religious freedoms were arguably not being respected, so their rights were not unacceptably infringed) was not accepted in *Eweida v United Kingdom* [2013] I Eur Court HR 215. The fact the person could ‘go elsewhere’ to a place where their rights were not infringed did not obviate a remedy for infringement of freedoms in the place they chose to be: at 244 [60].

It is concerned with determining truth. It seeks objectivity. In contrast, appeals to religious doctrine inevitably involve subjectivity, since we cannot know the truth of religious text.²²⁶ No court will consider this. Application of the rules of evidence will not resolve this. Religious text is subject to a range of different interpretations, as we see with the spectrum of religious groupings.²²⁷ These differences are probably permanent. Lawmakers, legislators and courts, are generally extremely reluctant to choose between these different views, for good reason. And many people in society reject religion altogether. These factors make it difficult for human rights instruments, or the law, to accommodate religious practices any more than they currently do. That doesn't mean that the law is drifting towards secularism in a way that is a 'Trojan horse for State-sponsored atheism'.²²⁸ It means religion has no *a priori* claim to superiority over other fundamental rights, and that the people assign to their democratically elected representatives the difficult task of reconciling religious freedoms with other rights, subject to review on disproportionality grounds by a court. There is no other law making body, and no body or individual that can arrogate for itself the right to determine which laws should apply to it or them.²²⁹

Laws LJ reflected on law and religion in *McFarlane v Relate Avon Ltd*:

The Judaeo-Christian tradition, stretching over many centuries, has ... exerted a profound influence upon the judgment of lawmakers 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 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. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion — any belief system — cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than

226 *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 134 (Mason ACJ and Brennan J): 'the State can neither declare supernatural truth nor determine the paths through which the human mind must search in a quest for supernatural truth ... there are no means of finding upon evidence whether a postulated tenet of supernatural truth is erroneous or whether a supernatural revelation of truth has been made'. 'The truth or falsity of religions is not the business of officials or the courts': at 150 (Murphy J). Cf Jeremy Waldron, *God, Locke and Equality: Christian Foundations in Locke's Political Thought* (Cambridge University Press, 2002) 236: 'commitment to human equality is most coherent and attractive when ... grounded in theological ... truths associated particularly with [Christianity]'.

227 *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 129 (Mason ACJ and Brennan J).

228 Rivers, 'The Secularisation of the British Constitution', above n 13, 347.

229 Jürgen Habermas, 'Religion in the Public Sphere' (2006) 14 *European Journal of Philosophy* 1, 9. Habermas, speaking of the religious citizen, concludes they '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 imposition of modern reflexivity'.

citizens; and our constitution would be on the way to a theocracy, which is of necessity autocratic.²³⁰

Doe is correct that autonomy of religious bodies exists because of, and to the extent of, state conferral of such a status,²³¹ contrary to natural law.²³² Legal positivist Dicey expressed a similar view, albeit in a technical context.²³³ Consistent with the rule of law, they are generally subject to the law of the state.²³⁴ The state has a legitimate, strong interest in the social organisation of a society.²³⁵ The High Court has recognised this interest suffices to limit freedom of religion.²³⁶

C Can the Distinction Between Belief and Manifestation of Belief Be Maintained?

Legal provisions recognising religious freedom distinguish belief and manifestation of that belief.²³⁷ Typically, the former is one of very few rights considered absolute.²³⁸ The latter is subject to legislative limitation, legitimate

230 [2010] EWCA Civ 880 (29 April 2010) [23]–[24].

231 Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (Oxford University Press, 2011) 119–20. He concludes that ‘the fundamental principle which emerges is that religious organizations are autonomous to the extent permitted by the law’: at 138.

232 Jeremy Bentham, for example, commented on the *Declaration des droits de l’homme et du citoyen du 26 août 1789* [Declaration of Rights of Man and Citizen of 26 August 1789]. Article 2 included a reference to ‘imprescriptible rights of man’. Bentham replied that ‘there are no such things as natural rights — no such things as rights anterior to the establishment of government — no such things as natural rights opposed to, in contradistinction to, legal’: Jeremy Bentham ‘Anarchical Fallacies: Being an Examination of the Declaration of Rights Issued During the French Revolution’ in Jeremy Waldron (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen, 1987) 46, 52.

233 ‘[A]s the Common Law Courts determine the legal limits to the jurisdiction of Courts-martial ... [they also] determine (subject ... to Acts of Parliament) what are the limits to the jurisdiction of ecclesiastical Courts’: Dicey, above n 217, 306.

234 Doe, above n 231, 121; John Locke also reached this view, concluding that ‘Christians by virtue of being Christians, are not in any way exempt from obedience to the civil magistrates’: John Locke, *A Paraphrase and Notes on the Epistles of St Paul to the Galatians, 1 and 2 Corinthians, Romans, Ephesians* (Clarendon Press, first published 1707, 1987 ed) vol 2, 589.

235 In this vein, it may be motivated by utilitarian principles: Jeremy Bentham, ‘Legislature’s Inaugural Declaration’ in John Bowring (ed), *The Works of Jeremy Bentham* (Russel & Russel, 1967) vol 9, 198, 199. Or it may seek to reflect broader values and morality of its society: see, eg, Sir Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1959); H L A Hart, *Law, Liberty and Morality* (Oxford University Press, 1963); Ronald Dworkin, *Taking Rights Seriously* (Pitman Press, 1977) ch 10. Or it may involve a combination of both.

236 *Adelaide Co of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 126 (Latham CJ), 149 (Rich J), 155 (Starke J), 157 (McTiernan J), 160 (Williams J).

237 *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 135–6 (Mason ACJ and Brennan J): ‘The freedom to act in accordance with one’s religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them’.

238 ICCPR arts 18(1)–(2); ECHR art 9(1).

objectives and a proportionality analysis.²³⁹ This distinction has a long historical pedigree,²⁴⁰ and appeared in United States First Amendment jurisprudence.²⁴¹ An absolute protection of freedom of belief is suggested by the anti-establishment provisions in the First Amendment and s 116 of the *Australian Constitution*. Can distinct treatment of belief and manifestation be justified?

Some argue it is artificial to separate belief from action, since the latter is caused by and based on the former. This derives some support from those who believe religious adherence is not simply belief, but a way of life integral to identity.²⁴² Those who believe this argue they cannot plausibly separate beliefs from actions. This view has found some support from judges,²⁴³ and academics.²⁴⁴ Moens claims the distinction is artificial in that ‘a court cannot find the refusal of an Amish defendant to send his children to school (ie action) unreasonable without finding that the religious beliefs on which the action is based (ie belief) are unreasonable’.²⁴⁵

With respect, it is not about assessing the reasonableness of beliefs or actions. The Amish are entitled to believe what they wish. The question for a legislator, and perhaps for a court if there is a challenge, is to balance those beliefs with other important objectives, like education of the young. The United States courts had determined by the time of *Wisconsin v Yoder* that they would strongly defend religious freedom, provided views had a religious basis and were sincerely held, and the law ‘substantially burdened’ freedom of religion.²⁴⁶ If the claimant could show that, the state would need to show compelling justification for interference with such actions, given issues of proportionality, least invasive means etc.²⁴⁷

None of the questions of the ‘religiosity’ of the claim, whether the beliefs are sincerely held or whether the law substantially burdens such beliefs, involves

239 ICCPR art 18(3); ECHR art 9(2). Other human rights instruments, such as the UDHR, UN Doc A/810, *Canadian Charter of Rights and Freedoms*, United States *Bill of Rights*, and the Victorian and Tasmanian human rights legislation do not expressly distinguish belief and manifestation. Indeed, the *United States Constitution* amend I expressly protects ‘free exercise’ of religion (clearly equivalent to manifestation), as does the *Australian Constitution* s 116. Whilst strong, these protections are not absolute: see, eg, *Employment Division, Department of Human Services v Smith*, 494 US 872 (1990); *Adelaide Co of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116.

240 Ahdar and Leigh trace it to Martin Luther: Ahdar and Leigh, above n 1, 32.

241 *Cantwell v Connecticut*, 310 US 296, 303–4 (1940), stating the First Amendment ‘embraces two concepts, — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be’.

242 Harrop A Freeman, ‘A Remonstrance for Conscience’ (1958) 106 *University of Pennsylvania Law Review* 806, 826.

243 *Wisconsin v Yoder*, 406 US 205, 220 (1972) (Burger CJ); *R (Williamson) v Secretary of State for Education* [2005] 2 AC 246, 257 [16] (Lord Nicholls).

244 Shelley K Wessels, ‘The Collision of Religious Exercise and Governmental Nondiscrimination Policies’ (1989) 41 *Stanford Law Review* 1201, 1208. See generally Marci A Hamilton, ‘The Belief/Conduct Paradigm in the Supreme Court’s Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct’ (1993) 54 *Ohio State Law Journal* 713.

245 Gabriel Moens, ‘The Action-Belief Dichotomy and Freedom of Religion’ (1989) 12 *Sydney Law Review* 195, 215.

246 *Wisconsin v Yoder*, 406 US 205, 221 (1972).

247 This remains the position in the United States: *Secretary of Health and Human Services v Hobby Lobby Stores Inc*, 134 S Ct 2751 (2014).

considering whether beliefs are reasonable. Even if the state could show such a justification, such that the law infringing the manifestation of religious views was constitutionally valid, this is not an assessment of the reasonableness of a person's religious views, or actions based upon them.

Hamilton criticises the law's distinction between belief and action:

As one stacks one case on top of another which calmly permits the regulation of religious 'conduct' while simultaneously heralding religious freedom, one is tempted to think that the members of the Court cannot be serious.²⁴⁸ ... [I]t seems patently ridiculous for the Court to say, as it has, that regulation which affects religious conduct does not affect belief.²⁴⁹

Practicality tends to support distinct treatment of belief and manifestation. It is near impossible for a state to police belief. Short of administering truth serum to individuals or technology that would allow an involuntary reading of the mind, states cannot practically know what a person truly believes. Their true beliefs may differ from their public utterances. We should accept the practical impossibility, let alone the moral offensiveness, of a state seeking to control what a person believes, including about religion.²⁵⁰

The law is comfortable with a distinction between thought and act relating to the thought. For example, I might think that City Hall would look better with a coat of red paint on it. But this belief is not and cannot be the basis of a legal prohibition. In contrast, if I commence painting City Hall red, the state will arrest me. Yet this was an action related to my belief. Clearly, the law can readily distinguish between thoughts and actions.

The other response draws upon Mill's distinction between occasions when what an individual thinks or does doesn't affect others, and occasions when it does (harm principle). He accepts the legitimacy of legal regulation of the latter. Applying that here, a person's beliefs per se do not infringe the rights of others. However, when that person acts upon such a belief, their actions may infringe the rights of others. Rawls recognised this distinction:

A person may indeed think that others ought to recognize the same beliefs and first principles that he does, and that by not doing so they are grievously in error and miss the way to their salvation. But an understanding of religious obligation and of philosophical and moral first principles shows that we cannot expect others to acquiesce in an inferior liberty. Much less can we ask them to recognize us as the proper interpreter of their religious duties or moral obligations.²⁵¹

248 Hamilton, above n 244, 725.

249 Ibid 759.

250 '[E]veryone may hold whatever opinion he pleases ... the sovereign has no competence in the other world; whatever may be the fate of the subjects in the life to come, it is nothing to do with the sovereign ...': Rousseau, above n 218, 185–6.

251 John Rawls, *A Theory of Justice* (Clarendon Press, 1972) 208. Rawls writes '[I]berty of conscience is limited, everyone agrees, by the common interest in public order and security': at 212. I do not suggest that everything that Rawls said is congruent with the views expressed in this paper regarding the reconciliation between religious freedom and equality rights. I cite Rawls here for a point about tolerating the views of others.

Hence, legal regulation can be justified for actions, but not the belief itself, even if the action is based on the belief.

Regarding Mill's harm principle,²⁵² it is appreciated he did not specifically apply his principles to questions of reconciliation between religious rights and equality principles. However, he thought members of a society accepted responsibility to others. Specifically, he required individuals to be mindful of the rights of others. He said that society had legitimate jurisdiction over actions of an individual that prejudicially affected the rights of others.²⁵³ Mill said a view by one person that others 'should be religious was the foundation of all the religious persecutions ever perpetrated',²⁵⁴ decrying the:

determination not to tolerate others in doing what is permitted by their religion, because it is not permitted by the persecutor's religion. It is a belief that God not only abominates the act of the misbeliever, but will not hold us guiltless if we leave him unmolested.²⁵⁵

Mill's 'harm principle' supports the absolute nature of the right to freely believe what one wishes, since that belief, per se, does not infringe the rights of others. However, manifestation of such a belief is justifiably limited, since it can detrimentally affect the rights of others.²⁵⁶ Locke's *A Letter Concerning Toleration* expresses a similar view, concluding '[n]obody ... neither single persons nor churches, [may] ... have any just title to invade the civil rights and worldly goods of each other upon pretence of religion'.²⁵⁷ Rousseau similarly concludes that individuals have autonomy, but must be mindful of the rights and interests of others.²⁵⁸

The philosophical argument in cases like *Cobaw* and *Bull v Hall* is that whilst the religious belief and conscience the staff member and organisation had was sincere, by seeking to manifest such beliefs by refusing to lease accommodation to a gay youth support group, they infringed the fundamental rights of members of that group to equality and dignity. Upon this basis, the state is justified in legislating to curtail the individual right to freedom of religion. Markey agrees:

252 John S Mill, *Utilitarianism, On Liberty, and Considerations on Representative Government* (J M Dent & Sons, first published 1910, 1972 ed).

253 Ibid 133.

254 Ibid 147.

255 Ibid.

256 In *Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 Latham CJ cited Mill, above n 252, in the context of supporting limits on freedom of religion: at 131.

257 Locke, *A Letter Concerning Toleration*, above n 220, 39. See also Locke, *Two Treatise of Government*, above n 10, 289 [7]: 'And that all Men may be restrained from invading others Rights, and from doing hurt to one another'. Although Locke was a fervent believer, stating elsewhere that individuals were the 'property' of the Maker. Notions of equality among citizens appear in the *Second Treatise*: 'A State also of Equality, wherein all the Power and Jurisdiction is reciprocal, no one having more than another: there being nothing more evident, than that Creatures of the same species and rank promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another': at 287 [4] (emphasis in original).

258 "[E]veryone is perfectly free to do what does not injure others." Here is the invariable boundary: Rousseau, above n 218, 185 quoting Marquis D'Argenson. Rousseau concludes that the dogmas of a religion are of no interest to the state, except to the extent that such dogmas concern morals and the duties which adherents of that religion owe to others.

The line of landlord's permissible conduct should be drawn where it begins to affect the rights of those who do not share the landlord's beliefs. The landlord here is not merely exercising his or her religion; the landlord is attempting to force others (the tenants) to adhere to his or her religion, or to impose the cost of his exercise of religion on other specific individuals. It is the difference between acting oneself according to one's beliefs and demanding that other private citizens act according to one's religious beliefs. A ... [religion] right that allows a believer to impose the believer's idiosyncratic definition of 'sinner' on another, thereby resulting in significant detriment, is indeed unsettling. Any right to accommodation should not include a right to define others in one's own theological terms when that definition creates an actual, negative impact on others.²⁵⁹

Religious adherents could argue the reverse, that whilst individuals have a right to equality and non-discrimination, this right ends where it affects the right of others. In this case, the CYC and R would argue their right to manifest their religious views is infringed by the manifestation of equality and non-discrimination rights by Cobaw and its members. They might argue that acceptance of the argument of Cobaw reifies equality and non-discrimination rights over other fundamental rights like freedom of religion.

At least two responses are apt. Firstly, the human rights instruments themselves (at least in some cases) provide for this reification of rights. For example, the *ECHR* freedom from anti-discrimination provision (art 14) is absolute; its art 9 protection of freedom of religion is expressly subject to laws passed to protect the rights and freedoms of others. The same pattern is evident in the art 18 freedom of religion right in the *ICCPR* which is similarly constrained, yet the art 26 provision is not. Mill believed the legislator was justified in regulating action along the lines of the harm principle. He did not answer how the legislator should resolve that conflict. He was concerned to outline when state interference was justified, not what it should be. Nor did he specifically address the question of conflict here between freedom of religion and equality rights in the context of sexuality. He cannot be used by upholders of freedom of religion to argue state interference in the manifestation of their rights is illegitimate. Our system recognises conflicting interests here, leaving it to the legislature to appropriately balance the rights, as reflected by discrimination legislation with exemptions, including religious exemptions.²⁶⁰

It is a matter for a court to interpret these exemptions in each jurisdiction studied, and consider any legal challenge to such laws on a proportionality analysis, at

259 Markey, above n 129, 538.

260 Timothy Macklem, above n 194, 62–3 lauds the:

insulat[ion] [of] state institutions and practices from the straitening effect upon morality of religious belief, thereby ensuring that those institutions and practices are capable of fostering valuable ways of life that religion does not recognize and may even forbid, ways of life that are critical to the well-being of at least some of those to whom the state is responsible, namely, those non-believers whose way of life is inconsistent with the requirements of one or more religious beliefs. One does not have to look far for instances of such non-believers. Homosexuality, for example, is condemned by certain religious beliefs, yet the ability to pursue a homosexual way of life free from public censure is clearly essential to the well-being of some, indeed many, people.

least in Europe and North America. It is not generally for the court to determine where the balance ought be struck; rather to assess the validity of the balance reached by the democratically-accountable Parliament. If religious groups do not agree with how the legislature has balanced the right to religion with other rights in legislation, they can lobby the legislature for change. It is largely, if not totally, futile for them to argue in court the legislature has struck the balance in a way different from the way they would have liked, or that religious freedom is insufficiently protected.

IV CONCLUSION

This paper has considered the question of reconciliation of religious freedom with anti-discrimination rights, in the context of accommodation and sexuality, which has been the focus of recent development in a range of jurisdictions. This has occurred within the broader frame of how religion and the law relate to one another. Recent cases, particularly in the United Kingdom and Australia, reflect greater emphasis on the right not to be discriminated against, over the right of a person to manifest their religious beliefs in a manner discriminatory towards homosexual people.

The paper has considered the interpretation of existing religious exemptions to anti-discrimination laws. It has found difficulties in the drafting of these provisions in terms of workability, conceding the difficulty in drafting appropriate exemptions in this area. It has rejected arguments favouring a position of sovereignty to a religious organisation over some ill-defined field. Religious freedoms exist to the extent that they are recognised by, and not subject to, law. And the distinction between religious belief and manifestation of that belief, the former being absolute and the latter subject to Parliament's will, is supported. Parliaments have the right to restrict the manifestation of religious belief where that belief will impact on the rights of others, and are best placed to attempt to reconcile such rights, subject to limited judicial review.