

Magna Carta and Freedom of Religion or Belief Conference
St Hugh's College, Oxford | 21-24 June 2015

“Freedom of Religion and Balancing Clauses in Discrimination Legislation”
Neil Foster¹

Introduction – Freedom of Religion as a Protected Right

The right to freedom of religion, while having its origins in various sources including the *Magna Carta*,² is a right protected today by all major international human rights instruments (Universal Declaration of Human Rights (art 18); International Covenant on Civil and Political Rights (ICCPR) (art 18); European Convention on Human Rights (ECHR) (art 9)). Whatever definition is adopted of the term “religion”, most people recognise that religion is a matter of “ultimate concern”, something that shapes a person’s values, their understanding of the meaning of life and how they ought to behave.

Any right to freedom of religion must include, as a minimum, the right to hold a particular religion or to change one’s religion. It is widely accepted that protection of religious freedom must also go beyond the protection of this internal aspect of the right to freedom of religion, and extend to the right to externally “manifest” religious beliefs in public gatherings, and the freedom to adhere to and observe one’s religious beliefs in both “religious” and “non-religious” settings.

This extended concept of religious freedom is recognised in the ICCPR (art 18):

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his [or her] choice, and freedom, either individually or in community with others and in public or private, to manifest his [or her] religion or belief in worship, observance, practice and teaching.

While it is clear that the “internal dimension” of religious freedom is absolutely protected, it is equally clear that the “external dimension” of the freedom, that is, the freedom to manifest one’s religion and act on one’s religious beliefs, may be subject to limitations in certain circumstances. A fundamental feature of “rights” of any sort, of course, is that, where they are given to more than one person, there is the potential for conflict. Any “freedom” given to a person to do something, will usually involve a “duty” on another person’s part to allow them to do it, even if it interferes with some other freedom or right of that person. Whether it is appropriate for one person’s right to be protected over and above another person’s right or interest requires a consideration of how competing rights and interests are to be appropriately balanced. The need for limitations in certain circumstances on the right to externally manifest one’s religious

¹ Associate Professor in Law, Newcastle Law School, University of Newcastle, NSW, Australia; responses welcome at neil.foster@newcastle.edu.au. See also <https://lawandreligionaustralia.wordpress.com>. I would like to thank my colleague Lucy Wilk for research and editorial assistance on an earlier version of the paper, although all remaining errors are ultimately my responsibility!

² See, for example, the comments made by the Master of the Rolls in June 2014 <https://www.judiciary.gov.uk/wp-content/uploads/2014/06/mor-speech-magna-carta-religion1.pdf>. More recently, see R Griffith-Jones & M Hill (eds) *Magna Carta, Religion and the Rule of Law* (Cambridge: CUP, 2015).

belief and the need for freedom of religious freedom rights to be balanced with the rights and interests of others is reflected in the ICCPR (art 18(3)):

Freedom to manifest one's religion or beliefs 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.

The focus of this paper is a consideration of how UK and Australian courts (and some US courts) have approached the application of balancing provisions, in the context of claims that a right to religious freedom should be protected. In particular, this “balancing” process has emerged as an important issue in laws protecting the right to be free from unlawful discrimination.

Of course there has been criticism of the metaphor of “balancing”. In an influential address in 2012,³ former Chief Justice of NSW, James Spigelman, commented:

Human rights discourse, which has always been comfortable with privileging a right over an interest, has never successfully dealt with situations in which rights conflict.⁴ This is a context bedevilled by a conflict of metaphors: from “rights as trumps” to “balancing”. As Benjamin Cardozo warned us: “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it”.⁵

“Balancing” is often a fraught process,⁶ particularly in the usual context where the conflicting values are simply incommensurable. As one United States Supreme Court Justice put it, the process is often like asking “whether a particular line is longer than a particular rock is heavy”.⁷

Accepting that “balancing” of interests is a difficult task, it seems impossible to avoid the language, which is common in decisions and academic comment on the area.⁸ But there are two different types of “balancing”. In effect a “balancing” process undertaken by a legislature will involve a decision that in particular contexts the right of one class of persons will be subordinated to the right of another class of persons, for particular public policy reasons. In its application by a court this may not involve a high degree of discretion given to judges, who will be bound by the balancing process already undertaken by the legislature.⁹ In some contexts, however, Parliaments may decide to incorporate judicial discretion in the form of a judgement about what is “reasonable”, or “proportionate”, or “necessary”. In these cases the decision of a judge will necessarily involve something like a “balance” of rights.

³ J Spigelman, “Hate Speech and Free Speech: Drawing the Line”, *Quadrant*, Dec 17, 2012; at <https://quadrant.org.au/opinion/qed/2012/12/hate-speech-and-free-speech>. I am grateful to the anonymous reviewer of an earlier version of this paper for the reference.

⁴ See Jeremy Waldron “Security and Liberty: The Imagery of Balance”(2003) 11 *Journal of Political Philosophy* 191, especially at 198-199.

⁵ See *Berkey v Third Avenue Railway Company* 244 NY 84 at 94-5 (1926).

⁶ [See] James Spigelman “The Forgotten Freedom: Freedom from Fear” (2010) 59 *International and Comparative Law Quarterly* 1 at pp 22-28.

⁷ *Bendix Autolite Corp v Midwesco Enterprises Inc* 486 US 888 at 897 (1987).

⁸ See for example S Shariff “Balancing Competing Rights: A Stakeholder Model for Democratic Schools” (2006) 29 *Canadian Journal of Education* 476-496, discussing the decision of the Supreme Court of Canada in *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, 2006 SCC 6, allowing a Sikh student to wear a “kirpan” (ceremonial knife) to school despite the objections of non-Sikh parents.

⁹ See the comments of Redlich JA in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 (16 April 2014) at [474], cited below.

While the necessary “balancing” of interests may sometimes involve over-ruling desires for action based on religion, it is important to keep in mind that human rights are not generally arranged in a hierarchy. It is not the case that some rights will always “trump” others, no matter how minor the breach of one and how significant the breach of the other. Or at least, that is the theory. The danger is that, in a “secular” Western society where religion is often perceived as archaic and anachronistic, freedom of religion rights will be restrictively construed, ignored or reduced to a merely formal principle and automatically subordinated to other rights and interests.¹⁰

This danger is particularly apparent in circumstances where a freedom of religion right is based on a conscientiously held religious belief that runs counter to what is commonly regarded as a “moral norm” in secular society, such as in the area of discrimination law. In this delicate and often controversial area, it is submitted that rights to religious freedom should be regarded as just as legitimate as other human rights, and that rights to religious freedom should not automatically be subordinated to other rights and interests.¹¹ Decisions of courts should be only reached following careful consideration both of the relevant legislative provisions that seek to protect rights to religious freedom, and also of those provisions that regulate the balancing exercise that must be undertaken when these rights conflict with the rights and interests of others. As will be seen below, there is an emerging tendency for courts to pay cursory attention to provisions seeking to protect religious freedom, ignore such provisions or restrictively construe them for reasons that are not readily apparent or for reasons that do not warrant such an approach. Approaches such as these should be avoided and are detrimental to the advancement of the protection of human rights generally and, more specifically, the advancement of the protection of religious freedom.

Protecting Religious Freedom

Religious freedom is generally protected in Western societies through a range of mechanisms. One approach is that of prohibiting discrimination, whether direct or indirect, based on religion.¹² Another is to recognise that in laws forbidding discrimination in other areas, there is occasionally the need to also provide protection for believers whose fundamental commitments may conflict with what would otherwise be generally accepted principles of discrimination law. So, for example, it is common for laws proscribing sex discrimination, to include provisions allowing religious groups to continue their long practices on religious grounds of restricting official clerical office to males rather than extending these to females.¹³ While these laws are occasionally under

¹⁰ See R Sandberg and N Doe (2007) ‘Religious Exemptions in Discrimination Law’ 66 *Cambridge Law Journal* 302-312.

¹¹ See, for example, P Parkinson, “Christian Concerns about an Australian Charter of Rights” in P Babie & N Rochow (eds) *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012), 117-151, noting at 121 “an emerging and almost absolutist view of the requirement of non-discrimination in the workplace.”

¹² In the UK, “religion” is a prohibited ground of discrimination under the *Equality Act* 2010 (UK), ss 4, 10. For the somewhat mixed situation across the various jurisdictions in Australia, see Neil J. Foster, “Religious Freedom in Australia” (2015 Asia Pacific JRCLS Conference, University of Notre Dame Broadway Campus, Sydney, Australia; May 2015) at: http://works.bepress.com/neil_foster/94 . at pp 23-24. Briefly, 6 out of the 9 jurisdictions in Australia broadly prohibit discrimination on the basis of religion.

¹³ In the UK, see *Equality Act* 2010, Sched 9 para 2(4)(a); in Australia, see, for example, *Sex Discrimination Act* 1984 (Cth) s 37.

attack,¹⁴ so far it has generally been recognised that the detrimental impact of the laws is outweighed by the fact that membership of those churches or groups imposing such rules is voluntary, and that those who object to these principles being applied are free to leave the church or group.¹⁵

However, as well as clauses delimiting discrimination in relation to churches or other religious groups, there are important issues that continue to arise about the exercise of religious freedom by ordinary believers. Can a religious small business owner operate their business in accordance with their religious principles? In particular, where their religious principles involve issues of sexual morality, can they decline to offer their services in a way that they see as supporting or condoning what they believe to be sexual immorality?

In general in considering the application of laws against discrimination on various prohibited grounds, there are two important issues: first, was the relevant decision *prima facie* discriminatory? And then, does some general “exemption” or “balancing clause” apply which recognises a fundamental human right which may need to be acknowledged, authorising what would otherwise be unlawful discrimination?

The second question becomes more complicated when we consider indirect, as opposed to direct, discrimination. The difference between the two forms of discrimination is widely recognised in law in this area, although it goes under different nomenclature- in the United States, for example, it is sometimes described by using the labels of “disparate treatment” (for “direct” discrimination, where the relevant decision is explicitly based on the particular prohibited ground), as opposed to “disparate impact” (or “indirect” discrimination, where a decision which seems to be made on a non-prohibited ground turns out to have a greater impact on a protected group than it does on the rest of society.)¹⁶ Where “indirect” discrimination is involved, the question of whether the act was discriminatory itself involves a consideration of a range of issues as to whether the decision was “reasonable” or “proportionate” to valid goals being sought to be achieved. In that sense matters that might be considered a “defence” are to some extent involved in the consideration of the preliminary question as to whether discrimination has been committed.

Drawing the right lines

Indeed, rather than seeing these “defences” as concessions “wrung out” of a reluctant legislature by some powerful lobby group, as they are sometimes painted in the

¹⁴ See Carolyn Evans and Beth Gaze, ‘Between religious freedom and equality: complexity and context’ (2008) 49 *Harvard International Law Journal Online* 40, 41: ‘there is an increasingly powerful movement to subject religions to the full scope of discrimination laws, with some scholars now suggesting that even core religious practices (such as the ordination of clergy) can be regulated in the name of equality.’

¹⁵ See *Ilafi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] FCAFC 26 (19 March 2014), concluding that freedom of religion rights did not extend to requiring that religious services be made available in a particular language, quoting the ECtHR at [78]: “in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual’s freedom of religion is exercised through his [or her] freedom to leave the community.”

¹⁶ For discussion of these two types of discrimination in the area of religious discrimination, illustrating some of the complexities of the area, see the recent decision of the US Supreme Court in *Equal Employment Opportunity Commission v Abercrombie & Fitch Stores, Inc* (No 14-86, June 1, 2015, 575 US ____ (2015)).

popular press,¹⁷ it seems to be a better analysis to see the limits drawn around discrimination laws as an integral part of a structure designed to reflect the relevant human rights as a whole.

This approach can be seen in the important comments of French J (as the current Chief Justice of the High Court of Australia then was) in *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16. That was not a case about religious freedom, but about a provision prohibiting “hate speech” on a racial basis, s 18C of the *Racial Discrimination Act* 1975 (Cth). The legislation contained a “defence” provision in s 18D excusing comments that “offend, insult, humiliate or intimidate” on the basis of race, in certain fairly widely drawn circumstances, so long as they were offered “reasonably and in good faith”. In considering questions as to how s 18D should be interpreted, given that it was described as an “exemption” in Parliamentary materials, French J commented:

[72] ... It is important however to avoid using a simplistic taxonomy to read down [s 18D](#). The proscription in [s 18C](#) itself creates an exception to the general principle that people should enjoy freedom of speech and expression. That general principle is reflected in the recognition of that freedom as fundamental in a number of international instruments and in national constitutions... The efficacy of the general principle so stated is demonstrated by approaches to statutory interpretation in relation to common law rights and freedoms set out in such decisions as *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277 at 304; *Bropho v Western Australia* [1990] HCA 24; (1990) 171 CLR 1 at 18 and *Coco v R* [1994] HCA 15; (1994) 179 CLR 427 at 437. More recently in the United Kingdom it has been exemplified by application of the so called ‘principle of legality’ in *R v Secretary of State for Home Department; Ex parte Simms* [1999] UKHL 33; (2000) 2 AC 115 at 131.

[73] Against that background s 18D may be seen as **defining the limits** of the proscription in s 18C and not as a free speech exception to it. It is appropriate therefore that s 18D be construed broadly rather than narrowly. (emphasis added)

The concept that a provision such as s 18D should be seen as “defining the limits” of the proscription in s 18C, in the interests of the principle of free speech, seems a helpful way to read “balancing” provisions in legislation dealing with discrimination which aim to protect the fundamental right of religious freedom.

The argument that this approach should be adopted to provisions directed to balancing religious freedom in discrimination legislation was explicitly rejected by Maxwell P in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75:

[182] The Attorney-General submits, however, that a special interpretive principle applies to these exemptions. Because their purpose is to protect a human right, it is said, the exemptions must be given a ‘broad’ interpretation. This principle is said to be established by the judgment of French J, as a member of the Full Federal Court in *Bropho v Human Rights and Equal Opportunity Commission*.¹⁸

[183] I would reject that submission. *Bropho* establishes no such principle. Leaving aside the fact that the views expressed by French J were not adopted by the other member of the majority in that

¹⁷ For one of many popular articles arguing against “exemptions” see P Stokes, “Love thy neighbour: religious groups should not be exempt from discrimination laws” *The Conversation*, Jan 17, 2013; at <http://theconversation.com/love-thy-neighbour-religious-groups-should-not-be-exempt-from-discrimination-laws-11634>.

¹⁸ (2004) 135 FCR 105 (*‘Bropho’*).

case (Carr J), what his Honour said was expressly referable to — and only to — the quite different statutory scheme there under consideration...

[186] The structure of the EO Act is, of course, quite different. The religious exemptions are of general application, expressed to cover conduct across the broad scope of pt 3 of the Act. Sections 75–77 are not ‘exemptions upon an exception’. They do not ‘define the limits’ of the prohibitions on discrimination. On the contrary, they are properly regarded as defining exemptions from the scope of those prohibitions.

However, while not explicitly grounding his comments on the earlier decision in *Bropho*, Redlich JA in dissent in *CYC v Cobaw* disagreed with the characterisation of the relevant provisions as merely “exemptions”. After noting that it was impossible to say that the relevant legislation had only one purpose, his Honour commented:

[516] Section 77 may be seen as **either** defining religious beliefs or principles that are not to be subject to discriminatory conduct in Part 3 **or** as an area of discriminatory conduct that is not caught by the Act. To read down the scope of the exemptions to give, in effect, primacy to the purposes of the Act was to do the very thing the Tribunal cautioned against — that is, privileging one right over the other. It was to disturb the **balance between the two rights** which the legislature intended, by imposing a greater level of restriction on a person’s religious beliefs and principles than the exemption allowed. In the absence of clear and unmistakable language, a construction was not to be preferred which gave one right a broader ambit and the other a narrower sphere of operation than the ordinary and plain words of the provision required. (emphasis added)

With respect, this approach seems the preferable one, and to be consistent with the general earlier comments of French J on similar legislation in the *Bropho* case. Rather than giving priority to anti-discrimination rights over religious freedom rights, the courts in interpreting legislation should give full effect to the choices made by the legislature in achieving what Redlich JA describes correctly as the “balance between the two rights”.

In the remainder of this paper the outworking of these principles will be considered through an examination of cases that illustrate how the courts are approaching this balancing process. The paper first considers the issues arising for religious freedom in the preliminary question as to whether discrimination has been committed, either direct or indirect, and then turns to examine the interpretation of separate “balancing provisions” designed to operate even if there has been *prima facie* discrimination.

1. Has there been discrimination?

(a) *Direct discrimination*

The most straightforward cases arise where a decision has been made which is directly on a prohibited ground. But as the first case to be noted here illustrates, sometimes making a decision on this issue can itself be problematic.

(i) **Direct race discrimination: The case of the Jewish school**

The case of *R v JFS*¹⁹ was a decision of the UK Supreme Court (UKSC). The importance and complexity of the decision is reflected in the fact that, unusually, a 9-member panel was convened. The case raised the difficult issue of whether it

¹⁹ *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS* [2010] 2 AC 728, [2009] UKSC 15 (16 Dec 2009).

amounted to racial discrimination for the Jewish Free School (the JFS) to prioritise the applications of students that were considered to be Orthodox Jews when the school received more applications for admission than were places available.

Judaism in the UK (as in other parts of the world) is splintered into different groups. The definition of “Jewishness” adopted by Orthodox Judaism is that someone is Jewish only if their mother, at the time of their birth, was an Orthodox Jew, or if they themselves have converted in a way that is recognised by Orthodoxy. In *R v JFS* the mother of M, who had applied for admission to the school, was Jewish by conversion at the time of M’s birth, but had converted into a group that was not recognised as Orthodox. As such, according to the JFS, M was not an Orthodox Jew; effectively, M was barred from admission to the JFS due to the circumstances of his birth.

The question for the UKSC was whether the application of this criterion was an act of “racial discrimination” as defined under the *Race Relations Act 1976* (UK) (the RRA). Section 1 of that Act provided that:

- (1) A person discriminates against another in any circumstances relevant for the purposes of any provision of this Act if-
- (a) On racial grounds he treats the other less favourably than he treats or would treat other persons...

“Racial grounds” was defined as “any of the following grounds, namely colour, race, nationality or ethnic or national origins” and “racial group” was defined as “a group of persons defined by reference to colour, race, nationality, or ethnic or national origins” (ss 1 and 3, RRA).

The members of the court were not agreed as to whether the decision here had been made on “racial” grounds or not. But a 5-4 majority held that it was directly discriminatory for the JFS to apply its criterion for admission, and hence the criterion was unlawful. Lord Phillips, the President of the Court, and 4 other members of the Court (Lords Mance, Kerr and Clarke and Lady Hale) held that the test laid down by Orthodoxy, while clearly *motivated* by religious reasons, was in truth a test of “ethnic... origin”.²⁰

We will return below to consider the implications of the finding by other members of the Court that what was at stake was “indirect” discrimination. But the finding of the majority here seems, with respect, correct. While one must have the utmost sympathy for the arguments of the minority on the direct discrimination issue, it does seem to flow from the provisions of the RRA that all direct discrimination on racial grounds will be unlawful, regardless of the justification offered for that discrimination. That decision means that criteria like the one at issue here, based on descent, as to whether or not someone belongs to a particular ethnic group, must be unlawful. This will remain the case unless Parliament introduces specific statutory exemptions for the Jewish community.²¹

²⁰ Ibid, *R v JFS*, 2009, [45].

²¹ It may be noted as a matter of interest that the problem here relates very specifically to a religion that defines itself in part on racial grounds. Other religions, such as Islam and Christianity, involve no criteria based on birth or ethnicity.

(ii) Direct sexual orientation discrimination

Cases dealing with discrimination on the basis of sexual orientation have also raised controversial issues about whether or not decisions were taken that involved “direct” discrimination. In particular, a question is raised as to whether it is possible to distinguish “sexual orientation” as a characteristic of a person, from “behaviour” associated with that orientation, or “support for the normality of same sex behaviour”.

This issue arises because, unlike most other prohibited grounds of discrimination, “sexual orientation” discrimination involves serious ethical dilemmas for those who adhere to traditional religious beliefs on sexual morality. That is, long-standing religious views (not only in Christianity but also in Islam and Judaism, for example) teach that same sex sexual behaviour is actually wrong, and contrary to God’s purposes for humanity. But one of the defining characteristics of a person who is of a homosexual “orientation” is a preference (to use a possibly controversial word) for sexual activity with a person of the same sex.

Sexual orientation and homosexual sexual activity

The first of these questions arose in the case of *Bull & Bull v Hall & Preddy*.²²

Mr and Mrs Bull had run a boarding house (attached to their own house) for many years. They had consistently maintained, as Christians, that they would not support what they regarded as immoral behavior by allowing couples who were not married to occupy the rooms containing double beds. (Indeed, as the Court of Appeal noted, they had received amazed and mocking commentary in the press back as far as 1996 for this policy, as it applied to heterosexual unmarried couples.) Consistently with this policy, they denied a double-bed room to Mr Hall and Mr Preddy, who were in a same sex partnership.

They were found to have been guilty of discrimination on the basis of sexual orientation.²³ The decision of the Court of Appeal upheld that decision as valid, as did the UK Supreme Court. They had argued that their actions were not based on the *sexual orientation* of the couple concerned, but on the fact that they were *not married*. But the Court of Appeal found that, since at least *some* heterosexual couples would have been given a room, but *no* homosexual couples (since the law of the United Kingdom did not at the time allow same sex marriage), then the refusal amounted to direct discrimination.²⁴

The relevant regulations were those made pursuant to the former *Equality Act* 2006. The relevant provision was regulation 4(1) of the *Equality Act (Sexual Orientation) Regulations* 2007 (SI 2007/1263), making it unlawful to discriminate against a person on the grounds of his or her sexual orientation by refusing to provide goods or services to that person, including boarding house accommodation. Reg 3, however, played a key role in the case, as it defined what amounted to discrimination on the basis of sexual orientation.

²² [2012] EWCA Civ 83, upheld on appeal at [2013] UKSC 73.

²³ Rutherford J, Bristol County Court, Case No 9BS02095/ 9BS02096, 18 Jan 2011.

²⁴ See in the Court of Appeal the judgment of the Chancellor, Sir Andrew Morritt, who at [61] framed the case in virtually these terms.

Discrimination on grounds of sexual orientation

3.—(1) For the purposes of these Regulations, a person (“A”) discriminates against another (“B”) if, on grounds of the sexual orientation of B or any other person except A, A treats B less favourably than he treats or would treat others (in cases where there is no material difference in the relevant circumstances)....

(4) For the purposes of paragraphs (1) and (3), the fact that one of the persons (whether or not B) is a civil partner while the other is married shall not be treated as a material difference in the relevant circumstances.

Reg 3(1) was expressed in a fairly standard form for legislation dealing with discrimination. If the Bulls (person “A”) had stopped Mr Hall or Mr Preddy (person “B”) at the counter and said- “we don’t provide rooms to homosexual people”, that would clearly have been an act of direct discrimination. It would have been so because, we may assume, if a heterosexual person (let us call them “O”, for “other”) had come to the counter they would have been given a room, and there was “no material difference in the relevant circumstances” other than sexuality.

Of course one can imagine cases where there would not be discrimination of this sort by refusing a room to B. Suppose the Bulls had a completely irrational hatred of people with red hair. If “B” (who happened also to be homosexual) had red hair but “O” (a heterosexual) did not, then their decision to deny a room to B would have been made “on the grounds of” their red hair (and they could probably provide examples of previous cases where they had turned away heterosexual red-haired people.)

The Bulls in this case made a similar claim. To paraphrase: “We simply applied a policy that couples who were not married (of whatever orientation) would not be supplied with a double bed. We have applied this policy for many years.”

But how is para 3(4) supposed to work in this situation? Let us assume that “one of the persons” – who in our example is “B”, Hall or Preddy- is a “civil partner”. (This refers to the UK legislation that allows same sex couples to have their relationship registered as a “civil partnership”. Apparently, though oddly enough it is not spelled out in the Court of Appeal judgment, Mr Hall and Mr Preddy were in such a formally registered partnership.)²⁵ Who is “the other” in the provision? One can only assume that the draftsman is picking up the word “other” from subpara (1), so that the “other” is the person with whom a comparison is being made. Para (4) seems to have the effect that the fact that O is married, and that B is (by contrast) in a “civil partnership”, is not to be regarded as a “material difference in relevant circumstances.”

And yet... what does that mean? On what seems to be the more natural reading of the provision, the question whether circumstances are materially different or not does not arise until the “gateway” of the first clause in reg 3(1) has been reached, that there has

²⁵ The fact that the complainants were involved in a civil partnership is mentioned in passing in the quotation at [13] of the decision of the trial judge at [36]: “I say nothing about what would have been the position if the claimants had not entered into such a legal relationship...” That this was a formal civil partnership turns out to be a crucial element in the claimant’s success. See the comments of the Chancellor, Sir Andrew Morritt, in the Court of Appeal at [66]: “they must be prepared to let them to homosexual couples, **at least if they are in a civil partnership.**” (Emphasis added.) But that seems to make this case formally one about discrimination between married couples and those in a registered civil partnership, *not* a decision about homosexual couples in general. Given the very small take-up of registered civil partnerships, the decision might have much less practical impact than at first appears. However, as will be noted below, the *Black v Wilkinson* decision involved a couple who were not in such a partnership, with a similar outcome.

been a decision made “on grounds of the sexual orientation.” If the decision that has been made can be clearly shown *not* to be on such grounds, then it seems arguable that there is no need to answer further questions about “material differences in relevant circumstances.” In that case reg 3(4) is not engaged.²⁶

But while this view seems to be sensible, arguably it would leave no room for reg 3(4) to operate at all. Suppose someone put up a sign at the entrance to a club: “married persons only”. If someone in a civil partnership were not allowed entry, it seems fairly clear that this would amount to discrimination. But it looks like discrimination on the grounds of “marital status”, not discrimination on the grounds of sexual orientation.²⁷

Still, it seems that the courts are now forced by reg 3(4) to regard distinguishing between a married couple and a “civil partnership” as “sexual orientation discrimination”. The fact that parties have entered a “civil partnership” establishes in most cases that they are homosexually oriented, and so the judgment seems to have been made that discrimination on the basis of one, is effectively equivalent to discrimination on the basis of the other. This at any rate is how the Court of Appeal read reg 3(4).²⁸

On appeal, in *Bull & Bull v Hall & Preddy*,²⁹ the Supreme Court upheld the decisions of the lower courts. There was a slight difference of opinion within the Court—three members found that this was “direct” discrimination, whereas two members of the court hold that it was “indirect” discrimination. But even those who held it was indirect discrimination took the view that it could not be justified.

Lady Hale, who gave the leading judgment for the majority, held that what had happened was clearly an act of “direct discrimination.” Her Ladyship said that if this was simply a case where the parties were treated as they were on the basis that they were unmarried, it would not have been “direct”. The evidence showed that unmarried *heterosexual* couples were also denied a double bed.

Nevertheless, the court had to apply the problematic reg 3(4) where the difference between a “civil partnership” and a marriage had to be ignored; here the parties were in a formal civil partnership which made the difference— see [25]. Her Ladyship then went further and said that the difference between marriage and civil partnership itself corresponded to a difference on the basis of sexual orientation— see [29], where she argues that only heterosexual people can get married, and only two people of the same sex can enter a civil partnership.

With respect, this seems dubious. Her Ladyship acknowledged that nothing was legally stopping a homosexually “oriented” person from marrying a person of the opposite gender. Yet she said this can be “left aside”. It is not clear why.

²⁶ This argument seems to have been run by counsel for the Bulls— see para [12] of the Court of Appeal decision where Rafferty LJ summarizes it. It did not succeed.

²⁷ Interestingly, “marital status” discrimination does not apply in the UK to the area of provision of goods and services, although it does apply in the area of employment. See Lady Hale in *Bull v Hall* at [17]: “While discrimination against a person on the ground that she is married was outlawed in the sphere of work by the Sex Discrimination Act 1975, it has never been unlawful to discriminate against the unmarried in any of the other areas covered by the Sex Discrimination Act 1975 and now the Equality Act 2010.”

²⁸ A similar decision was then reached by the Court of Appeal (before the appeal in the *Bull* case had been heard) in *Black & Anor v Wilkinson* [2013] EWCA Civ 820 (9 July 2013), although there are interesting differences in reasoning: no “civil partnership” was involved, and Lord Dyson MR thought that unconstrained by authority, he would have treated this, and the earlier decision, as cases of “indirect discrimination— see [22]. *Black* is discussed further below.

²⁹ [2013] UKSC 73.

Lord Kerr agreed with Lady Hale that because of reg 3(4) this was a case of direct discrimination, as did Lord Toulson.

There was then a question whether, even if this was the way the Regulations should be read, this was consistent with art 9 of the ECHR (which had to be used to interpret the regulations, even though it could not be directly invoked, since its only direct operation in the UK is against the government)- see [42].

Lady Hale conceded that there had been an interference with the Bull's rights to manifest their beliefs- see [41]. But she argued that under art 9(2) the state was allowed to qualify that right "for the protection of the rights... of others", and here Mr Preddy and Mr Hall had the right not to be discriminated against- [44]. The balancing process under art 9(2) had to consider whether it was "proportional" to do what had been done which impaired religious freedom, but in the end the protection of the rights of Mr Preddy and Mr Hall had to over-ride the rights of the Bulls- [51]. There is a key quote here which has already been influential in the more recent *Cobaw* decision, noted below:

[52] Sexual orientation is a core component of a person's identity which requires fulfilment through relationships with others of the same orientation. As Justice Sachs of the South African Constitutional Court movingly put it in *National Coalition for Gay and Lesbian Equality v Minister of Justice*, 1999 (1) SA 6, para 117:

"While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined."

[53] Heterosexuals have known this about themselves and been able to fulfil themselves in this way throughout history. Homosexuals have also known this about themselves but were long denied the possibility of fulfilling themselves through relationships with others. This was an affront to their dignity as human beings which our law has now (some would say belatedly) recognised. Homosexuals can enjoy the same freedom and the same relationships as any others. But we should not underestimate the continuing legacy of those centuries of discrimination, persecution even, which is still going on in many parts of the world. It is no doubt for that reason that Strasbourg requires "very weighty reasons" to justify discrimination on grounds of sexual orientation. It is for that reason that we should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion.³⁰

The upshot of the decision is that priority seems to be given to the right not to be discriminated against on grounds of sexual orientation, even when there is a clear clash with religious freedom. A distinction based on sexual *behaviour* is said to automatically be a distinction based on sexual *orientation*.

Sexual orientation and support for a homosexual "lifestyle"

The second of the issues noted above, whether opposition to a homosexual "lifestyle" or homosexuality "as a normal way of living", amounts to sexual orientation discrimination, was squarely raised by the Australian decision of the Victorian Court of Appeal in *Christian Youth Camps Limited v Cobaw Community Health Service Limited*.³¹

³⁰ This passage was quoted in the *Cobaw* appeal, [2014] VSCA 75 by Maxwell P at [60].

³¹ [2014] VSCA 75.

The complainant organisation, Cobaw, ran a project called “WayOut”, designed to provide support and suicide prevention services to “same sex attracted young people”. The co-ordinator of the project approached CYC (a camping organisation connected with the Christian Brethren denomination) to inquire about making a booking at a campsite that was generally made available to community groups. Mr Rowe, to whom she spoke, informed her that the organisation would not be happy about making a booking for a group that encouraged a homosexual “lifestyle”, as he later put it.

There was some factual dispute about what was said in the telephone conversation. However, in the end the issues were fairly clear. There had been a refusal to proceed with a booking; the reason for the refusal was connected with the CYC’s view of the philosophy of support for homosexuality as a valid expression of human sexuality; their opposition to this view was a result of what was seen by the CYC to be required by the Scriptures. The Tribunal (constituted by Judge Hampel of the Victorian County Court), ruled against the CYC and Mr Rowe, and ordered that they had unlawfully discriminated and should be jointly liable to pay a fine of \$5000.

The primary liability imposed was under ss 42(1)(a) and (c), and s 49, of the *Equal Opportunity Act 1995 (Vic)* (“*EO Act 1995*”). These provisions prohibited discrimination on certain grounds (among which were same sex sexual orientation, and personal association with persons of same sex sexual orientation), in the areas of “services”, in “other detriments”, and in accommodation.³²

On appeal an important issue was whether there had been *prima facie* discrimination. CYC argued that the decision not to accept the booking from Cobaw was not based on the “sexual orientation” of the participants, but upon the advocacy of homosexual activity which the event would involve- see para [52].

This argument was rejected by Maxwell P, who supported comments that had been made by the Tribunal to the effect that sexual orientation is “part of a person’s being or identity” and that:

To distinguish between an aspect of a person’s identity, and conduct which accepts that aspect of identity, or encourages people to see that part of identity as normal, or part of the natural and healthy range of human identities, is to deny the right to enjoyment and acceptance of identity.³³

In essence, his Honour seems to be saying that to criticise homosexual sexual activity is to attack those people who identify as homosexual. In particular at para [61] the following quote from *Bull & Bull v Hall & Preddy*³⁴ was supported, where Lady Hale said (as noted previously):

Sexual orientation is a core component of a person’s identity which requires fulfilment through relationships with others of the same orientation.³⁵

³² The previous legislation has now been replaced by the *Equal Opportunity Act 2010 (Vic)*, which contains provisions to similar effect, most of which came into operation on 1 August 2011.

³³ Maxwell P at [57], quoting Judge Hampel in the Tribunal, [193]. See para [59] where Maxwell P says that ‘her Honour was right to reject the distinction between ‘syllabus’ [the teaching to be conveyed on the weekend] and ‘attribute’, for the reasons which her Honour gave.’

³⁴ Above, n 29.

³⁵ At [52].

This view, that decisions made on the basis of same sex sexual activity, or support for such, are in effect decisions that discriminate against *persons* who identify as homosexual, seems to be impliedly supported by Neave JA (who simply says at one point that, apart from the question of personal liability, she dismissed the appeal for “substantially the same reasons” as the President- see [360]); and by Redlich JA. His Honour gave more detailed consideration to the issues- see paras [442]-[447]- but essentially took the position put forward by Maxwell P that “sexual orientation [is] inextricably interwoven with a person’s identity” (at [442]). His Honour then went on to consider a Canadian decision³⁶ holding that a printing company was guilty of sexual orientation discrimination when refusing to print leaflets which were “promoting the causes of” homosexual persons.

[446]... Efforts to promote an understanding and respect for those possessing such a characteristic should not be regarded as separate from the characteristic itself. To draw such a distinction was inconsistent with the prohibition against discrimination under the Code.

As will be noted later, Redlich JA also relied heavily on other aspects of the same decision in finding that in fact CYC and Mr Rowe *could* rely on the (individual) s 77 defence. But on this issue, of whether there had been discrimination or not, his Honour agreed with the other members of the Court.

In the end, then, all members of the Court of Appeal in *Cobaw* seemed to take the view that a refusal to support an activity providing support for homosexual sexual *activity*, is the same as discrimination against homosexual *persons*. The view that sexual “orientation” is a fundamental part of human “identity”, and the view that this must then be allowed expression in sexual activity, seems to be accepted.

A similar approach can be seen in a decision of the Canadian Supreme Court, *Saskatchewan (Human Rights Commission) v Whatcott*,³⁷ where the Supreme Court of Canada unanimously upheld the decision of a lower tribunal to fine the defendant for distribution of pamphlets opposing homosexuality.

As part of his defence against a claim for “homosexual vilification”, Mr Whatcott had argued that his comments referred to sexual activity, not to the “orientation” of persons. The Court’s response was as follows:

[124] Courts have thus recognized that there is a strong connection between sexual orientation and sexual conduct. Where the conduct that is the target of speech is a **crucial aspect of the identity** of the vulnerable group, attacks on this conduct stand as a proxy for attacks on the group itself. If expression targeting certain sexual behaviour is framed in such a way as to expose persons of an identifiable sexual orientation to what is objectively viewed as detestation and vilification, it cannot be said that such speech only targets the behaviour. It quite clearly targets the vulnerable group. {emphasis added}

³⁶ *Ontario (Human Rights Commission) v Brockie* (2003) 222 DLR (4th) 174, a decision of a 3-member bench of the Ontario Superior Court of Justice (Divisional Court) on appeal from a decision of a Board of Inquiry set up under the *Ontario Human Rights Code*.

³⁷ 2013 SCC 11.

The Court clearly leaves little room for negative comments on homosexual behaviour; if such is to be given, it needs to clearly be done in a way that avoids “detestation and vilification”.

Similar comments linking opposition to same sex marriage, to discrimination on the basis of sexual orientation, can be found in some cases dealing with those in the “wedding industries” who have an objection to homosexual behaviour based on Christian beliefs.

In one of the few superior court decisions addressing the issues, *Elane Photography v Willock*³⁸ the New Mexico Supreme Court upheld a fine imposed on a wedding photographer who had declined to provide services for a same sex “commitment ceremony”. In response to the claim made by Elane Photography that it was not discriminating against the couple on the basis of their orientation, but rather declining to support the institution of same sex marriage, the Court said (at [16]):

The difficulty in distinguishing between status and conduct in the context of sexual orientation discrimination is that people may base their judgment about an individual's sexual orientation on the individual's conduct. To allow discrimination based on conduct so closely correlated with sexual orientation would severely undermine the purpose of the [New Mexico Human Rights Act].

The Court continued, referring to a decision of the US Supreme Court:

[17] The United States Supreme Court has rejected similar attempts to distinguish between a protected status and conduct closely correlated with that status. In [*Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, — U.S. —, —, 130 S.Ct. 2971, 2980, 177 L.Ed.2d 838 \(2010\)](#), students at Hastings College of the Law formed a chapter of the Christian Legal Society and sought formal recognition from the school. The Christian Legal Society required its members to affirm their belief in the divinity of Jesus Christ and to refrain from “unrepentant homosexual conduct.” *Id.* & *id.* n. 3. Hastings refused to recognize the organization on the ground that it violated Hastings' nondiscrimination policy, which prohibited exclusion based on religion or sexual orientation. *Id.* at —, 130 S.Ct. at 2980. The Christian Legal Society argued that “it [did] not exclude individuals because of sexual orientation, but rather on the basis of a conjunction of conduct and the belief that the conduct is not wrong.” *Id.* at —, 130 S.Ct. at 2990 (internal quotation marks omitted). The United States Supreme Court rejected this argument, stating:

Our decisions have declined to distinguish between status and conduct in this context. See [*Lawrence v. Texas*, 539 U.S. 558, 575, 123 S.Ct. 2472, 156 L.Ed.2d 508 \(2003\)](#) (“When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination.” (emphasis added)); *id.*, at 583, 123 S.Ct. 2472 (O'Connor, J., concurring in judgment) (“While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.”); cf. [*Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S.Ct. 753, 122 L.Ed.2d 34 \(1993\)](#) (“A tax on wearing yarmulkes is a tax on Jews.”).

Id. We agree that when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects **conduct that is inextricably tied to sexual orientation**. Otherwise we would interpret the NMHRA as protecting same-gender couples against discriminatory treatment, but only to the extent that they do not openly display their same-gender sexual orientation. (emphasis added)

³⁸ 309 P.3d 53 (N.M., 2013).

The same logic was applied in the decision of the Benton County Superior Court in the US State of Washington in the combined proceedings in *State of Washington v Arlene's Flowers Inc, Ingersoll & Freed v Arlene's Flowers Inc*.³⁹ There Barronelle Stutzmann, proprietor of the business, and her firm, were held liable for breaching the State's anti-discrimination laws prohibiting denial of a service on the basis of sexual orientation. Stutzmann, who had supplied one of the complaints, Ingersoll, with flowers for some time, declined to do so on the occasion that he invited her to do the flowers for his proposed same sex wedding, on the basis of her Christian commitment and a desire not to support such a ceremony.

The court rejected Stutzmann's claim that her refusal to provide the flowers was not based on the sexual orientation of the client (whom she had often served previously), but rather on her desire not to express support for same sex marriage. She tried to rely (see lines 12-15 on p 28 of the transcript) on the distinction between conduct and orientation. But the court rejected the distinction, referring as the *Elane Photography* court had, to *Christian Legal Society v Martinez* 561 US 661 (2010) at 689. The Washington court held, following the *Elane Photography* decision, that same sex marriage was "inextricably tied" to sexual orientation.

In a similar case, *Re Klein dba Sweetcakes by Melissa and anor*,⁴⁰ the owners of a small-town cake shop were asked to make a wedding cake. When they discovered that this was for a same sex "commitment ceremony" (at the time same sex marriage was not legal in Oregon), they declined on the grounds of their Christian beliefs. In this decision the Commissioner ruled, on the basis of a previous finding of liability for sexual orientation discrimination,⁴¹ that they should pay \$135,000 in damages to the couple concerned for "emotional suffering".

The argument that the refusal to provide a cake was not based on the sexual orientation of the customers, but based on the fact that the cake was designed to send a message contrary to the shop-owner's religious beliefs, was rejected. The Commissioner ruled that holding a same sex wedding ceremony was "inextricably linked" to the complainant's sexual orientation, and "The Respondents' refusal to provide a wedding cake for Complainants because it was for their same sex wedding was synonymous with refusing to provide a cake because of Complainants' sexual orientation" (p 38, lines 14-16).

However, by way of contrast, in *Hands on Originals, Inc v Lexington-Fayette Urban County Human Rights Commission*⁴² a printer of T-shirts and promotional materials had declined to print advertising for a "Gay Pride" march. The company had been found by the Human Rights Commission to have discriminated against the local Gay and Lesbian Services Organization (GLSO) in its refusal.

³⁹ Benton Cty Sup Ct, Wash; Ekstrom J, Nos 13-2-00871-5, 13-2-00953-3; 18 Feb 2015.

⁴⁰ Commissioner of the Bureau of Labor and Industries, State of Oregon; Case Nos 44-14, 45-14; 21 April 2015.

⁴¹ See *Re Klein dba Sweetcakes by Melissa and anor* (Commissioner of the Bureau of Labor and Industries, State of Oregon; Case Nos 44-14, 45-14; 29 Jan, 2015).

⁴² Fayette Circuit Court, Civil Branch, 3rd Div, Ky; Civil Action No 14-CI-04474; James D Ishmael Jr, J; 27 April 2015.

Judge Ishmael overturned the finding of discrimination. His Honour noted that the company had operated in accordance with the Christian principles of its proprietor for some years, and had declined a number of previous printing jobs on the basis of the messages being conveyed (for example, shirts promoting a strip club and others containing a violence related message- see p 9). He also noted that the former president of the GLSO, who had filed the complaint, did not identify as gay and was actually married to someone of the opposite sex. It was a particularly clear case where the refusal of the job was based on the message, and not the sexual orientation of the customer.

In reviewing the Commission's decision the judge applied Constitutional principles as well as disagreeing with the finding of sexual orientation discrimination. The decision of the Commission was said to breach the company's First Amendment freedom of speech, because the Commission was in effect requiring them to speak a message they did not support (see p 9). As his Honour said:

HOO's declination to print the shirts was based upon the message of GLSO and the Pride Festival and not on the sexual orientation of its representatives or members. (at p 10, emphasis in original)

(The court also went on to consider various defences that would have applied even if there had been discrimination, which will be considered below.)

Another case from Australia illustrates that courts are sometimes prepared to acknowledge this distinction. In *Bunning v Centacare*⁴³ an employee of a Catholic family counselling centre was dismissed because of her involvement in support for "polyamorous" activities. She claimed to have been discriminated against on the basis of her sexual orientation, but the claim was dismissed.

Ms Bunning worked in the counselling centre in a senior position. (While operating under the "brand" of "Centacare", the Respondent's full name from the case documents was "The Corporation of the Trustee of the Roman Catholic Archdiocese of Brisbane Trading As Centacare", and hence it was clear that Centacare was a direct emanation of the Church.)

The Applicant's own documents revealed the following (see [7]):

her contact details as a counsellor at Centacare [had been] published on a website for the Brisbane Poly Group. These details had been originally published in or around late 2011, or early 2012, following a request from the group for the contact details of a 'poly-friendly' counsellor. The Brisbane Poly Group is a group of people involved and/or interested in the polyamorous lifestyle.

The website details had been brought to the attention of her employer, and on this basis her employment was terminated. Para [11] describes the events in the Applicant's words:

- (e) Furthermore, during the meeting the Applicant was told that the 'Brisbane Poly Group' goes against the ethics and moral teachings of the Catholic Church and that such a lifestyle would be in conflict with those teachings.
- (f) The Applicant was told that she was to be dismissed instantly for gross misconduct.

⁴³ [2015] FCCA 280 (11 February 2015).

The claim under the *Sex Discrimination Act 1984* (Cth) (“SDA”) was that the Applicant had been dismissed, or else put at a disadvantage, on the basis of her “sexual orientation”, and hence there had been a breach of the Act, s 14. Judge Vasta had to determine whether “being polyamorous” was a relevant sexual orientation. His Honour concluded that it was not. He referred to the Macquarie Dictionary definition of “polyamory” as

“The **mating pattern** of having a number of sexual partners at the same time” – [41] (emphasis in original)

As such the term referred to a certain type of behaviour. But, his Honour said, the word “orientation” referred to a “state of being” rather than actual behaviour:

[29] Under the Act, sexual orientation is how one is, rather than how one manifests that state of being. The manifestation of that state of being can take many forms. Those forms are what we know as “sexual behaviour”.

He concluded that the Applicant had shown that she adopted polyamorous *behaviour*, but had not demonstrated that this was a relevant *orientation*. In a very interesting passage worth quoting at length, he continued:

[33] In argument before me, the Applicant contends that “behaviour” is a “sub-set” of an orientation and therefore is covered by the definition in the [Sex Discrimination Act 1984](#).

[34] If the contention of the Applicant were correct, many people whose sexual activity might label them as sado-masochists, coprophiliacs or urophiliacs could claim that such is more than mere behaviour; it is in fact their very sexual orientation. If the contention were correct, then the illegal activities of paedophilia and necrophilia may have the protection of the [Sex Discrimination Act 1984](#) (Cth). Such a result would be an absurdity.

[35] This is because sexual orientation is something far more than how one behaves sexually. Many religious persons take a vow of chastity and do not behave sexually at all. Yet they still can have a sexual orientation under the definition in the [Sex Discrimination Act 1984](#). This is because their behaviour does not define their orientation.

Having noted that as a matter of legislative history, Parliament had declined to include “lawful sexual behaviour” as an alternative ground of discrimination, his Honour concluded:

[39]...I am led to the inexorable conclusion that “*sexual orientation*”, as the term is used in [s. 4](#) of the [Sex Discrimination Act 1984](#) (Cth), covers only that which it expressly covers, i.e., the state of being. It does not cover behaviours.

Hence the claim for sexual orientation discrimination failed, as the Applicant had not shown that the basis of the decision was a “condition” or “state of being” recognised under the SDA as a prohibited ground.

A similar decision of the Queensland Court of Appeal, although based on a different ground of discrimination under Queensland legislation, found that it was possible to distinguish between the “status” of being a “lawfully employed sex worker”, and the activity of engaging in lawful permitted sex work. A motel which had declined to accept further bookings from a customer because she was using the room for sex work,

was found not to have discriminated against the customer on the basis of her status as a sex worker.⁴⁴

Recently this issue has been the subject of a controversial ruling in Northern Ireland. In *Lee v Ashers Baking Co Ltd*⁴⁵ Mr Lee, a member of the “Queerspace” group in Northern Ireland, which had been campaigning for legislative change recognising same sex marriage there, went into the Ashers cake shop and ordered a cake to use at an event marking the celebration of gay rights.

He asked for the cake to be made featuring a picture of “Bert and Ernie”, two popular characters from the children’s show Sesame Street, along with a message supporting same sex marriage. Ignoring possible copyright issues, the bakers declined to make the cake on the more important grounds that they were Christians who took the Biblical views of appropriate sexual behaviour seriously, and that they were being asked to devote their cake-making skills to a message with which they fundamentally disagreed. With the apparent support of the local human rights body, Mr Lee took an action for discrimination against the bakers, alleging both sexual orientation discrimination, and also the somewhat unusual category of “political viewpoint” discrimination.

Putting to one side for present purposes the “political viewpoint” ground, essentially the claim here was similar to that made in the other “wedding industry” cases noted previously, that by refusing to support same sex marriage as an institution, the bakers had treated the customer less favourably than others, and hence had discriminated on the grounds of sexual orientation. District Judge Brownlie said:

[36] I [accept] the Plaintiff’s submission that same-sex marriage is or should be regarded as a union between persons having a sexual orientation and that if a person refused to provide a service on that ground then they were discriminating on grounds of sexual orientation.

With respect, her Honour really did not, it seems, give proper weight to the argument that the bakers, as they claimed, were not discriminating against Mr Lee as a *person*, but were declining to give their support to the *message* he wanted to convey, which was, literally, “Support Gay Marriage”. But her Honour’s response was that this was not important:

[40] Additionally, I do not accept the Defendant’s submissions that what the Plaintiff wanted them to do would require them to promote and support gay marriage which is contrary to their deeply held religious beliefs. Much as I acknowledge fully their religious belief is that gay marriage is sinful, they are in a business supplying services to all, however constituted. The law requires them to do just that, subject to the graphic being lawful and not contrary to the terms and conditions of the company. There appears to have been no consideration given to any other measures such as the non – Christian decorator icing the cake or, alternatively, sub-contracting this order.

⁴⁴ See *Dovedeen Pty Ltd v GK* [2013] QCA 116 (17 May 2013). It should be noted that the Court’s decision was heavily influenced by the fact that the definition of “lawful sexual activity” as a prohibited ground of discrimination under the *Anti-Discrimination Act* 1991 (Qld) s 7(1), specifically used the word “status”, which signaled for the Court a clear distinction between status and activity. See para [20]: “Discrimination on the basis that she was a lawfully employed sex worker was prohibited, but discrimination on the basis that she proposed to perform work as a sex worker at the motel was not prohibited”.

⁴⁵ [2015] NICty 2 (19 May 2015).

Her Honour said that the relevant “comparator” (for the purposes of determining whether sexual orientation discrimination had taken place) was not to consider the situation of a heterosexual person who wanted to order the same cake, but instead to compare the refusal to supply the cake here with the way that the firm would have responded to “a heterosexual person placing an order for a cake with the graphics either “Support Marriage” or “Support Heterosexual Marriage””- see [42]. The only explanation that seems possible for this comparison seems to be supplied by the very telling comment her Honour goes on to make:

[42]...I regard the criterion to be “support for same sex marriage” which is **indissociable** from sexual orientation. There is also an exact correspondence between the advantage conferred and the disadvantage imposed in supporting one and not the other.

In *Bressol v Gouvernement de la Commaunite Francaise Case* [2010] ECR I-2735, para 56, [2010] 3CMLR 559:

“I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification”.

[43] My finding is that the Defendants cancelled this order as they oppose same sex marriage for the reason that they regard it as sinful and contrary to their genuinely held religious beliefs. Same sex marriage is **inextricably linked** to sexual relations between same sex couples which is a union of persons having a particular sexual orientation. The Plaintiff did not share the particular religious and political opinion which confines marriage to heterosexual orientation. (emphasis added)⁴⁶

The comment can only be read as saying that discrimination here is unlawful because the class of persons who support same sex marriage is identical to the class of persons who are of homosexual sexual orientation. The problem is, of course, is that this comment is demonstrably false. To quote the UK Human Rights blog, a source which has never been known to be overly given to conservative views:

[T]he judge’s findings in relation to discrimination on grounds of sexual orientation do not make much sense. One key misstep appears to be that she conflates support for same-sex marriage with a homosexual orientation, when they are clearly different things. Many people who are not gay (including the Prime Minister) support same-sex marriage. Some people who are gay (including Rupert Everett and Dolce and Gabbana) oppose same-sex marriage.⁴⁷

Still, having found that anyone who opposes same sex marriage must be opposed to homosexual persons (the implications of this equation), it is not surprising that the Judge found that the bakers had discriminated on the basis of sexual orientation.

The *Ashers* case is interesting because it focuses the issues very clearly. Can it really be correct that to decline to apply one’s artistic talents to the promotion of a message one fundamentally disagrees with, is to discriminate against the person asking for the message on the basis of their sexual orientation? The approach taken in the Kentucky T-shirt case of *Hands-On Originals* seems more plausible, where of course the

⁴⁶ This paragraph seems to be directly based on cases cited by Lady Hale in *Bull v Hall*, above n 29, at para [19].

⁴⁷ A Henderson “Conscience and cake”, 21 May 2015, at <http://ukhumanrightsblog.com/2015/05/21/conscience-and-cake/>.

person requesting the message in support of “Gay Pride” was not themselves of homosexual orientation.

Yet so far the other decisions noted above have found it impossible to distinguish between the refusal of a general service to persons of a particular sexual orientation (which none of the businesses noted above have been doing), and the refusal to support a particular message.

In this area, then, where there is a finding of “direct” discrimination on the basis of sexual orientation, those who have a religious objection to the promotion and active support of a moral message contrary to their beliefs, will need to rely, if possible, on any applicable “balancing clauses” in the legislation. Before turning to these, some comment is appropriate on arguments made in the “indirect discrimination” area.

(b) Indirect Discrimination

The concept of “indirect” discrimination, as previously noted, is that sometimes there can be detrimental treatment of a group with a protected attribute even though the immediate ground of such treatment does not seem to be that attribute. On occasions that treatment may in fact be a “proxy” for actual discrimination on that ground; on other occasions it may be accidental, and for this reason laws prohibiting indirect discrimination allow such treatment if it can be independently justified on some acceptable basis.

In theory, the protection of religious freedom could be such an independent ground, which might justify what would otherwise be illegitimate “disparate treatment”. But as we will see, there are not many cases where, once *prima facie* indirect discrimination has been found, religious freedom has been accepted as a valid reason justifying such discrimination.

(i) Race: the minority in JFS

It will be recalled that the majority view in the *JFS* decision was that exclusion of certain Jewish children on the basis of characteristics of their parents was “direct” racial discrimination.

Four members of the Court, however, Lords Hope, Rodger, Walker and Brown ruled that the criterion used was in truth not “racial” but “religious”, and hence the prohibition did not fall foul of the legislation governing direct discrimination.⁴⁸ Lord Rodger, in particular, felt that the decision of the majority was problematic:

The decision of the majority means that there can in future be no Jewish faith schools which give preference to children because they are Jewish according to Jewish religious law and belief... Jewish schools will be forced to apply a concocted test for deciding who is to be admitted. That test might appeal to this secular court but it has no basis whatsoever in 3,500 years of Jewish law and teaching.

The majority’s decision leads to such extraordinary results, and produces such manifest discrimination against Jewish schools in comparison with other faith schools, that one can’t help feeling that something has gone wrong (Rodger LJ in *R v JFS*, 2009, at [225]-[226]).

⁴⁸ *R v JFS*, 2009, above n 19, [201]-[204] (Hope LJ); [232] (Rodger LJ); [235] (Walker LJ); [249] (Brown LJ).

Lord Rodger's comment points to an interesting aspect of the litigation. Section 50 of the *Equality Act 2006* (UK) allowed “faith-based” schools to apply selection criteria based on their religious beliefs where there were more applications for admission than were places available. In *R v JFS* there was a direct conflict between that section and the law prohibiting racial discrimination. For Lord Rodger, there should have been a way of avoiding the clash.

Section 1(1)(b) of the RRA also prohibited indirect discrimination in certain circumstances. That is, the section prohibited criteria which, when applied generally to people of more than one race, had a more detrimental effect on people of one race compared to people of other races *unless* the rule or criterion was “justifiable”. A claim of indirect discrimination had been made in the alternative in these proceedings. Two members of the UKSC majority, Lord Phillips and Baroness Hale, did not rule as to whether indirect discrimination had occurred. The other members of the Court, however, did go on to consider the issue.

In relation to the question whether there had been indirect discrimination against M, perhaps oddly, there was a marked division of opinion on the issue of “justification” among the four Law Lords who had found that there had been no direct discrimination. Lord Hope held that indirect discrimination *had* occurred.⁴⁹ Even assuming (as his Lordship had held) that the decision was not made directly on racial grounds, the effect of the criterion would be to impose a higher hurdle on those with no direct descent from a Jewish mother.

As to whether this indirect discrimination was justified in the circumstances, Lord Hope found that the policy could, in theory, be justified.⁵⁰ His Lordship held that “a faith school is entitled to pursue a policy which promotes the religious principles that underpin its faith” and that this was the reason why the *Equality Act 2006* (UK) allowed faith-based schools to discriminate on religious grounds.⁵¹ However, His Lordship concluded that in the circumstances there had been insufficient evidence presented by the JFS to show that the policy was “proportionate”.⁵² Lord Hope observed that if *prima facie* indirect discrimination could be shown, the defence under s 1(1)(b) of the RRA involved the question

Whether JFS can show that the policy had a legitimate aim and whether the way it was applied was a proportionate way of achieving it. The burden is on JFS to prove that this was so... (Hope LJ in *R v JFS*, 2009 at [205]).

His Lordship held that the aim that JFS had in applying its criterion was “legitimate”,⁵³ but then went on to find that it was not “proportionate”.⁵⁴ The JFS had not shown that it had gone through the process of considering “the impact that applying the policy would have on M and comparing it with the impact on the school” (at [211]). In the end his Lordship's view was that the issue of proportionality had not been properly addressed in the evidence (at [212]).

⁴⁹ *R v JFS*, 2009, *ibid* at [205].

⁵⁰ *R v JFS*, 2009, *ibid* at [209].

⁵¹ *Ibid*.

⁵² *R v JFS*, 2009, *ibid* at [214].

⁵³ *R v JFS*, 2009, *ibid* at [209].

⁵⁴ *R v JFS*, 2009, *ibid* at [212].

Lord Walker agreed with Lord Hope - at [235]. Conversely, Lords Brown and Rodger argued strongly that this was a situation where it *was* reasonable for the school to offer its services first of all to Orthodox Jews.⁵⁵

It is instructive to see how the members of the court dealt with the issue of indirect discrimination. Where a criterion is applied which has a “disparate impact” on people from a particular protected group, the approach which seems to be sanctioned by a majority of the members of the UKSC is to consider whether or not it is related to a “legitimate” aim and whether or not it is implemented in a “proportionate” way. That is, the relevant question is, can the alleged discriminator demonstrate that the severity of the impact of the rule *on the person discriminated against* is proportionate to the aim of the rule? It is submitted here that this approach to the balancing of indirect discrimination against the competing rights of others is an appropriate and sensible approach for the resolution of the difficult issues that arise in this area. As demonstrated later in this paper, this approach has not been adopted in other UK and Australian decisions. The alternative approaches taken by courts in these other decisions have resulted in some problematic outcomes for claimants as well as, it is argued here, a detrimental impact on the jurisprudence regarding the protection of religious freedom.

(ii) Sexual orientation: indirect discrimination in *Bull*

In the *Bull* decision, it will be recalled, the majority of the Supreme Court held that it was “direct” discrimination against a same sex couple on the basis of their sexual orientation, to deny them a double bed room in a boarding house.

Lady Hale also, however, addressed the questions that would have arisen if it were a case of indirect discrimination. Indeed, it was interesting that even the Bull’s lawyer conceded this was indirect discrimination, since imposing a criterion that parties be married was to disadvantage (at the time) homosexual persons, most of whom would not be married (even if it is not quite true, as her Ladyship says at [33], that they “cannot” enter the status.)

Under reg 3(3)(d), in a case of indirect discrimination, the alleged discriminator A was to be allowed to show that they could “reasonably justify” their behaviour “by reference to matters other than B’s sexual orientation.” The Bulls claimed that the reason for their behaviour was “a deeply held belief that sexual intercourse outside marriage is sinful”- see [35].

So why was this not able to be used as a justification? Lady Hale’s reasoning here is partly based on reg 3(4) noted above (broadly “equating” civil partnership with marriage), and argued that what the Bulls were saying was that their belief was that “sexual intercourse between civil partners” was sinful, and hence that this was precisely a question of sexual orientation. Hence, in terms of reg 3(3)(d), their beliefs could not be justified since they were beliefs which had reference to sexual orientation.

Her other arguments then discussed what in general was the purpose of the regulations and why they should preclude this sort of decision-making; indeed, in [37] she said: “We do not normally allow people to behave in a way which the law prohibits because they disagree with the law”! This of course is true, but is not to the point: if the Bull’s genuine religious belief was a “reasonable justification” for their behaviour, then

⁵⁵ *R v JFS*, 2009, *ibid*, [233] (Rodger LJ); [225]-[226] (Brown LJ).

their behaviour was not illegal. To put it this way trivialised a deeply held religious commitment as if it were a mere preference. Religious beliefs, her Ladyship suggested, can be shown in “stationery and various decorative items” but were not to be permitted in decision making- see [39].

In the end it seems that Lady Hale believed that the importance of redressing past wrongs to same sex attracted persons was such an important goal, that it had to over-ride the conscientious beliefs of the Bulls.

Lord Neuberger disagreed with Lady Hale on the “direct discrimination” point, but agreed that this was indirect discrimination and could not be “justified.” His Lordship said that the basis for the decision was the married status of the couple, not their sexual orientation; he said that reg 3(4) did not have any impact here, and implied that Lady Hale’s judgment was blurring the distinction between direct and indirect discrimination-see [84]. Lord Hughes agreed. On the question of justification of indirect discrimination, however, he agreed with Lady Hale, as did Lord Hughes.

It is interesting to compare the reasoning in *Bull* to that in *Black v Wilkinson*,⁵⁶ handed down after the Court of Appeal decision in *Bull* but before the UK Supreme Court appeal in that case, where there was a more detailed analysis of the “indirect discrimination” view. In almost identical circumstances, Mr Black and his partner Mr Morgan (though not in a civil partnership) applied for a double room in Mrs Wilkinson’s “Bed and Breakfast” and were refused. Mrs Wilkinson had a policy, she said, of only letting the double room to heterosexual married couples, on the basis of her Christian beliefs.

She was then sued as in breach of legislation prohibiting discrimination on the basis of sexual orientation. The question then arose, was this direct discrimination? The Master of the Rolls, Lord Dyson, interestingly took the view that it was not, even though in *Bull* a differently constituted Court of Appeal had held that it was. As his Lordship said:

[22] In my view, *Preddy* was not a case of *direct* discrimination against a homosexual couple on the ground of their sexual orientation, since there were other unmarried couples who would also be denied accommodation on the ground that they too were unmarried. It was, however, a case of *indirect* discrimination because the defendants’ policy in that case put homosexual couples at a disadvantage compared with heterosexual couples on the ground of their sexual orientation. The former could not marry, whereas the latter could (which was the very reason given by the court in *Preddy* for holding that there was direct discrimination in that case).

This, with respect, seems a very good analysis. Nevertheless, it did not finally resolve the matter in favour of Mrs Wilkinson, since once the view was taken that there was indirect discrimination, she had to show that this could be justified somehow as a “proportionate means of achieving a legitimate aim.”

There was an important comment at para [35]:

It is clearly established that, as a matter of general principle, (i) the right of a homosexual not to suffer discrimination on the grounds of sexual orientation is an important human right (article 8 and 14), and (ii) the freedom to manifest one’s religion or belief under article 9(1) is also an important human right. The importance of the former has been stated many times. For example, in *EB v*

⁵⁶ [2013] EWCA Civ 820, [2013] 1 WLR 2490.

France (2008) 47 EHRR 509, the ECtHR said at para 91: “where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within article 8....”. See also *Karner v Austria*, no 40016/98, (2003) 38 EHRR 528 at para 37 and *Eweida and others v United Kingdom* [2013] IRLR 231 at para 105. But the importance of the latter has also often been stated: see, for example, *Kokkinakis v Greece* (1993) 17 EHRR 397 at para 31 and *Eweida* at para 79 and 83 (last sentence). **Neither is intrinsically more important than the other. Neither in principle trumps the other.** But the weight to be accorded to each will depend on the particular circumstances of the case. (emphasis added)

The Master of the Rolls also noted at [38] that whereas in the past what has been called the “specific situation” rule might have been applied (that is, someone whose right to freedom of religion was threatened could simply have stopped engaging in the activity),⁵⁷ now following *Eweida* in the ECtHR it is clear that this is not the correct approach. The ability of a person to leave the sphere of activity (here, to stop offering double bed accommodation, say), rather than determining the issue, should now be “weigh[ed] ... in the overall balance when considering whether or not the restriction is proportionate”.⁵⁸

In undertaking the “balancing” process, however, his Lordship found against Mrs Wilkinson. One reason was that Parliament and the Executive had set up the law in the way it had while being conscious of the impact on businesses like hers (noting that the examples of bed and breakfast establishments were raised in Parliament).⁵⁹ The other reason was that Mrs Wilkinson had not been able to provide evidence to show that applying the law to her would mean that she would have to abandon the business completely- it was logically possible that she could offer accommodation by way of single rooms only.

In the end, then, the “indirect discrimination” analysis of a clash between sexual orientation discrimination rights, and freedom of religion, seems to usually be resolved in favour of the former. The careful balancing process suggested in *R v JFS* and noted above, weighing up the specific impact on the religious believer concerned against the particular harm suffered by the person complaining of discrimination, is not evident.

2. Balancing clauses applicable if *prima facie* discrimination has occurred

We turn, then, to balancing provisions that are used in discrimination legislation to specifically recognise religious freedom. As noted above, the preferable way to see these provisions as not “exemptions” from an overarching rule (although that term is sometimes used), but rather as “defining the limits” of what will be regarded as unlawful discrimination, by balancing different rights.

(a) Clauses applying to churches and religious bodies

It is fairly common for balancing provisions to be found in discrimination legislation, which explicitly recognise the position of churches and religious bodies. In

⁵⁷ See M Hill and R Sandberg, ‘Is Nothing Sacred? Clashing Symbols in a Secular World’ (2007) *Public Law* 488.

⁵⁸ *Eweida* [2013] ECHR 37 at [83].

⁵⁹ McCombe LJ, while agreeing with the overall outcome, expressed what I think are justified doubts as to whether the Regulation-making process undertaken here, while accompanied by public submissions, should really be given as much weight as a carefully argued Parliamentary debate.

sex discrimination legislation, as noted above, the historic practice of many churches of only appointing male clergy has been recognised as an area that will not be changed. But the extent of the provisions in other cases can be uncertain.

Two Australian cases illustrate some of the complexities that can arise even where this explicit protection is provided.

(i) OW & OV: the Christian foster care organisation

The decision of the NSW Court of Appeal (NSWCA) in *OV and OW v Wesley Mission*,⁶⁰ provides a good example of an appropriate application of a ‘balancing clause’ protecting religious freedom.

OW and OV, a same-sex couple, claimed that the Wesley Mission had discriminated against them when they applied to become foster carers for children in need. In response to their application, the Mission advised OW and OV that they were not eligible candidates as the Mission’s guidelines did not permit the fostering of children out to same-sex couples. In support of its stance, the Mission relied on s 56 of the *Anti-Discrimination Act 1977* (NSW) (ADA), which provided an “exception” to the more general laws in that Act prohibiting discrimination. Section 56 relevantly provided that:

56 Religious bodies

Nothing in this Act affects: ...

(c) the appointment of any ... person in any capacity by a body established to propagate religion, or

(d) any other act or practice of a body established to propagate religion that conforms to the *doctrines of that religion* or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion. [emphasis added]

It was conceded by the Mission that, unless s 56 applied, the Mission had engaged in an unlawful act of discrimination under the ADA.⁶¹ (It seems uncontroversial that a criterion referring to “same sex couples” is directly discriminatory.)

At first instance, the Administrative Decisions Tribunal (ADT) found that there had been discrimination and that the s 56 provision did not apply.⁶² A key part of the ADT’s reasoning was that a preference for ‘traditional marriage’ (that is, solemnised monogamous heterosexual partnerships) was not a ‘doctrine’ of the Christian church as a whole - [128]. This finding was based, at least partly, on the fact that ministers called by the parties to give evidence gave opposing views regarding the question whether a preference for traditional marriage relationships amounted to a “doctrine” of the Christian religion.

This decision was set aside on appeal to the Administrative Decisions Tribunal Appeal Panel (ADTAP).⁶³ The ADTAP held that the original Tribunal had misdirected

⁶⁰ *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010).

⁶¹ Section 49ZP of the ADA prohibits discrimination on the basis of homosexuality in provision of services.

⁶² *OV v OZ (No 2)* [2008] NSWADT 115 (1 April 2008).

⁶³ *Members of the Board of the Wesley Mission Council v OV and OW (No 2)* [2009] NSWADTAP 57 (1 October 2009).

itself by requiring that a doctrine be uniformly accepted across the whole of Christendom before it could count for the purposes of s 56 and remitted the matter back to the ADT with a list of questions it should consider.⁶⁴ This decision was appealed to the NSWCA.

In effect, the decision of the NSWCA affirmed the ADTAP's ruling but held that the questions formulated by the ADTAP for the ADT should have been formulated with a different 'approach and emphasis'.⁶⁵ The matter then came back to the ADT for final determination.⁶⁶ The ADT reviewed the evidence that had previously been presented to the Tribunal by representatives of the Wesley Mission and concluded that the word 'doctrine' was broad enough to encompass, not just formal doctrinal pronouncements such as the Nicene Creed, but effectively whatever was commonly taught or advocated by a body and included moral as well as religious principles ([32]-[33]). The evidence of Rev Garner, who gave evidence in relation to issues of doctrine, was accepted as showing that the provision of foster care services by a homosexual couple would be contrary to a fundamental commitment of the organisation to Biblical values. Hence the defence under s 56(d) was established.

In the course of discussing s 56(d), the ADT considered an argument that had been put forward by the applicants that any exemption under that provision would only operate in relation to so-called 'pastoral' activities or apparently 'religious' activities such as the running of church services, and that the placement of children in foster-care was not an activity of this type. The ADT ruled (relying on comments that had been made by Allsop P in the NSWCA) that this distinction could not be maintained. The exemption applied to all activities of the body that either conformed to the doctrines of the religion or were necessary to avoid injury to the religious susceptibilities of the adherents of the relevant religion ([30]).

In this case the ADT found both that the first limb and second limb of the defence had been made out; the first being that the refusal to entertain the claimant's application 'conform[ed] to the doctrines of [the] religion'; the second limb being that to allow homosexual foster carers was 'necessary to avoid injury to the religious susceptibilities of the adherents of that religion'. It should not be thought that the ADT was necessarily happy with this decision. The ADT members commented, for example, that the first limb of s 56(d) was "singularly undemanding" because all it required was that an act be "in conformity" with a doctrine, not that to do otherwise would have been "in breach" of a doctrine (at [35]). Nevertheless, the Appeal Panel's decision does seem to be a reasonable application of the exemption in s 56(d).

(ii) CYC v Cobaw: Christian camping organization

The decision in the next case to be discussed, however, was more problematic. The facts of *CYC v Cobaw* have been noted above already, involving the Christian Youth Camps organisation declining a booking from a same sex oriented youth support group.

The relevant legislation, the *EO Act* 1995, contained two exemptions based on religion. Section 75(2) provided:

⁶⁴ Ibid.

⁶⁵ *OV & OW v Wesley Mission*, 2010, above n 60, at [83].

⁶⁶ *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010).

- (2) Nothing in Part 3 applies to anything done by a body established for religious purposes that –
- (a) conforms with the doctrines of the religion; or
 - (b) is necessary to avoid injury to the religious sensitivities of people of the religion.

And s 77 provided:

Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.

The Tribunal held, however, that neither of these provisions assisted either the CYC or Mr Rowe.⁶⁷

Here we will consider s 75, dealing with religious bodies; below we will mention s 77 in its application to individuals. While both parties could be potentially held liable for discrimination, only CYC could rely on the s 75 defence, which applied to “a body established for religious purposes”. (The word “body” clearly implied a corporate entity of some sort, not an individual.)⁶⁸

The Tribunal had ruled that CYC could not rely on the s 75 defence for a number of reasons: that it was not a body “established for religious purposes”, and in any event that the refusal of accommodation did not “conform with the doctrines” of any relevant religion, nor was it necessary to “avoid injury to the religious sensitivities” of believers. In effect, for similar reasons, the Court of Appeal agreed. In my view this is one of the most problematic aspects of the decision. It is also the feature of the decision that is likely to have the most impact in those other jurisdictions which have an equivalent of s 75 as a defence to discrimination legislation.

Was CYC a **“body established for religious purposes”**? Maxwell P agreed with the decision of Judge Hampel that CYC was not such a body. There was a long discussion and review of the evidence at paras [199]-[254]. Features which pointed to the “religious purposes” of CYC were its establishment by the Brethren denomination, the fact that it was required to operate “in accordance with the fundamental beliefs and doctrines of the Christian Brethren”, that it had to aim to create an “obviously Christian” atmosphere, that its provision of camping facilities was to provide “an opportunity to communicate the Christian faith”, that those who visited the campsites should “experience Christian life and values”, and that it had power to advance to the Trustees of the Brethren church money for “charitable” purposes- see paras [204]-[205]. Members of the Board of CYC were to subscribe to the Brethren declaration of faith- [206].

On the other hand, Maxwell P regarded a number of other features of the way that CYC operated as counting against the body being one that was operated “for religious

⁶⁷ For my earlier comments on, and criticism of, the Tribunal decision see my paper "Freedom of Religion in Practice: Exemptions under Anti-Discrimination Laws on the Basis of Religion." *Law and Religion: Legal Regulation of Religious Groups, Organisations and Communities- Melbourne Law School, University of Melbourne*, 15- 16 July 2011. Available at: http://works.bepress.com/neil_foster/46 .

⁶⁸ In this area I agree with the comments of Maxwell P at [158], that Mr Rowe himself could not have directly relied on s 75, and would need (if he otherwise discriminated) to rely on s 77. However, this would not preclude Mr Rowe, if sued separately as somehow having an imputed liability for the actions of CYC, invoking s 75 as a defence that CYC could have invoked. But it seems that the legislation here, and other such legislation around Australia, does not usually deem officers and employees who are not directly involved in discrimination to be so liable.

purposes”: advertising on the website and brochures did not contain any explicit reference to Christianity; the site was regularly booked by secular groups; there was no prohibition of any particular type of activity offered on their advertising, and camps were not required to have any Christian content (even though Christian groups did also occasionally use the site.)

The President quoted at length from a judgment of Dixon J in an old High Court of Australia decision dealing with a testamentary bequest, *Roman Catholic Archbishop of Melbourne v Lawlor*,⁶⁹ where his Honour said that to establish the charitable category of a trust for religious purposes, the actual activities themselves must be “religious”. From the examples given by Dixon J, this meant “directly” religious- spiritual teaching, support of clergy or church buildings or gifts to religious societies. Undertaking a “secular” activity could not be a “religious” purpose, even if motivated by religious reasons- [231]-[232].

Maxwell P distinguished, however, the decision of the High Court in an important recent decision, *Federal Commissioner of Taxation v Word Investments*,⁷⁰ which had held that a body which was itself clearly set up for religious purposes (Bible translation in that case) could still be regarded as “charitable” even though it engaged in secular commercial enterprises to provide funding for those religious purposes. The implication seemed to be, perhaps, that if the Christian Brethren church had *directly* run the camping activities, rather than setting up CYC as a separate organisation, it would have been able to rely on s 75(2).

With respect, his Honour was very much relying on a narrow view of what “religion” requires in saying that CYC was not established for “religious purposes”. At [246] he characterised the “very purpose for which CYC exists” as “the commercial activity of making campsite accommodation available to the public for hire”. Yet that is not what CYC’s founding documents said. Of the 10 substantive objects, set out in para [205], 4 contained an explicit reference to CYC’s religious goals. Maxwell P acknowledged that these existed, but still concluded that the main activity was a secular one, and suggested that only if CYC were offering “avowedly religious” camps could it have been described as having religious purposes- [249].

Maxwell P commented at [180]-[188] on the question as to whether freedom of religion should receive a “broad” or “narrow” interpretation. On the one hand, his Honour suggested (as noted previously) that French J (as he then was) got it wrong in the earlier decision of *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105 by giving a broad reading to a “freedom of speech” defence in the RDA. But on the other hand he said that the exemptions in ss 75-77 should not be “read down” and that neither one of the “co-existing rights” (that is, freedom from discrimination or freedom of religion) should be “privileged over the other”- at [188]. With respect, while there was lip service paid to the equal status of the rights concerned, it is hard to avoid the conclusion that indeed the discrimination right was being given a much broader reading than that of freedom of religion.

Neave JA seemed to impliedly support Maxwell P’s comments on the question of whether CYC was a body established for religious purposes (see [360] where her Honour states in effect that where she makes no other comment on issues, she agrees with the

⁶⁹ (1934) 51 CLR 1.

⁷⁰ (2008) 236 CLR 204.

President.) Redlich JA at [439] point (4) also indicated his agreement by saying that CYC was not a “religious body established for religious purposes” (although it should be noted that the first occurrence of the word “religious” in that phrase is not to be found in s 75(2).)⁷¹ With respect, his Honour later made a number of important points about s 77 (noted below) which imply that he ought perhaps to have been more willing to revisit the question of whether CYC was a body “established for religious purposes”.⁷²

The result of this unanimity on this point in the decision, if followed elsewhere, seems to be that even a body with explicitly faith-driven objects may be found to not be a body “established for religious purposes” if it engages in a wide range of community services which do not explicitly require a faith commitment from the recipients. It may be queried whether this is a good policy outcome. Well known service bodies such as the Salvation Army or St Vincent de Paul offer services to members of the public without inquiring as to their faith stances. Is it really the case that these bodies cannot be said to be established for “religious purposes”? They would presumably argue that Jesus’ teaching in the parable of the Good Samaritan,⁷³ and a range of other teaching in the Bible, makes “care for widows and orphans”,⁷⁴ and other community activities a “religious purpose” for those who are committed to Christ.

If a distinction between these bodies, and groups like the CYC, is sought in the fact that CYC charged commercial rates for their services, this seems to be committing the error that Redlich JA points out later in his discussion of s 77, of assuming that commercial involvement and religious commitment are incompatible. Does the fact that a Salvation Army fundraiser may charge for sausage sandwiches really preclude them from being a body “established for religious purposes”? Nevertheless, this outcome seems arguable when this aspect of the *Cobaw* decision is taken into account.

The next question to be considered was, if CYC had been a religious body, was the refusal of accommodation **justified by its doctrines or the sensitivities of believers?**

Despite finding that CYC was not entitled to rely on s 75 defences, Maxwell P went on to consider whether, if it were, it could have justified the refusal of the booking on doctrinal or other grounds under s 75(2).

Yet again, his Honour operated on a narrow view of “religious activity” which virtually excluded anything except church services and bible studies. Even if CYC had been a religious body, the doctrinal defences, his Honour held, could not apply to “secular” activities. In para [269] CYC’s decision to “voluntarily enter the market for accommodation services” meant that it had to behave in a way that did not allow any consideration of “doctrinal” issues.

⁷¹ And in this respect, if his Honour were applying that incorrect phrase to his analysis (ie the legislation does not require the body to be characterized as a “religious” body) it might be said that his decision on this point proceeded on the basis of a misunderstanding.

⁷² For example, in para [550] his Honour correctly pointed out that, unlike some decisions of the European Court of Human Rights (as to which see the discussion below when s 77 is considered), the defence in s 77 “operate[s] in the commercial sphere” and “permits a person’s faith to influence them in their conduct in both private and secular and public life”. While these comments relate to s 77, the logic of his Honour’s remarks apply to s 75 as well. The emphasis on the commercial aspects of the CYC’s activities was allowed to undercut the fact that all these activities were explicitly grounded in Christian faith.

⁷³ Luke 10:25-37.

⁷⁴ James 1:27 – “Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress and to keep oneself from being polluted by the world.” (NIV)

In case this was in error, however, his Honour considered whether there would have been any clash with doctrine. He accepted the reasoning of Judge Hampel in the Tribunal, who had adopted the submission of a theological expert that “doctrines” of the Christian faith were to be confined to matters dealt with in the historic Creeds, none of which mentioned sexual relationships- see [276]-[277].

His Honour then further went on to consider what result would have followed were he to accept that views about the exclusivity of sexual relationships to marriage, and the nature of marriage as between a man and a woman, were in fact “doctrines”. He noted that these views functioned as moral guidelines for those within the church, and that no doctrine of Scripture required interference with those outside the church who chose to behave otherwise- see [284]. Hence in his Honour’s view a refusal of accommodation cannot have been “required” by Christian doctrine. On this point he held that “conforms to” doctrine must mean that there is “no alternative” but to act in this way- [287]. Indeed, his Honour went on to explain to the CYC what measures they should have taken if they were serious about this doctrine, such as warning guests that sexual activity outside marriage should not take place on the campsite- see [290].

It is submitted that there are a number of serious problems with this whole passage of the judgment. One is that the question of what is a “doctrine” is being resolved by a comparison of expert evidence by a Judge who has no real familiarity with the faith concerned. Can it really be Parliament’s intention that judges of secular courts make a decision as to what is a “core” doctrine or not of a particular faith?⁷⁵

In addition, the view that action in “conformity” with doctrine must be “required” or “compulsory” seems far too narrow. This very view was recently decisively rejected by the European Court of Human Rights (ECtHR) in the case of *Eweida v United Kingdom* [2013] ECHR 37. There the action of British Airways in ordering its staff member not to display a cross was at one stage defended on the basis that wearing a cross was not “required” by Christian doctrine. The ECtHR in considering a claim under the freedom of religion provision in art 9 of the *European Convention on Human Rights* ruled that it was not necessary to show a breach of religious freedom that the action in question be “compulsory”. At [82] the Court commented:

In order to count as a “manifestation” within the meaning of Article 9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a **sufficiently close and direct nexus** between the act and the underlying belief must be determined on the facts of each case. In particular, there is **no requirement on the applicant to establish that he or she acted in fulfilment of a duty** mandated by the religion in question (emphasis added).

In that case the wearing of a cross, while not a “duty”, was clearly a “manifestation” of religious commitment. While the language of s 75(2) is not the same as that of art 9, a similar approach would seem to be desirable. (And it should be noted

⁷⁵ On this point see the comment of Redlich JA when discussing the s 77 defence at [525]: “Neither human rights law nor the terms of the exemption required a secular tribunal to attempt to assess theological propriety (citing *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* (2006) 15 VR 207, 220 [36] (Nettle JA).) The Tribunal was neither equipped nor required to evaluate the applicants’ moral calculus.”

that Maxwell P accepted that international human rights jurisprudence on freedom of religion was, while not binding, certainly a relevant source to which Australian courts should look- see [192]-[198].⁷⁶

The other point that should be noted is that Maxwell P's discussion of Christian doctrine not requiring the "shunning" of non-Christian persons who do not conform to it (which is clearly correct), fails to deal with the question whether an organisation can be seen to be providing support for a particular *viewpoint* which has been announced when a booking is made. This point was picked up by Redlich JA in his discussion of s 77 (see below), and is also applicable to the question whether providing a booking here would have involved the CYC providing encouragement of, and a platform for, teaching which they perceived as contrary to an important part of Christian belief. There is a similar approach taken to the s 75(2)(b) question of an injury to "religious sensibilities". The fact that previously no inquiry had been made of the sexual practices of those attending the camps was taken to mean that simply allowing homosexual persons to attend was not of itself an interference with religious sensibilities. His Honour failed to consider the issues raised by a clear declaration on the part of the person booking that the aim of the camp included an aim of "normalising" homosexual activity, which the CYC considered sinful.

Since Neave JA agreed with Maxwell P that CYC were not a "religious" body, her Honour did not discuss the possible application of s 75 to the corporation. Redlich JA at [439] point (4) very briefly expressed his agreement with Maxwell P that that, for the purposes of s 75, "the beliefs or principles upon which CYC relied were not 'doctrines' of the religion". It seems his Honour was adopting the very narrow view of "doctrines" as purely stemming from the historic Creeds, although his remark is so brief that one cannot be sure. As will be seen, his Honour later took a broader view of "beliefs" under s 77.

It is perhaps worth noticing at this point the odd fact that the whole *Cobaw* decision almost completely ignores the previous decision of the NSW Court of Appeal in *OV & OW* discussed above.⁷⁷ As noted, one of the main issues in that case was whether a belief that marriage between a man and a woman was the ideal way for a child to be raised, could be justified as being a "doctrine" of the Wesley Mission. After an initial Tribunal finding to the contrary, the Court of Appeal directed a new hearing, noting that there was a need to consider "all relevant doctrines" of the body concerned.⁷⁸ On referral to the Tribunal, it held that the word 'doctrine' was broad enough to encompass, not just formal doctrinal pronouncements such as the Nicene Creed, but effectively whatever was commonly taught or advocated by a body, and included moral as well as religious principles.⁷⁹ It may be that the Victorian Court of Appeal considered that the final decision in the proceedings, being one of an administrative tribunal not a superior court, was not binding; but it seems unusual that it was not even noted. Certainly some comments of the NSW Court of Appeal were relevant, and in accordance with the High

⁷⁶ See also Neave JA at [411], noting that the Court "can also take account of international jurisprudence on the right to freedom of religion". A recent example of an Australian court making extensive use of ECHR jurisprudence on religious freedom can also be found in the decision of the Full Court of the Federal Court in *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] FCAFC 26 (19 March 2014).

⁷⁷ The one and only reference to the litigation in the *Cobaw* appeal is to be found in a very brief footnote, n 141, to the judgment of Maxwell P, on the fairly technical issue of what "established" means.

⁷⁸ See the CA decision, per Allsop P at [9].

⁷⁹ *OW & OV v Wesley Mission*, 2010 [ADT], [32]-[33].

Court's directions to intermediate appellate courts in Australia,⁸⁰ should have been taken into account unless regarded as "plainly" wrong.⁸¹

Application of balancing clauses to "religious groups", then, will partly depend on which organisations are allowed to count as "religious", and also on which of their religious beliefs are allowed to count as "doctrines". Even if, as the court here says, refusal to support a message about the "normality" of homosexuality is itself directly discriminatory, the proper application of the balancing clause here should have allowed CYC to use their objection to that message as a reason not to provide the relevant service.

(b) Clauses applying to individual believers

Another type of "balancing clause" that might be used is one that applies, not just to religious groups, but to individual believers. Here there might be specific clauses applying to believers embedded into discrimination laws, or there might be a general provision providing religious freedom protection, which will also apply to discrimination laws.

In an already lengthy paper I do not propose to deal in any detail with "general" religious freedom protection laws, but to flag that in some of the cases so far discussed, they were raised as possibly applicable.

One example from the US is the "Kentucky T-shirt" case, *Hands-On Originals*.⁸² It will be recalled that this was one of those fairly rare cases where the court was prepared to draw a distinction between producing a message of active support for "Gay Pride", on the one hand, and discriminating on the basis of sexual orientation, on the other. Here the judge had ruled that there had been no *prima facie* discrimination by refusing to print a T-shirt with the relevant message.

In addition, however, the court went on to consider whether the Commission's finding at first instance of discrimination, was a breach of religious freedom rights.

One option in the United States is to consider whether there has been a breach of the First Amendment "free exercise" clause in the US Constitution. Claims under the First Amendment relating to the operation of general anti-discrimination laws, however, are often met by the very narrow interpretation of the clause in the US Supreme Court decision of *Employment Division v Smith* 494 US 872 (1990), holding that there would be no protection for freedom of religion when Congress had enacted a "neutral law" (i.e. one not specifically targeted at religion) of general application.

Here, however, the judge did not need to find his way through the barrier of the *Smith* decision, because Kentucky statute KRS 446.350 was a State-based version of the Religious Freedom Restoration Act ("RFRA"; legislation of a similar nature having been introduced by the Federal Congress in 1993 and later adopted by a number of US States). This provision required a Government showing that a substantial burden on

⁸⁰ See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 81 ALJR 1107 at [135]- while the comment relates directly to "uniform national legislation", it would seem to apply here where legislation in most States, while not completely uniform, usually includes some defence relating to "doctrine".

⁸¹ See the comments on this point in my discussion of the High Court's refusal of special leave to appeal in the *CYC v Cobaw* litigation, Foster (2014) "High Court of Australia declines leave to appeal *CYC v Cobaw*" at: http://works.bepress.com/neil_foster/89 .

⁸² Above, n 42.

religious freedom could be shown to be in furtherance of a “compelling governmental interest” and was the “least restrictive means” to further that interest.

Here there was a clear burden in requiring a Christian printing firm to support a message they saw as contrary to the Bible. (In light of the Supreme Court decision in *Burwell v Hobby Lobby Stores Inc* 573 US ___ (2014), the RFRA provision in referring to “person” should be read as including corporate persons like the company HOO- see p 14). The Government could not demonstrate why it was necessary to do this to further any interest it had- as the judge noted, the complainant organisation had no problems in getting their printing done by another company. (Indeed, HOO in its dealings with the GLSO had offered to find another company who would do the job at the same price that they would have charged, if the organisation had had any problems in doing so.)

So there are some circumstances where a “general” religious freedom protection law like the RFRA might provide a balancing provision to a discrimination law. But there are also occasionally explicit exemptions written into such laws.

More often, however, there is little protection provided for individuals. In the *Bull v Hall* proceedings, noted previously, this became apparent; the Bulls as Christian believers who were not representing a “Christian organisation” had no specific protections they could rely on (although they were able to argue the question as to whether the law of the UK was consistent with the general religious freedom protection provided by art 9 of the ECHR.)

But in Australia, where there is no such general religious freedom protection, believers have sometimes found themselves without even an arguable remedy.⁸³ In NSW, an early decision under the *Anti Discrimination Act 1977* in *Burke v Tralaggan*⁸⁴ held that a Christian couple who refused to allow an unmarried couple to rent a flat they owned, on moral grounds, had unlawfully discriminated on the ground of “marital status” under s 48 of the Act.⁸⁵

There is something of an irony in the fact that the only major provision in anti-discrimination legislation in Australia designed to provide protection for religious freedom for general citizens (as opposed to religious organisations or “professionals”) is contained in the law of Victoria.⁸⁶ The irony lies in the way that the scope of this provision has been so narrowly interpreted in the recent decision of the Victorian Court of Appeal in *CYC v Cobaw*⁸⁷ we have noted already on other issues.

The current provision is s 84 of the *Equal Opportunity Act 2010* (Vic):

⁸³ For a general review of religious liberty protection in Australia, see Neil J. Foster, "Religious Freedom in Australia" (2015 Asia Pacific JRCLS Conference, University of Notre Dame Broadway Campus, Sydney, Australia; May 2015) at: http://works.bepress.com/neil_foster/94 .

⁸⁴ [1986] EOC 92-161.

⁸⁵ For comment on the decision at the time, see G Moens, “The Action-Belief Dichotomy and Freedom of Religion” (1989) 12 *Sydney Law Review* 195-217.

⁸⁶ There is a provision in s 52(d) of the *Anti-Discrimination Act 1998* (Tas) which allows a “person” to discriminate “on the ground of religious belief or affiliation or religious activity” insofar as it is in relation to an “act that –

(i) is carried out in accordance with the doctrine of a particular religion; and

(ii) is necessary to avoid offending the religious sensitivities of any person of that religion.” This provision, then, only applies as an exemption to discrimination on the basis of religion, not generally, and so is substantially narrower than the Victorian provision discussed in the text. So far as I am aware there are no reported decisions dealing with the Tasmanian provision.

⁸⁷ Above, n 31.

Religious beliefs or principles

84. Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion.

The former Victorian Act contained a similar provision, s 77 of the *Equal Opportunity Act 1995* (Vic):

77. Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.

It was this provision was subject to a very narrow reading in *CYC v Cobaw*. I have discussed this decision in some detail in a previous note.⁸⁸ But let me briefly summarise the ways in which the Court of Appeal here provided a very narrow reading of the apparently generous provisions of former s 77 of the 1995 Act, which will also impact on future readings of s 84 of the 2010 Act. I will also note the dissenting view of Redlich JA, which may provide guidance in the future should the majority view not remain authoritative. (His Honour's views may also provide guidance in other jurisdictions, where appellate courts at least will need to decide whether or not the *CYC v Cobaw* decision is "clearly wrong" or not, if it is applicable to similar provisions elsewhere.)

On the question of the **necessity** of the relevant action for compliance with beliefs, Maxwell P ruled that Mr Rowe, the CYC representative who made the decision to decline the booking, could not rely on s 77, as it was not "necessary" for him to apply sexual standards of morality from his religious beliefs, to other persons. The rule that sex should only be between a heterosexual married couple was a rule of "private morality" and even on its own terms did not have to be applied to others- see [330]. This of course ignored the fact that Mr Rowe was being asked to support a message of the "normality" of homosexual activity with which he fundamentally disagreed.

As Redlich JA in dissent noted:

[567] ... What enlivened the applicants' obligation to refuse Cobaw the use of the facility was the disclosure of a particular proposed use of the facility for the purpose of discussing and encouraging views repugnant to the religious beliefs of the Christian Brethren. The purpose included raising community awareness as to those views. It was the facilitation of purposes antithetical to their beliefs which compelled them to refuse the facility for that purpose. To the applicants, acceptance of the booking would have made them morally complicit in the message that was to be conveyed at the forum and within the community.

Neave JA discussed the meaning of the phrase "necessary... to comply" and concluded that, while there was a subjective, honesty, element in the criterion, it also required some objective consideration. She summed up the requirement as "what a reasonable person would consider necessary ... to comply with his genuine religious

⁸⁸ See Foster (2014) "Christian Youth Camp liable for declining booking from homosexual support group" at: http://works.bepress.com/neil_foster/78 .

belief”, at [425]. This seems to be correct, so long as “reasonable” means “a reasonable person who belongs to the particular religion”.

Redlich JA seems to have adopted a similar criterion:

[520]...the word ‘necessary’, in its application under s 77 to religiously motivated action, must mean action which a person of faith undertakes in order to maintain consistency with the canons of conduct associated with their religious beliefs and principles.

Does the new wording of s 84, “reasonably necessary... to comply”, imply that the previous wording of s 77 was a purely subjective criterion? No, Neave JA concluded at [427]. The implication is that the change in s 84 was simply clarifying something that was already present in s 77. On this question Redlich JA seems to have taken a slightly different view. At [531]-[532] his Honour suggested that the contrast with the later provision supported a more “subjective” interpretation of the earlier one. On the other hand, he went on to comment that even if the provision required a showing of “reasonable necessity”:

[533] This test of necessity still falls short of the more demanding, and narrower, view of the Tribunal.

In other words, the narrow approach of the Tribunal would still be inappropriate under the reformulated s 84.⁸⁹

Another aspect of the question of “necessary to comply” was an issue concerning the content of the religious beliefs. How was this to be determined? And was it sufficient if an action was “motivated” by belief, or did it have to be “required”?

Maxwell P again took a narrow view of these questions. He accepted the reasoning of Judge Hampel in the Tribunal, who had adopted the submission of a theological expert that “doctrines” of the Christian faith were to be confined to matters dealt with in the historic Creeds, none of which mentioned sexual relationships- see [276]-[277].

His Honour then further went on to consider what result would have followed were he to accept that views about the exclusivity of sexual relationships to marriage, and the nature of marriage as between a man and a woman, were in fact “doctrines”. He noted that these views functioned as moral guidelines for those within the church, and that no doctrine of Scripture required interference with those outside the church who chose to behave otherwise- see [284]. Hence in his Honour’s view a refusal of accommodation cannot have been “required” by Christian doctrine. On this point he held that “conforms to” doctrine must mean that there is “no alternative” but to act in this way- [287]. In relation to Mr Rowe his Honour commented at [331]: “The very notion of compliance suggests that there is a rule, or a prohibition, which the religious believer must obey.”

⁸⁹ There was some discussion of the differences between the 1995 and the 2010 legislation in the application for special leave to appeal to the High Court: see *Christian Youth Camps Limited v Cobaw Community Health Services Limited and Ors* [2014] HCATrans 289 (12 December 2014). Counsel for CYC noted that the provisions were very similar, but in the end the High Court refused leave, and one ground seemed to be the fact that it was a question of the interpretation of the old Act. For a review of the Special Leave application see Neil J Foster, (2014) “High Court of Australia declines leave to appeal CYC v Cobaw”, at: http://works.bepress.com/neil_foster/89.

Neave J at [435] also distinguished between some behaviour being “motivated by ... religious beliefs” and being “necessary”.

Redlich JA, in contrast to the majority, ruled that it was not necessary or appropriate for the court to make a decision about the “centrality” or “fundamental” nature of religious beliefs.⁹⁰ Nor was it necessary to show that the beliefs “compelled” the believer to do the act in question.⁹¹ With respect, this approach seems preferable to that of the majority, in that it preserves the autonomy of believers to live in accordance with their religious convictions as they see, consistent with appropriate limits.

In what **spheres of life** is religion allowed to matter?

In the analysis offered by Neave JA at [429] what was at stake was said to be “protecting the right of individuals to hold religious beliefs and express them in worship *and other related activities* and protecting the rights of other members of a pluralist society to be free from discrimination”. The emphasis is there to highlight words of some concern. There is an unfortunate tendency in some commentary on religious freedom to see it as merely dealing with what goes on in church meetings. This description of religious freedom as relating to “worship and other related activities”, where “worship” is no doubt intended to mean “church meetings”, gives a very narrow scope to religious freedom.

That this is indeed what her Honour intended can be seen in the next paragraph, where she purports to rely on European jurisprudence to say:

[430]...Where the act claimed to be discriminatory arises out of a commercial activity, it is less likely to be regarded as an interference with the right to hold or manifest a religious belief than where the act prevents a person from manifesting their beliefs *in the context of worship or other religious ceremony*. That is because a person engaged in commercial activities can continue to manifest their beliefs in the *religious sphere*. (emphasis added)

As explained in my previous note on the case,⁹² there were some European and UK decisions which came very close to holding the very harsh view that the right to freedom of religion in the employment context, for example, could be perfectly well protected by the fact that an employee whose religious freedom was impaired could leave and find another job. But those views have now substantially been rejected by the decision of the European Court of Human Rights in *Eweida v The United Kingdom* [2013] ECHR 37 at [83] where the court accepted that a person who was sacked for their religious beliefs had indeed experienced a restriction on their religious freedom.

The narrow view, then, that somehow religious freedom protection does not apply in the commercial sphere, or only in a very attenuated way, does not receive support from current European jurisprudence. More importantly, it received no support from the wording of s 77. There were no words excepting “commercial activity” from the requirement to protect an action seen as necessary to comply with religious beliefs.

In effect, as Redlich JA noted in his dissenting judgement on this point in *CYC v Cobaw*, Neave JA was endeavouring to conduct the “balancing” process involved herself.

⁹⁰ See [525]: “Neither human rights law nor the terms of the exemption required a secular tribunal to attempt to assess theological propriety.”

⁹¹ See [520]. It would be sufficient that it be an action that the person “undertakes in order to maintain consistency with the canons of conduct associated with their religious beliefs and principles”.

⁹² Above, n 88.

But in fact that balancing process had **already** been conducted by Parliament, which had placed s 77 in its then-applicable form, into the legislation. As Honour noted:

[474] The exemptions in ss 75, 76 and 77 of the Act protect aspects of what may be described as the ‘right to religious freedom.’ Where the legislature, in carving out an exemption from what would otherwise be discriminatory conduct, has struck a balance between two competing human rights, the task for the Court is not then one of determining how the balance should be struck. The Court must faithfully construe and apply the provisions without preconception or predisposition as to their scope so as to give effect to the legislative intent.

And later:

[515] When, as is so obviously the case with s 77, Parliament adopts a compromise in which it balances the principle objectives of the Act with competing objectives, a court will be left with the text as the only safe guide to the more specific purpose.⁹³ Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.⁹⁴

Redlich JA, contrary to the other members of the Court of Appeal, concluded that Mr Rowe *could* make out a defence under s 77. He said that the Tribunal had given an unjustifiably narrow reading of religious freedom, wrongly subordinating the provisions in ss 75 and 77 to “non-discrimination” rights. Instead, Parliament’s language had to be read as it stood. There was to be no presumption that religious freedom only applied in a “non-commercial” sphere. Indeed, the other provisions of the 1995 Act showed clearly that the non-discrimination obligations were intended to apply in the workplace and the marketplace. Hence the limits on those obligations drawn by ss 75 and 77 were clearly also operational in those areas.

His Honour concluded a very illuminating discussion on these issues as follows:

[572] Section 77 excuses an act of discrimination in the marketplace when it is known that to perform the act will facilitate a purpose that is fundamentally inconsistent with the person’s belief or principles. The application of the exemption does not depend upon CYC having advertised that it was a religious organisation or provided some means of forewarning that particular uses of their facility would be refused. The absence of such steps could not give rise to the inference that their religious principle or belief did not necessitate the refusal of the request. As adherents to the faith of the Christian Brethren the applicants’ beliefs dictated their response upon being informed of the intended use of their facility. Once the applicants were invested with knowledge of the purposes of the WayOut forum and the matters which, as Ms Hackney acknowledged, would inevitably be discussed, the applicants were bound by their principles and beliefs to refuse the use of their facility for that purpose.

It is greatly to be regretted that the majority did not approve these comments. An application for special leave to appeal the decision to the High Court of Australia was refused.⁹⁵

⁹³ *Kelly v The Queen* (2004) 218 CLR 216, 235 [48] (Gleeson CJ, Hayne and Heydon JJ).

⁹⁴ *Nicholls v The Queen* (2005) 219 CLR 196, 207 [8] (Gleeson CJ).

⁹⁵ See above, n 89.

Conclusion

The focus of this paper has been upon protection of religious freedom as seen in the policy choices made by legislatures, and the interpretative choices made by courts, in the realm of legislation prohibiting unlawful discrimination.

One of the themes has been the growing number of cases where “sexual orientation” non-discrimination rights have clashed with religious freedom rights. On this particular theme other cases, which do not directly originate within discrimination law, could have been mentioned. These include two out of the quartet of cases that were considered in *Eweida and others v The United Kingdom* [2013] ECHR 37, which have been discussed in previous literature.⁹⁶ In each of these cases a believer had been dismissed for reasons connected with their religious beliefs and the impact of those beliefs on their work. In *Ladele* a Christian marriage registrar had been dismissed after declining to register same sex civil partnerships; in *Macfarlane* a Christian sex counsellor dismissed after doubts were raised about his willingness to counsel same sex partners. In both of these cases, while the European Court of Human Rights (ECtHR) correctly accepted that there had been a *prima facie* burden on the workers’ rights of religious freedom under art 9 of the ECHR, the court held that this burden was effectively justified by the interests of the State in promoting “non-discriminatory” workplace practices.

While the decision in *Macfarlane* could perhaps be justified on the basis that the nature of the counselling involved was made clear to Mr Macfarlane before he commenced employment, the decision in the case of *Ladele* seems much harder to justify. In dissent in the ECtHR, Judges Vučinić and De Gaetano took the view that the local authority had not even made out the preliminary point that it was pursuing a legitimate policy of “non-discrimination” in insisting that Ms Ladele register civil partnerships. As they note, no member of the public had been denied a service offered by the Council because of Ms Ladele’s actions (*Eweida and ors v UK*, 2013 at [6] in their judgment). The question of “proportionality” had not been properly addressed, and it had not been demonstrated that there was any rational connection between the authority’s policy of non-discrimination and the decision made to dismiss Ms Ladele (*Eweida and ors v UK*, 2013 at [6]).

Ms Ladele had a genuine objection to being involved in a newly expanded area of her responsibilities (it was not, for example, as if she approached an organization for a job that involved tasks to be performed that she knew beforehand would violate her conscience). Her objection could easily have been accommodated within the work practices of the authority, and indeed, there is some evidence that other councils had done so by not appointing registrars with a religiously-based objection to the position. By doing this, the authority would not have been making any particular public statement; no persons seeking a civil partnership registration would have been, or in fact were, inconvenienced in any way. The objection to this course of action came from two fellow staff members who took offence at Ms Ladele’s actions. In the end, the offended feelings

⁹⁶ For discussion of the issues after the domestic, UK, decisions in the *Ladele* and *MacFarlane* cases, see Patrick Parkinson, “Accommodating Religious Beliefs in a Secular Age: The Issue of Conscientious Objection in the Workplace” (2011) 34/1 *University of New South Wales Law Journal* 281-299. For comment on the ECtHR decision see, for example, I Leigh & A Hambler, “Religious symbols, conscience, and the rights of others” (2014) 3 *Oxford Journal of Law and Religion* 2-24; E Lim “Religious exemptions in England” (2014) 3 *Oxford Journal of Law and Religion* 440-461.

of these staff members were given priority over Ms Ladele's ability to continue to be an employee without violating her conscience.

Another, more recent case which might have involved a clash between sexual orientation rights and religious freedom was *Mbuyi v Newpark Childcare (Shepherds Bush) Ltd*,⁹⁷ where a Christian childcare worker was dismissed because answers she had given to a co-worker who enquired about her views on homosexuality upset the co-worker. In that case the Tribunal accepted Ms Mbuyi's claim to have been the victim of discrimination on the basis of her religious beliefs (both directly and indirectly.)

Still, this paper has been concerned with the protection of religious freedom where a claim of discrimination on *other* grounds has been made. The preceding analysis has illustrated a number of important issues that need to be addressed for there to be proper and balanced protection of religious freedom in the administration of discrimination law.

First, there needs to be a nuanced view of what amounts to *prima facie* direct discrimination where reasons adopted for a decision are based on religious commitments. The courts seem to have been too ready to assume that a decision based on religious reasons has been targeted at a person *qua* member of a protected class, when other interpretations are possible.

In particular it seems almost incredible that in the recent *Ashers* decision, as noted above, a baker could be found to have discriminated on the basis of the sexual orientation of a person by simply declining to produce a message of verbal support for a message favoured by that person. This is especially the case when clear evidence can be found that the class of persons who supported this message, was by no means identical to the class of same sex attracted persons. In this context the "Kentucky T-shirt case", *Hands-On Originals*, seems to have a much better approach.

In the "wedding industry" cases, it is submitted that there is a clear and valid distinction to be made between service of same sex attracted persons as general customers, and a request for the devotion of artistic skills to the celebration of an event which is seen as fundamentally contrary to mainstream religious teachings. In the *Arlene's* case, for example, one of the customers had been served for years by the provision of flowers, and it was only when celebration of a proposed marriage was at stake that the small business owner politely declined. Again, it is clearly not the case that "support for same sex marriage" is identical with the class of "same sex attracted persons"- many heterosexual persons support the institution, a sizable number of homosexual persons see no need for such.

Of course there are other cases where it does seem difficult to separate the ground of decision from being inextricably linked with same sex sexual orientation. Despite the other problems identified here with the decision, it seems reasonable to say that in *CYC v Cobaw* the decision not to accept a booking for a camp which supported same sex sexual activity, was based on a criterion which is in the end a clear characteristic of same sex attracted persons. (In other contexts there may be more to be said in favour of a legitimate distinction between "sexual orientation" and "sexual behaviour", but in this case direct discrimination seemed to be made out.) In *OV & OW* it seems correct to say

⁹⁷ Case No 3300656/2014; ET, 21 May 2015; "might have" because no formal claim for discrimination or harassment on the basis of sexual orientation was made by the co-worker, although the dismissal, as in the *Ladele* case, was justified on "anti-discrimination" grounds generally.

that a decision to deny fostering services to a same sex attracted couple was directly discriminatory.

Secondly, where the issue is one of *prima facie* “indirect discrimination” (or “disparate impact”), the courts need to be much more willing to consider as “reasonable” a commitment to a religious world-view as an explanation and justification for allegedly discriminatory behavior.

It is submitted here that in order to properly balance the right to freedom of religion with the rights and interests of others it is necessary to adopt the careful approach taken by the majority of the UKSC in *R v JFS*.⁹⁸ This approach requires an assessment as to whether the policy or decision that conflicts with a right to religious freedom is based on a legitimate aim. If the policy or decision is found to be based on a legitimate aim it is then necessary to consider whether the implementation of that policy or decision is proportionate to the harm that would be caused to the person claiming that their right to externally manifest their religion should be protected. It also involves an assessment and consideration of the harm that would be caused to others if the right to religious freedom was protected over and above the relevant rights and interests of others.

Thirdly, in crafting a mix of legislative provisions dealing with discrimination, Parliaments need to be careful to include adequate “balancing” or “delimiting” provisions which make it clear where religious beliefs may be taken into account, and spell out clearly when decisions made on religious grounds will not be discriminatory. Courts should also accept the decisions made by Parliaments in these areas, and not give unduly narrow readings to such provisions. Where “religious bodies” are given the benefit of such provisions, the term should be read broadly not simply to cover bodies directly devoted to the activities of public worship and evangelism, but also to recognize the large range of social services bodies which are established for religious reasons by churches, and serve the community from a religious motivation. Incidental involvement in commercial activities, where profits are directed back to religious or not-for-profit ends, should not disqualify an organization from receiving such protection.

These balancing clauses should also provide genuine protection for the religious freedom of ordinary, non-“organizational”, believers. This is particularly important in jurisdictions, like Australia, where there is no generalized religious freedom protection under human rights instruments. Legislatures need to take religious freedom obligations seriously.

As evidenced by its inclusion as a right in all major international human rights instruments, the right to religious freedom is an important and fundamental human right. Domestic legislatures have recognised that the right to religious freedom should be protected and have enacted provisions that seek to protect this freedom and balance this freedom with the rights and interests with others.

As noted, some recent cases demonstrate a failure to appreciate that the right to religious freedom is just as legitimate as other human rights; a failure to conduct a careful balancing exercise when rights to religious freedom conflict with the rights and interests of others; and the adoption of an overly restrictive approach to legislative provisions seeking to protect rights to religious freedom.

⁹⁸ Above n 19.

The decision of the ECtHR in *Eweida*⁹⁹ was welcome in its recognition that freedom of religion is an important human right that must be given due weight, and in stressing the need for decisions that impact on freedom of religion to be carefully assessed to see whether they are a proportionate response to the genuine and legitimate concerns of the party imposing limitations. It is to be hoped that as superior courts in Australia and England continue to develop the law in these areas, they follow this example of giving appropriate recognition to religious freedom.

⁹⁹ Above, n 58.