

# FREEDOM BEYOND THE COMMONS: MANAGING THE TENSION BETWEEN FAITH AND EQUALITY IN A MULTICULTURAL SOCIETY

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*As religious traditions and equality norms increasingly collide, commentators in Australia have questioned the existence and scope of exceptions to anti-discrimination law for religious bodies. The authors argue that this presents a shifting understanding of anti-discrimination law's purpose. Rather than focusing on access or distribution, anti-discrimination law is said to centre on self-identity. When justified by this and related values, anti-discrimination law tends towards a universal application — all groups must cohere to its norms. In defending religion-based exceptions, the authors argue that this universalising fails to recognise central principles of religious liberty (principally the authority of the group) and the multicultural reality of Australia. The authors argue that more attention should be given to a social pluralist account of public life and the idea of a federation of cultures. Non-discrimination norms ought to operate in the 'commons' in which members of the community come together in a shared existence, and where access and participation rights need to be protected. Beyond the commons, however, different groups should be able to maintain their identity and different beliefs on issues such as sexual practice through, where relevant, their staffing, membership or service provision policies.*

## I INTRODUCTION

In recent years, there has been growing tension in Australia and elsewhere between churches, other faith groups, and equality advocates concerning the reach of anti-discrimination laws. This reflects a broader tension that has arisen between religion and the human rights movement,<sup>1</sup> despite a long history of involvement by people of faith in leadership on human rights issues.<sup>2</sup> There are

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1 See, eg, Julian Rivers, 'Law, Religion and Gender Equality' (2007) 9 *Ecclesiastical Law Journal* 24; Christopher McCrudden, 'Legal and Roman Catholic Conceptions of Human Rights: Convergence, Divergence and Dialogue?' (2012) 1 *Oxford Journal of Law and Religion* 185.

2 Jean-Paul Marthoz and Joseph Saunders, 'Religion and the Human Rights Movement' (Report, Human Rights Watch, 2005) 4–8. See also Clemens N Nathan, *The Changing Face of Religion and Human Rights: A Personal Reflection* (Martinus Nijhoff, 2009).

particular tensions between religious liberty and the accepted norms that prohibit discrimination on the grounds of gender and sexual orientation.<sup>3</sup>

In this article, we examine how the tension between religious liberty and equality can be better resolved. We argue that the rise in this tension between equality norms and religious freedom in Australia has much to do with a transformed understanding of the purposes of anti-discrimination law. We contend that there has been a shift away from focusing on questions of access and participation towards a particular notion of dignity or identity. On this view, equality law should be increasingly universalised, that is applied to all groups, in order to protect individuals against ‘status harms’. We argue that this shift underlies arguments, seen recently in Australia, to limit or remove religious exceptions to the reach of anti-discrimination law.

Anti-discrimination law’s scope involves very significant issues of public policy and principle. Australia is a multicultural society, and on some issues, particularly concerning sex and marriage, people have deeply held beliefs and values that conflict with the values promoted by some equality law advocates. As a result, the problem for social policy is seeking to ensure that different values and beliefs around personal morality and religious faith are respected, while maintaining the most important aspect of the principle of non-discrimination — that in our shared communal life as a society, differences in race, gender, sexual orientation, and other personal attributes are not grounds for exclusion. How best to achieve this balance goes to the heart of debates about the proper role of the state in relation to other forms of social organisation within a society, and the support that the state should provide to mediating institutions between the individual and the state.

In this article, we argue that this push against the religious exceptions or exemptions to anti-discrimination law risks a failure to balance different human rights and to make room for different moral values and views on sex and family life in a multicultural society.<sup>4</sup> We argue further that respect for human rights requires a respect for freedom of religion and association which allows voluntary groups, at least to a significant extent, to be governed by their own shared values and beliefs. It is in recognition of where the commons are, in the life of a community, and what lies outside of the commons, that the balance between religious freedom and equality is to be found.

Part II sets out the problem — that Australia is an increasingly diverse multicultural society in which many people hold religious beliefs that conflict with non-discrimination norms. It also explores the opportunity for debate and change on such matters within those religions. Part III explains the shifting rationale for anti-discrimination law, and why that has led to increased tensions. Part IV then looks at recent arguments raised in the Australian context for curtailing or

3 Rivers, ‘Law, Religion and Gender Equality’, above n 1.

4 In this article, we use the term ‘exceptions’ generically to include (and often advocate for) what are generally regarded as ‘exemptions’. Rex Ahdar and Ian Leigh have argued that whereas an exception is characterised by a proportionality test, an exemption specifies the scope of liberty in advance: Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press, 2005) 132, 309–11.

eliminating religious exceptions. Part V points to an alternative view. We contend that more focus should be given to institutional design: how the state relates to groups and individuals, how the group relates to the individual, and how plural sources of authority are to be negotiated. And we offer two lines of argument in this direction: the ability of groups to form an ethos, purpose, or identity in Australia's multicultural society, and a social pluralist claim — that different groups can foster social goods in their own way. Part VI, consistent with this focus on institutions, argues that more attention should be given to the spaces or contexts in which anti-discrimination law should, as a matter of community norms, apply. This is called the 'commons'. Part VII concludes by looking at the particular issue of receipt of public funds.

## II MULTICULTURALISM AND RELIGIOUS DIVERSITY IN AUSTRALIA

### A Religion, Ethnicity and Immigration

Australia is a nation consisting almost entirely of migrants. Apart from Australia's Indigenous population, all Australians either immigrated to this land or are descendants of those who have done so within the last 230 years. The proportion of the population who were born overseas increased from 10 per cent in 1947<sup>5</sup> to 27 per cent in 2011.<sup>6</sup> A further 26 per cent of persons born in Australia had at least one overseas-born parent, according to the 2006 Census.<sup>7</sup> Currently, the Australian population has a net gain of one international migrant every two minutes and five seconds.<sup>8</sup> Thus, a substantial proportion of all Australian residents are either first or second generation Australians.

The different waves of migration over the last two centuries have brought a diverse range of cultures and religious beliefs to Australia's shores. Before the middle of the twentieth century, most immigrants were Catholics or Anglicans. Some belonged to smaller Christian traditions.<sup>9</sup>

5 Australian Bureau of Statistics, *1301.0 — Year Book Australia, 2009–10: Country of Birth* (21 January 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/0/92C0101965E7DC14CA25773700169C63?opendocument>>.

6 Australian Bureau of Statistics, *3412.0 — Migration, Australia, 2010–11* (17 December 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Products/84074889D69E738CCA257A5A00120A69?opendocument>>.

7 Australian Bureau of Statistics, *Year Book Australia*, above n 5.

8 Australian Bureau of Statistics, *Population Clock* (19 December 2014) <<http://www.abs.gov.au/ausstats/abs@.nsf/0/1647509ef7e25faaca2568a900154b63?OpenDocument>>.

9 Stuart McIntyre, *A Concise History of Australia* (Cambridge University Press, 3<sup>rd</sup> ed, 2009).

Migration has increased very rapidly since the end of World War II,<sup>10</sup> and that has greatly increased diversity of ethnic origin and religious belief.<sup>11</sup> Australia has a significant number of people whose parents or grandparents came to Australia from Italy and Greece. The Italian community added to the strength of Catholicism within Australia,<sup>12</sup> while the growing Greek community ensured a strong Orthodox presence.<sup>13</sup> There are sizeable communities from Lebanon, both Maronite Catholics and Muslims.<sup>14</sup> Many came as refugees after the conflicts of the 1970s. More recently, the Muslim community has expanded through immigration from other conflict-ridden countries — in particular Afghanistan and Pakistan.<sup>15</sup> Immigration from China, India and other Asian countries has also gathered pace in recent years, further diversifying the cultural and religious mix of the Australian population.<sup>16</sup> While adherents to non-Christian religions remain a relatively small minority of the population as a whole, that proportion is growing steadily both through immigration and differential patterns of fecundity.<sup>17</sup> Between the 2001 and 2011 censuses, the proportion rose from 4.9 per cent to 7.2 per cent.<sup>18</sup> There has also been a significant increase in people indicating no religion.<sup>19</sup>

While there may be those who would still view Australia as essentially a country of people descended from former residents of the United Kingdom and Ireland, with the addition of some other migrants, it would be inaccurate nowadays to suggest that there is one dominant culture to which minority groups ought to conform as a consequence of choosing to come to Australia. It is better to understand Australia as a federation of cultures in which there are different values and beliefs, all of which deserve to be respected and, wherever possible, accommodated. The term ‘federation’ — pointing to an integral whole — imports an understanding that there is a common life which rests upon some values that are either shared, or

10 See Manning Clark, *A Short History of Australia* (Penguin, 4<sup>th</sup> revised ed, 2006) ch 12. At the outbreak of World War II, publicists boasted that 98 per cent of the population was either born in the United Kingdom or descended from families in the United Kingdom: at 305.

11 See generally Australian Bureau of Statistics, *3416.0 — Perspectives on Migrants, 2007* (19 August 2008) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3416.0Main+Features12007>>.

12 See Migration Heritage Centre, *Journey to a New Life: Italian Migration in NSW* (2011) <<http://www.migrationheritage.nsw.gov.au/exhibition/journey/church/>>.

13 See New South Wales Government, Department of Education and Communities, *Racism. No Way — Australian Communities: Greek Australians* (2013) <<http://www.racismnoway.com.au/teaching-resources/factsheets/56.html>>.

14 See Australian Bureau of Statistics, *Perspectives on Migrants*, above n 11.

15 See Australian Bureau of Statistics, *3412.0 — Migration, Australia, 2011–12 and 2012–13* (30 January 2015) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3412.02011-12%20and%202012-13?OpenDocument>>; Australian Bureau of Statistics, *1301.0 — Year Book Australia, 2012* (21 January 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0-2012-Main%20Features-Article%20-%20Humanitarian%20arrivals-59>>.

16 Ibid.

17 Eric Kaufmann, *Shall the Religious Inherit the Earth? Demography and Politics in the Twenty-First Century* (Profile Books, 2010) ch 2.

18 Australian Bureau of Statistics, *2071.0 — Reflecting a Nation: Stories from the 2011 Census, 2012–2013* (16 April 2013) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013>>.

19 Ibid.

which those who do not share these values need to accept.<sup>20</sup> Multiculturalism requires both majority and minority groups to adapt to one another.<sup>21</sup>

## **B Gender, Marital Status and Sexual Practice**

It is only in some areas that faith conflicts with anti-discrimination laws. Most faith groups accept many principles of equality — for example, equal pay and ensuring access to government services. However, three areas to which this acceptance may not extend are in relation to male leadership, marital status, and sexual practice.

The Roman Catholic Church, Eastern Rite Catholic churches, Orthodox communities, and some Protestant churches, or groups of churches within Protestant denominations,<sup>22</sup> are committed doctrinally to the idea that priests, ministers or pastors (as the case may be) must be male. Most of the non-Christian faiths similarly have traditions of male leadership. Marital status is also an issue for the Roman Catholic Church, given its continuing commitment to priestly celibacy.

Another significant issue is sexual practice. The Abrahamic religions have all historically disapproved of sex outside of marriage, and issues concerning heterosexual relationships may bring faith groups into conflict with anti-discrimination laws. For example, one of the twenty different grounds upon which someone can now sue for discrimination in Tasmania is ‘lawful sexual activity’.<sup>23</sup> Could a church be taken to court for discrimination if it were to discipline a youth worker for engaging in frequent casual sexual relationships?<sup>24</sup> Such activity is lawful, but faith groups that emphasise the importance of marriage and monogamy would say that such casual sexual relations are not how God intended people to enjoy sex, or to form satisfying and lasting intimate relationships.<sup>25</sup> On this basis, if a paid youth worker in a church is engaging regularly in casual sex or living with someone in an intimate relationship outside of marriage, and that becomes known to the church leadership, the leaders may well conclude that

20 See, eg, Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Jane Marie Todd trans, Harvard University Press, 2011) 11–12 [trans of: *Laïcité et liberté de Conscience* (first published 2010)], pointing to the need to accept ‘constitutive values’.

21 Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Clarendon Press, 1995). See also Jürgen Habermas, ‘Religious Tolerance — The Pacemaker for Cultural Rights’ (2004) 79 *Philosophy* 5, 17–18.

22 For example, the Anglican Church of Australia allows a diversity of views on female ministers, with some dioceses maintaining a largely traditional view concerning male leadership.

23 *Anti-Discrimination Act 1998* (Tas) s 16(d).

24 On the ‘hook-up culture’ in university settings, see Kathleen A Bogle, *Hooking Up: Sex, Dating, and Relationships on Campus* (New York University Press, 2008); Donna Freitas, *The End of Sex: How Hookup Culture Is Leaving a Generation Unhappy, Sexually Unfulfilled, and Confused About Intimacy* (Basic Books, 2013).

25 ‘Relationship status’, which includes de facto and co-habiting couples, can raise similar tensions: see *Anti-Discrimination Act* (Tas) s 16(fa); Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 17(h). For a history of thinking about marriage in the western legal tradition, influenced by different Christian traditions, see John Witte Jr, *From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition* (Westminster John Knox Press, 2<sup>nd</sup> ed, 2012).

the youth worker's conduct is inconsistent with continuing employment in that church. However, an anti-discrimination lawyer may take the view that the youth worker's authentic expression of himself through lawful sexual practice has been curtailed, an act that might be considered as discrimination. For the church it is a matter of discriminating between right and wrong.

While there can be a conflict between religious teaching on heterosexual relationships and how some people engage in these relationships, the main area of difficulty is in relation to same-sex relationships.<sup>26</sup> Norms surrounding homosexual practice have undergone rapid change over the last fifty years. Both domestically and internationally, reaction from religious groups has been complex. While sexual orientation might be considered to entail sexual desire, attraction, *and* action as necessarily bundled together under identity or personhood, for many, Christian teaching on sexual ethics differentiates between sexual acts and inclinations, with a concern only for the former. For example, the Catholic Church's teaching calls for respect, compassion, and sensitivity towards those with homosexual inclinations, and is opposed to any discrimination on the grounds of sexual orientation.<sup>27</sup> Instead, it is homosexual acts that are seen by the Church as sinful.<sup>28</sup>

However, within the Christian churches, there is no uniform position on homosexual practice. For some, accepting change has led to schism and subsequent property disputes,<sup>29</sup> while attempting to officially permit differences of opinion within the remaining body or movement.<sup>30</sup> Churches established primarily for gay and lesbian Christians have begun to emerge,<sup>31</sup> but the traditionalist view that homosexual conduct is inconsistent with a moral life continues to be mainstream

26 Chai R Feldblum, 'Moral Conflict and Liberty: Gay Rights and Religion' (2006) 72 *Brooklyn Law Review* 61.

27 Libreria Editrice Vaticana, *Catechism of the Catholic Church* (United States Conference of Catholic Bishops, 2<sup>nd</sup> ed, 2000) [2358] states:

The number of men and women who have deep-seated homosexual tendencies is not negligible. This inclination, which is objectively disordered, constitutes for most of them a trial. They must be accepted with respect, compassion, and sensitivity. Every sign of unjust discrimination in their regard should be avoided. These persons are called to fulfill God's will in their lives and, if they are Christians, to unite to the sacrifice of the Lord's Cross the difficulties they may encounter from their condition.

28 Ibid [2357].

29 See, eg, Brian Schmalzbach, 'Confusion and Coercion in Church Property Litigation' (2010) 96 *Virginia Law Review* 443, which describes the property disputes that have arisen from schism in the United States Episcopal Church following Gene Robinson's installation as Bishop of New Hampshire.

30 The Episcopal Church, USA allows for the blessing of same-sex unions by a priest with the approval of the diocesan's bishop: see Standing Commission on Liturgy and Music, *Resolution A049: Authorize Liturgical Resources for Blessing Same-Gender Relationships* (12 July 2012) The General Convention of the Episcopal Church <<http://www.generalconvention.org/gc/resolutions?by=number&id=a049>>. Even here, difference of opinion can lead to legal difficulties. For example, in *OV v Members of the Board of the Wesley Mission Council* (2010) 79 NSWLR 606 the Administrative Decisions Tribunal, and eventually the New South Wales Court of Appeal, had to decide what was the relevant body of believers for the purposes of determining the ambit of the religious exception provision in *Anti-Discrimination Act 1977* (NSW) s 56.

31 For example, the Metropolitan Community Church congregations in various cities: see Troy Perry, *History of MCC* (2013) Metropolitan Community Churches <<http://mccchurch.org/overview/history-of-mcc/>>.

amongst Pentecostal churches, Orthodox churches, the Roman Catholic Church, and evangelical denominations.<sup>32</sup> These differences of view extend beyond churches to affiliated or related bodies and schools.<sup>33</sup> Homosexual practice is also disapproved of in other Abrahamic religions and other cultures that are less influenced by religious values.<sup>34</sup>

### **C Faith and Tradition**

That there should be a divergence of views in faith communities is not surprising. While the pace of change in western societies has been very rapid over the last 50 years, faith communities tend to consider change more slowly. The world's major religious faiths are inherently traditional. That is one reason why religious faith has such a stabilising role in the lives of both individuals and communities.

This is not to say that traditions cannot change. Religious bodies are familiar with processes of internal contestation and dialogue. Arguments on issues of sexual orientation and gender within faith communities take different forms. Some religious groups and writers echo the policy positions established in legal human rights discourse and offer the same rationales. Others may develop their own understanding of equality from within their religious tradition (understood, on their account, as potentially richer).<sup>35</sup> In some instances, this includes committed voices within the tradition advocating, for example, for the inclusion of women and people who are married in priestly roles, or recognition of same-sex couples while the main body maintains, through argument, its historical position.<sup>36</sup>

None of this difference and contestation is particularly unusual. Religious traditions are familiar with ongoing internal dialogue and contest, creating what Alasdair MacIntyre calls 'an historically extended, socially embodied argument' over what is the right way to live.<sup>37</sup> Amidst this, the tradition continues to bind. While no tradition is hermetically sealed, argument is often characterised by a relationship to origins or founding narratives, the present authority of received

32 See, eg, Libreria Editrice Vaticana, above n 27, [2357]–[2358]; Reginald White, 'Homosexuality' in Walter A Elwell (ed), *The Concise Evangelical Dictionary of Theology* (Baker, 1991) 232–3.

33 For evidence of a variety of approaches to these issues in religiously based schools, see Carolyn Evans and Beth Gaze, 'Discrimination by Religious Schools: Views from the Coal Face' (2010) 34 *Melbourne University Law Review* 392.

34 See, eg, Tom Mountford, 'The Legal Status and Position of Lesbian, Gay, Bisexual and Transgender People in the People's Republic of China' (Research Paper, International Gay and Lesbian Human Rights Commission, 24 March 2010).

35 See, eg, Diedre J Good et al, 'A Theology of Marriage Including Same-Sex Couples: A View from the Liberals' (2011) 93 *Anglican Theological Review* 51. See generally, Zachary R Calo, 'Religion, Human Rights and Post-Secular Legal Theory' (2011) 85 *St John's Law Review* 495, 503, arguing that religious traditions should 'neither reject nor embrace but rather transform the idea of human rights by entering into a constructive engagement with the logic and categories of modernity'.

36 See, eg, Christopher McCrudden, 'Reva Siegel and the Role of Religion in Constructing the Meaning of "Human Dignity"' (Working Paper No 320, University of Michigan, 2013) 17, noting the 'intense discussion' and 'wide variety of different viewpoints' within the Roman Catholic community on 'human rights, the role of women, and gay rights'.

37 Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Duckworth, 3<sup>rd</sup> ed, 2007) 222.

norms, and processes for inter-generational transmission.<sup>38</sup> The tradition thus maintains its own normative force.<sup>39</sup> Such dynamics fit with long-held justifications for religious liberty: that organised religions and their members in the community can represent ‘locations of authority in civil society’, and that in seeking moral formation, how we should respond to God’s demands or call to relationship, these ‘locations’ instantiate a loyalty beyond, but to be reconciled with, the demands of government.<sup>40</sup>

However, it is these dynamics — a tradition engaged in extended argument, developing its own account of moral formation — that are questioned by a new claim: that equality, understood in a particular way, should be applied universally to all groups. This has led to challenges to the practice of giving exemptions to religious organisations where anti-discrimination norms would conflict with religious doctrines or values on such issues as male leadership, sex, and marriage.

### III THE SHIFTING JUSTIFICATION FOR EQUALITY

Anti-discrimination writers have advanced a number of principles, sometimes overlapping and sometimes competing, as the fundamental basis or rationale for anti-discrimination law. Each of these are contested; as Sandra Fredman notes, ‘[i]t is striking that, despite the widespread adherence to the ideal of equality, there is so little agreement on its meaning and aims’.<sup>41</sup>

Understanding what underpins anti-discrimination law, its aims or fundamental principles, is important. Such principles shape the scope of anti-discrimination law — what areas of life it applies to, how far it should ‘bite’, or against whom it should be applied — and, consequently, its substantive outcomes.<sup>42</sup> Importantly, anti-discrimination law’s underlying purposes shape how religious liberty (or, indeed, religious non-discrimination) complements or competes with obligations not to discriminate on the basis of gender or sexual orientation. Here we can see a possible shift. Rather than supporting the presence of multiple groups in what may broadly be termed ‘public life’, certain recent arguments in anti-discrimination

38 See, eg, Martin Krygier, ‘Law as Tradition’ (1986) 5 *Law and Philosophy* 237.

39 See Oliver O’Donovan, *Common Objects of Common Love: Moral Reflection and the Shaping of Community* (William B Eerdmans Publishing Company, 2002) 33: ‘The claim of tradition is not the claim of the past over the present, but the claim of the present to the continuity with the past which enables common action to be conceived and executed.’ See also Alan C Hutchinson, *Evolution and the Common Law* (Cambridge University Press, 2005) 4–5.

40 See Julian Rivers, *The Law of Organized Religions: Between Establishment and Secularism* (Oxford University Press, 2010) 295; Julian Rivers, ‘The Secularisation of the British Constitution’ (2012) 14 *Ecclesiastical Law Journal* 371, 398: ‘the idea that there might actually be a God, who might really be calling people into relationship with himself, who might make real demands on his worshippers’. See also Rowan Williams, *Faith in the Public Square* (Bloomsbury Press, 2012) ch 2, 29, who describes ‘graded levels of loyalty’; Steven D Smith, ‘Discourse in the Dusk: The Twilight of Religious Freedom?’ (2009) 122 *Harvard Law Review* 1869, 1881–2, who argues that religious liberty has traditionally focused on a jurisdictional concept of dual authorities.

41 Sandra Fredman, *Discrimination Law* (Oxford University Press, 2002) 2.

42 *Ibid* ch 1.



discourse point to the following claim: that the dignity of individuals requires the universal, or near-universal application of an undifferentiated non-discrimination requirement against all groups, including the religious.

### **A Multiple Justifications**

The origin of anti-discrimination laws was in a movement to protect historically disadvantaged groups that had been ‘subject to widespread denigration and exclusion’.<sup>43</sup> The *Civil Rights Act* of 1964<sup>44</sup> in the United States of America is a prominent example. It followed a campaign for social and racial justice with people of faith often at the forefront. It provided a catalyst for developing similar laws in other countries to prohibit discrimination on the basis of race and gender. Gradually, anti-discrimination law expanded to other fixed characteristics such as disability,<sup>45</sup> reflecting a concern for oppressed or disadvantaged groups. As Cass Sunstein puts it:

a special problem of inequality arises when members of a group suffer from a range of disadvantages because of a group-based characteristic that is both visible for all to see and irrelevant from a moral point of view. This form of inequality is likely to be unusually persistent and to extend into multiple social spheres, indeed into the interstices of everyday life.<sup>46</sup>

Here we see multiple potential aims underpinning anti-discrimination law. Focusing on historical injustice might be linked to a restitution or remedial-based argument — restoring particular groups to participation in public life following past discrimination and its ongoing effects.<sup>47</sup> However, complementing the central case of historical injustice,<sup>48</sup> there are other underlying reasons for anti-discrimination laws. Sunstein’s characterisation, for example, points to a common argument for good reasoning in public decision-making: eliminating irrelevant considerations, thereby opening public services and spaces to every person who ought to secure its benefits.<sup>49</sup> More generally, this also alludes to the idea of anti-discrimination law as serving distributive justice, that is, the

43 T M Scanlon, *Moral Dimensions* (Harvard University Press, 2008) 74.

44 42 USC §1971 et seq (1988).

45 Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination Law: Text, Cases and Materials* (Federation Press, 2<sup>nd</sup> ed, 2014) 17.

46 Cass R Sunstein, ‘The Anticaste Principle’ (1994) 92 *Michigan Law Review* 2410, 2411–12.

47 Fredman, above n 41, 19–20.

48 In *Mandla v Dowell Lee* [1983] 2 AC 548, 562–3, the House of Lords characterised the prohibition on ethnic discrimination as protecting groups with, for example, ‘a long shared history’ and ‘a cultural tradition of its own’ (often linked with religious observance) that *may also* be coupled with a history of oppression (or dominance).

49 See John Finnis, ‘Equality and Differences’ (2011) 56 *American Journal of Jurisprudence* 17, 27–8.

participation of different groups in what may be broadly termed ‘public’ goods across ‘multiple social spheres’.<sup>50</sup>

## 1 *Participating in Public Goods*

How do these rationales affect our central issue, the apparent tension between anti-discrimination law and religious liberty? Christopher McCrudden has suggested more generally that where rights compete the aim should be a ‘practical concordance’, in which ‘[n]either side of the debate is ruled out of court, there are no “outlaws”, and respectful attention is given to the claims of both parties’.<sup>51</sup> On this view, claims of religious liberty and a prohibition on discrimination by reason of gender or sexual orientation are both to be maximally accommodated in public life.

How this should be done in practice needs further examination, and we offer arguments towards this later in this article;<sup>52</sup> but the underlying aim, we suggest, is a distributional account of non-discrimination in which different groups, who may otherwise experience economic or social disadvantage, are able to participate in public or shared goods.<sup>53</sup>

However, many anti-discrimination advocates have shifted away from this focus on group access or, rather, have added new arguments potentially incompatible with shared participation in public goods.<sup>54</sup> As McCrudden notes, greater emphasis is now given to protecting an individual’s self-identity.<sup>55</sup> Discrimination law, on this account, centres more on respect for and facilitation of personal autonomy, or attempting to reduce the costs to individuals of adhering to certain

50 See, eg, Christopher McCrudden, ‘Equality and Non-Discrimination’ in David Feldman (ed), *English Public Law* (Oxford University Press, 2<sup>nd</sup> ed, 2009) 499, 535 [11.94]. There are different ways to understand this. Discrimination law could be seen as preventing economic and social disadvantage linked to membership of a group. See, eg, Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart, 2008) 1–2. McCrudden notes ‘[e]quality as participation’ — the aim ‘that all, including those previously excluded, should have a voice in public affairs, especially in the daily decisions of those who shape their life’ — as one anti-discrimination model: Christopher McCrudden, ‘Thinking about the Discrimination Directives’ (2005) 1 *European Anti-Discrimination Law Review* 17, 18.

51 Christopher McCrudden, ‘Dignity and Religion’ in Robin Griffith-Jones (ed), *Islam and English Law* (Cambridge University Press, 2013) 94, 99, 103. McCrudden goes on to relate this argument to art 14 (non-discrimination) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) (*‘European Convention on Human Rights’*): at 105–6.

52 See Part VI below.

53 For another account of anti-discrimination law as a means of protecting group-rights see Owen M Fiss, ‘Groups and the Equal Protection Clause’ (1976) 5 *Philosophy & Public Affairs* 107.

54 Christopher McCrudden, ‘Multiculturalism, Freedom of Religion, Equality and the British Constitution: The *JFS* Case Considered’ (2011) 9 *International Journal of Constitutional Law* 200, 206. McCrudden argues that ‘[w]hat is particularly problematic about this debate on the theoretical foundations of antidiscrimination law is the extent to which each generation appears to layer its understanding on top of the preexisting debates’.

55 *Ibid.*

identities.<sup>56</sup> Mark Freedland and Lucy Vickers describe this as a shift towards the maximisation of different lifestyles.<sup>57</sup> We can understand it as consistent with the growth of (and shifts in) identity politics and an increasing emphasis on a particular conception of dignity.

## **2 The Expanded Scope of Anti-Discrimination Laws**

Over the years, the scope of anti-discrimination law has expanded in Australia to cover an ever increasing number of protected attributes. For example, the Commonwealth government's ill-fated Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 had 18 grounds for discrimination.<sup>58</sup> Senators recommended three more grounds be added.<sup>59</sup> Academic experts<sup>60</sup> and human rights groups<sup>61</sup> argued for several more grounds to be included. Alexander Somek has noted that 'there seems to inhere in anti-discrimination law a generalizing momentum' that drives continuing expansion in its scope.<sup>62</sup> This arguably reflects trends in identity politics. Beginning in the last part of the twentieth century, attention in much political discourse shifted from ideological political battles to the 'politics of recognition', orientating around attention to, and attempted accommodation of, differences based on cultural or group identity.<sup>63</sup> Within this trend, there lay an expansive claim: that citizens are to be treated on the basis of their unique identities or authentic selves. In itself, such an expansive focus on identity could raise new tensions with religious liberty, and the consequent need for further exceptions.

This is not to say that the new grounds do not encompass historically disadvantaged groups. For example, the Commonwealth government's Exposure Draft included the new ground of sexual orientation.<sup>64</sup> This could be, and is, in part justified by historical and contemporary exclusion of gays and lesbians from, for example,

56 See, eg, Nicholas Hatzis, 'Personal Religious Beliefs in the Workplace: How Not to Define Indirect Discrimination' (2011) 74 *Modern Law Review* 287, 292–3, arguing equality aims 'at sustaining for every person the conditions for an autonomous life'.

57 Mark Freedland and Lucy Vickers, 'Religious Expression in the Workplace in the United Kingdom' (2009) 30 *Comparative Labor Law & Policy Journal* 597, 606.

58 See Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 17.

59 The Senate Legal and Constitutional Affairs Legislation Committee, 'Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012' (Commonwealth of Australia, February 2013) ix.

60 For example the Discrimination Law Experts Group, in response to a governmental discussion paper, proposed extending the list of protected attributes to include 'homelessness', 'socio-economic status' and 'cognitive diversity': Discrimination Law Experts' Group, Submission to Legal and Constitutional Affairs Legislation Committee, *Consolidation of Commonwealth Anti-Discrimination Laws Submission*, 13 December 2011, 8–9.

61 See, eg, Human Rights Law Centre, Submission to Legal and Constitutional Affairs Legislation Committee, *Consolidation of Commonwealth Anti-Discrimination Laws Submission*, January 2012, 18–32. The Human Rights Law Centre argued for a significant expansion in the number of protected attributes, including prohibition of discrimination on the basis of 'other status'. Many of these were drawn from, or influenced by, international conventions.

62 Alexander Somek, *Engineering Equality* (Oxford University Press, 2011) 6.

63 Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed), *Multiculturalism and 'The Politics of Recognition'* (Princeton University Press, 1992) 25.

64 See Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 17(q).

employment or services. But there is also a new and substantive appeal to the ‘deliberative freedoms’ of individuals within anti-discrimination law.<sup>65</sup> Sexual orientation is, in this way, one important identity marker for self-determination.

### 3 *Anti-Discrimination Law and Human Dignity*

As equality law has increasingly been seen as a branch of human rights — perhaps the most significant branch — courts and advocates in various countries have argued its purpose is to advance human dignity.<sup>66</sup> What is meant by ‘human dignity’ is contested.<sup>67</sup> Nevertheless, the concept has appealed to some because it invokes a universal characteristic for humanity, thus providing a potential basis for the equality of persons.<sup>68</sup> The Canadian Supreme Court has interpreted equality as founded on the value of human dignity, which ensures ‘equal recognition’ for all members of society ‘equally capable and equally deserving of concern, respect and consideration’.<sup>69</sup> As the Court makes clear, this construal of dignity is associated with self-respect and self-worth,<sup>70</sup> or what the Constitutional Court of South Africa calls, in a similar interpretation, the ‘ability to achieve self-identification and self-fulfilment’.<sup>71</sup>

The language used here draws from a particular interpretation of dignity, viewed as central to human rights. For example, Jürgen Habermas characterises dignity in terms of equal concern and respect for individuals’ conceptions of the good. He views it as the underlying principle of a shared abstract constitutionalism.<sup>72</sup> Ronald Dworkin understood dignity to be the fundamental value of all political rights, and framed it as the individual’s capacity to search for and make a judgement as to the meaning, the point and the value of human life, ‘and the relationships, achievements, and experiences that would realize that value in

65 Sophie Moreau, ‘What Is Discrimination?’ (2010) 38 *Philosophy & Public Affairs* 143, 147.

66 See McCrudden, ‘The *JFS* Case Considered’, above n 54, 205–6, describing the trend; Robin Allen and Gay Moon, ‘Dignity Discourse in Discrimination Law: A Better Route to Equality?’ (2006) 6 *European Human Rights Law Review* 610.

67 See the collected essays in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013).

68 Fredman, above n 41, 17–18.

69 *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497, 529 [51] (‘Law’). The Court has more recently expressed reservations over the use of dignity as a legal test, while not doubting its essential place as a value: see *R v Kapp* [2008] 2 SCR 483, 503–6 [19]–[25].

70 *Law* [1999] 1 SCR 497, 530 [53].

71 *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1999] 1 SA 6, [36] (Ackerman J) (Constitutional Court). Ackerman J also referred to the ‘fair distribution of social goods and services and the award of social opportunities’ for, in this case, gay men.

72 See Jürgen Habermas, ‘The Concept of Human Dignity and the Realistic Utopia of Human Rights’ (2010) 41 *Metaphilosophy* 464, 469. For further criticism of Habermas’ (and Dworkin’s) account, see Joel Harrison, ‘“A Communion in Good Living”: Human Dignity and Religious Liberty beyond the Overlapping Consensus’ in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) 451.

his own life'.<sup>73</sup> When translated into the anti-discrimination context, this liberal egalitarian conception of dignity, closely associated with personal autonomy, can have direct consequences for negotiating any tensions with religious conscience.

Recent experience from England and Wales illustrates the potential dynamics. An example is the decision in *Ladele v Islington London Borough Council*.<sup>74</sup> In that case, the Court rejected Ms Ladele's argument that she was, as a Christian, discriminated against on the ground of religion when she was dismissed after refusing to officiate at civil partnership ceremonies as part of her civil registrar duties. Islington London Borough Council had adopted a 'Dignity for All' policy, requiring all registrars to promote principles of equality and officiate at any ceremony, regardless of the couples' sexual orientation.<sup>75</sup> Upholding Islington's decision to apply its policy universally, Lord Neuberger considered it relevant that Ms Ladele's actions were causing offence to two of her co-workers and that the existence of an exemption would potentially offend members of the public.<sup>76</sup>

The *Catholic Care* litigation posed a similar dynamic. In that case, the Charity Tribunal considered that permitting a Catholic adoption agency to maintain its policy of only serving married couples would be 'particularly demeaning' to same sex couples.<sup>77</sup> This followed after the government's decision not to exempt religious agencies from the duty not to discriminate on the ground of sexual orientation. Then Prime Minister Tony Blair stated, 'I start from a very firm foundation: there is no place in our society for discrimination'.<sup>78</sup> On this approach, the existence of religiously-motivated discrimination is seen as diminishing dignity, even when alternatives readily exist or no victim of discrimination is directly engaged. No space was permitted for those who held the conscientious view that it was best for children to be placed with adoptive parents of different genders.

A religious group or individual's action, it is said, causes a 'status harm', reducing the person's dignity.<sup>79</sup> The existence of discriminatory conduct, even if framed

73 Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2006) 72; Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press, 2011) 203–4, 330–5. In *Planned Parenthood v Casey* 505 US 833, 851 (O'Connor J) (1992), the United States Supreme Court provided a meta-principle for this outlook: 'the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life'.

74 [2010] 1 WLR 955 ('*Ladele*'). See also Patrick Parkinson, 'Accommodating Religious Belief in a Secular Age: The Issue of Conscientious Objection in the Workplace' (2011) 34 *University of New South Wales Law Journal* 281. An appeal to the European Court of Human Rights was unsuccessful: see *Eweida v United Kingdom* (2013) 57 EHRR 213. See also Ian Leigh and Andrew Hambler, 'Religious Symbols, Conscience, and the Rights of Others' (2014) 3 *Oxford Journal of Law & Religion* 2.

75 *Ladele* [2010] WLR 955, 960 [9].

76 *Ibid* 970 [52].

77 *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* (Unreported, Charity Tribunal, McKenna J, Member Carter and Member Hyde, 26 April 2011) 19 [52] ('*Catholic Care*'). See also *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2013] 2 All ER 1114, 1137 [66], which emphasises the detrimental effect on gays and lesbians caused by knowledge of discrimination in adoption services.

78 Quoted in *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2010] 4 All ER 1041, 1046 [7].

79 On 'status harms', see McCrudden, 'Equality and Non-Discrimination', above n 50, 535 [11.94]; Vickers, above n 50, 62–4.

as an exception to a general prohibition, is understood as making a statement that people of a particular sexual orientation are of less worth.<sup>80</sup> Worth (one's dignity) is understood as strongly connected to a person's autonomy — his or her capacity to pursue a way of life and be affirmed in that pursuit.<sup>81</sup> On this basis, representing the claim that same-sex sexual conduct is not to be encouraged as a licit conception of the good life is taken as a harmful signal against or a stigmatising of personal identity.<sup>82</sup> There is no necessary limit to this argument. It extends beyond access to or participation in public goods to the knowledge that discriminatory conduct exists somewhere in society.<sup>83</sup> Logically, it applies equally to all individuals, groups, and religious bodies — hence the 'Dignity for All' policy in *Ladele* and Prime Minister Blair's claim that anti-discrimination law must have a universal application. Exceptions to the general norm of non-discrimination would 'serve irreparably to undermine those prohibitions'.<sup>84</sup>

This gives rise to what Gonthier J called a 'collision of dignities'.<sup>85</sup> In a context where dignity means the ability to enact one's own conception of the good, preventing a religious person or group from pursuing an ethos on the basis that it is contrary to the dignity of gays and lesbians is arguably to state that the religious are not of equal worth.<sup>86</sup>

Two claims are made to avoid this incommensurable clash. First, religious belief and practice is associated with a private sphere — either a limited, internally-focused space of worship (for example) or the holding and expression of opinion.<sup>87</sup> We address this further below.<sup>88</sup> Second, pursuing non-discrimination objectives is understood as promoting the 'rights and freedoms of others'.<sup>89</sup> Within the 'dignity' frame (so understood), this is properly concerned with ensuring that individuals can pursue a shared capacity to craft their own lives. Religious groups, on this basis, should be subject to the properly public, uniform application of a rule in favour of (and needing to recognise) what one judge has called anti-

80 See Maleiha Malik, 'Religious Freedom in the 21<sup>st</sup> Century' (Paper presented at Westminster Faith Debates, King's College, University of London, 18 April 2012).

81 See, eg, Edwin Cameron, 'Dignity and Disgrace: Moral Citizenship and Constitutional Protection' in Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013) 467. Cameron emphasises personal identity as cultivating one's self of selfhood. The emphasis on personal autonomy is also seen in the concern that same-sex marriage could potentially devalue those who chose other forms of cohabitation or do not desire long-term committed relationships: see at 480; William N Eskridge 'The Same-Sex Marriage Debate and Three Conceptions of Equality' in Lynn D Wardle et al (eds), *Marriage and Same-Sex Unions: A Debate* (Praeger, 2003) 167, 183.

82 See, eg, Feldblum, above n 26, 119. Feldblum emphasises the 'deep, intense and intangible hurt' caused by religious accommodations rather than failure to access or participate in goods.

83 See Andrew Koppelman, 'You Can't Hurry Love: Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions' (2006) 72 *Brooklyn Law Review* 125, 138.

84 Aileen McColgan, 'Class Wars? Religion and (In)equality in the Workplace' (2009) 38 *Industrial Law Journal* 1, 11.

85 *Chamberlain v Surrey School District* [2002] 4 SCR 710, 788 [132] (Gonthier J).

86 See Koppelman, above n 83, 125–6.

87 See, eg, Malik, above n 80, 2, emphasising a permissible realm of speech.

88 See Part V A below.

89 See the *European Convention on Human Rights* art 9(2); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(3) ('*International Covenant on Civil and Political Rights*').

discrimination law's promotion of 'the individuality [of] interests'.<sup>90</sup> Indeed, religious groups are, for some, the prime originators and bastions of misogyny and homophobia.<sup>91</sup> Their contentions are sourced in 'hostility'; their ethic is simply liberty-constraining.<sup>92</sup> Anti-discrimination law, on this basis, is a key tool for advocates who are sceptical of religion in public life more generally.<sup>93</sup>

## IV REACHING INTO INTERNAL GOVERNANCE

Against this backdrop, recent arguments have been raised, in the context of legislative reform, indicating a movement to curtail the scope of religious exceptions. Carolyn Evans and Beth Gaze, for example, note:

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.<sup>94</sup>

### A Narrowing the Religious Exceptions

In the United Kingdom, the Labour Government tried in 2010 to limit permissible sexual orientation, sex, and marital status discrimination within churches and other faith groups to very narrow categories of persons: those leading or assisting in liturgical or ritual practice, or promoting or explaining the doctrine of the

90 *R (E) v Governing Body of JFS* [2010] 2 AC 728, 773 [90] (Lord Mance) ('*JFS*'). See also Taylor, above n 63, 48–51, 60–1, discussing the liberal egalitarian tradition's tendency towards the universal application of a central rule understood as representing individual interests; Harrison, above n 72, discussing modernity's 'flattening' impulse.

91 See, eg, Margaret Thornton, 'Christianity "Privileged" in Laws Protecting Fairness' (2011) 5 *Viewpoint* 41, 45; Frances Raday, 'Culture, Religion and Gender' (2003) 1 *International Journal of Constitutional Law* 663.

92 See Robert Wintemute, 'Religion vs Sexual Orientation' (2002) 1 *Journal of Law & Equality* 125.

93 See McCrudden, 'The *JFS* Case Considered', above n 54, 207; Rivers, 'Law, Religion and Gender Equality', above n 1, 33–4.

94 Carolyn Evans and Beth Gaze, 'Between Religious Freedom and Equality: Complexity and Context' (2008) 49 *Harvard International Law Journal* 40, 41 <<http://www.nswchurches.org/Resources/Articles/A09024.pdf>>. See also Cass Sunstein, 'On the Tension between Sex Equality and Religious Freedom' in Debra Satz and Rob Reich (eds), *Toward a Humanist Justice: The Political Philosophy of Susan Moller Okin* (Oxford University Press, 2009) 129. This might be considered surprising in light of international law, which clearly recognises the right to appoint religious personnel according to the beliefs of the religion: see *United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR, 36<sup>th</sup> sess, 73<sup>rd</sup> plen mtg, UN Doc A/RES/36/55 (25 November 1981) art 6.

religion.<sup>95</sup> This would have been a significant shift from previous practice, which focused on compliance with the doctrines of the religion or not conflicting with the strongly held convictions of the religion's followers when employing a person for the purposes of an organised religion.<sup>96</sup> It would have meant that the non-discrimination requirement applied to various pastoral staff, leaders, and youth workers whose primary tasks within a working week did not involve teaching or leading worship.<sup>97</sup> The potential change was, however, defeated in the House of Lords.

There has also been strong advocacy for the position that the scope of the religious exceptions should be narrowed in Australia. As will be seen below, some anti-discrimination law experts have argued that exceptions should, at least, only apply to a very narrow category of persons and never to any service which is in receipt of public funds. On occasion, they appear to extend this argument to ending religious exceptions entirely. They suggest that any specific religious exceptions should be eliminated in favour of a more general limitations clause. However, the content given to such clauses indicates that an exception for religious groups or organisations with a religious ethos would be increasingly difficult to maintain.

Religious-based exceptions from non-discrimination duties generally focus on two areas: first, the employment and membership decisions of an organised religion (churches and analogous groups); and second, the employment and service-related decisions of connected bodies (schools, charitable bodies) or employers with a religious ethos.<sup>98</sup> There is no universal approach in Australian legislation, but elements of this two-part focus are generally present in different Acts. Thus, for example, the *Sex Discrimination Act 1984* (Cth) provides an exception for the ordination of priests and ministers, an exception for practices of a body established for religious purposes, and an exception for employing staff in any religiously based educational institution (the latter two where needed to conform with doctrine or to avoid injury to the religious sensibilities of adherents).<sup>99</sup> The *Fair Work Act 2009* (Cth) includes exemptions for action taken against staff in good faith and on the basis of religious doctrine or to avoid injury to the religious 'susceptibilities' of adherents.<sup>100</sup>

95 See the then Equality Bill 2009 (UK) sch 9 para 2(8), discussed in Patrick Parkinson, 'Christian Concerns About an Australian Charter of Rights' (2010) 15(2) *Australian Journal of Human Rights* 83, 89. See also Daniel Boucher, 'A Little Bit against Discrimination? Reflection on the Opportunities and Challenges Presented by the Equality Bill 2009–2010' (Research Paper, CARE UK, 2010). On the state of the law following defeat of these proposed provisions, see Russell Sandberg, 'The Right to Discriminate' (2011) 13 *Ecclesiastical Law Journal* 157, 173–80. Sandberg notes the Government maintained the view that the enacted exception was as narrow as the proposed provision in the Bill, but he questions this interpretation.

96 See *Employment Equality (Sexual Orientation) Regulations 2003* (UK) reg 7(3). See now *Equality Act 2010* (UK) c 15, sch 9 para 2.

97 Cf *Reaney and Hereford Diocesan Board of Finance* [2007] Employment Tribunal Case No 1602844/2006 (17 July 2007) (UK) ('*Reaney*').

98 See, eg, *Equality Act 2010* (UK) c 15, sch 9 pt 1 para 2(1)(a) (employment by an organised religion), sch 11 (exceptions for schools).

99 See *Sex Discrimination Act 1984* (Cth) ss 37(1)(a), 37(1)(d), 38.

100 See *Fair Work Act 2009* (Cth) s 351(2)(c).



State law adds its own unique provisions. For example, the *Equal Opportunity Act 2010* (Vic) also includes an exception from anti-discrimination when it is 'reasonably necessary' for a person 'to comply with the doctrines, beliefs or principles of their religion'.<sup>101</sup>

Most of the argument against religious exceptions has been directed at schools and charitable bodies receiving public funds. For example, the 'Discrimination Law Experts Group' in its submission on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) argued that '[a]s a matter of principle ... public funding should not be spent on *any* activities that are discriminatory'.<sup>102</sup> The Group was endorsing the Government's move to exclude aged-care providers from the exception. It expanded this to argue, in particular, that all religiously based schools in receipt of public funding should be excluded.<sup>103</sup> This has been supported by others.<sup>104</sup> The reasons for this contention reflect the dignity concerns discussed above — exclusion and status harms, perpetuated with taxpayer money<sup>105</sup> — and further arguments, for example: implying that education is better done by public and secular institutions subject to 'community standards',<sup>106</sup> expressing concerns over impeding access to education;<sup>107</sup> and asserting that education in religious schools isolates children from the experiences of different groups in society, thus undermining community harmony.<sup>108</sup> Importantly, none of these contentions are actually dependent on the feature of public funding. It may be that public funding is seen as adding to the status harm, by signalling some degree of acceptability. However, if these arguments are legitimate at all, they can equally apply to the existence of private religious schools discriminating in employment or admission.

Exceptions with respect to ministers are generally less controversial, but arguably still questioned. Some argue that this should be the only permissible religion-

101 *Equal Opportunity Act 2010* (Vic) s 84.

102 Discrimination Law Experts Group, Submission No 207 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, 18 December 2012, 28 (emphasis in original) ('*Submission No 207 to Human Rights and Anti-Discrimination Bill Inquiry*').

103 *Ibid* 28–9.

104 See, eg, Castan Centre for Human Rights Law, Submission No 249 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, December 2012, 7 ('*Submission No 249 to Human Rights and Anti-Discrimination Bill Inquiry*'); New South Wales Gay & Lesbian Rights Lobby, Submission No 29 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*, 18 April 2013, 6.

105 See, eg, New South Wales Gay & Lesbian Rights Lobby, Submission No 387 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, December 2012, 6 ('*Submission No 387 to Human Rights and Anti-Discrimination Bill Inquiry*').

106 Castan Centre for Human Rights Law, 'Consolidation of Anti-Discrimination Laws' (Submission to the Australian Government Attorney-General's Department, January 2012) [63].

107 *Submission No 387 to Human Rights and Anti-Discrimination Bill Inquiry*, above n 105, 6.

108 *Submission No 207 to Human Rights and Anti-Discrimination Bill Inquiry*, above n 102, 28–9.

based exception to anti-discrimination law, if specific exceptions are maintained at all.<sup>109</sup>

## **B Removing the Religious Exceptions**

An alternative position, which is frequently encountered, is that there should be no specific religious exceptions at all; rather, the religious group or affiliated institution should be made to justify any discriminatory action with reference to a general limitations clause. For example, the Discrimination Law Experts Group states that it does not support the existence of religious exceptions.<sup>110</sup> While it recognises the ‘policy position that has been taken to permit religious bodies to discriminate where others may not’ (and argues this should be narrowed),<sup>111</sup> the Discrimination Law Experts Group’s most desired outcome is maintaining only a general exception whereby any form of discriminatory conduct must be justified within a human rights framework.<sup>112</sup>

If current, specific exceptions were removed, similar outcomes *might* nevertheless be obtained. For example, the *Sex Discrimination Act 1984* (Cth), as noted, provides an exception for religious bodies from, prohibitions on, inter alia, sex and marital status discrimination in respect of ordination and training, and an exception for religiously based educational institutions when employing members of staff.<sup>113</sup> If these exceptions were to be repealed, the Catholic Church, Orthodox Jews, or groups within the Islamic community would need to argue that, in respect of employment, being male is a genuine occupational qualification of the priesthood or religious leadership, appealing to the more general provision in the legislation.<sup>114</sup> The success of such a claim, however, would very much depend on how such a generalised defence of justification would be applied. This faces a number of problems.

Questions would arise as to whether a requirement is an occupational qualification for that group. For example, the Anglican Church of Australia admits different practices concerning the ordination of women across the country, with a few dioceses declining to ordain women as priests. Those minority dioceses might struggle to argue that it is a genuine occupational qualification for an Anglican minister to be male when this is not the case in most of the country, or in many other parts of the Anglican Communion, despite the Province and Communion itself admitting different stances.<sup>115</sup>

109 See, eg. Castan Centre for Human Rights Law, above n 106, [74]–[75].

110 *Submission No 207 to Human Rights and Anti-Discrimination Bill Inquiry*, above n 102, 27.

111 *Ibid.*

112 *Ibid.* 24. See also similarly Castan Centre for Human Rights, above n 106, [56]–[58].

113 See *Sex Discrimination Act 1984* (Cth) ss 37, 38. Section 23(3)(b) also provides an exception for accommodation provided by a religious body.

114 See *ibid.* s 30. The current provision only applies to sex and not marital status. In other words, it currently would not cover the Catholic Church’s celibacy and singleness requirement.

115 Cf *Reaney* [2007] Employment Tribunal Case No 1602844/2006 (17 July 2007) (UK), [104]. *Reaney* notes that one could look to the particular Diocese or to the wider Church of England when considering the strongly held views of members, both in that case holding the same position.

More generally, the present list of circumstances in which the gender of a person constitutes a genuine occupational qualification under the *Sex Discrimination Act 1984* (Cth) would not readily cover the ordination of priests, rabbis, or imams.<sup>116</sup> Although the list of examples given in that section is not meant to limit the generality of the provision, the list is nevertheless characterised by practical or privacy considerations (those conducting body-searches should be of the same gender; the reasonableness of providing separate sleeping facilities) or functional ends (dramatic performances; servicing separate bathrooms).<sup>117</sup> Determining whether being male, or celibate and single, is a genuine occupational qualification for the priesthood requires an entirely different category for analysis.<sup>118</sup>

To view this functionally from a perspective external to the tradition — looking, for example, to who is served, privacy concerns, and physical attributes — would ignore the epistemic integrity of different churches' internal doctrines and conversations, which are ultimately theological and ecclesiological. Principals or boards of religious schools would have similar difficulties if they wanted to insist, for example, that teachers not live together in a sexual relationship outside marriage. From one perspective, how a maths teacher conducts her sexual life is not functionally relevant to her teaching. To adopt the language of the general exception proposed in the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) cl 23, a court may not see requiring a particular sexual ethic as a proportionate response to the aim of maintaining a religious-ethos school. But this is only one perspective on the boundaries of teaching, that is, one perspective of role occupancy for employees generally within a communal setting that tends towards an instrumental separation between cultivating knowledge in a particular subject and cultivating a way of life. In contrast, a school can be readily understood in more classical terms as a form of social order concerned with moral instruction and the formation of an entire community.<sup>119</sup> It is, in this sense, an institutional manifestation and extension of a religious tradition, not unlike a church, which places requirements, potentially, on all its members.<sup>120</sup>

There is, however, a much wider concern with a general exception — that in its specific targeting it tends towards preventing a religious accommodation claim. In submissions on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth), those who advocated narrowing or removing the religious exceptions argued that any general clause should be confined to conduct that is seen to be a proportionate means of achieving a legitimate, non-discriminatory end

116 See *Sex Discrimination Act 1984* (Cth) s 30(2).

117 *Ibid.*

118 For this reason, the *Equal Opportunity Act 2010* (Vic) s 82(4) states in relation to the exception for employment in religious bodies that an 'inherent requirement' must take account of the '[t]he nature of the religious body and the religious doctrines, beliefs or principles' of the body.

119 See, eg, John Milbank, *Being Reconciled: Ontology and Pardon* (Routledge, 2003) 182–4; Nigel Biggar, 'What Are Universities For?' *Standpoint* (online), July/August 2010 <[www.standpointmag.co.uk/node/3156/full](http://www.standpointmag.co.uk/node/3156/full)>.

120 See Rivers, *The Law of Organized Religions*, above n 40, 130–1. Rivers argues that the boundary between an organised religion and a religiously based organisation can be hazy.

or objective.<sup>121</sup> The non-discriminatory end or objective in question was framed variously as consistency with the objects of the legislation, according with human rights principles, and facilitating the achievement of substantive equality.<sup>122</sup> The general thrust of these exceptions is arguably limited to permitting discrimination where it serves the purpose of advancing a minority group,<sup>123</sup> for example: hiring visually impaired people to work with Vision Australia; ensuring women lead or are first-responders at domestic violence refuges; or permitting only LGBTI persons to act as counsellors for a charity targeting LGBTI bullying. There may be instances where this advancement extends to a religious group — for example, running a women’s-only swimming lesson to encourage Muslim women to swim. However, where religious exceptions are seen as creating a status or dignitarian harm, then they are not consistent with a non-discriminatory objective. If this is the underlying concern, then even permitting an exception for priests, ministers, or teachers of doctrine stands on shaky ground. These are, after all, the apparent positions of exhortation and influence.

The Australian Human Rights Commission (AHRC) has made statements pointing in this direction. It argued in 2008 for all exemptions in the *Sex Discrimination Act 1984* (Cth) to be made subject to a three-year sunset clause during which they would be reviewed to determine whether they should be retained, limited, or removed entirely.<sup>124</sup> In itself this is not a call to abolish religious exceptions. However, the AHRC continued:

These exemptions exist at the intersection of two fundamental human rights, namely the right to practice a religion and belief and the right not to be discriminated against on the basis of sex, marital status, pregnancy or potential pregnancy. ... There is clearly a strong body of opinion amongst some religious institutions that opposes any change to the religious exemptions. However, the rights to religious freedom and to gender equality must be appropriately balanced in accordance with human rights principles. ... The existing permanent exemption provides little incentive for religious bodies to re-examine their beliefs about the role of women ... The permanent exemption does not provide support for women of faith who are promoting gender equality within their religious body.<sup>125</sup>

The AHRC acknowledged that the *United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*,<sup>126</sup>

121 See *Submission No 249 to Human Rights and Anti-Discrimination Bill Inquiry*, above n 104, 6; *Submission No 207 to Human Rights and Anti-Discrimination Bill Inquiry*, above n 102, 23–4.

122 See *Submission No 249 to Human Rights and Anti-Discrimination Bill Inquiry*, above n 104, 6; *Submission No 207 to Human Rights and Anti-Discrimination Bill Inquiry*, above n 102, 23–4.

123 See New South Wales Gay & Lesbian Rights Lobby, ‘Embracing Equality’ (Submission to the Consolidation of Commonwealth Anti-Discrimination Law, January 2012) 19 <[http://glrl.org.au/index.php/Resources/resources\\_holder/GLRL-Publications](http://glrl.org.au/index.php/Resources/resources_holder/GLRL-Publications)>.

124 Human Rights and Equal Opportunity Commission, *Submission to the Senate Committee on Legal and Constitutional Affairs, Inquiry into the Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, 1 September 2008, [478].

125 *Ibid* [469]–[475].

126 GA Res/36/55, UN GAOR, 36<sup>th</sup> sess, 73<sup>rd</sup> plen mtg, UN Doc A/RES/36/55 (25 November 1981).

affirms the right to appoint religious personnel according to the beliefs of the religion.<sup>127</sup> Yet, it evidently saw it as the role of the law to provide support for women of faith who seek changes to the doctrines and practices of their religious community. Such a role was to be effected by the narrowing of exceptions, if not through their replacement by a general limitations test — both aimed at reform. In advancing this position, the Commission departed from a position of neutrality, choosing to take sides in a religious debate.

This view has not, so far, gained traction with legislatures throughout Australia. Specific exceptions for religious bodies have been maintained.<sup>128</sup>

Below, we offer further framework arguments as to how and why religious belief should be accommodated within non-discrimination norms. In addition, there are important reasons to maintain specific provisions instead of a general limitations clause. First, a general limitations clause would require litigation to determine the boundaries of permissible religiously based discrimination. This might lead to similar results as current exceptions. However, dispute resolution — settling the uncertainty of whether the law should apply on a case-by-case basis — is costly, especially for schools or small non-profit associations that engage in constructive activities that build social capital. Freedom from unnecessary regulation is important for the charitable and non-profit sectors, and is a social good, since to the extent that less money is spent on administrative and compliance costs, more can be spent on services. Second, creating a specific exception for religious bodies strikes a legislative balance that ‘reduce[s] the issues that would have to be determined by courts or tribunals in such a sensitive field’.<sup>129</sup> A proportionality test asks whether the group is pursuing a legitimate aim, and in a proportional manner. This presents the real risk of courts engaging in a moral evaluation of religions or the theological validity of a group’s beliefs.<sup>130</sup> A specifically tailored exception — more in the form of an exemption — thus reflects a common principle in religious liberty adjudication: the court should avoid inquiring into or second-guessing the religious group’s judgements of internal governance and employment.<sup>131</sup>

127 Ibid [477].

128 See, eg, *Anti-Discrimination Act 1977* (NSW) s 56; *Sex Discrimination Act 1984* (Cth) ss 37, 38; *Equal Opportunity Act 1984* (SA) ss 50, 85ZM; *Equal Opportunity Act 1984* (WA) ss 66(1), 72, 73; *Discrimination Act 1991* (ACT) ss 32, 33, 46; *Anti-Discrimination Act 1991* (Qld) ss 41(a), 90, 109; *Anti-Discrimination Act 1996* (NT) ss 30(2), 37A, 51; *Anti-Discrimination Act 1998* (Tas) ss 51, 52; *Equal Opportunity Act 2010* (Vic) ss 81, 82, 83, 84.

129 *R (Amicus) v Secretary of State for Trade and Industry* [2007] 1 ICR 1176, [123].

130 Rivers, *The Law of Organized Religions*, above n 40, 133.

131 See, eg, *R (Wachmann) v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth* [1992] 2 All ER 249, 255–6 (*‘Wachmann’*). In *Wachmann*, in determining who is morally and religiously fit to carry out the duties of rabbinical office, the Court stated they ‘would never be prepared to rule on questions of Jewish law’ and ‘must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognised divide between church and state’. See also *R (E) v The Governing Body of JFS* [2008] EWHC 1535 (QB) [4]: ‘The court is not concerned to assess the validity of such matters, let alone to adjudicate on religious controversies within a religious community’.

‘Balancing’ the group’s decision and the claims of an individual through litigation is, in principle, wrong. It requires an assumption that the court is competent to assess the necessity of a religious group’s decision. Rather, the legislative decision recognises the autonomy of the group — and so it should. As Julian Rivers argues:

If the law sides with the individual, there is no way of protecting collective freedom to unite around a given conception of priesthood [or, we add, a collective view of the requirements of a religious body, like a school], but if the law sides with the collective body, there is always the option of exit and founding a new organization.<sup>132</sup>

Comparative case law has endorsed the centrality of this option.<sup>133</sup> The law thus recognises that the religious group has its own discursive integrity; it is a tradition always undergoing an internal conversation. Finally, recognising this means that the group has its own discretion as to the appropriateness of enforcing an ‘organic’ view of employment; that is, requiring all, most, or some employees to reflect an outlook at one with the religious community.<sup>134</sup> In practice, if a proportionality test were enforced, the likely outcome would be a distorting of the community’s position through a perceived need to harden roles or job descriptions — the necessity of describing someone, such as a cleaner, who has a purely practical role, as a ‘Minister’ with regular prayer duties in order to pursue the legitimate aim of forming a community of worship and prayer.<sup>135</sup>

## V INDIVIDUALS, COMMUNITIES, AND THE STATE

The underlying argument for narrowing religious exceptions, when focused on a dignitarian claim, is not, in principle, limited in scope. Arguably, exceptions for ministers and certain teachers are accorded (if this view is adopted) in order to avoid a political fight. Engaging in a confrontation with the worldwide Catholic Church, Orthodox Judaism, or Islam concerning the theological positions of the

<sup>132</sup> Rivers, *The Law of Organized Religions*, above n 40, 136.

<sup>133</sup> See, eg, *X v Denmark* (1976) 5 Eur Comm HR 157; *Knudsen v Norway* (1985) 42 Eur Comm HR 247; *Williamson v United Kingdom* (European Commission of Human Rights, First Chamber, Application No 27008/95, 17 May 1995) (ministers hold a duty of loyalty to the church); *Rommelfanger v Federal Republic of Germany* (1989) 62 Eur Comm HR 151 (doctor at a Roman Catholic hospital holds a duty of loyalty). Recently, in *Sindicatul “Păstorul Cel Bun” v Romania* (2014) 58 EHRR 284, 319 [137] (citations omitted), the Grand Chamber of the European Court of Human Rights considered that:

In accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members or to exclude existing ones. Similarly, art 9 of the Convention does not guarantee any right to dissent within a religious body; 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 freedom to leave the community.

The Court continued by emphasising ‘that the State should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image or unity’: at 324 [165].

<sup>134</sup> See Ahdar and Leigh, above n 4, 323–4.

<sup>135</sup> This is not fictional. See Rivers, *The Law of Organized Religions*, above n 40, 134 n 135, noting the advice now being developed for churches in the United States.

faith is perhaps seen as unwise as a matter of social policy. However, is the answer to the problem just one of *realpolitik*? Or is there a principled basis on which one could assert that governments have no right to impose anti-discrimination norms on religious groups that would prohibit them from choosing leaders, teachers, or members in accordance with their traditions and beliefs?

### **A The Public-Private Divide**

For some, excluding at least the core functions of religious communities from the application of non-discrimination norms is justified by an appeal to a private-public dichotomy. Anti-discrimination law should, it is argued, regulate public conduct, not private belief. Legislation could be seen as sometimes pointing in this general direction. Section 9(1) of the *Racial Discrimination Act 1975* (Cth), for example, applies a prohibition on racial discrimination to ‘public life’. Other statutes define the reach of anti-discrimination law in terms of specific areas such as employment, education, and the provision of goods and services. Some also cover certain kinds of clubs. For example, the *Sex Discrimination Act 1984* (Cth) applies to clubs, which are defined in s 4 as follows:

‘club’ means an association (whether incorporated or unincorporated) of not less than 30 persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that:

- (a) provides and maintains its facilities, in whole or in part, from the funds of the association; and
- (b) sells or supplies liquor for consumption on its premises.

That is, a local RSL or bowling club is covered by the legislation as such a club is largely indistinguishable in its service provision from the services provided by other restaurants, bars, and gambling venues. However, we suggest that these legislative boundaries are best understood as resulting from attentiveness to particular contexts, rather than reflecting a private-public divide more generally.

Appeals to this private-public dichotomy when determining permissible religiously based discrimination are too blunt and problematically constraining; they fail to account for the reality of social involvement by religious bodies that interact with the public. In the *Catholic Care* litigation, the Charity Tribunal for England and Wales stated, ‘religious belief cannot provide a lawful justification for discrimination on grounds of sexual orientation in the delivery of a public-facing service’.<sup>136</sup> The statement reflects a problematic dynamic often seen in religious liberty jurisprudence — understanding religious manifestation as an incursion into the largely secular sphere of public life.<sup>137</sup> Some commentators have extended this dynamic to argue that the right ‘balance’ of tolerance or accommodation means permitting religious speech in public life, but not

<sup>136</sup> (Unreported, Charity Tribunal, McKenna J, Member Carter and Member Hyde, 26 April 2011) 6 [14].

<sup>137</sup> See Parkinson, above n 74.

conduct.<sup>138</sup> Others have referred to permitting religiously based discrimination on gender or sexual orientation grounds where the group, separated from public life, forms an ‘island of exclusivity’.<sup>139</sup> The difficulty with this, however, is that it describes only a select range of groups.<sup>140</sup> Churches, in parish, communal, or evangelistic life, are typically orientated towards the public, as are religious schools. They are a ‘public-facing service’, engaged in shaping what the ‘public’ is. Unless one takes the view that the existence or public knowledge of these groups creates a dignitarian or status harm, then the issue before us is how to account for and on what terms to support these different groups operating in ‘public’ life.

## **B Multiculturalism and Social Pluralism**

At the outset of this article, we alluded to a justification for religious liberty: that organised religions and their members in the community can represent sites of authority standing over and against, but also to be reconciled with, government.<sup>141</sup> This frames religious liberty as concerned with institutional design: how the state relates to groups and individuals; how the group relates to the individual; and how plural sources of authority are to be negotiated. The broad focus is on what are sometimes referred to as ‘mediating institutions’ — the existence in civil society of multiple groups or spheres of collective action.

The word ‘mediating’ may, however, be misleading if it posits an idea that groups exist merely to facilitate or negotiate two poles of authority — between the individual and the state. Such an account occludes the claim that the group itself exercises authority, and may have existed before (or endure after) the rise of particular states.<sup>142</sup> It is this kind of existence and argument, we suggest, that the ‘dignitarian’ claim discussed above struggles to recognise. Fundamentally, this claim is premised on a state-individual dichotomy, where the group exists to facilitate individual rights and the state is tasked with enforcing their universal protection against apparent restraints or harms. A competing argument, focusing on mediating institutions, can be developed from multiple bases. Here, we introduce two major threads for reflection, pointing to an increasingly multicultural society and the cooperation of multiple communities in a social pluralist vein. We then turn to consider where anti-discrimination prohibitions are most warranted, in what we call the ‘commons’.

138 See, eg, Malik, above n 80, 2.

139 Vickers, above n 50, 225–6.

140 Alvin J Esau originally used the phrase to describe Hutterite, Amish, and Mennonite communities in Canada: see Alvin J Esau, “‘Islands of Exclusivity’: Religious Organization and Employment Discrimination” (2000) 33 *University of British Columbia Law Review* 719.

141 Rivers, *The Law of Organized Religions*, above n 40, 295. See also above n 40 and accompanying text discussing group or institutional justifications for religious liberty.

142 See, eg, Victor M Muñiz-Fraticelli, *The Distinctiveness of Religious Liberty* (29 July 2011) *Social Science Research Network* <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1921646](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1921646)>.



Multiculturalism can have multiple meanings.<sup>143</sup> Concerning the response to cultural and religious diversity, multiculturalism, on some accounts, is associated with identity politics — recognising the ‘unique identity of this individual or group, their distinctness from everyone else’ and their equal worth.<sup>144</sup> This leads to the contention that group differences should be accommodated through ‘group-differentiated rights’.<sup>145</sup> The group-based focus, however, may need refining. Some prominent theorists promoting multiculturalism have argued that recognising group difference fits within a more general discourse of *individual* rights — the group or cultural community is framed as providing the individual with one possible option amongst others in a society.<sup>146</sup> The loss of a culture, on this account, is the loss of a source of choice.<sup>147</sup>

As this brief description of one well-regarded account of multiculturalism intimates, multiculturalism discourse and religious liberty concerns certainly overlap, but there is also difference. Much of the language of multiculturalism discourse — of institutional design, the governance and accommodation of groups and identity concerns, the relationship of majority norms to minority norms and to civic obligations<sup>148</sup> — has arguably drawn from the experience of negotiating religious difference.<sup>149</sup> Indeed, in something of a return, recent controversies in the United Kingdom concerning ethnic groups have been considered within the frame of religious liberty.<sup>150</sup> This reflects a more general shift in public policy towards religion as the marker of difference to be negotiated.<sup>151</sup> However, there are differences between the two discourses. As Victor Muñoz-Fraticelli points out, whereas multiculturalism can be construed as facilitating contexts for choice in a liberal society, religious liberty discourse has historically and traditionally concerned claims of authority and self-governance — the *jurisdictional* relationship, most notably, of the church and religious associations to political power.<sup>152</sup>

143 For a further breakdown of different meanings, see Jonathan Chaplin, *Multiculturalism: A Christian Retrieval* (Theos, 2011) 32.

144 Taylor, above n 63, 38, 64.

145 See Sarah Song, ‘Multiculturalism’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Winter 2010) <<http://plato.stanford.edu/archives/win2010/entries/multiculturalism/>>.

146 See, eg, Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986) 251–4; Kymlicka, above n 21, 126.

147 See Muñoz-Fraticelli, above n 142, 6–7.

148 See, eg, Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women’s Rights* (Cambridge University Press, 2001) 3, 13, pointing to the dilemma of accommodation and protection of citizenship rights within the question of institutional design; Kymlicka, above n 21, 111, referring to the ‘establishment’ of a majority culture as an argument for accommodating minority groups.

149 See Habermas, above n 21, 17–18.

150 See, eg, *Ghai v Newcastle City Council* [2009] EWHC 978 (Admin) (8 May 2009). The case was overturned on other grounds: see *Ghai v Newcastle City Council* [2011] QB 591. See also *R (on application of Swami Suryananda) v Welsh Ministers* [2007] EWCA Civ 893 (23 July 2007).

151 See McCrudden, ‘The *JFS* Case Considered’, above n 54, 203–4.

152 Muñoz-Fraticelli, above n 142.

### C Accommodating Community Identity

Recognising that multiculturalism and religious liberty can point at different aims, the unmistakable presence of multiple groups within society, and the question of their negotiation, remains constant.<sup>153</sup> As Charles Taylor has argued, in negotiating different values and beliefs, we should begin with the presumption that ‘cultures that have provided the horizon of meaning for large numbers of human beings ... that have, in other words, articulated their sense of the good, the holy, the admirable’ will be or will contain something deserving of respect.<sup>154</sup> On that basis, the practices of that community should be accommodated wherever possible. Such an approach is endorsed in international human rights law. For example, art 27 of the *International Covenant on Civil and Political Rights* provides that ethnic, religious or linguistic minorities have the right to enjoy their own culture, to profess and practise their own religion, or to use their own language in community with the other members of their group. This does not stand as a claim for recognition of the practices of ethnic minorities irrespective of other human rights, but is a rights claim of its own which is not lightly to be displaced or ignored.

Two aspects of community identity are particularly important. The first is the right of freedom of association within the community. For example, a Jewish community organisation which insists that membership is confined to recognised members of the Jewish community arguably ‘discriminates’ on two grounds — race and religion.<sup>155</sup> It does so, however, for the best of reasons and for the most worthy of causes — the right, and the need, to promote group identity and cohesion in order to maintain the traditions of one culture within a federation of cultures.

The second important aspect of community identity concerns education. Many parents are quite satisfied with the public education system or send their children to private schools that do not have a strong religious or cultural identity. For others, however, the religious or cultural identity of the school, and its inculcation of religiously based moral values, is of critical importance. That is, parents choose that school because it is a means of transmitting to their children the beliefs, moral values, and practices that are important to them.<sup>156</sup> This right to educate one’s children in accordance with parents’ religious values is also strongly supported

153 See Tariq Modood, *Multiculturalism: A Civic Idea* (Polity Press, 2007) 5. Modood describes multiculturalism as ‘the political accommodation of minorities formed by immigration to western countries’.

154 Taylor, above n 63, 72–3.

155 See *JFS* [2010] 2 AC 728.

156 See also above n 120 and accompanying text discussing arguments against an instrumental view of education that potentially divides teaching roles from religious inculcation.

in international human rights law.<sup>157</sup> Such a transmission of values may include having to make decisions as to membership, which may also extend to teachers and staff. Inculcating a common purpose and ethos is not necessarily isolated to particular actors — for example, a religious studies teacher. A school may choose to include teachers and staff who are not co-religionists, but it may also understand the community to be one of faith, prayer, and virtue as developed within the tradition. Individuals, in this sense, are governed and shaped by the ethos of the community as a whole.<sup>158</sup>

Indeed, one of the difficulties involved in discussing these issues is the confusion caused by the use of ‘discrimination’ and the language of exceptions as the framework for legal discussion.<sup>159</sup> The United Nations Human Rights Committee has explained that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant’.<sup>160</sup> In terms of staffing, for example, the core need and claim of religious schools is to be able to select staff who share the religious identity of the organisation. This could be framed as ‘discrimination’ which is treated exceptionally, but it could equally be understood as the necessary freedom to select people with a certain characteristic, to be free to advertise for and select staff (whether professional staff or otherwise) who will honour the beliefs, values and codes of conduct of the school, and to be able to make adherence to certain beliefs and codes of conduct a condition for continuing employment if that is important to the religious mission of the school.<sup>161</sup> As John Finnis has argued, taking away from parents this right, in relation to their children’s moral education in the name of equality and non-discrimination in the selection of staff, is oppressive.<sup>162</sup>

It should not be thought, however, that this concern for communities merely reflects a desire to maintain one’s own fenced-off backyard. Rather, the focus on the group’s purpose and ethos can also be understood as fostering different

157 See, eg, *International Covenant on Civil and Political Rights* art 18(4), which protects the right of parents ‘to ensure the religious and moral education of their children in conformity with their own convictions’. See also *United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res/36/55, UN GAOR, 36<sup>th</sup> sess, 73<sup>rd</sup> plen mtg, UN Doc A/RES/36/55 (25 November 1981) art 5(2): ‘Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents’.

158 See Robert K Vischer, *Conscience and the Common Good: Reclaiming the Space between Person and State* (Cambridge University Press, 2010) 97. Conditions of loyalty applied to other groups’ or associations’ ethos is not, of course, unusual. See Vickers, above n 50, 9.

159 See Rivers, *The Law of Organized Religions*, above n 40, 124, 136.

160 Human Rights Committee, *General Comment No 18: Non-Discrimination*, 37<sup>th</sup> sess, UN Doc HRI/GEN/Rev.9 (Vol. 1) (11 October 1989) [13].

161 As Gwyneth Pitt has argued:

where communities exist based on a particular faith or belief which is accepted as a blueprint for every aspect of a members’ lives, it is difficult to see why they should not be able to require that everyone within the community should share the same faith. This must be relevant to the strength and sustainability of the community in that form and seems unremarkable.

Gwyneth Pitt, ‘Religion or Belief: Aiming at the Right Target?’ in Helen Meenan (ed), *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (Cambridge University Press, 2007) 202, 222–3.

162 Finnis, above n 49, 37.

contributions to shared goods within a federation of cultures. In this respect, the use of ‘federation’ has fruitful echoes in social pluralist literature. Analogously, John Neville Figgis referred to a ‘community of the communities’.<sup>163</sup> Harold Laski advocated society as a loose federal structure of groups and associations.<sup>164</sup> Fundamentally, these early twentieth century writers were developing anti-statist arguments for the ‘vitality and legitimacy of self-governing associations’.<sup>165</sup> For example, Figgis argued that the failure to recognise the ‘unity of life and action’ of associations like the church meant a focus on the state and individuals as the only sites of authority, the only ‘real’ entities.<sup>166</sup> Following from this, he considered that there was a creeping absolutism — the state’s unity was now seen as representing the interests of natural individuals, and so any group that offered ‘standards of morals different from those of the state’ was always subject to intervention in favour of apparent individual interests.<sup>167</sup> In contrast, social pluralist theorists emphasised that the world is characterised by a complex range of groups. Figgis argued that it is only within such settings that persons can come to recognise themselves — their personality and creativity in relationship with others and in respect of shared ends.<sup>168</sup> Laski considered that by locating authority at the more diffuse local level of various groups, the individual would cultivate a more genuine sense of citizenship, for it is within these groups that one develops an interest in shared goods — the importance and shape of education or charity, or the virtues of politics.<sup>169</sup>

More recent writers have begun to rediscover these theorists, developing their themes in the context of conscience claims, religious liberty, associational interests, and commentary on the common good.<sup>170</sup> Their recovery is understandable in light of a number of dynamics or perceived problems. For example, a debate continues over whether western countries are experiencing ‘de-politicisation’ — a decline in thick engagement by persons in associational politics (churches, unions, and political parties, most notably) — the causes of this, and, consequently, how such associations can be sustained.<sup>171</sup> This debate occurs at the same time that government policy in different countries has focused on partnering with different religious and cultural groups in service provision (or

163 John Neville Figgis, ‘The Great Leviathan’ in Paul Q Hirst (ed), *The Pluralist Theory of the State: Selected Writings of G D H Cole, J N Figgis and H J Laski* (Routledge, 1989) 111, 121.

164 See, eg, Harold Laski, ‘The Pluralistic State’ in Paul Q Hirst (ed), *The Pluralist Theory of the State: Selected Writings of G D H Cole, J N Figgis and H J Laski* (Routledge, 1989) 183, 189.

165 Paul Q Hirst, ‘Introduction’ in Paul Q Hirst (ed), *The Pluralist Theory of the State: Selected Writings of G D H Cole, J N Figgis, and H J Laski* (Routledge, 1989) 1, 2.

166 Figgis, above n 163, 116.

167 Ibid.

168 Ibid 117.

169 Laski, above n 164, 188, 192.

170 See, eg, Paul Horwitz, ‘Churches as First Amendment Institutions: of Sovereignty and Spheres’ (2009) 44 *Harvard Civil Rights-Civil Liberties Law Review* 79, 104; Rowan Williams, *Faith in the Public Square* (Bloomsbury Press, 2012) 271; Vischer, above n 158, 112.

171 See, eg, Luke Bretherton, *Christianity and Contemporary Politics* (Wiley-Blackwell, 2010) 6, 39; Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, 1991); Steve Bruce, ‘Secularization and the Impotence of Individualized Religion’ in Bryan S Turner (ed), *Secularization: The Sociology of Secularization* (Sage, 2010) vol 2, 295, 302–3.

securitisation).<sup>172</sup> Increasingly then, different groups, each with their own beliefs and practices, are occupying shared spaces. The response to this is not necessarily a top-down enforcement of apparently shared abstract principles. Rather, as dichotomies between private and public break down, such groups within these shared spaces can engage with one another and build ties as they mutually pursue particular goods — for example, education, charity, safe neighbourhoods, and community festivities.<sup>173</sup>

Importantly, this engagement intimates that there might not be, and need not be, entire agreement between different groups. The ‘dignitarian’ and status harm approach discussed in Part III points towards a single rule from the sovereign centre as representing the rights of individuals — in this case, a universal principle of non-discrimination. However, the socially pluralist perspective points towards considering how different groups could be accepted as contributing to shared goods in different and not incompatible ways. For example, Catholic adoption agencies believe that raising children is best undertaken by married, heterosexual couples and do not believe it is right to assist gay or lesbian couples to adopt children.<sup>174</sup> This position regarding what is best for children is not necessarily shared by legislators. Nevertheless, the Catholic agencies are undertaking a worthy task of familial restoration and child rearing, pursued in light of their understanding of the needs of a child and of virtuous living. Assuming there are alternative adoption agencies that have children available for adoption, the participation of Catholics should be accepted, both because we endorse religious groups pursuing their understanding of human flourishing and because the alternative is the closure of the agencies or the removal of Catholics from the social good of adoption.<sup>175</sup> Such an approach also recognises the choice of a mother who gives a child up for adoption to a Catholic agency that holds such values, rather than to another agency, which does not.

Of course, there are times when it is right for the state to intervene. Freedom of religious association, notably, is limited. Where these limits lie is contentious. Certain principles are largely accepted — that, for example, the individual should always have the right to exit a community, consistent with the capacity to change one’s beliefs.<sup>176</sup> But other principles require further interpretation. The boundary

172 See Bretherton, above n 171, ch 1. See also Part VII A below.

173 Bretherton, above n 171, 15; Vischer, above n 158, 120. As Rivers also notes, while religious bodies are concerned with internal governance, they also ‘have an interest in some areas of public administration — what might be called areas of concurrent jurisdiction: rites with civil significance, chaplaincies, schools, social welfare provision and participation in formal public discourse’: Rivers, ‘The Secularisation of the British Constitution’, above n 40, 375–6.

174 See above n 77 and accompanying text discussing the *Catholic Care* litigation.

175 See also John Milbank, ‘Shari’a and the True Basis of Group Rights: Islam, the West, and Liberalism’ in Rex Ahdar and Nicholas Aroney (eds), *Shari’a in the West* (Oxford University Press, 2010) 135, 144. In the United Kingdom, religiously-affiliated adoption agencies either accommodated the prohibition, separated their adoption activities from their religious moors — for example Diocese authority — or severed their ties with a church: see *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales* [2010] 4 All ER 1041, 1047 [8].

176 See United Nations Human Rights Committee, *General Comment No 22: Article 18 (Freedom of Thought, Conscience and Religion)*, 48<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [5] (‘UNHRC General Comment No 22’).

of ‘the rights and freedoms of others’ is a prominent example.<sup>177</sup> The freedom against religious coercion is something of a baseline,<sup>178</sup> but do the ‘rights and freedoms of others’ extend to status harms, as discussed? Similarly, in England and Wales, by incorporating the *European Convention on Human Rights*, a group or person’s religious manifestation claim must be ‘consistent with basic standards of human dignity’.<sup>179</sup> These terms of limitation are open to interpretation,<sup>180</sup> and such interpretation can draw from the competing arguments discussed in this article.

Part of the solution to determining the boundaries of association claims, we suggest, lies in determining the areas where anti-discrimination law should apply. In the discussion that follows, we raise a suggestion for consideration, consistent with our focus on institutional design, multiculturalism, and social pluralism: that more attention should be given to identifying clearly what are the ‘commons’ in which governments must insist on unified values regarding, in particular, gender and sexual orientation, as distinct from instances where different groups can cultivate their own ethos in pursuing particular goods.

## VI THE COMMONS

Laski argued that ‘we are bundles of hyphens’.<sup>181</sup> Individuals exist as members of different communities, with different attachments and affinities: union member-citizen-employee-church member, for example. Although these attachments overlap, our obligations may be tailored to a specific situation or role. Others have raised similar arguments, pointing to the ‘obligations of citizenship’ and ‘[s]pheres of [i]ntersubjectivity’ ranging over communities constituted by ethical bonds, law, and human personhood as such.<sup>182</sup> We suggest that within these different community affiliations, there are places or encounters where people who may be different from one another in all kinds of respects, including gender, sexual orientation, beliefs and values, can expect not to be excluded.<sup>183</sup> This could be called a ‘commons’.<sup>184</sup> The commons is not simply whatever is public as distinct from private. As discussed, plural affiliations can cover what might typically be conceived of as ‘public’ — outward-facing services for churches,

177 *International Covenant on Civil and Political Rights* art (3); *European Convention on Human Rights* art 9(2).

178 *UNHRC General Comment No 22*, UN Doc CCPR/C/21/Rev.1/Add.4, [8].

179 See *R (Williamson and Others) v Secretary of State for Education and Employment* [2005] 2 AC 246, 258–9 [23] (Lord Nicholls); *Campbell and Cosans v United Kingdom* (1982) 4 EHRR 293, 304–5 [36].

180 See also McCrudden, ‘Dignity and Religion’, above n 51; Harrison, above n 72.

181 Harold J Laski, *The Foundations of Sovereignty and Other Essays* (George Allen & Unwin, 1921) 170.

182 See Chaplin, above n 143, ch 7; Vischer, above n 158, 93–5, discussing Rainer Forst, *Contexts of Justice: Political Philosophy Beyond Liberalism and Communitarianism* (University of California Press, 2002) 5.

183 This is different from the claim that particular persons within such institutions might nevertheless be accommodated. *Ladele* [2010] 1 WLR 955 is one prominent example.

184 Martha Minow, ‘Is Pluralism an Ideal or a Compromise?: An Essay for Carol Weisbrod’ (2008) 40 *Connecticut Law Review* 1287, 1310–11 uses the analogous idea of ‘shared spaces’.

educational institutions, and welfare organisations.<sup>185</sup> Rather, the ‘commons’ is more focused on particular spheres of official authority and potentially most commercial enterprises, where non-discrimination should be expected given the norms of the institution or affiliation involved.

Discussing obligations to the poor in his New Year’s sermon from 389, St John of Chrysostom stated: ‘[A] harbour receives all who have encountered shipwreck ... whether they are good or bad or whatever they are who are in danger, it escorts them into its own shelter’.<sup>186</sup> As John Perry discusses, there is an abstraction at work here in regarding the recipient of an action.<sup>187</sup> In certain instances, we purposefully do not and should not deny service to a person on the basis of an identity marker. The harbour master, because of his commitment to life, looks beyond the characteristics of the recipient and instead responds to need in a particular ‘common’ context. We suggest that further exploring what these contexts are might be fruitful. Here, we offer a few thoughts in this direction.

Places governed or presided over by office holders provide something of a central case. Judges, most notably, are required to ‘do right to all manner of people’ in exercising their office ‘without fear or favour, affection or ill-will’.<sup>188</sup> A judge excluding him or herself from considering a family law case because, for example, it involves a gay partnership is difficult to accept.<sup>189</sup> The notion of ‘official’ contexts can be expanded outward to particular institutions. For example, education within state schools and universities carries an expectation of equality of opportunity for those who meet standards of entry or an institutional ethos that emphasises the education of all persons.<sup>190</sup> Within such spaces, anti-discrimination laws play an important role by establishing community standards that further the goals of the institution.

Beyond these ‘official’ commons, spaces, or institutions lies a range of associations — natural, educational, charitable, voluntary, or commercial. Voluntary associations of the like-minded, those who share opinions, interests, or a shared identity and are not engaged in profit-making,<sup>191</sup> provide a possible point of contrast. For example, if a group of women form a women’s book club then that is not part of the commons. They may be motivated by an ethos of mutual support, for example, that specifically demands the exclusion of men. The *Sex*

185 See above nn 137–40 and accompanying text discussing the public orientation of, notably, churches.

186 Quoted in John Perry, ‘Two Questions for Wolterstorff: On the Roles Played by Rights-Talk in History and the Measuring of Worth’ (2010) 23 *Studies in Christian Ethics* 147, 155.

187 *Ibid.*

188 See, eg, *Oaths Act 1900* (NSW) sch 4.

189 See also *McClintock v Department of Constitutional Affairs* [2008] IRLR 29, [53]. This case concerned a Justice of the Peace seeking to excuse himself from cases concerning gay couples adopting.

190 See, eg, *University of Sydney Act 1989* (NSW) s 31, which prohibits religious tests or political discrimination in student admissions.

191 See *Sex Discrimination Act 1984* (Cth) s 4 (definition of ‘voluntary body’). Voluntary body is defined to mean ‘an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit’. There are some exceptions, for example, clubs (as defined in the *Sex Discrimination Act 1984* (Cth)) and trade unions.

*Discrimination Act 1984* (Cth) recognises this dynamic by excluding voluntary associations from the prohibitions on discrimination.<sup>192</sup>

Voluntary organisations may be small, like the book club, or very large and very public, like a political party. Still, both are typically characterised by first, the need to exclude in some instances and on certain grounds (political opinion, for example) in order to maintain an ethos and second, correspondingly, the right of exit for disaffected members. This is typical in religious associations. The group calls on its members to ‘be a Catholic’ or ‘be a Muslim’. This means potentially excluding, from positions of authority most notably, those who are ‘not Catholic’ or ‘not Muslim’; but this exclusion requires not only ‘religious’ discrimination, where religious discrimination refers to differentiating between Catholics or Muslims and other faiths. Rather, beyond a set of comparative doctrinal religious propositions (akin to political opinion), ‘being a Catholic’ or ‘being a Muslim’ includes a much more holistic sense of virtuous living that extends to sexual practice. If there is a conflict between the individual and the group, the typical response is to allow for the group’s internal norms and conversation to decide the matter. To be sure, this can be hard for individuals who, for example, are agitating for change in respect of gender or sexual orientation regarding leadership,<sup>193</sup> but the response to this is not necessarily legal. It may be dialogical or exhortatory, leaving the legal realm characterised by protecting against religious coercion, which may prevent the person from leaving.

This analysis equally applies to religious educational institutions. Where a particular religious identity is essential to its mission, such educational institutions need to have the freedom to employ staff who fit with that mission, or to educate students within a particular tradition. Others can ordinarily find alternative employment, or have their children educated, without being in any material way affected by exclusion from a religiously specific educational institute.

Commercial enterprises, however, pose added complications. Comparative experience has wrestled with what to do with conscientious claims in the context of commercial endeavours. For example, religious groups and individuals have objected to providing bed and breakfast services and wedding photography for gay and lesbian couples.<sup>194</sup> On their account, providing such a service would be facilitating and endorsing a life that they cannot accept is morally praiseworthy or acceptable. Domestically, a similar issue has been raised by a Victorian camp ground, run by Christian Brethren, refusing to accommodate a gay and

192 Ibid s 39.

193 See Shachar, above n 148. Shachar criticises a simplistic focus on the right of exit, arguing it fails to account for ‘obstacles such as economic hardship, lack of education, skills deficiencies, or emotional distress’: at 41. Even so, she expresses her concern for those (women, in particular) who suffer ‘severe and disproportionate burdens’, especially in family law, and analogises the state’s intervening role to cases of domestic abuse: at 17, 19, 37, 41–2.

194 See, eg, *Bull v Hall* [2014] 1 All ER 919 (private hotel); *Black v Wilkinson* [2013] 4 All ER 1053 (bed and breakfast business); *Elane Photography v Willock* (NM Sup Ct, No 33,687, 22 August 2013) (wedding photographer).



lesbian youth group aimed at suicide prevention.<sup>195</sup> As these examples illustrate, a commercial body may be closely affiliated with, for example, a family setting or religious organisation, and it may not simply be governed by a profit motive. It may endeavour to both earn a living and do so in a manner that manifests a religiously based ethos.

Our focus in this article has been on educational institutions and religious associations. We do not propose a complete theory of when commercial enterprises should be able to claim religious conscience.<sup>196</sup> The mere fact, however, that an association or individual is acting in a commercial environment seems much too blunt a basis for imposing anti-discrimination requirements universally. Commercial circumstances are too varied. In response, one could potentially look at this in two different ways. First, one could ask whether declining to shut down a particular conscience claim, and therefore failing to impose a particular claim of non-discrimination, ‘exacts too great a cost on the common good’, as Vischer argues.<sup>197</sup> He explains that this requires reflecting on access to employment (whether a claim ‘threatens the excluded individuals’ ability to function in society by foreclosing economic opportunity’) and meaningful access to services (alternative photographers, for example).<sup>198</sup> What is avoided is a ‘categorical approach’ to the limits of conscience.<sup>199</sup> Second, in a related way, some commercial enterprises should be considered part of the ‘commons’ where, rather than being associations formed out of a religious ethos, they are purposefully open to the general public for profit-making purposes. Eating, drinking, and gambling venues, general stores, and commercial suppliers are the most likely examples.<sup>200</sup>

In the world outside of the commons, differences exist and matter. Traditions and values, even if those traditions and values are not shared by the majority culture, can and should be accepted as part of the fabric of plural groups, associations, and cultures making up the wider community or ‘federation’. In the commons, however, there must be tolerance of difference; indeed, at times a certain abstraction which treats the person qua person is positively required. This respects equality of opportunity or access. The normative impact of the ‘commons’ should not be understated. Within a wide array of contexts, anti-discrimination principles remain the norm. The law, in other words, continues to play an important general role in establishing standards within communal spaces.

195 *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615 (Victorian Supreme Court of Appeal).

196 This is becoming an increasingly prominent debate in the United States, fuelled, for example, by the recent contraceptive mandate within health care reforms. See, eg, James D Nelson, ‘Conscience, Incorporated’ [2013] *Michigan State Law Review* 1565.

197 Vischer, above n 158, 27.

198 *Ibid* 27–8.

199 *Ibid*.

200 See Part V A below (discussing clubs).

## VII RELIGIOUS ORGANISATIONS IN RECEIPT OF PUBLIC FUNDS

As noted, some commentators have argued that when religious groups receive public funds to provide services, such as health, welfare, or education to members of the faith group or the general community, anti-discrimination law should fully apply.<sup>201</sup> This may include schools and aged care facilities, which might primarily serve members of a particular community but be open to others. If, however, the scope of anti-discrimination law tracks the general frames presented in this article, then government funding should recognise and coordinate with the existence of multicultural or plural communities and with the relative autonomy of religious institutions when the government wishes to draw upon their services.

The distinction that needs to be made is between situations where governments are ‘purchasing’ services to be delivered through non-government agencies to the general community in a given locality, and situations where the government is providing funding support to a diverse range of bodies that are delivering services, giving the consumer some choice or reflecting the existing different communities. In the first situation, for government to permit discrimination would be an abdication of its duties to provide services to the whole community in that area. In the second situation, there is room for diversity on contested moral and social issues provided that everyone can access a service.

### A Faith-Based Organisations and Welfare Services

Religious organisations have long played a very large part in the provision of services for the Australian community in the areas of education, health, and care for both the young and the old who need it.<sup>202</sup> In the last couple of decades, both state and Commonwealth governments have increasingly relied upon such faith-based organisations to deliver services that previously had been provided by government entities.<sup>203</sup> From the governmental point of view, this outsourcing of service delivery to non-profit organisations — many of them with a religious identity — has numerous benefits. Non-government organisations are perceived as being able to provide higher quality services in some areas.<sup>204</sup> Outsourcing to non-government services also transfers all the ‘risk’ in providing staff with continuing paid employment and the costs of acquiring and maintaining infrastructure for the management and delivery of services. These would be

201 See above n 102 and accompanying text discussing submissions on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth).

202 See, eg, Peter Camilleri and Gail Winkworth, ‘Catholic Social Services in Australia: A Short History’ (2005) 58 *Australian Social Work* 76; John Murphy, ‘The Other Welfare State: Non-Government Agencies and the Mixed Economy of Welfare in Australia’ (2006) 3 *History Australia* 44.1.

203 Brian Dollery and Joe Wallis, ‘Social Service Delivery and the Voluntary Sector in Contemporary Australia’ (2001) 36 *Australian Journal of Political Science* 567, 570.

204 David Billis and Howard Glennerster, ‘Human Services and the Voluntary Sector: Towards a Theory of Comparative Advantage’ (1998) 27 *Journal of Social Policy* 79.

major benefits to government even if the non-government agencies did not also deliver a quality and efficiency premium.

An example of a government purchasing services is in assisting the unemployed to find work. Prior to the 1990s, employment centres were operated by the government. During that decade there was a transformation, with the government contracting these services to non-government agencies on a tender basis. Many of these organisations are non-profit, faith-based welfare agencies.<sup>205</sup> Family Relationship Centres (FRCs) provide another example. FRCs are community-based services funded by the Australian government, which operate in accordance with guidelines set by the government. However, they are run by non-government organisations with experience in counselling and mediation. They seek to provide support to 'parents going through family difficulties, in particular, those who have either separated from the other parent or who are contemplating separation'.<sup>206</sup>

It is unreasonable to expect faith-based organisations to abandon their identity as such just because they are delivering services on behalf of government. The word 'discrimination' is often unhelpful here. Although it may entail declining employment to some, faith-based organisations are exercising a right to select people who have a certain characteristic, such as a commitment to a particular religious faith, which fits with the religious character of the organisation. It is a loyalty or ethos requirement. The risk to government in seeking to make non-profit organisations look much like public service organisations is that this will destroy the very characteristics that make the non-government agency more suitable to deliver that service. As Dollery and Wallis have argued:

any attempt by official policy makers to force voluntary-sector organisations to adopt more formal structures and practices as a precondition for engaging in human service delivery will serve to undermine the very strengths which give them a comparative advantage. Given the current legislative emphasis on financial and other forms of accountability at all levels of government in Australia, and the concomitant legal obligations on organisations in receipt of public funding, this is by no means a trivial problem.<sup>207</sup>

205 See Mark Considine, 'The Reform that Never Ends: Quasi-Markets and Employment Services in Australia' in Els Sol and Mies Westerveld (eds), *Contractualism in Employment Services: A New Form of Welfare State Governance* (Kluwer Law, 2005) 41; Mark Considine, Jenny M Lewis and Siobhan O'Sullivan, 'Quasi-Markets and Service Delivery Flexibility Following a Decade of Employment Assistance Reform in Australia' (2011) 40 *Journal of Social Policy* 811.

206 Patrick Parkinson, 'The Idea of Family Relationship Centres in Australia' (2013) 51 *Family Court Review* 195, 195.

207 Dollery and Wallis, above n 203, 574–5. Cf Jonathan Birdwell and Mark Littler, 'Faithful Citizens' (Research Report, Demos, 8 April 2012) 16–17, 41, who argue that the ethos of faith-motivated public service providers, their connection to the past and a location, and the prominent relationship they maintain with churches or other faith organisations are all central to the 'social value' they provide and should, accordingly, be prioritised by faith-motivated service providers.

## B Funding a Diverse Range of Services

The government commonly provides some funding support to a range of organisations working in an area. Independent schools are one example. While there are many independent schools that have a religious foundation but now no longer identify as schools with a distinctively religious mission, others retain a distinctively religious purpose or exist primarily for the education of children who come from families that identify with a particular religious group.

For example, Islamic schools exist for the education of children of Muslim families. An Islamic school may choose to enrol non-Muslims, if any parents seek to do so. It may choose to employ non-Muslim staff, and may need to do so to fill a sudden vacancy or otherwise where a suitably-qualified Muslim teacher cannot be found. However, to insist that the school should not ‘discriminate’ at all in employing staff or enrolling students is to misunderstand the very reason for its existence. The same is true of most schools that identify as religious. Catholic schools, for example, exist in order to educate children within the Catholic faith. For the most part, the parents who wish to send their children to Catholic schools identify with that faith community.

Even if such schools are permitted to select staff and students in a way that is consistent with the purpose of the school, should they receive public funding? Australia has long demonstrated its support for diversity by funding religiously or culturally specific private schools in exactly the same way that other private schools are funded. That financial support to schools helps them to provide education to children. Parents also pay fees. If the independent education sector were not so substantial, the burden on the public purse to educate the nation’s children would be very much greater than it is.<sup>208</sup> Public support of private education is therefore a benefit to the government.

More importantly, support for a range of different schools, on a non-discriminatory basis, is a way in which the government can help support religious and cultural diversity in a multicultural society — recognising and accepting that across the community there is a range of moral values and different conceptions of the good. Accepting the freedom to teach the tenets of the faith through educational institutions run by faith-based communities is one way of giving effect to the government’s international commitments.<sup>209</sup> Of course, the government could

208 The Independent Schools Council of Australia reports that based on 2009–10 figures, and combining both state and Commonwealth Government funding:

public support for a student in a government school was on average \$14,380. On average, total government funding for a non-government school student was \$7,430, while for an independent school student it was \$6,450 per year. Therefore, taking into account state and territory government and Commonwealth Government contributions to Australian school education, students in independent schools on average receive less than half the public support of students in government schools ...

Independent Schools Council of Australia, Submission No 17 to Senate Education, Employment and Workplace Relations Legislation Committee, *Inquiry into the Australian Education Bill 2012*, 8 February 2013, 6.

209 See above n 158 and accompanying text discussing arguments characterising any teacher as potentially contributing to and participating in a school’s cultural or religious ethos.

withdraw all funding from religious schools if they choose to give preference to employing staff who are adherents of the faith or give preference in admission to children from religious families. However, if all funding were withdrawn from religious schools that discriminated, the government would effectively be depriving the less well-off members of the community of the right to educate their children in conformity with their own convictions. Funding schools with no religious commitment while refusing to fund schools that retained a strong religious identity arguably would be discriminatory, depending on how we frame the aims of anti-discrimination law.<sup>210</sup>

Similar considerations arise in relation to services such as residential aged care. This form of care is subsidised by the government, with residents also making a contribution in accordance with their capacity to pay.<sup>211</sup> There are a large number of aged care providers. Some have strong religious identities, others have a historic or cultural religious identity, and others have a secular foundation. The diversity of aged care provision gives people a significant degree of choice regarding the kind of residential care that will best suit them. As long as all elderly people have access to a service that meets their needs, it ought not to matter that some homes wish to give preference to people who share the same religious identity and values, or comply with them. The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth), however, recently amended the *Sex Discrimination Act 1984* (Cth), removing the exception to non-discrimination in respect of services if the religious body is providing Commonwealth-funded aged care.<sup>212</sup> The government emphasised access to services for older same-sex couples.<sup>213</sup> However, no evidence was adduced that there was actually a problem with access for which anti-discrimination law provided a solution.<sup>214</sup> Rather, the change was arguably motivated by the understanding of anti-discrimination discussed in this article (albeit in the context of public contracting): an increasing

210 See also Rivers, *The Law of Organized Religions*, above n 40, 281, discussing public contracting. If the purpose of anti-discrimination law is, as discussed above, to enforce universally a particular conception of dignity, then applying the law to the religious school most likely will be viewed as necessary. If the fundamental question, in this context, is access and participation, the matter will be decided differently.

211 See generally Department of Social Services, *My Aged Care*, Australian Government <<http://www.myagedcare.gov.au>>.

212 See *Sex Discrimination Act 1984* (Cth) s 37(2).

213 See Explanatory Memorandum, Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) 42 [190]; Supplementary Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 (Cth) 6.

214 According to data from the 2011 census, only 0.1 per cent of all partners aged 65 years and over are in same sex relationships: Australian Bureau of Statistics, *Same Sex Couple Families* (16 April 2013) Commonwealth Government of Australia <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features852012-2013>>. It seems very unlikely that amongst the services meeting the needs of the 99.9 per cent of couples over 65 who are in heterosexual relationships, there are not a great many providers who would also be happy to accommodate diversely partnered people who need couple accommodation in aged care facilities.

emphasis on universally applying a single rule in favour of identity claims or against ‘dignitarian’ harms.<sup>215</sup>

### **C Sub-Contracting Service Delivery to a Community**

The position is different where the government is purchasing services to be delivered by a non-government organisation acting as an agent of the government to provide services to a whole community. The services must be supplied on a non-discriminatory basis. Typically one non-government organisation will have responsibility for the delivery of services in each area, and if the organisation has a conscientiously-based objection to providing a service to a certain category of person, then it is probably not a suitable organisation to deliver that service on behalf of the government. Such problems rarely occur.<sup>216</sup>

If issues do arise, or concerns about them are raised, it is best to deal with such matters in funding contracts so that the solution can be tailored to the particular problem that arises from the conscientious objection.<sup>217</sup> If necessary, governments may need to fund more than one organisation to deliver services in an area. For example, if a government chooses to provide healthcare to a population in an area primarily through a Catholic hospital, it will need to take into account in its planning that the hospital does not deliver the full range of services that people may be legally entitled to — such as abortion services — and so it will need to find another service provider to deliver these additional services. Such problems

215 As well as noting the access argument, Mark Butler, the Minister for Ageing, further explained the rationale for the change as follows:

While most aged care service providers are accepting of residents regardless of sexual orientation, gender identity or intersex status, we think there should be legal protection that ensures such discrimination cannot occur ... When such services are provided with tax payer dollars, it is not appropriate for providers to discriminate in the provision of those services.

Mark Dreyfus and Mark Butler, ‘New Protections for Sexual Orientation, Gender Identity and Intersex People Pass the House’ (Media Release, 30 May 2013). The same argument could provide the basis for removal of all exceptions for religious organisations that receive public funding.

216 For example, the Homeless Persons’ Legal Clinic in Victoria reports that a huge number of social and homelessness services are provided by faith-based organisations.

In practice, the HPLC rarely sees these organisations providing services in a discriminatory manner in reliance on the exception. In many cases, it is antithetical to the inclusive, compassionate, supportive services that these organisations aim to provide.

Public Interest Law Clearing House Victoria (PILCH), Submission No 425 to the Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012*, 21 December 2012, 14. This submission offered one example of an issue where a Catholic Primary School refused to enrol a child of a same sex couple. The submission omitted to note that the problem was resolved by the speedy and decisive intervention of the Bishop: see ‘School Forced to Take Same-Sex Couple’s Daughter’, *The Age* (online), 14 December 2011 <<http://www.theage.com.au/national/school-forced-to-take-samesex-couples-daughter-20111214-1ou92.html>>. Importantly, however, that a group or multiple groups do not make use of the exception does not indicate it should not exist. The group’s autonomy (and other groups’ autonomy) extends to making such decisions, or not.

217 This should not be thought of as a second-best alternative to individual claims. Providing remedies to individuals can be an ineffective form of achieving change unless they have advisers and advocates who can help them know their rights and act on them. See Hazel Genn, *Paths to Justice: What People Do and Think About Going to Law* (Hart, 1999); Pascoe Pleasence et al, ‘Causes of Action: First Findings of the LSRC Periodic Survey’ (2003) 30 *Journal of Law and Society* 11.

can readily be resolved without enacting legislation to employ a general rule that may have consequences that go beyond the resolution of the problem to which the legislation is proposed as an answer.

## VIII CONCLUSION

The issue of discrimination on the grounds of sexual orientation, in particular, is one that arouses passionate feelings. It is an issue of great personal importance for those who have a same-sex orientation. It is also an issue that often leads to intemperate debate. This is unfortunate. It is important to have a respectful discussion of how, in a multicultural society, we deal with differences of opinion on issues concerning sex and relationships. Ethnic, cultural, and religious groups retain strong traditional values about sex and family life. It may well be that traditional understandings of sexual morality will change among the world's major religions, and that the shifts in public opinion will stimulate reconsideration of traditional norms and values. However, such change is likely to come slowly, if at all. And if change does come, it might still look different to the norms espoused within prominent parts of the human rights and equality movements.

These dynamics are, however, normal. They are the substance of a group's internal conversation. They are the basis for developing an ethos that extends out through public spaces — churches, educational institutions, and charitable care. But changes as to how anti-discrimination law is conceived place increasing pressure upon this. This article has argued that there is a tendency towards universally applying the law against all groups. Such an approach reflects an institutional vision in which the group is subject to claims of individual right — against status or (what is understood to be) dignitarian harms. A different vision, however, would focus more on how different groups can exist and even engage with one another over shared goods. This article has argued that this would be more consistent with the multicultural reality of Australia, its plural sources of authority, and principles of religious liberty.