EXCEPTIONAL RELIGIOUS FREEDOM

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The reach of anti-discrimination law has been extended greatly over recent years to apply to many more personal characteristics and choices than in the past, including issues of sexual practice and relationship status. This has led to potential conflict with churches and other faith groups, to the extent that religious beliefs and moral values are inconsistent with non-discrimination norms. These potential conflicts have been dealt with by use of exceptions for religious groups to the general prohibitions against discrimination. However those exceptions are increasingly under attack, with some calling for their complete removal.

This paper explores the basis for these religious exceptions and considers how we can ensure respect for different values and beliefs in a multicultural society, while also promoting norms of non-discrimination and equality. It is argued that the solution to these problems lies in identifying more clearly what are the ‘commons’ in which governments must insist on non-discrimination norms, and the areas outside of the commons which should, in principle, not be subject to such regulation. It is argued that it is better to define carefully who should be regulated and why, rather than stating broad prohibitions and then carving out sometimes complex exceptions. Voluntary associations of the like-minded should not be seen as part of the commons because there is a free market in such voluntary associations. Religious bodies are voluntary associations. People may choose whether or not to belong to a faith community.

When religious organisations provide services to the general public, different considerations apply and there are particular issues when the organisations receive public funds. 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 which are delivering services, giving the consumer some choice. 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 that is lawful.
I INTRODUCTION

In Australia, churches have long been central to the life of local communities. They are points of connection between people and centres of caring. They have provided a very important source of volunteer effort in communities as well – and this is a crucial aspect of ‘social capital’ which benefits the community as a whole.\(^1\) Religion has not only played a major part in the majority culture. It is also inseparable from the culture of many minority ethnic groups in Australia.

The new tensions about anti-discrimination laws

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. The origin of such laws was in a movement to protect historically disadvantaged groups which have been “subject to widespread denigrations and exclusion”.\(^2\) People of faith such as Dr Martin Luther-King were in the forefront of these campaigns for social justice. These laws were concerned with fixed characteristics such as race, gender and disability. Over the years the scope of these laws has expanded quite dramatically to cover an ever increasing number of protected attributes which include not only fixed characteristics but also personal choices and histories.\(^3\) The law in Tasmania is an example. Among the 20 different grounds on which someone can now sue for discrimination in that State are lawful sexual activity, relationship status and personal histories such as medical history or having a criminal record.

The expansion of the reach of anti-discrimination law has not only been in terms of the number of grounds of discrimination but also in the areas of social, economic and cultural activity which are subject to regulation. This new approach to anti-discrimination law is based on the idea of legal regulation as a tool for promoting substantive equality in society,\(^4\) rather than merely addressing historic injustice and prejudice. This shift is reflected in a change in terminology, with terms such as ‘equality law’ and ‘equality rights’ replacing the earlier terminology of ‘anti-discrimination law’.

The conflicts between the ‘equality law’ movement and faith groups have increased in recent years for two reasons. First, it is now fast becoming a mainstream proposition amongst these ‘equality law’ advocates that in principle, law can reach into the internal organisation and governance of religious organisations to compel them to depart from traditional practices and beliefs, even those which are grounded in theological convictions. An example of this is the failed attempt, in 2010, by the Labour Government in Britain to prohibit churches and other faith groups from discriminating in the employment of youth workers and other staff even where such differentiation

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\(^1\) Andrew Leigh, *Disconnected* (UNSW Press, 2010).


\(^3\) Tasmanian *Anti-Discrimination Act 1998* s. 16.

is required by the theological beliefs or moral values of the faith. These provisions in the Equality Bill passed the House of Commons but were defeated in the House of Lords after concerns about the impact on religious freedom.5

Secondly, the expansion of the various grounds for discrimination has brought conflict with faith groups that see some choices concerning sexual practice as being incompatible with the teachings of their faith. Consequently there are issues for these faith groups about employing people in positions where they have a leadership or teaching role if the person does not accept or seek to live out those teachings.

It is in combination, that these two factors are most significant. There are advocates who argue both that the law can and should regulate the internal practices of religious organisations and who insist that it should be unlawful for such organisations to discriminate on matters concerning the private lives of employees or potential employees.

Lawful sexual conduct and relationship status are examples of where these tensions arise. ‘Hooking up’ is lawful. Most faith groups would say however that hooking up is not wise, and not how God intended us to enjoy sex or to form satisfying and lasting intimate relationships. The Abrahamic religions, and most other cultures for that matter, also emphasise the importance of marriage. It is lawful to live with someone in an intimate relationship outside marriage. However, it is inconsistent with traditional Christian teaching, and indeed the teaching of other world religions, to do so.

If a paid youth worker in a church is engaging in the hook-up culture 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 the youth worker’s conduct is inconsistent with continuing employment in that church. To secular advocates, that person’s dismissal from employment may be ‘discrimination’, and on this, the church leadership may agree with them. The difference is that the church leadership would see it as a matter of discriminating between right and wrong. That is what moral codes are for.

Fait, sex and relationships in a multicultural society

As a consequence of the extensive changes to anti-discrimination law over time, this area of law in Australia has now become an area of division rather than consensus. Very significant issues of public policy are involved. Australia is a multicultural society and on some issues, particularly concerning sex and marriage, people have deeply held beliefs and values which conflict with the values promoted by some of these advocates for ‘substantive equality’. How then can we ensure

respect for different values and beliefs around personal morality and religious faith, while maintaining what is most important about the principle of non-discrimination, that in our shared communal life as a society, differences of race, gender, sexual orientation, and other personal attributes are not a basis for exclusion?

It will be argued that in a multicultural society, there need to be laws that prohibit discrimination; but the law also needs to allow minority groups (and this includes religious groups) to maintain their culture and identity. Promoting diversity means allowing particular organisations or workplaces not to be diverse, if they reflect a particular cultural or religious identity which forms part of the diversity of the society as a whole. That involves an acceptance that culturally or religiously specific organisations should be able to select staff who belong to that minority group or, in the case of religious groups, adhere to the beliefs and values of the faith. No harm comes to the rest of the community by so doing because typically allowing such groups to select in accordance with the mission fit of the organisation makes no appreciable difference to the rest of the population. Others can find employment, educate their children, engage in commerce and receive or deliver services without being in any material way affected by the exclusion from that culturally or religiously specific community.

This paper proceeds by first examining the potential, in a multicultural society, for conflict between traditional religious and cultural values and non-discrimination norms, and then reviews the criticisms of the religious exceptions. It is argued that the solution to these problems lies in identifying more clearly what are the ‘commons’ in which governments must insist on majority values, and the areas outside of the commons which should, in principle, be unregulated. When religious organisations provide services to the general community, difficult issues occasionally arise, especially when the organisations receive public funds. These issues are considered in the final part of the paper.

II AUSTRALIA AS A FEDERATION OF CULTURES

Australia is a nation consisting almost entirely of migrants, for apart from our indigenous population, all of us have 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% in 1947 to 25% in 2008. A further 26% of persons born in Australia had at least one overseas-born parent, according to the 2006 Census. Currently, the Australian population has a net gain of one international migrant every two to three minutes. Thus a substantial proportion of all Australian residents are either first or second generation Australians.

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7 Australian Bureau of Statistics, ibid.
8 Australian Bureau of Statistics, ibid.
The different waves of migration over the last two centuries have brought a diverse range of cultures to Australia’s shores. They also had a diverse range of religious beliefs. For some people, faith was unimportant, or a matter merely of nominal identity. Others came with a stronger adherence to faith. Migrants brought more than one faith tradition. The Irish immigrants were often devout Catholics while other migrants were Anglicans or belonged to smaller Christian traditions.

In addition to those from the British Isles (including Ireland), Australia early on received migrants from China. Migration has increased very rapidly since the end of World War Two. The recent waves of immigration since that time have greatly increased the diversity of the population. 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, while the arrival of the Greeks ensured a strong Orthodox presence. The many refugees from Lebanon after the conflicts of the 1970s brought with them more than one faith tradition also. Some were Maronite Catholics; others Lebanese Muslims. More recently, the Muslim community has expanded through immigration from other conflict-ridden countries, in particular Afghanistan and Pakistan. Immigration from China, India and other Asian countries has also gathered pace in recent years, further diversifying the cultural and religious mix in the Australian population.

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, some newly arrived, others longer established, and a society in which there are different values and beliefs, all of which deserve to be respected. However this must occur within a framework in which our common life rests upon some values that are either shared, or which those who do not share these values need to accept.

**Anti-discrimination law in a multicultural society**

For the most part, this federation of cultures has lived in considerable harmony, supported by laws that prohibit discrimination. These laws have very widespread acceptance, particularly those concerned with racial discrimination. By and large, other non-discrimination laws command widespread acceptance also, in particular laws prohibiting discrimination on the basis of gender and disability.

A federation of cultures, to be successful, requires laws that prohibit discrimination; but it also requires laws that allow it. This is because respect for different cultures requires that communities be permitted to retain their distinctive cultural identities. The right to do so has very strong

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10 At the outbreak of World War II, publicists boasted that 98% of the population was either born in the United Kingdom or descended from families in the United Kingdom. Clark M, *A Short History of Australia*, (4th revised ed., Penguin, 2006) p. 305.
endorsement in international human rights law. For example, Article 27 of the International Covenant on Civil and Political Rights, (the ICCPR) 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.

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 recognized members of the Jewish community arguably ‘discriminates’ on two grounds – race and religion; but it does so 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.

No harm comes from permitting freedom of association among those who share a common culture or religion. A diverse society requires ‘discrimination’ where that ‘discrimination’ takes the form of selection criteria for culturally or religiously specific organisations that have been established in order to foster group identity and to transmit cultural or religious values. Indeed, to talk in terms of ‘discrimination’ in this context in reference to the exclusion of those who are not members of that community is to misunderstand the very meaning of the word discrimination. As the UN’s Human Rights Committee sought to explain in paragraph 13 of the Human Rights Committee’s General Comment 18 (Non-Discrimination):

‘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.’

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 is of critical importance. That is, parents choose that school because it is a means of transmitting to their children the beliefs and values that are important to them, and of protecting their children, at least for a while, from influences that are seen as inimical to those beliefs and values. This right of freedom to educate one’s children in accordance with parents’ religious values is also strongly supported in international human rights law (see e.g. Article 18(4) of the ICCPR).

**Gender, sex and faith in Australia’s federation of cultures**

It is only at the margins that faith conflicts with most anti-discrimination laws. Gender equality is widely accepted, but many faith traditions have issues in the area of religious leadership. The Roman Catholic Church, for example, is committed to a male priesthood. So too are the Eastern Rite Catholic churches, the Orthodox communities and some Protestant churches, or groups of
churches within Protestant denominations. 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.

It is understandable that some secular post-moderns become impatient with those who adhere to such norms or beliefs. To many, such beliefs are at best outmoded and at worst, discriminatory and offensive, in particular because of the clash with non-discrimination norms. The pace of change in western societies has been very rapid indeed over the last 50 years. Yet for faith communities that have evolved slowly over many hundreds and thousands of years, fifty years is not long, and nor is the modern world necessarily right in all things. It is characteristic of faith communities that belief rests upon sacred texts and/or teachings handed down from one generation to the next over centuries. Beliefs and understandings may well evolve over time, but rarely in revolutionary transformations.

The world’s great religious faiths are inherently traditional. Like other traditions, (such as many legal systems) they are characterised by origins in the past, the present authority of received norms, and processes for inter-generational transmission. Traditions bind because they have their own normative force. That is one reason why religious faith has such a stabilizing role in the lives of both individuals and communities. Traditional faith provides continuity in a world of rapid change, and meaning that brings life-giving refreshment in the post-modern world’s existential desert.

**Gender, marital status and religious leadership**

There has, until recently, been an acceptance around the western world that anti-discrimination laws need to contain exceptions to deal with the issue of religious leadership, respecting freedom of religion and the autonomy of religious communities to determine their own norms on such matters in regard to their own internal organisation. The UN Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief affirms the right to appoint religious personnel according to the beliefs of the religion.

**Sexual practice**

Sexual practice is a much more difficult issue because the potential for conflict between faith communities and anti-discrimination law is more extensive. The conflict between norms and values is not necessarily confined only to the issue of selection of people for positions of religious leadership. Issues of sexual practice are a core topic of moral teaching in faith communities.

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


Traditional teaching on sexual practice, at least in the Abrahamic religions, has not been accepting of sex outside marriage, including adultery, and nor to homosexual relations.

Homosexual relations are an area of particular sensitivity and difficulty. In traditional Christian belief, affirmed both by the Catholic Church\(^ {14}\) and typically, by evangelical and pentecostal churches,\(^ {15}\) homosexual acts are regarded as inconsistent with Christian moral conduct. Although often the issues are presented as being about discrimination on the grounds of sexual orientation, in traditional Christian teaching, homosexual orientation is no more of an issue than heterosexual orientation. Christian teaching on sexual ethics is concerned only with sexual acts, not inclinations. For example, Catholic Church teaching calls for respect, compassion, and sensitivity towards those with homosexual inclinations, and is opposed to any discrimination on the grounds of sexual orientation.\(^ {16}\) However, in the sexually liberated world of the twenty-first century, the distinction between sexual orientation and sexual practice is seen as a distinction without a difference.

Within the Christian Churches, there is no longer a uniform position on homosexual practice. The diversity of opinion is perhaps most evident in the Uniting Church of Australia which has had some difficulty maintaining unity over the issue.\(^ {17}\) Churches for gay and lesbian Christians have also begun to emerge. Christians differ also on the extent to which they see their moral views as relevant to those who do not purport to live by the teachings of Christ. One might, for example, adopt a particular sexual ethic for oneself, while holding to the view that sexual morality is entirely a matter of personal belief and choice.\(^ {18}\)

The issue of homosexual practice is not only a problem for the Abrahamic religions. It has been frowned on in a great variety of cultures around the world. For example even in communist and atheistic China, sodomy was not legalized until 1997 and it was only in 2001 that homosexuality was removed from the list of mental illnesses in the third version of the Chinese Psychiatric

\(^ {14}\) *Catechism of the Catholic Church* (2\(^ {nd} \) ed), para 2357.


\(^ {16}\) Para 2358 of the *Catechism of the Catholic Church* (2\(^ {nd} \) ed) is as follows: “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.”


\(^ {18}\) 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.
Disorder and Classification Standards. Sexual orientation, then is an issue not only in the Abrahamic religions but in cultures that are less influenced by religious values.

The issue of discrimination on the grounds of sexual orientation 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 which leads often to intertemperate debate. That is unfortunate. It is important to have a mature and respectful discussion of how, in a multicultural society, we deal with differences of opinion on issues concerning sex and relationships. It cannot be expected that the great world religions will change their traditional teachings just because of shifts in popular opinion within certain parts of the world, or that there will be a dramatic and sudden shift in attitudes among ethnic and cultural minorities which retain strong traditional values about sex and family life.

It may well be that traditional understandings of sexual morality will evolve and change among the world’s great 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. That is both the strength and weakness of traditions which find their origin in historic texts and the teachings of past generations handed down to the present. Adaptation of received truths occurs slowly, cautiously and only after careful reconsideration. That is no doubt frustrating to some people who don’t believe in the idea of objective truth at all.

III CRITIQUES OF THE RELIGIOUS EXCEPTIONS

The clash between religious values and other values has to a large extent been avoided in the past by use of exceptions to anti-discrimination laws. Commonly, anti-discrimination laws are drafted to:

- state the grounds on which discrimination is prohibited
- state the areas in which discrimination is prohibited (for example, employment, education and the provision of goods and services)
- state exceptions to the prohibitions, or provide exemptions.

Anti-discrimination laws, then create a prohibition, and an exception to the prohibition, as a way of accommodating legitimate difference. The religious exceptions follow this pattern. An example of a standard form of exception in Australia is to say that the discrimination will be lawful if it conforms with the doctrines, beliefs or principles of the religion or is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

However, such exceptions are now being increasingly criticised. While those who oppose such exceptions may concede that there needs to be some accommodation for religious freedom, they

argue for such religious exceptions to be narrowed significantly. There is a valid argument that some exceptions are broader than necessary in state and federal laws and that the scope of the exceptions could in some cases be narrowed without much difficulty to faith-based communities. However, a coherent discussion of this issue requires that first of all it be established why it is that regulation of religious bodies through anti-discrimination law is justified in the first place.

The criticism of religious exceptions derives in part from concerns about the scope of exceptions in general, and a desire to scrutinise very strictly any exceptions that are permitted. Indeed, the Australian Human Rights Commission argued in 2008 for all exemptions in the Sex Discrimination Act 1984 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.

Those who argue for removal of the religious exceptions variously assert that religious organisations should not be exempted from the operation of laws that apply to everyone else; or they should not be permitted to discriminate at all if they are in receipt of government funds; or at least they should not be exempt in relation to goods and services; or at least they should not be able to discriminate in the provision of services when providing services on behalf of government. These are all different propositions, and their merits need to examined with regard to those differences.

**The abolitionist position**

Such views have been put forward on more than one occasion by a distinguished group of academic anti-discrimination law specialists. In a submission made to the Australian government in December 2011 (which was in response to a discussion paper on reforms to federal anti-discrimination law) the Group wrote:

> We recommend that the religious exceptions be repealed. If they are retained we recommend that they not apply to functions undertaken under contract to the government and that are undertaken with public funding. If they are retained we recommend that a religious organisation seeking to rely on them should be obliged to identify the religious doctrine or susceptibility involved and the source of religious authority for the claim.

The Discrimination Law Experts’ Group explained its views as follows:

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20 This view is common to academics, lobby groups and ‘human rights’ organisations.. See e.g. Submission 249 to the Senate Committee on Legal and Constitutional Affairs on the Exposure Draft of the Human Rights and Anti-Discrimination Bill, 2012, pp. 6-7.


22 Ibid, p.16.
We believe that the religious exceptions should be removed because we do not accept that religious rights should prevail over the rights of individuals to be treated in a non-discriminatory way in public sphere activities… If the exceptions are retained then they should be cast in the narrowest available form in order to minimise the denial of non-discrimination rights involved.

In its submission on the Exposure Draft of the federal government’s Human Rights and Anti-Discrimination Bill, the Group repeated its opposition to the inclusion of any religious exceptions to the operation of anti-discrimination law, but accepted that the Government had made a policy decision to retain them.23

Such recommendations would appear to indicate a view that anti-discrimination law could be used to override the traditions and values of faiths and minority cultures in the name of ‘equality’. There is some support for this position in a submission of the Australian Human Rights Commission to a Senate Committee examining the effectiveness of the Sex Discrimination Act.24 The Commission wrote:25

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 permanent exemption does not provide support for women of faith who are promoting gender equality within their religious body.

The Commission evidently saw it as a legitimate role of law to provide ‘support’ for women of faith who seek changes to the doctrines and practices of their religious community.

How far the Commission would go in using the coercive power of Australian law to try to change the beliefs and practices of worldwide religions was, however, unclear. The Commission acknowledged that the UN Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief affirms the right to appoint religious personnel according to the beliefs of the religion, but thought that at the very least the exceptions currently contained in the legislation could be narrowed. In accordance with its recommendation that all permanent exemptions be made subject to a three year sunset clause, it suggested that further consideration could be given at that time to the question of whether the exemption “should be

24 The Commission was then known as the Human Rights and Equal Opportunity Commission. Its name was changed by legislation in 2009.
removed, retained or replaced with a more narrowly tailored exemption”. The Commission also contemplated that exceptions could be replaced by a ‘general limitations’ test.

The effect of removing the religious exceptions

What would the removal of the exceptions mean if applied to the Sex Discrimination Act 1984 (Cth)? This legislation prohibits discrimination, inter alia, on the grounds of sex and marital status. Section 37 provides that the prohibitions do not affect:

(a) the ordination or appointment of priests, ministers of religion or members of any religious order;

(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;

(c) the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or

(d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Section 38 provides an exception for “an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.”

There is also an exception contained in s.23(3)(b) of the Act in relation to accommodation provided by a religious body.

If, as the Discrimination Law Experts’ Group recommended, these ‘religious exceptions’ in the Sex Discrimination Act were to be repealed, issues would arise about whether it would be unlawful:

- for the Catholic Church to refuse to ordain women or married men as priests;
- for other faiths, such as Islam, to refuse appointment to women as religious leaders in their communities;
- for religious orders to remain single sex;

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26 Ibid at para 478.
27 Ibid at paras 464-5.
28 Such religious orders do not exist only in Christian faith traditions. Buddhists also have monasteries. See for example the Sunnataram Forest Monastery: [http://www.sunnataram.org]. See also the (male) Bodhinyana Monastery in Western Australia: [http://www.bodhinyana.org.au], and the Dhammasara Nuns' Monastery: [http://www.dhammasara.org.au].
• for an Islamic school to decline to appoint someone as a teacher when the person openly lives with a partner outside of marriage.

Much would depend on whether the exceptions were replaced with some generalised defence of justification or reasonableness, and how such a test would be applied. It may also be that religious bodies could claim other exceptions under the Act.

_Priests and other religious leaders_

It would seem that the only basis on which the Catholic Church or the Islamic community could claim exemption for its religious leaders would be to argue that being male is a genuine occupational qualification on theological grounds. The list of circumstances in which the gender of a person constitutes a genuine occupational qualification would not readily cover the circumstances of ordination of priests (s.30). Other faith communities would have even greater difficulties. For example, the Anglican Church of Australia tolerates different practices concerning the ordination of women across the country, with a few dioceses declining to ordain women as priests. It would be very difficult indeed for those minority dioceses to argue that it is a genuine occupational qualification for a priest to be male when this is not the case in most of the country or in many other parts of the Anglican Communion.

_Members of religious orders_

Most likely, it would be lawful for single sex religious orders to remain. If members of a religious order only receive food and shelter as part of a communal living arrangement then they are not employees. However, they provide education in preparing novices for their religious vows (s.21) and provide accommodation to their members (s.22); so prima facie, religious orders will be covered by the prohibition in the Sex Discrimination Act.

To the extent that the order is an educational institution, training its novices, there may be a partial exemption on this ground (s.34(2)). There may also be an exemption arising under s.39 which provides:

> Nothing in Division 1 or 2 renders it unlawful for a voluntary body to discriminate against a person, on the ground of the person's sex, marital status, pregnancy, breastfeeding or family responsibilities, in connection with:

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29 However if they do receive an income from the religious order, then presumably they would be employees, in which case there may be a defence of genuine occupational qualification based on the nature of the residential accommodation (s.30).

30 The definition of a voluntary body is contained in s.4: "voluntary body" means an association or other body (whether incorporated or unincorporated) the activities of which are not engaged in for the purpose of making a profit, but does not include:

(a) a club;
(a) the admission of persons as members of the body; or

(b) the provision of benefits, facilities or services to members of the body.

**Issues about living with a partner outside marriage**

Other issues arise in relation to marital status. The genuine occupational qualification exemption (s.30) applies only to gender discrimination, not marital status discrimination. If the religious exceptions were removed it would be difficult to see what other exemptions would cover the Catholic Church’s prohibition on the marriage of priests since this would be a form of direct discrimination. There would also be difficulties for all churches if they wanted to insist that ministers of religion should not live together in an intimate relationship with someone outside marriage.

It follows that some religious practices might be protected, notwithstanding the removal of the religious exceptions, if other exceptions were redrafted to make it clear that these practices were covered. The genuine occupational requirement exception could, for example, be extended to cover both sex and marital status, but even this exception could cause difficulties for some denominations in which there is a difference of theological opinion on female priests.

**Anti-discrimination law and the internal governance of religious organisations**

However all this begs the question, should a religious body be allowed to insist on an all-male priesthood, or indeed a celibate one? No doubt there are those who would cheer at the thought that the Australian government would try to force the Catholic Church in Australia to abandon its traditional belief and practice of only ordaining unmarried men to the priesthood. Some might even cheer at the idea that Muslim communities in Australia could be taken to court for failing to appoint female Imams or for discriminating against an applicant for a teaching position in a Muslim school who is living with someone outside marriage. Sometimes even members within faith communities would like to see the government join their side in a campaign to bring about change within the religion.31

It seems that for the more fervent advocates of non-discrimination, the potential reach of the law has few boundaries. For example, Mr Michael Gorton, then Chair of Victoria’s Equal Opportunity

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(b) a registered organisation;
(c) a body established by a law of the Commonwealth, of a State or of a Territory; or
(d) an association that provides grants, loans, credit or finance to its members.

31 See e.g. the submissions of Catholic and Anglican women 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 (2008), cited by HREOC, above n.24 at para 476. See also Cahill, Des, Submission to Parliamentary Inquiry, Victoria, September 2012 at


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and Human Rights Commission, told a Parliamentary Inquiry on Victoria’s Equal Opportunity Act in 2009:32

“I think there are a number of faiths that have some fundamental beliefs that we would not accept as meeting the obligations of the Charter and the Act, because some of those fundamental beliefs are, at their core, discriminatory. There are some fundamental beliefs in some faiths that, for example, are absolutely discriminatory against women, that would be not acceptable in our pluralist, secular society.”

It followed from this view, that religious faiths ought to be brought into line with the Commission’s interpretation of the Charter of Rights and made subject to the obligations of the anti-discrimination legislation.

How far could this extend? Australian experts Carolyn Evans and Beth Gaze note:33

“[T]here 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.”

Such views leave no room for organisations to have a zone of autonomy free from interference from the government. Do advocates for the removal of religious exceptions really mean to force the Catholic Church to ordain women? Do they intend that the Australian government should put the Catholic Church into a position where it would become compelled by the doctrines of its faith to engage in civil disobedience? Do they intend to provoke a conflict with the nation’s devout Islamic community? These are valid questions to ask of proponents of this view.

If the religious exceptions were removed entirely from the Sex Discrimination Act, with the effect that religious bodies could not insist that their clergy or other religious leaders be either male or unmarried, the Australian Parliament would thereby be enacting a level of interference in the internal governance and practices of religious organisations that is unprecedented almost anywhere in the world. Even the communist countries of the former Soviet bloc recognised the right of churches to organise themselves in accordance with their beliefs and traditions, subject to restrictions and monitoring by these atheist governments.

Thus far, such a radical view of the role of government has not gained much traction with legislatures. Parliamentarians, accountable to voters and aware of the limitations of their authority, are understandably less bold than the theorists. Legislators, particularly those in small jurisdictions remote from the centres of world power, could not expect that the major world religions will take

too much notice of their attempts to alter doctrinally based traditions through law. For example, the Catholic Church, with a worldwide presence and, rightly or wrongly a doctrinal commitment to a male, celibate priesthood, or modern Islam which also maintains a tradition of male leadership, are unlikely to change their doctrines suddenly because the Australian Capital Territory or Tasmania declare it to be unlawful.

**IV THE COMMONS AND PRIVATE PROPERTY**

Clearly, engaging in a confrontation with the worldwide Catholic Church or with Islam concerning the theological positions of the faith would be 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 secular anti-discrimination norms on religious groups which would prohibit them from choosing leaders in accordance with their traditions and beliefs?

**Public life**

Religious freedom ought to be a sufficient answer. Yet it seems not to be for those who would argue that equality rights ‘trump’ religious freedom. It is not a sufficient response to them to say that religious freedom trumps equality, because such an exchange of positions can only result in a kind of stalemate in which opposing camps both clothe themselves in the moral authority of ‘human rights’.

There is, however, another basis for justifying the exclusion of religious leadership positions from the application of non-discrimination norms. The essential distinction between the areas that anti-discrimination law should regulate and the areas where it should not, is one between public and private worlds. This is reflected for example in section 9(1) of the Racial Discrimination Act 1975, which provides:

> It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

That is one of the broadest prohibitions in Australian anti-discrimination laws, but even this provision is confined to what is called ‘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 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.

The commons

Another way of thinking about the boundary between the public and private in a multicultural society is that it is a boundary between the ‘commons’ and private property. In medieval villages, there were areas of land which were available to all, where they could graze animals or otherwise join in activities shared with others. Nowadays they would be called public parks.

The commons, in a multicultural society, is the place where people who may be different from one another in all kinds of respects, including race, gender, sexual orientation, beliefs and values, come together in a shared communal existence. In that place they ought to interact with one another without reference to difference. The commons includes the world of commerce, employment, and education within state schools and universities. In the commons, there must be tolerance of difference and equality of opportunity. Anti-discrimination laws play an important role in achieving this, not least by establishing community standards.

In the commons, differences do not, and should not matter. There is and must be a homogeneity of treatment. However, in the world outside of the commons, differences do matter, and heterogeneity must be accepted, for it is in this private area of life that people are free to be different and to live in accordance with their own traditions and values even if those traditions and values are not shared by the majority culture. Multiculturalism means nothing if that is not the case.

It follows that in a society which respects and treats equally the different cultural groups in the community, the law must protect the private world beyond the commons. In that private world, I should be able to say what I like and free to associate with the people I want to associate with. It is in the world outside of the commons that I can live out my family life in accordance with my traditions and values and in which I can practice my religious faith. It is in the world outside of the commons that multiculturalism can be given its fullest expression.

A federation of cultures requires that there be a generous area outside of the commons, an area where government allows people the freedom to be different, and which protects the right of people to hold different views on moral and social issues.

Religious groups as voluntary associations

Characteristic of organisations that ought not to be seen as part of the commons is that they are voluntary associations of the like-minded, or who share opinions, interests, ethnicity or simply choose to meet together. If a group of women in a particular locality want to get together to form a women’s book club then that is a private activity. It is not part of the commons. If men want to do
the same, they should be entirely free to do so. To talk about ‘gender discrimination’ in this context would be very odd because there is a free market in voluntary associations. Feel excluded? Join another group or start your own. The same is true of ethnic associations. If people of Croatian origin wish to form a social club, they should be free to do so. That much seems obvious.

Voluntary organisations may be small, like the book club, or very large, like a political party. A political party is a voluntary association of the like-minded in which members join together to promote particular interests. Should it be unlawful for a political party to discriminate on the basis of political opinion by refusing to admit into membership someone who holds views that are antithetical to the party? Clearly not. Political parties are not part of the commons. Feel excluded because of your political opinions? Join another party or start your own.

That is one reason why faith-based organisations in principle ought to be seen as being outside of the commons. They are organisations in which both membership and participation is voluntary. To be sure, a religious identity is much more complex and multifaceted than being a member of a book club or a political party. However, participation is voluntary. I may identify as a Catholic as a matter of heritage and upbringing, but it remains my choice whether or not to practice as a Catholic. If I do not practice then I might retain my identity, describing myself as a lapsed Catholic, or abandon my identity, no longer identifying as a Catholic at all. I may also choose to participate in another faith community.

On this analysis, religious groups ought to fall outside the restrictions of anti-discrimination law not because they are religious, but because they are voluntary associations of the like-minded. Any such organisation in which participation is voluntary should not be seen as part of the commons. The internal rules of the religious body do not impair the equal opportunity rights of non-members, because people who do not like those rules need not participate in the religious community.

That analysis would still leave room to treat some clubs as part of the commons, where they are really not associations of the like-minded and where they are essentially providing an eating, drinking and gambling venue. It is easy enough to frame a law bringing such clubs within the commons on the basis that they sell food and alcohol for consumption on the premises and have gaming machines. There may be other clubs that are prohibited for public policy reasons such as white racist groups, but arguably this would be because of their incitement to hatred rather than because the club only allows Caucasian members. A society that is confident enough of its shared values ought to be able to rely on social disapproval to deal with such fringe groups, rather than creating martyrs through prohibition.

**The voluntary association for young, single Korean women who like books**

The objection to this may be made, why should people be permitted to discriminate even in voluntary associations? One might accept for example, that the book club should be limited to women if it is a social activity that women want to engage in together; but should they be allowed to discriminate on the basis not only of gender, but also age, or relationship status? Should the law
permit a club to exist which is not just limited to women, but single women under 30? What about if the group consists of single women under 30 of just one ethnicity, say Korean?

There are two answers to the question of whether this should be permitted. The first is that it does absolutely no harm for young, single Korean women who like books to have a club the boundaries of which are marked by reference to four different grounds of discrimination. If these young women enjoy meeting together as a social activity, and discussing books together in English, why shouldn’t they do so? The second answer is to say that the complications arising from wanting to regulate far exceed the benefits of so doing.

The problem can be illustrated, for example, by reference to the federal government’s ill-fated Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012. That Bill sought to regulate all clubs as being part of the commons if they satisfied the following definition:

*club or member-based association* means an association (whether incorporated or unincorporated) of people associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that provides and maintains its facilities, in whole or in part, from the funds of the association.

This is the same definition as in the Disability Discrimination Act 1992 but it is much broader than the definition in the Sex Discrimination Act, which is limited to clubs for 30 members or more that sell liquor. The definition in the draft Bill included unincorporated associations, which are just informal groups of people. The only qualification was that the group must have funds which are used to provide and maintain ‘facilities’. ‘Facilities’ is a word of wider meaning than ‘premises’. The primary meaning given by the Macquarie Dictionary is “something that makes possible the easier performance of any action”, for example, transport facilities. How far that extends is not easy to say.

Arguably, if the club rents a local school hall, or a room in a community centre or church, for its meetings, then it has premises, albeit not ones which it occupies exclusively. ‘Facilities’ might go further, to include a library of books maintained for the use of the members, together with other things they need such as cups, saucers and plates, even if the group does not formally rent premises.

Sensibly enough, there were exceptions to the provision on clubs in the draft Bill. Clause 35 provided:

*The exception in this section applies in relation to a club or member-based association:*

(a) if membership of the club or association is restricted wholly or primarily to people (the *target group*) who have a particular protected attribute, or a particular combination of 2 or more protected attributes; and

(b) restricting membership to the target group is consistent with the objects of this Act.
If so, then the club may discriminate against a person who is not in the target group if:

(a) the discrimination consists of:
   (i) excluding the person from membership of the club or association; or
   (ii) restricting (whether wholly or partly) the person’s access to benefits or services provided by the club or association; and

(b) the discrimination is not on the ground of another protected attribute, or a combination of attributes that includes another protected attribute.

So, under this proposed law, are the young, single Korean women who like books permitted to form a club which has funds to maintain its ‘facilities’ and is limited to those of the relevant age, ethnicity, gender and relationship status? It would appear so based on the fact that it is a group restricted to people who have certain protected attributes; but then one would have to look at the objects of the Act to see if the restrictions are consistent with it (clause 35(1)(b)). If it is just a women’s group with no other limitations, it would be deemed to be consistent with the objects of the Act because the draft legislation specifically said so (clause 35(3)). The problem is that the restrictions are multiple. The objects of the proposed Act were, inter alia, to “eliminate discrimination” and to “promote recognition and respect within the community for:

(i) the principle of equality (including both formal and substantive equality); and

(ii) the inherent dignity of all people.

So if the law were enacted, and members of the group, or the manager of premises that rents out a room to the group, were to seek the advice of a lawyer about the legality of the restrictions on membership, he or she would have to say that on a fair reading of the objects of the legislation, the restrictions are probably not lawful. The group may promote friendship and literacy; its activities may even be consistent with Article 27 of the ICCPR, but it does not seem as if the restrictions on the membership of the group have much to do with eliminating discrimination or promoting recognition and respect for the principle of equality. However, the lawyer might advise that there is no real way of knowing for sure without going to court, which would cost the young, single Korean women who like books thousands of dollars.

All of this leads to a fundamental question. Why should the young, single Korean women who like books need legal advice about such a harmless activity? Why should the organisation that rents premises to them need to worry about whether the group is breaking the law? Why regulate? That is not a question that is asked nearly often enough. The anti-discrimination lawyer often seems to

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34 The objects of this Bill, entitled the Human Rights and Anti-Discrimination Bill, actually didn’t mention any human rights other than protection from discrimination. Consequently, the objects clause did not allow for any balancing of different human rights. It is also far from clear whether the discrimination could be regarded as justifiable conduct under another clause of the Bill.
ask why someone should be exempted from legislation - hence the concern about exceptions and exemptions. It is important first to ask a prior question. Why should this person or group be included in the legislation in the first place?

To regulate by prohibiting something, and then to have to work out the exceptions to the prohibition that are considered justified, adds greatly to the complexity of the law and of our communal life, and involves significant compliance costs. It also risks prohibiting perfectly sensible and beneficial activities because someone has not thought of all the permutations where an exception is justified.

**Communicating law**

There are also issues about how laws are communicated to the public. It is not enough that laws are written and passed. If they are intended to ‘speak’ to the general public, then they must be communicated to the public in a way that people can readily understand, and hopefully not misunderstand. The proposed law, in this respect, was extraordinarily complicated. One would need first to identify that this group of young Korean women have an unincorporated association which falls within the definition of a club, then to realise that their limitations are discriminatory, then to identify that there is an exception which covers them, then to see whether the restrictions are consistent with the objects of the Act (as required by the exception), which is a question incapable of a definitive answer without a judicial ruling.

Such complex laws cannot be communicated to the general public in a simple and clear manner. For the most part, they are likely to be unknown and therefore ineffective as law. They are also likely to be misunderstood, because when statutory law is complex it is often replaced in people’s minds by folklaw – what people believe the law to be. That can be a serious distortion of what the law actually says.

It is better for these reasons not to create the prohibition in the first place unless there is a strong and clear rationale in terms of public policy. Many religious groups, like the young single Korean women, are small non-profit associations which engage in constructive activities that build social capital. The case for regulating voluntary associations of the like-minded through anti-discrimination law is exceedingly weak.

Market forces can very often address any problems that arise. Non-discrimination is a widely held social value and people can make choices about what groups they join, taking account of that value. There is a tendency in the modern era to turn to law as the default tool in social policy if something is bad “there must be a law against it”. Yet law is so often a clumsy and expensive tool. There are other sources of norms, and other forms of pressure other than coercion through legal regulation. Social disapproval is a powerful means of persuading people to behave better.
V RELIGIOUS ORGANISATIONS IN RECEIPT OF PUBLIC FUNDS

More difficult problems arise when religious groups provide goods and services, such as education, for these would appear to be part of the commons. Very often, these services receive some financial support from government.

Schools

Education provides a good example of the issues that may arise. There are many independent schools that have a Christian foundation but which do not identify any more as schools with a distinctively religious mission. They have become part of the commons by reason of the way in which their mission has evolved. Other schools, however, 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 Islamic school should be exempt from the operation of anti-discrimination laws not because religions should be given a privileged status but simply because the Islamic school is not sufficiently ‘public’ to warrant this form of regulation. Put differently, it is not part of the commons. The same is true of most schools that identify as religious. Catholic schools, for example, exist in order to educate children in the Catholic faith. For the most part, the parents who wish to send their children to Catholic schools identify with that faith community. Other parents, typically, are welcome to enrol their children in the school, but who could complain if the school gives preference to the children of Catholic families and preference to employing staff who are Catholic or who are active Christians in other denominations? Were it not to do so, the school would be abandoning the reason for its existence.

One of the difficulties involved in discussing these issues is the confusion that is inherent in the use of the word ‘discriminate’. In terms of staffing, for example, the core need and claim of Christian schools is to be able to select staff who share the religious identity of the organisation. They don’t need a right to ‘discriminate’. All they need is the freedom to select people with a certain characteristic, that is 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. They also need 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. The right of positive selection of Christian teachers to Christian schools or Muslim teachers to Muslim schools is a right to choose people with a particular characteristic when that characteristic is important to the purpose of the school.

To date, anti-discrimination laws have been drafted in ways that accommodate the need in some circumstances, for selection of staff or admission to membership to be based on specific religious criteria, just as the law has accommodated appropriate activities confined to one gender. This is appropriate. Since such faith-based schools are not purporting to offer a general service to the community, nor to be a general employer of qualified teachers, they should not be seen as a part of the commons. It is reasonable nonetheless, for schools which claim not to be part of the commons to make their religious identity and mission clear in public documents such as websites.

Should such schools receive public funding? Australia has long demonstrated its support for diversity by funding religiously or culturally specific private schools in exactly the same way as any other private school is funded. That financial support to schools helps them to provide education to children. Parents also pay fees. If the independent sector in education were not so substantial, the burden on the public purse to educate the nation’s children would be very much greater than it is. Public support of private education is 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. This accords also with the government’s commitment under Article 18(4) of the ICCPR which specifically protects the right of parents “to ensure the religious and moral education of their children in conformity with their own convictions.” In similar vein, Article 5(2) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief (1981) provides that: “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”. 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 these human rights.

Yes of course, the Government could withdraw all funding from the systemic Catholic schools because they give preference to employing Catholic staff and to educating children from Catholic families. However, Catholic schools would not be Catholic in any meaningful sense of the word if they were not permitted to do this. If all funding were withdrawn from Catholic 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. It would also be discriminatory to fund schools with no religious commitment while refusing to fund schools that did retain a strong religious identity. Neutrality, for government, means funding such schools on a non-discriminatory basis.
Health and welfare organisations

More difficult issues arise in relation to religious groups that provide services to the general community but nonetheless maintain a vigorous religious identity. Mostly such issues arise in the health and welfare sectors. These religiously based providers are clearly operating in the commons so far as they are providing services to the general public. It is unreasonable to expect faith-based organisations to abandon their identity as such just because they are delivering services on behalf of government; on the other hand, governments must provide services to all of their citizens and residents, without discrimination.

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. Mostly these are Christian organisations because of the dominance of past migration from Britain and Europe. However, Jewish organisations also have a long history of providing such services in Australia. A growing number of such services are now being provided by organisations of other faith communities.

In the last couple of decades, both state and federal governments have increasingly relied upon faith-based organisations to deliver services that previously had been provided by government entities. 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, for example the provision of foster care.\(^35\) 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 major benefits to government even if the non-government agencies did not also deliver a quality and efficiency premium.

The issue of discrimination in the delivery of services is a difficult one. The position that the government should not provide public funds to organisations that ‘discriminate’ has some substance to it; but the issues are more complex than they may first appear. 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 which are delivering services, giving the consumer some choice. 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 that is lawful.

\(^35\) Special Commission of Inquiry into Child Protection Services in NSW (2008).
An example of a government purchasing services is in assisting the unemployed to find work. Prior to the Howard government years, employment centres were run by the government. The Howard government contracted these services to non-government agencies on a tender basis, and many of these organisations are non-profit, faith-based welfare agencies. Family Relationship Centres (FRCs) provide another example. The FRCs are community-based services funded by the Australian Government, and 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.36

These services must be supplied on a non-discriminatory basis for essentially the non-government organisation is acting as an agent of the government, in the delivery of those services. 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. Rarely is there a problem about this.

More commonly, governments provide some funding support to a range of organisations working in an area. How then should it handle conscientious objection to the delivery of a particular service? No difficulties arise if religious organisations refuse to deliver certain kinds of services to anyone – for example Catholic hospitals may refuse to perform abortions. In restricting the services that they offer, they are not discriminating, because they simply do not provide that service at all. If a government provides health care 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 want to have and so it will need to find another service provider to deliver additional services.

There are situations, however, where a hospital or clinic may be comfortable delivering a service to a certain category of person, but not to other categories of person. Infertility treatment provides an example. A hospital or clinic might decide as a matter of conscience that it should only offer such a service to married couples, based upon its religious convictions; or it may decline to offer it to single people on the basis that a child should preferably be born into a two parent household.

The answer to the question of whether the hospital or clinic should be allowed to discriminate in the provision of such services depends, to a very great extent, on whether we respect religious faith and freedom of conscience, or care very little for it. Article 18 of the ICCPR ought to provide a convincing answer to those who would wish to prohibit a religiously based hospital or clinic from acting on its conscience. Article 18(1) provides:

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

It is subject to limitations. Article 18(3) provides that the right may be subject to limitations, but only those that are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. Freedom of conscience, and the right to manifest one’s religion in ‘observance’ and ‘practice’ clearly arise in the example of providing infertility treatment. No other rights are affected since there is no right to infertility treatment, and if there were, it is likely that other providers could and would offer the service requested.

Other issues concern the staffing or organisations. For example, should welfare organisations working in the commons, delivering services, be entitled to select or prefer staff who share the religiously based mission of the organisation? Yes, if we care about diversity. In a multicultural society, there ought to be room for both secular and religious organisations to provide health and welfare services. Many Christian organisations have very long histories of service in welfare delivery and arguably there ought to be a compelling reason to force them to either abandon that religious identity or abandon providing services. Welfare organisations typically will have a diverse range of staff in their employment but insist on senior staff sharing the faith tradition of the organisation. That is seen to be both necessary and sufficient to retain the organisation’s religious identity.

In the absence of any compelling reason why faith-based organisations should be required to abandon their religious identity, respect for faith in a multicultural society requires allowing them to do so, as long as existing and prospective staff understand that they are joining an organisation with that identity and with staffing policies that take account of religious belief and practice.

VI CONCLUSION

One of the problems that needs to be addressed in crafting a law on discrimination which will command broad community acceptance is how to balance the rights and interests of people who hold different beliefs and values in a multicultural society. That includes respecting people’s beliefs and acknowledging that on issues of sex and family life, there is a range of views in the community.

It is not good enough to see this issue entirely through the lens of non-discrimination, for that obscures from view the other human rights and freedoms involved. In a multicultural society, it is very important to avoid moral monoculturalism – the imposition of one set of moral values on the whole community in ways which allow no tolerance for different moral values and beliefs.

The word ‘discrimination’ is often unhelpful here for it has pejorative connotations that confuses the right to select people who have a certain characteristic, such as a commitment to a particular
religious faith, with the right to exclude people because of a characteristic that they have. It is also important to recognise, as the UN Committee on Human Rights has done, 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 legitimate purpose supported by the ICCPR. A religious purpose is most certainly a legitimate purpose under Article 18 of that Covenant.

In a federation of cultures, the law needs generally to prohibit discrimination in the commons, but to protect the rights of freedom of religion and association outside of the areas of community life where any differentiation would be discriminatory. To have such a sensitive multicultural policy is to promote diversity and respect different cultures equally.

Given the hostility to exceptions by many advocates in the field, the strategy of dealing with the issues for religious groups or minority cultures by means of exception from general laws should be replaced by clearer definitions of what is, and is not discrimination and what are the areas of public life that represent the commons. Exceptions to the prohibitions contained in discrimination laws could certainly be narrowed, as long as we first define clearly why certain areas are being regulated in the first place.