Freedom of Religion and Exceptions in Anti-Discrimination Law: A Loose Canon

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CERTIFICATE OF ORIGINAL AUTHORSHIP

I, Kerrin Bennett, declare that this thesis is submitted in fulfilment of the requirements for the award of Master of Laws (Research) in the Faculty of Law at the University of Technology, Sydney, Australia.

This thesis is wholly my own work unless otherwise referenced or acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

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ABSTRACT

Concern about religious freedom rights has emerged as one of the most prominent social and political issues of the early 21st Century in Australia. Much consternation has followed the introduction, over the past 40 years, of laws prohibiting discrimination on various grounds across all jurisdictions in Australia. The civil rights movements of the 1960s and 70s yielded positive results in prohibiting racial and gender discrimination in public life. Further developments in the past 20 years have led to the recognition of the need for prohibiting further types of discrimination, such as on the grounds of disability, age, relationship status, family responsibilities and sexual orientation. Religious bodies have enjoyed substantial conditional exceptions to a range of forms of discrimination, particularly on grounds of sex, sexual orientation and relationship status. The protection of religious freedom for organisations established for a religious purpose by way of permissibility to discriminate outstrips individual entitlements to the same freedom despite international laws stating that 'everyone' has the right to freedom of thought, conscience and religion. Since Australia's change to marriage laws permitting legal same-sex marriage following the 2017 Australian Marriage Law Postal Survey. there have been increasing concerns about what anti-discrimination laws mean for religious adherents and many people believe their religious rights are being threatened. When prominent footballer, Israel Folau, had his contract terminated after making disparaging comments about homosexuality on social media, the restriction on rights to observe, practise and speak publicly about religious beliefs has been questioned. Having received the final report of the Prime Minister's Expert Panel, the Religious Freedom Review in 2018, the parliament is now expected to take action to provide clarity through law reform.

This thesis seeks to analyse the tension between freedom of religion and the right to be free from discrimination by gaining an understanding of the principles behind religious exceptions to anti-discrimination laws. By uncovering a range of interpretive constructions about religion and religious freedom, it is possible to gain a better understanding of exactly who and what is to be protected. This process leads to a suggested framework for anti-discrimination laws that accounts for the human right to freedom of religion while protecting vulnerable groups from the most harmful forms of discrimination.

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GLOSSARY

ATO	Australian Taxation Office
ACNC	Australian Charities and Not-for-profits Commission
AHRC	Australian Human Rights Commission
APA	American Psychological Association
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
LGBTQI	Lesbian, Gay, Bisexual, Trans-sexual, Queer, Intersex
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UN HRC	United Nations Human Rights Committee

Chapter 1 Introduction

The scope and limits of freedom of religion are matters of current concern in Australian politics, law and society. Despite an increasing movement of citizens away from mainstream Christian religions and a corresponding rise in people identifying as non-religious in Australia,[1] new levels of religious fundamentalism are expanding across the globe.[2] Although most of these factions are not new, their voices are becoming ever more audible and there appears to be a rise in more extreme manifestations of religion. One result is further tensions, as individuals and groups fight to secure their rights to practise and observe religion in liberal democracies, while others counter this by asserting their right to be free from the impact of the religion of others. This tension presents a challenge for governments to determine how best to balance the need to both permit and restrict religious freedom. Hence, Evans states that 'religion is back on the public agenda both domestically and internationally.'[3]

One aspect of the debate is the legal treatment of religious organisations and individuals in anti-discrimination laws.[4] There has been recent criticism of anti-discrimination exceptions for religious organisations[5] as well as some concerns about the impermissibility of similar rights for individuals to act on their religious beliefs leading

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[1] Australian Bureau of Statistics, *Yearbook Australia 2007* (Catalogue No 1301.0, 24 January 2007) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyCatalogue/7056F80A147D09D3CA25723600006532?opendocument> compared with Australian Bureau of Statistics, *Census of population and housing: Reflecting Australia – Stories from the Census 2016* (Catalogue No 2071.0, 28 June 2017) http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Religion%20Data%20Summary~70 ('*Census 2016 – Reflecting Australia'*).

[2] Michael O. Emerson and David Hartman, 'The Rise of Religious Fundamentalism' (2006) 32(1) *Annual Review* of *Sociology* 127.

[3] Carolyn Evans, 'Introduction' in Peter Cane, Carolyn Evans and Zoe Robinson (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, 2008) 1, 1.

[4] Shawn Rajanayagam and Carolyn Evans, 'Corporations and Freedom of Religion: Australia and the United States Compared' (2015) 37 *Sydney Law Review*, 329; Russell Sandberg, 'The Right to Discriminate' (2011) 13 *Ecclesiastical Law Journal*, 157, 173.

[5] Russell Blackford, *Freedom of Religion and the Secular State* (Wiley-Blackwell, 2012) 199; Margaret Thornton, 'Christianity "Privileged" in Laws Protecting Fairness' (2011) 5 *Viewpoint: Perspectives on Public Policy* 41.

to discrimination against others,[6] particularly as a result of recent changes to marriage laws. The well-known *cake baker* case[7] in the United States (US) exemplifies the conflict. The case involved a baker, Jack Phillips, who refused to bake a cake for a same-sex couple's marriage ceremony as he was opposed to same-sex marriage on the basis of his religious beliefs. A finding of discrimination by the Colorado Civil Rights Commission followed and was upheld by the state court. The decision was overturned by the United States Supreme Court in 2018. The court found that the Commission violated Phillips' rights to freedom of religion under the First Amendment to the United States Constitution.[8] Phillips distinguished between his willingness to serve all customers and his wishes not to support the celebration of events that violated his deeply-held religious beliefs. The court further distinguished between the sale of cakes generally, and the use of personal artistic skill in the creation of a cake.[9] The court compared the Commission's treatment of Mr Phillips' refusal to bake a cake on the basis of religious beliefs, with its upholding of refusals by other bakers to bake cakes on the basis of other beliefs of conscience such as where bakers had refused to bake cakes including offensive text. The court found that the Commission did not deal with the case with the requisite neutrality towards Mr Phillips' religious beliefs but was instead hostile to them.[10]

Modern democratic state commitments to human rights, tolerance and pluralism have led to a range of responses to these challenges by western governments, lawmakers, academics, politicians and the media. To which individuals and groups tolerance is to be granted, and to what extent, have become contentious questions and the law of religious freedom, both domestically and in other jurisdictions, has been said to be inconsistent and ambiguous in some respects.[11] This thesis focuses on the intersection of religious freedom and anti-discrimination rights highlighting an inconsistency in the way in which anti-discrimination laws treat religious organisations as opposed to individuals.

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[6] Russell Sandberg, 'The Right to Discriminate' (2011) 13 *Ecclesiastical Law Journal*, 157, 173.
[7] *Masterpiece Cakeshop v Colorado Civil Rights Commission* 584 US (2018); 138 S Ct 1719 (2018) ('*Masterpiece Cakeshop*').
[8] *United States Constitution* amend I.
[9] *Masterpiece Cakeshop* (n 7) 11 (Kennedy J).
[10] Ibid 18 (Kennedy J).
[11] Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (The Federation Press, Sydney 2012) 6 ('*Legal Protection of Religious Freedom')*; Margaret Thornton and Trish Luker, 'The Spectral Ground: Religious Belief Discrimination' (2009) 9 *Macquarie Law Journal* 71, 73.

Anti-discrimination laws in every jurisdiction in Australia (Commonwealth, state and territory) prohibit discrimination against individuals on the grounds of age, race, disability or impairment, sexual orientation or sexuality, marital or relationship status and family or carer responsibilities in areas of education, employment and the provision of goods and services including accommodation.[12] The laws are complex with many other grounds being added by various jurisdictions such as political opinion, religion, intersex status, pregnancy, breastfeeding and criminal records. Anti-discrimination laws apply to educational institutions, Commonwealth and State agencies, companies and businesses including partnerships and sole traders, clubs and societies. They also apply to employees of those entities and all individuals.[13]

There are exemptions or exceptions[14] to some of these laws for religious bodies; for example, under Sections 37 and 38 of the *Sex Discrimination Act 1984* (Cth) organisations established for a religious purpose, under certain circumstances, can refuse people employment, clergy roles and education on the grounds of their sex, gender identity, sexual orientation, relationship, marital or pregnancy status. They can also deny people goods and services on the same grounds. The rationale for these exceptions has been postulated to be the protection of the right to freedom of religion,[15] meaning in this context that certain forms of discrimination are viewed as necessary in

[12] *Sex Discrimination Act 1984* (Cth); *Racial Discrimination Act 1975* (Cth); *Fair Work Act 2009* (Cth); *Age Discrimination Act 2004* (Cth); *Disability Discrimination Act 1992* (Cth); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1991* (QLD)*; Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (TAS); *Equal Opportunity Act 2010* (VIC); *Equal Opportunity Act 1984* (WA).

[13] The only exceptions to anti-discrimination laws in terms of *discriminators* for purposes unrelated to occupational or specific requirements are organisations established for religious purposes. Therefore, the laws apply to all entities including individuals.

[14] The terms 'exemption' and 'exception' are often used interchangeably when referring to provisions of anti-discrimination laws that operate to exclude religious groups or bodies from those laws. Consistent with the Australian Government's Religious Freedom Review, the term 'exception' is used in this paper to refer to those exclusory provisions.

[15] Evans, *Legal Protection of Religious Freedom* (n 11) 121; Christy Clark, 'Anti-discrimination law exemptions don't strike the right balance between rights and freedoms', *The Conversation* (online) 30 June 2016 <https://theconversation.com/anti-discrimination-law-exemptions-dont-strike-the-right-balance-between-rights-and-freedoms-61660>; *Religious Freedom Review: Report of the Expert Panel* (Report to the Prime Minister of the Commonwealth of Australia, 2018) 10, 39-40, 43 ('*Religious Freedom Review'*).

order to uphold certain religious doctrines, values and morals. Accordingly, anti-discrimination laws have been described as a threat to religious freedom.[16]

The current state of anti-discrimination law exceptions for religious bodies is peculiar as religious freedom is recognised as an international *human* right which infers that the right is primarily vested in people rather than organisations. The International Covenant on Civil and Political Rights states that 'everyone shall have the right to freedom of thought, conscience and religion'[17] yet the focus of Australian anti-discrimination exceptions is firmly on the rights of religious organisations rather than on 'everyone'. The aim of this research is to uncover reasons for this seemingly arbitrary granting of discrimination rights to religious organisations, to search for its legitimacy, or lack thereof, and to suggest how it may be overcome if found to be in need of revision.

The current debate in Australia is situated in an ambiguous political climate whereby lines of allegiance are not easy to demarcate. While some historically dominant religious groups wishing to assert their right to be exempt from anti-discrimination laws align with conservative political parties, demographic data complicates the picture. The Australian Marriage Law Postal Survey conducted in 2017 revealed that nine out of twelve Sydney Federal electoral zones in which the majority voted against marriage equality, were parliamentary seats held by the more 'progressive,' 'liberal' Australian Labor Party.[18] According to Census 2016 data these electorates consist of similar numbers of people declaring religious affiliation to the Australian population overall. What is notable about them is that they contain high proportions of people born

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[16] Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Interim Report: Legal Foundations of Religious Freedom in Australia* (2017) 50.

[17] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(1). See also the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg. UN Doc A/810 (10 December 1948), art 18 which states the right in almost identical terms.

[18] The Australian Marriage Law Postal Survey, 2017 asked the question: 'Should the law be changed to allow same-sex couples to marry?". Federal electorates held by the Australian Labor Party where the majority voted 'No' were Barton, Blaxland, Chifley, Fowler, Greenway, McMahon, Parramatta, Watson and Werriwa. Those held by the Liberal Party were Banks, Bennelong and Mitchell. All 6 electorates where over 60% of respondents voted 'No' were held by the Australian Labor Party; Australian Bureau of Statistics, *Australian Marriage Law Postal Survey, Results for NSW* (Catalogue No 1800.00, 15 November 2017) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1800.0~2017~Main%20Features~New%20South%20Wales~9> ('*Marriage Law Survey*').

overseas (between 40% and 60% compared with 26% in Australia overall)[19] and people of the Islamic faith, (6% to up to almost 30% in Blaxland[20] compared with 2.6% across Australia).[21] Two of these electorates also contain higher proportions of people affiliating with other faiths aside from Islam and Christianity (13% to almost 20% in Fowler compared with 9% in Australia).[22] At the same time inner urban very safe Labor electorates returned a strong vote in favour of same-sex marriage.[23] On the other hand, some strong conservative electorates in which some of the largest majorities voted in favour of marriage equality for same-sex couples were held by the Liberal Party and consist of higher proportions of people affiliated with Christian religions such as Warringah and Mackellar.[24] It seems religion and its manifestation through unyielding traditional beliefs cross ideological and geographic boundaries, demonstrating the complexity of the current political climate in which this issue is embedded.

Literature and positioning of research

An examination of the literature identifies two streams of discourse dealing with the right to religious freedom and its protection and limitation through laws; one relating to the balance of competing interests and the other to how religious freedom is interpreted or constructed. Commentaries about religious freedom involving matters of extent and balance ask questions such as: 'how much religious freedom is acceptable?' and 'what legal restrictions would amount to an imposition by government on freedom of religion?' Striking the right balance is a matter of weighing up competing interests. Other explanations imply that the answers may hinge, at least partially, on how the nature of the freedom itself is interpreted or constructed. As stated by Aroney the interpretation of the nature of religion and religious freedom can be fundamental to how the law is able to justify its treatment.[25] This paper sits primarily within the interpretive limb of the literature and seeks to examine how a revision of interpretations and

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[19] Australian Bureau of Statistics, *Census of Population and Housing: Quickstats Australia 2016* (Catalogue No 2061.0, 27 June 2017) <http://www.abs.gov.au/websitedbs/D3310114.nsf/Home/2016%20QuickStats> ('*Census Quickstats 2016*').

[20] Ibid.

[21] *Census 2016 – Reflecting Australia* (n 1).

[22] *Census Quickstats 2016* (n 19).

[23] (Sydney 84% 'Yes'; Wentworth 81% 'Yes') *Marriage Law Survey* (n 18).

[24] Warringah (75% 'Yes' vote and 56.2% Christian compared with 52.2% in Australia) and Mackellar (68% 'Yes' vote and 62.2% Christian); *Marriage Law Survey* (n 18); *Census Quickstats 2016* (n 19).

[25] Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *Queensland Law Journal* 153.

constructions might help to resolve some of the perplexing debates that present challenges in trying to accommodate and restrict permissibility to discriminate on the basis of freedom of religion.

This study involves a particular focus on whether freedom of religion is interpreted as an individual and/or communal right. If freedom of religion is a communal right does this lead to the conclusion that religious groups, organisations and corporations can legitimately exercise all the human rights involved in religious freedom? How far does permissibility of discrimination on the basis of thought, conscience and religion legitimately extend? At present anti-discrimination laws do not generally recognise this right for individuals in public activities. In fact, a strict reading of the law might lead to an interpretation that there is a prohibition on discrimination in aspects of private life.[26] The sole exception to the application of anti-discrimination law to individuals is section 84 of the Victorian *Equal Opportunity Act* which exempts individuals from compliance with Part 4 of the Act relating to the prohibition of discrimination where the discrimination is reasonably necessary for a person to comply with their religion.[27]

1.1 Significance of the study and identified research gap

The debate over the balance between the right to freedom of religion and the right to be free from discrimination has been particularly intense during recent times, prior to, during and following the Australian Marriage Law Postal Survey in 2017 and subsequent legislative amendments to the *Marriage Act*.[28] The Australian government responded to these tensions by conducting a Religious Freedom Review in 2018 (The Ruddock Review) announcing the appointment of an Expert Panel to conduct the review which sought to examine whether Australian law adequately protects the human right to freedom of religion. The review involved significant public consultation through written submissions and face-to-face meetings. The final report of the Expert Panel, titled *Religious Freedom Review: Report of the Expert Panel,*[29]was released on

[26] See, eg, section 9 of the *Racial Discrimination Act 1975* (Cth) which makes it unlawful to do any act involving a preference based on race, colour, descent or national or ethnic origin in social life. This could be given a strict reading that a preference for friendships or relationships with persons of a particular ethnicity may be a contravention of the section.
[27] *Equal Opportunity Act 2010* (Vic) s 84.
[28] *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).
[29] *Religious Freedom Review* (n 15).

13 December 2018 in addition to the Australian Government's response.[30] While this thesis looks to submissions to the review for evidence of interpretations and constructions of freedom of religion and addresses the report and its recommendations, the report is not the focus of this research. This thesis deals more generally with the theoretical underpinnings of laws that protect and limit freedom of religion and exceptions to anti-discrimination laws for religious organisations.

Discourse at the intersection of religious freedom and anti-discrimination tends to focus primarily on the balance of competing interests which reduces the issue to the questions of whether, and if so in what circumstances, the right to freedom of religion can trump the right to be free from discrimination. Commentators often seek to determine the permissibility of discrimination based on its purpose, whether it will be harmful or the context of its operation. Some have sought to strike the right balance between protecting both religious freedom and protecting individuals from discrimination and it is often a matter of balancing benefits and harms.

Less common is discourse that seeks a resolution by analysing interpretations and constructions of the human right to freedom of thought, conscience and religion. According to Kinley et al there has been insufficient conversation between legal philosophers and international lawyers about 'the meaning and contours of human rights; not just about specific rights … but also about the concept of rights itself'.[31] Although the topic of this thesis is specifically the human right to freedom of religion, it is hoped that it may respond to this call to pursue new possibilities for old problems by considering interpreted or constructed meanings underpinning laws that protect and limit the freedom. In order to undertake the task of balancing rights there must be a good understanding of the nature and content of those rights and how they have been interpreted and subsequently encapsulated in laws. This approach could extend to interpreting the foundations of other human rights specifically, or human rights generally.

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[30] Australian Government, *Australian Government Response to the Religious Freedom Review* (2018).

[31] David Kinley, Wojciech Sadurski and Kevin Walton, 'Preface' in David Kinley, Wojciech Sadurski and Kevin Walton (eds), *Human Rights: Old problems, New possibilities* (Edward Elgar, Cheltenham, UK, 2013) viii.

Recent literature has noted individual and communal aspects of religion as significant to the concept of religious freedom. This particular consideration is an increasingly important issue impacting decisions about the treatment of freedom of religion in the law. This thesis will consider both individual and communal aspects of religion arguing that the freedom of thought, conscience and religion is primarily a fundamental human right vested in individuals that should not be extended to organisations. However religious organisations along with all other businesses and corporations should have the right to promote and advance their mission and values. This thesis demonstrates that laws can be introduced to take into account the rights of, and limits on, individuals to act on their religious and non-religious beliefs of conscience as well as the rights of, and limits on, organisations to make choices that support the maintenance of their identity and mission. A revision of religious freedom in anti-discrimination laws along these lines could potentially go a long way towards avoiding the social structures and hierarchies that are unfair, oppressive and inconsistent with liberal values.

Rather than analysing whether or not discrimination ought to be permitted for religious purposes by considering the correct balance between benefits and harm, this thesis seeks to identify particular interpretive constructions of the human right of religious freedom that lead to varying degrees of tolerance of discrimination exercised by religious organisations, non-religious organisations and individuals. After discovering and questioning these constructions, this thesis suggests changes to anti-discrimination laws to reflect a new set of interpretations more aligned with international human rights and the role of religion in modern secular societies.

Due to certain underlying interpretations having been assumed to be correct, reasonable and therefore unquestioned, in rethinking these, this research fills a particular conceptual gap in the literature. From this conceptual gap the research then fills a more functional gap in identifying how these underlying interpretations have influenced anti-discrimination laws and how the laws might be reframed.

Some of the conceptual questions include: Is the human right of religious freedom a right vested in organisations? Are there any other rights organisations might draw on instead of freedom of religion in order to preserve particular values? Which values can justifiably be preserved, and which cannot in a fair and secular society? What kinds of

selectivity should amount to unlawful discrimination? What is the rationale behind sexual orientation discrimination and is it religious? Is the rationale based on a belief shared by all religious adherents or only a few? Some of these questions have been raised by courts in cases involving discrimination and religious freedom. Some have been addressed in international human rights instruments. However, the literature has been scant on conceptual discourse at the intersection of freedom of religion and anti-discrimination law and so far, Parliament has not grasped some fundamental concepts that might facilitate successful legislative revision. Perhaps there is a preference to avoid challenging some of the more deeply-held and persistent ideas that permeate debates about religious freedom due to the tense political climate. The result has been a debate and discourse that lacks both a deeper analysis of the human right of freedom of religion and some foundational principles upon which to discuss the intersection of religious freedom and anti-discrimination. This thesis will address this gap by deepening and clarifying the conceptual underpinnings of the right to freedom of thought, conscience and religion and how they influence exceptions to anti-discrimination laws.

Research Question

The research question to be answered by this thesis is:

Should the law permit religious organisations and individuals to discriminate on the basis of freedom of religion, and if so, under what circumstances?

1.2 Research approach

The research question will be answered with respect to exceptions for both organisations and individuals and each will be treated separately.

This thesis will involve identifying, analysing and critiquing a number of interpretive constructions of religious freedom. It is argued that these constructions have contributed to the irregularity between the treatment of religious organisations and individuals in respect of their rights to act in accordance with religious convictions. Interpretive constructions that underpin the right of religious *organisations* to discriminate relevant to this study relate to:

- The notion that religious freedom is vested in entities other than humans;
- A supremacy of large-scale powerful Churches derived from history and tradition;
- A strong emphasis on the communal dimensions of religion and their meaning for religious freedom;
- A uniform interpretation of the concept of 'religious susceptibilities' in anti-discrimination laws.[32]

Constructions of religion and human rights that have impacted upon the right of *individuals* to act on their religious beliefs or other beliefs of conscience relate to:

- Interpretations that limit the scope of religion and religious belief (what is and is not to be considered religion);
- The positioning of religion and its manifestation above other meaningful and esoteric pursuits;
- The notion that some groups have greater entitlements to religious freedom than others;
- A constructed hierarchy of human rights in which the right to be free from discrimination is given a higher status than other human rights.

In addition to the above interpretations, a problematic feature of anti-discrimination law is a confusing conflation of grounds of discrimination. Australian legislation makes no distinction between innate characteristics, such as race, age, sex, intersex, disability and sexual orientation and those that involve chosen lifestyles, such as relationship or domestic living status, marital status, and religious or political belief. Some grounds may arguably fall somewhere in between depending on a range of contextual circumstances, such as ethno-religion, divorce and pregnancy. An important feature of this thesis is support for a distinction between immutable and mutable grounds of discrimination. The former includes criteria that are outside the control of individuals and the latter are optional, changeable over time and within the control individuals. This

[32] Under sections 37(1)(d), and 38(1)-(3) of the *Sex Discrimination Act 1984* (Cth) discrimination on various grounds is permitted to avoid 'injury to the religious susceptibilities of adherents'. Other legislative exceptions to anti-discrimination provisions use the term 'religious sensitivities,' for example, the *Equal Opportunity Act 2010* (VIC) s 82(2)(b).

thesis argues that the failure to draw this distinction in anti-discrimination laws and the grouping of these distinctly different (although ambiguous in some aspects) types of criteria together is an error. The question is whether discrimination against individuals on the grounds of their choices ought to be prohibited and whether anti-discrimination laws should only protect immutable traits, or at least give more certain protection to them than chosen lifestyles and preferences.[33]

The interpretations outlined above are in some instances supported and in others questioned in Australian cases and the writings of prominent scholars in the field. This research will both support and challenge various positions in the current discourse.

The hypothesis to be tested in this study is that the interpretations and constructions that underpin Australian anti-discrimination laws, where they intersect with freedom of religion, show that the law is imbalanced in favouring not only religious groups and bodies but certain religious beliefs over other beliefs of conscience, and should be corrected so as to provide consistency with international human rights laws. Some criticisms have already been raised by courts, scholars, politicians and stakeholders while other problem areas have so far been overlooked. This study pinpoints those underlying features of constructed notions of religious freedom and anti-discrimination laws that have created barriers to resolving the tensions between these important human rights. While the tensions appear to be an insurmountable accumulation of competing interests, and the solutions elusive, this research suggests that it need not be this way. By uncovering the deeper underlying concepts behind the laws, it may be possible to move closer to resolving debates, not only in relation to religious freedom and anti-discrimination but to tensions between other conflicting human rights.

One of the interpretations to be challenged is that freedom of religion may be vested in groups and organisations in addition to individuals. This leads to discussion about what such a proposition means for both organisations and individuals and their rights to act on religious convictions. One of the key arguments in this paper is that there has been an over-emphasis on communal rights to religious freedom at the expense of the recognition that the human right to thought, conscience and religion is only vested in

[33] This will be discussed in detail in Chapters 6 and 7.

human beings. This thesis deals with how the legal rights of organisations and individuals may be reframed to reflect this position. This suggestion does not deny that religious bodies exercise religious freedom but that such exercise is representative of the religious freedom of individual members of a religious congregation. Nor is the autonomy of religious institutions recognised by various courts including the European Court of Human Rights[34] in conflict with this proposition. In fact, this thesis supports such autonomy in so far as it furthers the mission, goals and values of a religious organisation which in turn are a reflection of the mission, goals and values of its members. What is significant is the distinction between the intentions of the institution as an entity and those of the individual members and this will become more clear throughout this thesis.

Scope of Research

There are many aspects to freedom of religion including rights to manifest religion, such as the observance of special days of religious obligation, communal worship and the right to wear religious garments. Apart from anti-discrimination exceptions, other exceptions to general laws are granted to religious organisations[35] and these are relevant to the debate about the state's role in facilitating religion in society. However, due to length limitations, these aspects of religious freedom and the law could not be included in this study which is restricted to Australia's legal treatment of the religious freedom to discriminate against people belonging to certain groups in employment, education and the provision of goods and services.

1.3 Research methodology

This research aims to reveal interpretations of the human right of freedom of thought, conscience and religion that underpin its treatment in current Australian anti-discrimination laws and to critique those interpretations. As a sociolegal study, this research involves not only law but sociology, political philosophy and some psychological theories relating to group behaviours and their impact on society when religious freedom is seen as vested in groups and organisations as well as, or instead of,

[34] See, eg, *Fernandez-Martinez v Spain* (European Court of Human Rights, Application No. 56030/07, 12 June 2014).
[35] See, eg, an exemption for religious institutions from payroll tax under section 48(1)(a) of the *Payroll Tax Act 2007* (NSW).

individuals. The thesis is a mixed-methods study that will include four specific methods. Firstly, as it deals with the underpinnings of law, it is a conceptual study investigating the ideas and assumptions (called interpretations or constructions in this thesis) which make up the theories upon which the laws are based. Some of the ideologies underpinning the state's role in both supporting and restricting religious freedom originate from the writings of early liberal philosophers during and leading up to the 'Enlightenment' such as Locke, Rousseau, Voltaire and Montesquieu. Due to length limitations this study can include only a very basic coverage of these classics. The primary focus is on more recent discourse and judicial decisions which are influential in modern interpretations in a changing society in which some of the fundamental and basic theories of the Enlightenment are being challenged.

With the emergence of more parliamentary-public consultation, stakeholder commentary is becoming more influential in the development of theories and subsequently the making of laws. Hence, the texts used will include submissions to the Religious Freedom Review[36] and other religious freedom inquiries, parliamentary reading speeches, academic journals, judicial decisions and media articles. In respect of submissions to inquiries, which are voluminous, a selection of material from submissions has been made to grasp the range of understandings, beliefs and proposals relevant to freedom of religion and anti-discrimination laws. All other texts will be selected for commentary on religious freedom and analysed to identify interpretive content that may be ambiguous, contradictory or questionable.

Secondly, this study applies doctrinal methods to identify and analyse current Australian anti-discrimination laws and their judicial interpretation with a focus on Commonwealth laws. State jurisdictions will be included, where appropriate, in order to compare and highlight distinguishing features and their impact on judicial outcomes.

Thirdly, although not a comparative study, some useful comparisons with jurisdictions outside Australia will be made in order to highlight different approaches to religious freedom and anti-discrimination law, including in relation to organisational and individual rights to freedom of religion.

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[36] *Religious Freedom Review* (n 15).

Finally, a review of relevant international and regional human rights laws (the Universal Declaration of Human rights; the International Covenant on Civil and Political Rights; the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief; the European Convention on Human Rights) and their interpretation will be an important aspect of the study and will highlight Australia's responsibilities in this area. Terminology used in such instruments is important and this study will highlight areas of contention in Australia's application of either narrow or wide interpretations of the meaning of religion and belief. Such an analysis will assist in making conclusions about Australia's consistency with international law in relation to religious freedom, anti-discrimination and other relevant human rights. However, it will also highlight difficulties as the instruments do contain some ambiguity allowing for a variety of interpretations and applications by states to specific domestic circumstances. Hence the instruments have some limits in their potential application. Compliance with international laws continues to be dependent on the interpretation of those laws by states.

1.4 Chapter Outline

Chapter 2 begins the thesis with a discussion of the literature on the relationship between religion and the state and the dimensions of this complex debate. It then provides a brief history and foundational summary of the right to freedom of religion forming a background for the study.

Chapter 3 outlines current legal protections and restrictions on religious freedom to the extent that it permits otherwise unlawful discrimination in Australia.

A discourse analysis follows in Chapter 4 in order to identify interpretations and constructions of religious freedom in various texts. The resources to be analysed will be cases, legislation, parliamentary debates and reading speeches, parliamentary and government departmental reports such as the Australian Human Rights Commission's, 'Freedom of Religion and Belief in 21st Century Australia'[37], the final report of the Religious Freedom Review 2018 and other Australian Law Reform Commission and

[37] Bouma, Gary, Desmond Cahill, Hass Dellal, and Athalia Zwartz, Australian Human Rights Commission, *Freedom of Religion and Belief in 21st Century Australia* (Report, 2011).

Human Rights Commission Reports. These reports and submissions provide evidence of interpretations and constructions of the right to freedom of religion. Other secondary sources such as academic articles and texts are fundamental to the study and will provide commentary on existing and suggested interpretations.

Chapter 5 analyses two significant features of anti-discrimination principles and laws. The first is a confusing melding of grounds for discrimination in which there is no distinction between ways of being (innate attributes) and ways of living (values, preferences and lifestyles), known as immutable and mutable attributes respectively. The second concerns the ambiguity around the concept of 'injury to the religious susceptibilities of adherents' which is featured in some provisions of anti-discrimination laws as a standard to be met for the permissibility of discrimination.[38]

Chapter 6 addresses impacts of the interpretations and constructions of freedom of religion and anti-discrimination principles raised in Chapters 4 and 5, along with potential remedies where they are found to be problematic.

Chapter 7 gathers together the above concepts and provides suggestions for a new framework for the intersection of the right to freedom of religion and anti-discrimination. This would be a framework that acknowledges religious freedom as primarily a *human* right and proposes anti-discrimination laws that combine this concept with a practical approach that permits individuals to maintain their own personal convictions and morals and organisations to uphold their mission and values.

Chapter 8 is a concluding summary of the outcomes of the thesis.

1.5 Conclusion

This thesis endeavours to contribute to an improved understanding of the human right of religious freedom by considering a range of principles that underpin current constructions and interpretations of both religion and religious belief that are relevant to

[38] Under sections 37(1)(d), and 38(1)-(3) of the *Sex Discrimination Act 1984* (Cth) discrimination on various grounds is permitted to avoid 'injury to the religious susceptibilities of adherents'. Other legislative exceptions to anti-discrimination provisions use the term 'religious sensitivities,' for example, the *Equal Opportunity Act 2010* (VIC) s 82(2)(b).

exceptions to anti-discrimination law in Australia. Further, this research is intended to be reform-oriented. Religious exceptions in anti-discrimination laws demonstrate an enforceable application of underlying interpretations or constructions of religious belief and religious freedom in society that ought to be scrutinised. Such interpretations should be reconsidered as the nature of religion and its importance in the lives of citizens in Australia are changing. Rethinking them will help to dismantle the deadlock that exists in this polarised debate. This study suggests it is time for a deeper level of analysis of the nature of freedom of religion and its meaning for Australian citizens, so as to encourage laws that better reflect the principles of a diverse, liberal, democratic, secular state.

Chapter 2 Background

In order to answer the research question, it is fitting to begin at the origins of the human right of freedom of thought, conscience and religion and to examine how it has been justified in the past and present. An understanding of the context of human rights in terms of the relationship between state and citizen is relevant to the outcomes of this research as the subject of this thesis is the scope of the right of people and organisations to exercise freedom of thought, conscience and religion and under what circumstances this can be restrained by the state by the enactment of legislation.

2.1 Freedom of religion as a human right

Freedom of religion is recognised internationally as one of a number of human rights. The United Nations' defines human rights as 'inherent to all human beings whatever [their] nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status'.[1] Humans have probably always sought to affirm their own individual freedoms along with their rights against, not only other individuals, but the tyranny of societal rulers. In fact, observations of animals in social systems reveal the phenomenon is likely to pre-date homo sapiens as even invertebrates have been observed to make attempts to assert their individual rights over others in the group and to attempt to interfere with the dominance of other members and to fight over resources.[2]

Evidence of the concept of making human rights a legal concern can be found in ancient civilisations such as that which occupied Mesopotamia in the 18th Century BC. The Babylonian King Hammurabi set wages for specific workers, rental rates for property

[1] 'What are Human Rights?', *United Nations Office of the High Commissioner* (Web Page) <https://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>.
[2] Valerio Sbragaglia, 'Fighting over burrows: the emergence of dominance hierarchies in the Norway lobster' (2017) 220(24) *The Journal of Experimental Biology* 4624-33.

and outlined procedures for judicial fairness.[3] Moving forward 3,500 years, firstly the signing of the Magna Carta in 1215, although far from protecting the ordinary person as it was primarily about securing rights for elite barons against the king of England, marks a starting point in officially limiting the arbitrary power of the sovereign.[4] The second point was marked by the English Civil War and the Glorious Revolution resulting in the Bill of Rights of 1689 which finally overturned the myth of the divine rule of kings.[5] Although not a comprehensive list of rights the Bill granted certain protections against cruel punishments including torture. According to Bates the significance of the Bill of Rights in terms of human rights was its removal of absolute power of the state for the sake of the individuals within it.[6]

An historical turning point in the development of human rights was the 18th Century enlightenment movement marked by the writings of philosophers such as Hobbes and Locke who had much to say about civil liberties, equality and the limited role of government.[7] While Hobbes believed the only role of the state was the protection of citizens from harm,[8] Locke argued that the state's role was the protection of liberty and governance by consent.[9] While both ideas were based on the notion that people have natural rights to certain protections, these opposing views form a tension that has found its pew at the heart of modern debates about civil rights and liberties. According to Hobbes individuals cannot be trusted to self-govern and must relinquish their natural rights to a monarch in return for protection.[10] Locke claimed that man had by nature the 'power to preserve his life, liberty and estate against the injuries of other men'.[11] Both theorists referred to protection from harm; However Locke was of the view that when given the right information people could make good decisions and govern themselves.

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[3] D G McNeil, 'The Code of Hammurabi' (1967) 53(5) *American Bar Association Journal* 444–446.
[4] Ed Bates, 'History' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2010) 15-33, 16-17.
[5] Ibid 17.
[6] Ibid.
[7] Thomas Hobbes, *Leviantan* (OUP 2009) in Peter Laslett (ed), *Locke: Two Treaties of Government* (Cambridge University Press, 1988) ('Hobbes in Laslett').
[8] Ibid 222.
[9] John Locke, *Two Treatises of Government* (Cambridge University Press, first Published 1690 in Peter Laslett (ed), *Locke: Two Treaties of Government* (Cambridge University Press, 1988) 222 ('Locke in Laslett').
[10] 'Hobbes in Laslett' (n 7) 113.
[11] 'Locke in Laslett' (n 9) 107.

Locke's ideas have become fundamental to the notion that human rights are inherent in the individual: Locke wrote that man was born with a 'Title to perfect freedom, and an uncontrolled enjoyment of all the Rights and Privileges of the Law of Nature, equally with any other Man, or Number of Men in the World'.[12]

Locke's ideas were undeniably influential in the drafting of the United States Declaration of Independence of 1776.[13] The Declaration claimed that all men are created equal and are endowed with certain unalienable rights including the rights to 'Life, Liberty and the Pursuit of Happiness'.[14] Across the Atlantic the French were working on a similar project. Section 16 of the 1789 French Declaration of the Rights of Man and Citizen sought to affirm the link between limits on state power and the protection of human rights.[15] Although the inherent rights vested in humans were a significant part of the development of society for thousands of years prior, Thomas Paine was perhaps the first author to use the phrase 'human rights' in a published work in 1791.[16]

The United States Constitution of 1789 contained unspectacular assertions about rights but this was then updated in 1791 with the first ten amendments to the Constitution coming into force and becoming known as the United States Bill of Rights.[17] Relevant to this thesis is the First Amendment which reads: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …'[18] The Bill of Rights is known as the modern world's introduction of the recognition of both a limit on state enforced religion along with a right to freedom of religion, commonly referred to as 'free exercise'. That being said, religious freedom was not a concept unique to the US, nor the modern world. Inscriptions on the Cyrus Cylinder of Ancient Persia which dates to about 530 BC provide evidence of religious tolerance in

[12] Ibid.
[13] Bates (n 4) 18.
[14] United States Declaration of Independence 1776.
[15] Bates (n 4) 19.
[16] Ibid 20.
[17] *United States Constitution*.
[18] *United States Constitution* amend I.

ancient times. King of Anshan, Cyrus the Great's declarations allowed freedom of religious worship to diverse peoples persecuted and displaced by a neighbouring ruler.[19]

This background demonstrates an important aspect of the recognition of human rights and freedoms which is that they substantially arose from the notion of the necessity for protection from state interference rather than protection of citizens from each other.

In more recent times human rights have been elevated to a position of high priority by the international community and are an embedded feature of the United Nations and its work. Religious freedom is enshrined in state constitutions, such as in the United States and Australia and was declared by the United Nations in Article 18 of the Universal Declaration of Human Rights (UDHR)[20] and adopted in Article 18 of the International Covenant on Civil and Political Rights (ICCPR).[21]

Who has human rights?

Human rights are vested in humans. This may appear obvious, but it has been argued that human rights may, in fact, be extended to groups, communities, organisations and even corporations. This is a significant issue emerging from this study and indicates that religion and the human right to freedom of religion are perhaps open to interpretation or can be constructed in a variety of ways.

Freedom of Religion and the State

The notion that people have a right to freedom of religion and that states ought to refrain from restricting this freedom is embedded in theories relating to the relationship between states and citizens and literature relating to religious freedom often begins at this junction. The contribution of leading philosophers including Thomas Hobbes, John Locke and John Rawls on the role of the state in the lives of individuals have been influential in understanding the right to freedom of religion as they form the basis for

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[19] Barbara G.B. Ferguson, 'The Cyrus Cylinder—Often Referred to as The "First Bill of Human Rights"', *Washington Report on Middle East Affairs* (Special Report, May 2013) <http://www.wrmea.org/2013-may/the-cyrus-cylinder%E2%80%94often-referred-to-as-the-first-bill-of-human-rights.html>.

[20] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg. UN Doc A/810 (10 December 1948), art 18 ('*UDHR*').

[21] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(1) ('*ICCPR*').

the modern day liberal democratic state in which individual freedoms are both protected and restricted by the state.

While Hobbes believed in the necessity of absolute power of the ruler in order to avoid a disorderly society, he claimed the ruler was restrained to the extent that he must exercise his authority responsibly with the laws of God and of nature.[22] His proposition that the power to govern is somewhat in the hands of the governed, later known as the 'social contract' developed by Rousseau in his book *The Social Contract,*[23] is relevant to the citizen-state relationship today. However, Hobbes' vision of individual freedoms and liberties was more limited. He believed individuals had few if any natural rights other than the right to preserve one's life as all were subservient to the ruler.[24] It was Locke who advocated the natural liberty and equality of human beings.[25] In *Political Liberalism*, Rawls' theory, which he referred to as 'justice as fairness,' included an assertion that each person has an equal right to basic liberties including political and civil liberty, equality of opportunity, freedom of thought, liberty of conscience and freedom of association.[26]

In drawing on Locke's understanding of the role of the state in the lives of individuals, Blackford points out that a liberal state embraces social pluralism allowing a wide range of individual and cultural differences, favouring liberal principles such as freedom of speech, sexual and reproductive decision-making and rejection of arbitrary punishments but may also tolerate illiberal ideas.[27] This social pluralism including the toleration of cultural differences is widely recognised to include religious differences. Rawls asks: 'How is it possible for there to exist over time a just and stable society of free and equal citizens who still remain profoundly divided by reasonable, religious, philosophical and moral doctrines?'[28] Despite Rawls' solution which he refers to as *political liberalism,* that aims for a political conception of justice that can gain the support of an overlapping

[22] G.C.A Gaskin (ed), *Thomas Hobbes Leviathan* (Oxford World's Classics Oxford University Press, 1996).
[23] Jean Jacques Rousseau, *The Social Contract* (Ozymandias Press, 2016).
[24] Bates (n 4)15-33, 17.
[25] Ibid.
[26] John Rawls, *Political Liberalism* (Expanded Edition, Columbia University Press, New York, 2005) 139, 219.
[27] Russell Blackford, *Freedom of Religion and the Secular State* (Wiley-Blackwell, 2012) 4.
[28] Rawls (n 26) 47.

consensus of reasonable religious, philosophical and moral doctrines, along with the retorts of many who came before and after him, it is this question that still plagues lawmakers today. Indeed, Rawls' proposition is that there can be a set of reasonable comprehensive doctrines tolerated by citizens in consensus[29] forming a shared political conception as the basis of public reason in political debates.[30] Rawls states '[t]he religious doctrines that in previous centuries were the professed basis of society have gradually given way to principles of constitutional government that all citizens, whatever their religious view, can endorse'.[31]

The notion of a widespread acceptance of a set of reasonable comprehensive doctrines as proposed by Rawls may be an elusive utopian vision. Some cultural or religious practises, such as male marriage with female minors and the prohibition on the appointment of female Catholic priests, mean that consensus on doctrines is difficult to achieve. This situation is incompatible with Rawls' notion of constitutional government and justice as fairness as there is no consensus about what is fair in a liberal pluralism. As an example, the overlapping consensus of reasonable religious, philosophical and moral doctrines is currently being challenged with sharia law increasingly operating alongside laws in some western nations[32] and pressures to recognise it in others.[33]

Rawls may have spoken too soon. Perhaps even as recently as 1993, Rawls did not entirely contemplate the extent of global change since developing his influential theories, including extensive geographic multi-culturalism, the growth of fundamentalist religious ideology and radically diverse political opinion with tensions being exacerbated by technological advances in communication. Hence, Evans argues that lawmakers are caught between a number of competing imperatives and for this

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[29] Ibid.

[30] Ibid.

[31] Ibid 10.

[32] For example, the Muslim Arbitration Tribunal in England operates under the *Arbitration Act 1996* UK. It settles disputes relating to family, divorce, wills and commercial disputes. Decisions are binding and enforceable across the United Kingdom (UK). Sharia courts and the Jewish beth din do not have legal authority in the UK. Church of England ecclesiastical courts have been scaled back and deal with only church property and criminal law relating to clergy; 'Religious Courts', *Humanists UK* (Web Page, 2019) (<https://humanism.org.uk/campaigns/human-rights-and-equality/religious-courts/>).

[33] Ann Black, 'Legal Recognition of Sharia Law: Is this the right direction for Australian Family Matters?' (2010) 84 *Family Matters* 64-67; Family Council of Australia, Report to the Attorney-General, *Cultural Community Divorce and the Family Law Act 1975: A proposal to clarify the law* (August 2001) [2.12]-[2.18].

reason law and policy around religion is not a cohesive whole and consists of compromises between political and world views.[34] Adding to this are societal commitments to historical and traditional ideologies firmly embedded in culture which have resulted in the privileging of powerful religious organisations. Many of these commitments have not been seriously questioned in the public sphere until recently.

Various theories and opinions abound about the role of religion in modern society including its scope and its limitations. The Lockean approach was that the state should neither impose nor persecute religion because it does not concern itself with other-worldly things.[35] Other philosophers of the Enlightenment supported the notion of a separation of church and state[36] and today, although still questioned, secularism remains a dominant state structure that is popular amongst scholars in the west. As Sadurski states, the idea of a secular state that avoids involvement in matters of religion, yet does not interfere with religious expression or activities has long been understood.[37] Similarly, Meyerson argues that religion should be regarded as a private matter[38] and the state should not purposefully advance religion, nor supress it.[39] In practice this means governments should not act on religious purposes, assist religious groups to spread their religious beliefs, nor should they account for religious convictions in justifying laws and public policies.[40] The rationale for this position is clearly that not all citizens subscribe to the same religious beliefs and so any preferential treatment of a particular religion by a government that represents all citizens equally is an imposition on, and potentially exclusory of, all outside the religious group. Hence, Meyerson raises Dworkin's contention that the translation into law of external preferences is an insult to the equal moral status of all citizens.[41]How religion may remain a private matter is questionable. While Meyerson qualifies the private nature of religion on the non-

[34] Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (The Federation Press, Sydney 2012) 5-6.
[35] Blackford (n 27) 198.
[36] See, eg, Charles-Louis de Secondat, Baron of Montesquieu, known simply as Montesquieu; MJC Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, Indianapolis, 2nd ed, 1967) 83.
[37] Wojciech Sadurski, 'Neutrality of Law towards Religion' (1990) 12 *Sydney Law Review* 420, 421.
[38] Denise Meyerson, 'Why Religion Belongs in the Private Sphere, Not the Public Sphere' in Peter Cane, Carolyn Evans and Zoe Robinson (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, 2008) 44.
[39] Ibid 53.
[40] Ibid 44.
[41] Ibid 52.

interference of government, there are numerous ways in which religion reaches into the public sphere such as in the participation by religious bodies in commercial activities, which may in turn amount to advancing religion, at least to some extent.

In *Religion Without God,* Dworkin puts forward a case for not only an equal moral status for all citizens, but an equal status of profound convictions about life and its responsibilities, whether derived from a belief in a god or not.[42] In this way Dworkin extends the scope of government's neutrality which should cover all such convictions. This is significant as there has been extensive debate about the scope of religion and whether non-theistic and even non-religious convictions ought to be included in the right to freedom of religion.

According to the Universal Declaration of Human Rights proclaimed in 1948 by the General Assembly of the United Nations, all people have the right to freedom of thought, conscience and religion.[43] While this sweeping proposition appears straight forward enough, how exactly governments are to support or implement it through law and policy is far from clear and in many respects controversial. Section 116 of the Australian Constitution protects the ability of citizens to freely exercise religion and prohibits the establishment of a state religion.[44] However this protection is limited.[45]

As stated previously, religious freedom in Australia has been legislated for in part by exceptions to anti-discrimination laws for religious organisations which entitle them to discriminate against people on the grounds of race[46], sex, gender, sexual orientation, age, disability and in some cases, religion in areas of their operations such as employment, education and the provision of goods and services. Although these exceptions are firmly entrenched in a range of anti-discrimination laws in Australia they are not without their critics. Blackford argues that while religious individuals, communities and organisations have the right to believe what they want, teach their beliefs to others and manifest them in ritual practices they should be expected to adhere

[42] Ronald Dworkin, *Religion Without God* (Harvard University Press, 2013) 116.
[43] *UDHR* (n 20) art 18; Also see *ICCPR* (n 21) art 18(1) which states the right in almost identical terms.
[44] *Australian Constitution* s 116.
[45] This will be discussed further in Chapter 3.
[46] In state legislation. See Appendix 1.

to neutral secular laws.[47] He asserts that religious employers should not expect to be exempt from paying payroll tax and there ought to be no automatic entitlement to exceptions from generally applicable laws.[48] Likewise, Sadurski proposes a strict separation of law and religion which cannot be maintained where a state is accommodating religious claims for special protection and recognition.[49] Meyerson contends that exceptions are motivated by the belief that religion has a special value or is dictated by a higher sovereignty and that religions appear to be entitled to a claim to be above the law.[50]

The position of some commentators is that the current situation in liberal democracies such as Australia is one where religious freedom in the hands of organisations would be more aptly referred to as religious privilege. The argument is based on the historical and traditional underpinnings of organised religion that, despite states' proclaimed commitment to secularism, still remain dominant. Accordingly, Thornton claims that in Australia religious belief is accorded 'a privileged status de facto'[51] and 'that the secular state defers to powerful interests despite its own egalitarian rhetoric'.[52] She further argues that no organisation should be able to exempt itself from equal opportunity legislation unless an exception can be fully justified.[53] According to the Public Interest Clearing House and the Human Rights Law Resource Centre anti-discrimination law exceptions protect traditional social structures and hierarchies.[54]

Despite community and political support for anti-discrimination in general, there remains considerable academic support for religious exceptions to ordinary laws even amongst secularists. Blackford maintains a strong overall position of state neutrality but concedes that exceptions to laws on religious grounds may be possible for religious

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[47] Blackford (n 27) 199.
[48] Ibid 124.
[49] Sadurski (n 37) 451.
[50] Meyerson (n 38) 54.
[51] Margaret Thornton, 'Christianity "Privileged" in Laws Protecting Fairness' (2011) 5 *Viewpoint: Perspectives on Public Policy* 41, 42.
[52] Ibid 45.
[53] Ibid.
[54] Public Interest Law Clearing House and Human Rights Law Resource Centre, Submission No 676 to the Scrutiny of Acts and Regulation Committee, *Inquiry into the Exceptions and Exemptions in the Equal Opportunity Act 1995* (2009) 79.

organisations for a secular purpose.[55] He states that in deciding whether to enact an exception the state should weigh up its secular reasons without considering the merits of the religious belief itself.[56] Similarly secularist, Dworkin agrees that exceptions to laws may be possible where there will not be significant damage to policy and where there will be no injury to individuals. He maintains that Catholic adoption agencies who refuse same-sex couples may be exempt from anti-discrimination laws if there are other agencies available to them.[57] Harrison and Parkinson argue that non-discrimination norms should operate in 'the commons' where the community comes together in a shared existence and where participation rights need to be protected, but for the maintenance of identity and belief, beyond the commons where religious groups act in private, different groups should be permitted to discriminate.[58]

Similarly, balancing liberty with harm, Evans argues that the freedom of religious groups to select clergy on the basis of sex, marital status or sexuality is an important aspect of religious freedom that impacts upon a relatively small number of people, and therefore it is difficult to justify its removal.[59]

Interpreting the right to freedom of religion

While the balance between rights and responsibilities is one way to determine the scope and limits of freedom of religion, another is to interpret the meaning and nature of religious freedom which may provide some answers as to its significance for individuals and groups, and how the law ought to treat it. Dworkin provides an example of an interpretive approach in arguing that while some liberties such as freedom of speech and the right to a fair trial are liberties to which individuals have *special rights,* he claims that religious freedom is not one of these.[60] He claims that special rights place much more powerful and general constraints on government interference[61] but religious freedom should be part of a more general right called *ethical independence* which means religions can be forced to restrict their practices so as to obey rational non-

[55] Blackford (n 27) 200.
[56] Ibid.
[57] Dworkin (n 42) 135.
[58] Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society' (2014) *Monash University Law Review* 413, 413.
[59] Evans (n 34) 138.
[60] Dworkin (n 42) 130.
[61] Ibid.

discriminatory laws that do not give them more than equal consideration.[62] In this sense Dworkin refers to the *nature* of religious freedom rather than arguments about the extent or limits of religious freedom in a particular situation.

Other theorists focus on the definition of religion and there are robust arguments that, if not the definition itself, the freedom applied to religion should be expanded to include non-religious beliefs of conscience, which would bring the conception of religious freedom into line with the international law position that all people have the right to freedom of thought, conscience and religion.[63] Leiter who interprets religious and non-religious claims of conscience as having equal moral and legal status argues that religious claims of conscience are no more important than non-religious claims but they are not given equal moral or legal standing.[64] In another perspective on interpretation, Meyerson draws on the work of Rawls in stating that if all people are to be treated with mutual respect, the exercise of state power should be justified in terms of shared reasons and religious reasons are not of this kind.[65] Parkinson analyses the nature of religious belief and its meaning for believers in daily life in arguing for the freedom of religious employers to select employees who support their values and beliefs. He states that the narrow view of work ignores the identity and mission of an organisation as relevant in determining occupational requirements.[66]

A developing area of analysis that could have a direct impact on exceptions to anti-discrimination law for religious individuals and organisations is that which seeks to determine whether to interpret religious freedom as being vested in not only individuals, but groups, communities, organisations and corporations. In his comprehensive article on this theme, 'Freedom of Religion as an Associational Right,'[67] Aroney argues that because religion has associational and communal dimensions freedom of religion can

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[62] Ibid 135.
[63] *UDHR* (n 20) art 18; Also see *ICCPR* (n 21) art 18 which states the right in identical terms.
[64] Brian Leiter, *Why Tolerate Religion?* (Princeton University Press, 2013) ix, 103.
[65] Meyerson (n 38) 71.
[66] Patrick Parkinson, 'Threats to Religious Freedom Hard to Justify' (2011) 5 *Viewpoint: Perspectives on Public Policy* 46, 47.
[67] Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *Queensland Law Journal* 153.

justifiably be extended to organisations and corporations.[68] His intention is to establish the associational communal dimensions of religion as a matter of principle.[69]

The question of whether or not corporations have the right to religious freedom was dealt with in *CYC v Cobaw*.[70] The court held that corporations were not entitled to rely on the right to religious freedom. The comment of Neave JA is compelling:

> Like other human rights, the right to freedom of religious belief can only be enjoyed by natural persons. Because a corporation is not a natural person and has neither soul nor body, it cannot have a conscious state of mind amounting to a religious belief or principle.[71]

A burgeoning question then is: to what other types of business or organisational entities other than corporations should this apply?[72] The outcome of the case and a comparative study with a US case, *Burwell v Hobby Lobby Stores Inc*[73] in which the court arrived at the opposite outcome, was discussed by Rajanayagam and Evans, who state that the literature on the subject is 'still in a relatively immature state'.[74] The discourse relating to how the apparent communal dimensions of religion can apply to the right to religious freedom is emergent and becoming significant in the tension between religious freedom and anti-discrimination rights. Evans argues that freedom of religion or belief has both an individual and collective aspect and while human rights belong to individuals, the right to manifest religious freedom collectively means it has an organisational dimension.[75] Further, she contends that state interference in the selection of clergy and teachers, establishing schools and distributing texts would require significant justification.[76]

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[68] Ibid.
[69] Ibid 185.
[70] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615.
[71] Ibid [413] (Neave JA).
[72] A corporation is defined in section 57A of the *Corporations Act 2001* (Cth) as a company (registered under the Act) or body corporate including an incorporated association. A corporation excludes an unincorporated association, partnership, sole trader and trust.
[73] *Burwell v Hobby Lobby Stores Inc*, 134 S Ct 2751.
[74] Shawn Rajanayagam and Carolyn Evans, 'Corporations and Freedom of Religion: Australia and the United States Compared' (2015) 37 *Sydney Law Review*, 329, 346.
[75] Evans (n 34) 35.
[76] Ibid.

Mortensen claims that '[i]n Australia, religious freedom only takes on real meaning in the extent to which it is lawful for religious groups to discriminate'.[77] His argument is based on the notion that religious freedom consists of an underlying value of pluralism.[78] This is yet another example of an interpretive approach to the concept of religious freedom that seeks to determine its underlying features in order to make an argument for rights to free exercise of religion, rather than by balancing the right with its impact on individuals and society.

Aroney rightly claims that much is at stake in the question of whether freedom of religion is understood to be an individual, associational or communal right.[79] He argues that if the right to believe and practice is seen as merely individual, there is a risk that rights of religious groups will be subordinated to the rights of not only individuals members, but also the rights of non-members who may make claims against them under anti-discrimination and other laws.[80] Whilst Aroney clearly views this as a problem, others may not agree believing that certain individuals' rights could in fact prevail over group rights to manifest religious beliefs. Indeed, Thornton claims that 'while the right to freedom of belief (and non-belief) may be exercised in association with others … adequate regard must be paid to competing freedoms and respect for the rights of others'.[81] She further states that human rights, by definition, are not vested in corporations but in human beings which is reflected in international instruments and it is a logical fallacy to extrapolate rights to religious freedom from an individual's private beliefs to an impersonal corporation.[82] Thornton's comments show how both an interpretive and balancing approach to religious freedom can be used to determine its scope and limits.

This research is not intended to make conclusions about whether discriminating on the basis of thought, conscience or religion against individuals is right or wrong. A determination of rightness, wrongness or justice would require a lengthy philosophical

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[77] Reid Mortensen, 'A Reconstruction of Religious Freedom and Equality: Gay, Lesbian and De Facto Rights and the Religious School in Queensland' (2003) 3 *Queensland University of Technology Law and Justice Journal* 320, 323.
[78] Ibid.
[79] Aroney (n 67) 154.
[80] Ibid.
[81] Thornton (n 51) 45.
[82] Ibid.

foray into theories of morality. This study recognises that morality is complex. This is nowhere more apparent than in cross-cultural and cross-religious debates. What is moral may depend on one's religion; yet the state is restricted in its ability to establish any particular religion, and this in turn impacts the ability of the state to engage in law-making for purely moral purposes. What is not so subjective in liberal democracies are legitimacy and the rule of law which require that law represents the people, is applied equally and fairly to all and that no one is above the law.[83] This principle is reflected in Article 26 of the ICCPR.[84] Despite more recent criticisms of the role of the rule of law and its contested meanings the principle has widely been recognised as essential in legitimising contemporary constitutional democracy.[85]

MacDonald explains the difference between justice and legitimacy:

> Discourse about justice … seeks to provide us with reasons to agree with particular courses of action; legitimacy discourse, on the other hand, asks us to bracket the question of whether we agree, seeking instead to provide us with reasons to accept particular outcomes.[86]

Public confidence in the law is vital to its legitimacy. How well the law meets these requirements will determine whether or not laws are legitimate but not right or wrong and not just or unjust. Justice can be seen as subjective in a pluralist society while legitimacy involves a more objective standard.

With the above in mind the research methods are intended to facilitate the search for legitimacy rather than the rightness or wrongness of the act of discrimination or laws that prohibit discrimination in the course of employment, education or the provision of goods and services.

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83 'What is the Rule of Law?', *Australia's Magna Carta Institute* (Web Page) <https://www.ruleoflaw.org.au/about-us/>.

84 *ICCPR* (n 21) art 26.

85 Michel Rosenfeld, 'Modern Constitutionalism as Interplay Between Identity and Diversity' in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference and Legitimacy* (Duke University Press Books, N Carolina USA, 2012) 3.

86 Euan MacDonald, 'Recasting the relationship: Human rights, democracy and constitutionalism as material *topoi* of legitimacy' in David Kinley, Wojciech Sadurski and Kevin Walton (eds) *Human Rights: Old Problems, New Possibilities* (Edward Elgar, UK, 2013) 170-200, 174.

2.2 Interpretations and constructions of religion and freedom of religion

Since the rise in postmodernist theories in the mid 20th Century it has become widely acknowledged that some phenomena, once thought to be inherent in social systems arising from natural, static or uncontrollable forces, are socially constructed through the development over time of shared assumptions. Social constructionist theory was introduced by Berger and Luckmann in 1966[87]and has been a feature of voluminous social discourse since. Attitudes and values about religion and freedom of religion can be seen as socially constructed phenomena. Whether one ought to call the variety of understandings about the meaning and scope of religion and religious freedom interpretations or constructions is a contentious question that goes to the origins of the phenomenon and in the case of religion this might depend on one's beliefs about the roots of religious belief. Some will argue religion was bestowed upon humans by a particular supernatural power or deity and being divinely granted, its meaning can only be interpreted. Others will see religion itself as a wholly social construction. The terms 'interpretation' and 'construction' will be used interchangeably throughout this thesis on the basis that whether or not religion is constructed or interpreted, attitudes and beliefs about its place and treatment in secular society are open to agential interpretation and are likely to be socially constructed.

The meaning of religion in Australian law

When the judges of the High Court undertook to determine the meaning of religion in the 1983 *Scientology Case*[88] they relied on widely accepted notions of religion or interpreted meanings based on their own understandings of what religion is. The different definitions that arose from the case along with definitions from other jurisdictions show that the meaning of religion is subjective, open to interpretation and can be constructed to mean a variety of things. Indeed, in the *Jehovah's Witness case* Latham CJ said, 'It would be difficult, if not impossible to devise a definition of religion which would satisfy the adherents of all the many various religions which exist, or have

[87] Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Doubleday, New York, 1966).
[88] *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120 ('*Scientology case*').

existed, in the world'.[89] This statement infers that the task of the judges in the case was to 'construct' a definition but that it would most likely be inadequate.

The *Scientology case* resulted in the most widely recognised definition of religion in Australia and is followed by government agencies and cited internationally.[90] Although three separate definitions arose from the case, the first and subsequently most commonly adopted, was the objective test of Mason ACJ and Brennan J which asserted that religion must consist of the following indicia:

a) A belief in a supernatural Being, Thing or Principle, and
b) The acceptance of canons of conduct in order to give effect to that belief.[91]

Deane and Wilson JJ agreed that religion involved a belief in the supernatural and ideas about a code of conduct or standards but did not need to involve belief in a supernatural Being.[92] They included the requirement of an identifiable group that perceives itself as religious although expressed doubt over its necessity.[93] Murphy J cast a wider net adding that simply finding meaning and purpose in life could be religion, along with the addition of a range of practical alternative requirements such as involvement in religious propagation or acceptance by the public as religion.[94] Murphy J expressly included indigenous spirituality in his definition.[95]

The Mason ACJ and Brennan J definition has been adopted by the Australian Taxation Office (ATO)[96] and the Australian Charities and Not-for-Profits Commission (ACNC)[97] for determining tax exemption and religious charitable status respectively. The ATO requires that a religious institution be registered with the ACNC as a 'charity' in order to access tax concessions.

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[89] *Adelaide Co. of Jehovah's Witnesses, Inc. v Commonwealth* (1943) 67 CLR 116, 48.
[90] See, eg, the *Scientology case* definition is cited in *R (on the application of Hodkin and another) v Registrar General of Births Deaths* and Marriages [213] UKSC 77.
[91] *Scientology case* (n 88) (Mason ACJ and Brennan J) [14].
[92] Ibid [16] [18] (Wilson and Deane JJ).
[93] Ibid [18] (Wilson and Deane JJ).
[94] Ibid [37] (Murphy J).
[95] Ibid [9] (Murphy J).
[96] Evans (n 34) 62.
[97] 'Charity Subtypes,' *Australian Charities and Not-for-profits Commission* (Web Page) [4] < https://www.acnc.gov.au/for-charities/start-charity/before-you-start-charity/charity-subtypes >.

The Australian Bureau of Statistics uses an Australian Standard Classification of Religions for the purposes of demographic data collection. The classification states that religion is regarded as 'a set of beliefs and practices usually involving acknowledgement of a divine or higher being or power by which people order the conduct of their lives both practically and in a moral sense'.[98] In addition to this, the classification refers to a number of factors that play a role in defining religion. These are the opinion of adherents, practical considerations and generally-held notions about the nature of philosophies, organisations and institutions.[99]

Belief in supernatural phenomena combined with practices manifesting this belief are common themes in most law and literature on religion but there are exceptions. *In Wang v Minister for Immigration and Multicultural Affairs,* Wilcox J referred to two quite different dictionary definitions of religion.[100] The Oxford English Dictionary reflects the supernatural stance stating that religion is 'Action of conduct indicating a belief in, reverence for and desire to please a divine ruling power.'[101] The Macquarie Dictionary provides a much broader, more scientific description that omits the supernatural, stating that religion is 'the quest for values of the ideal life, involving three phases: the ideal, the practices for attaining the values of the ideal, and the theology or world view relating to the quest to the environing universe'.[102] This latter definition is very broad.

The purpose of the above summary is to demonstrate that religion and its meaning is open to interpretive construction. It is argued that the subjective nature of what religion is extends to beliefs about what aspects of religion ought to be protected and exempted from ordinary laws.

2.2.1 Scope of freedom of thought, conscience and religion

One of the most significant issues in the construction of the meaning of religion and religious belief and one relevant to this thesis is the notion of scope. Although it is

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[98] Australian Bureau of Statistics, *Australian Standard Classification of Religious Groups 2016* (Catalogue No 1266.0, 18 July 2016).
[99] Ibid.
[100] [2000] FCA 1599 (10 November 2000).
[101] Ibid [6].
[102] Ibid [5].

recognised that religious belief may be distinct from other beliefs of conscience, the inclusion of thought and conscience together with religion in Articles 18 of the UDHR and ICCPR respectively infers that high levels of individual autonomy and liberty are to be tolerated by states. In 1993 the UN Human Rights Committee (UN HRC) released 'General Comment No. 22: The right to freedom of thought, conscience and religion' which elaborates on Article 18 of the ICCPR. One of the prominent features of the comment is its explanation of the scope of the freedom. It states:

> The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief … the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.[103]

Although the statement relates to freedom of religion rather than the definition of religion, it does indicate a more expansive interpretation of religion as a basis for the freedom than that adopted by Australian courts and government agencies.

General Comment 22 makes it clear that Article 18 distinguishes between the freedom of thought, conscience, religion or belief from the freedom to *manifest* religion or belief[104]and that restrictions on the freedom to manifest are permitted only where prescribed by law and necessary to protect public safety, order, health, morals or the fundamental rights and freedoms of others.[105] One of the most complex issues in defining the scope of religious freedom is determining what manifestations ought to be protected by law and what should not.[106] More importantly is the question of what manifestations of religion or belief should be restricted by law as without legal prohibition one can generally assume acts are permitted. These issues form the subject of this research thesis in relation to the permissibility of discrimination on the basis of religious belief.

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[103] Office of the High Commissioner of Human Rights, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [1].
[104] Ibid [3].
[105] Ibid [8].
[106] Evans (n 34) 36.

To date, Australia has shown some reluctance to apply expansive freedoms as set out in international human rights instruments and has a selective approach to restrictions on freedom of thought, conscience and religion. One area of selectivity is Australia's legal approach to religious exceptions to anti-discrimination laws for religious organisations while denying exceptions to individuals. Another is the favouring of some beliefs of conscience or religion over others such as the bias towards traditional religious celebrants in their entitlement to refuse to solemnise same-sex marriages.[107] While Evans argues there is evidence that the more expansive view of religion is moving into Australian law,[108] it is clear that in some respects the opposite could be said to be true. For instance, freedom of thought and conscience are being restricted in the areas of vaccine conscientious objection,[109] religious tolerance legislation,[110] and mandatory provision of goods and services regardless of beliefs of conscience.[111]

2.3 Conclusion

This background analysis has provided the context within which freedom of religion is both permitted and limited in Australia and highlights some foundational principles from which the tension between freedoms and obligations emerge. It is clear that there are barriers to the resolution of these tensions and the aim of this thesis is to suggest that interpretative constructions of religion and religious freedom serve to maintain irrational and contradictory legislative outcomes. While international law and Australian judicial interpretation of freedom of religion (to the extent that judicial review is permitted) are relatively consistent, anti-discrimination legislation is somewhat discordant.

Before exploring the legislative tensions arising from differing constructions and interpretations of freedom of religion the thesis will provide an overview of current

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[107] *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) s 39DD.

[108] Evans (n 34) 45.

[109] See, eg, from 2016 the removal of non-medical conscientious objection to immunisation as part of the 2016 'No Jab, No Pay' amendments to Commonwealth social security legislation: *A New Tax System (Family Assistance) Act* 1999 (Cth) s 6; and 2017 Amendments to public health legislation in Victoria, New South Wales and Queensland, eg, the *Public Health Act 2010* (NSW) s 87 requiring vaccines for all children enrolling in child care with no non-medical objection permissible.

[110] See, eg, the *Racial and Religious Tolerance Act* 2001 (Vic) which brings religious vilification to an equal status as racial vilification. The legislation moves towards the prohibition of criticism of religion and religious organisations, on the basis of thought and beliefs of conscience.

[111] Anti-discrimination laws in all jurisdictions mandate the provision of goods and services without discrimination on a range of grounds despite an individual's thought, religion or beliefs of conscience.

legal protections and restrictions on the permissibility to discriminate on the basis of thought, conscience and religion in Australia.

Chapter 3 Legal Protection and Restriction on the Religious Freedom to Discriminate in Australia

The focus of this thesis is to explore both the rationale for, and legitimacy of, Australia's laws that protect and restrict the religious freedom of organisations and individuals to discriminate. The purpose of this chapter is to identify the current laws in question and provide some explanation as to their operation where necessary and relevant to this research. There is excellent academic coverage of the range of laws that protect religious freedom such as by Evans[1] and Meyerson[2] and rather than repeat the content of such comprehensive guides, this chapter outlines those specific aspects of the law protecting freedom of religion that are relevant to discrimination and to the research question in this thesis.

According to Evans it is generally understood that people in Australia have the freedom to choose and speak about religion without state interference, but the extent to which the state accommodates religion when making laws is more controversial.[3] Australia's legal protection of religious freedom overall is viewed as weak in comparison with other similar countries,[4] containing no real positive obligations on the Australian government to protect religious freedom.[5] The most significant problem identified by Evans is the limited scope of protection under the Constitution which leaves avenues open for legislative and common law interference with religious freedom.[6]

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[1] Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (The Federation Press, 2012).
[2] Denise Meyerson, 'The Protection of Religious Rights Under Australian Law' 3 (2009) *Bringham Young University Law Review* 529.
[3] Evans (n 1) 13.
[4] Evans (n 1) 87-8; Meyerson (n 2) 552; Australian Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (Report, July 1998) 23.
[5] Evans (n 1) 87-8; Meyerson (n 2) 552; Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of the Commonwealth of Australia, *Interim Report: Legal Foundations of Religious Freedom in Australia* (Interim Report, 2017) viii.
[6] Evans (n 1) 91.

3.1 Constitutional protection and restriction

The Australian Constitution provides a rudimentary level of protection of religious freedom. Section 116 states:

> The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.[7]

Interestingly, the Australian Constitution preamble declares that the instrument 'unites the Federation of peoples of the various states with the blessing of Almighty God'.[8] At the time of drafting of the Constitution, Australia was a country overwhelmingly dominated by Christians who made up over 96% of the population.[9] This is now reduced to 52%[10] and represents an important fact in considering the changing needs of Australians for laws that both limit and protect freedom of religion.

Section 116 contains three statements about restricting the Commonwealth's powers in relation to making laws in respect of religion: non-establishment of religion, freedom to exercise religion and the prohibition on religious tests for public office. The first and third elements of the section are firm affirmations for the restriction of the role of religion in the Commonwealth. The second element offers protection for the right to religious freedom. However, this is limited in three aspects. Firstly it restricts the legislative power of the Commonwealth only and there is nothing to prevent the States establishing religion or imposing religious practices.[11] Nor does it prohibit any actions of private individuals or organisations.[12] A referendum in 1988 aimed at amending s116 so as to confer greater protection from State and territory infringements on freedom of religion was not carried.[13] Secondly, section 116 is not a guarantee or undertaking that the government will protect the right to religious freedom.[14] Finally the section is vague

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[7] *Australian Constitution* s 116.
[8] Ibid Preamble.
[9] Australian Bureau of Statistics, *Yearbook Australia 2006* (Catalogue No 1301.0, 20 January 2006).
[10] Australian Bureau of Statistics, *Census of Population and Housing: Reflecting Australia - Stories from the Census 2016* (Catalogue No 2071.0, 28 June 2017).
[11] Evans (n 1) 71.
[12] Ibid 71-2.
[13] 'Referendum Dates and Results' *Australian Electoral Commission* (Web Page, 24 October 2012) < https://www.aec.gov.au/elections/referendums/referendum_dates_and_results.htm>.
[14] Evans (n 1) 71.

and is not an accurate reflection of the Commonwealth's powers to limit the free exercise of religion. The Commonwealth has made laws that prohibit some religious practices. For instance, bigamy, which is a common practice for a number of religions such as Islam and the Church of Jesus Christ of Latter-day Saints (Mormon Church), is unlawful in Australia.[15] The vagueness and uncertainty about the scope of the section leads to litigation in which tribunals and courts are required to enmesh themselves in matters of religion and religious belief. The results have indicated a high degree of subjectivity in interpreting the meaning of religion and belief and have led to inconsistent outcomes. This is evidenced by the range of definitions of religion offered by the different judges in the *Scientology case,*[16] from Mason CJ and Brennan J's limited belief in the supernatural to Murphy J's all-encompassing interpretation and the reference to even broader dictionary definitions in *Wang v Minister for Immigration and Multicultural Affairs*.[17]

Nevertheless, Mason CJ and Brennan J affirmed that the High Court's interpretation of the meaning of religion is important in understanding the operation of s 116:

> The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution … Religion is thus a concept of fundamental importance to the law. Moreover, … it is inevitable that the judgments in the Supreme Court, so long as they stand without consideration by this Court, will influence the construction placed upon s. 116 of the Constitution by other Australian courts.

The High Court therefore recognises the importance of the definition of religion to determinations of what exactly is to be protected under the freedom of religion clause in the Constitution. However, the definition set out the majority in the *Scientology Case* is substantially more limited than constructions of freedom of religion in international instruments which set a broader basis upon which to consider the freedom.

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[15] The definition of 'marriage' under s 5 of the *Marriage Act 1961* (Cth) is 'the union of 2 people to the exclusion of all others, voluntarily entered into for life'; Bigamy is prohibited and punishable by 5 years imprisonment under s 94.

[16] See the definitions of Mason CJ and Brennan J compared with Wilson J and Deane J and that of Murphy J in *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, [136] outlined in Chapter 2.

[17] [2000] FCA 1599 (10 November 2000) [5-6].

3.2 Legislative protection and restriction

The Commonwealth has no Constitutional power to legislate specifically for religion or human rights.[18] The external affairs power is used to implement treaties including those that protect human rights.[19] Evans states that the government has not used the power to further protect religious freedom.[20] However it has conferred power on an executive body, the Australian Human Rights Commission, to enforce anti-discrimination aspects of the ICCPR.[21] Although the Australian Parliament has not enacted comprehensive human rights legislation or a Bill of Rights, Australia has enacted laws including discrimination laws, privacy laws, child protection laws and criminal laws which reflect international human rights principles.[22]

Three Australian jurisdictions have enacted human rights legislation.[23] The Acts reflect Article 18 of the UDHR and ICCPR protecting the right to freedom of thought, conscience and religion.[24] These can be repealed at any time by parliaments in those jurisdictions.

Legislation at the intersection between discrimination and religious freedom predominantly relates to the protection of individuals from being discriminated against on the ground of their religious beliefs or practices. However, this is found to be limited to an extent in relation to religion. Currently discrimination on the ground of religion is not generally unlawful under Federal law. The ground of ethnicity under section 9 of the *Racial Discrimination Act* may capture situations where the attribute is seen to relate to

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[18] Evans (n 1) 41.

[19] *Australian Constitution* s 51(xxix); See the High Court's interpretation of the external affairs power in respect of the Commonwealth's powers to implement its international legal obligations in *Commonwealth v Tasmania* (1983) 158 CLR 1 (*The Tasmanian Dam Case*), *Richardson v Forestry Commission* (1988) 164 CLR 261 and *Queensland v Commonwealth* (1989) 167 CLR 232.

[20] Evans (n 1) 44.

[21] *Australian Human Rights Commission Act 1986* (Cth).

[22] The Hon. Catherine Branson QC, 'The role of the Australian Human Rights Commission in protecting and promoting human rights in Australia' (President Speech, Australian Human Rights Commission, Tokyo, Japan, 27 April 2010) <https://www.humanrights.gov.au/news/speeches/president-speech-role-australian-human-rights-commission-protecting-and-promoting>.

[23] *Human Rights Act 2019* (Qld); *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities 2006* (Vic).

[24] *Human Rights Act* 2004 (ACT) s 14; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14.

religion and ethnicity.[25] Adverse actions against employees or prospective employees on the ground of religion is unlawful under the *Fair Work Act*.[26] However, curiously, this is limited to actions that are unlawful under anti-discrimination law in force in the place where the action is taken.[27] This inevitably leaves anti-discrimination law on the ground of religion to the states. Most states prohibit discrimination on the ground of religion.[28] New South Wales provides protection for ethno-religious discrimination[29] and South Australia only discrimination based on 'religious appearance or dress'.[30]At the time of writing, the Commonwealth government has drafted a set of legislative Bills that prohibit discrimination on the grounds of religion and has sought public comment on the Bills.[31]

While discrimination on the ground of religion or religious belief is a significant and changing area of equality law, this research relates to another form of discrimination; that which is perpetrated against people on the grounds of a range of criteria, on the basis of a claim to the right to freedom of thought, conscience and religion. This form of discrimination exercised specifically on the basis of freedom of thought, conscience and religion is essentially limited to religious organisations in all jurisdictions. In New South Wales such organisations are permitted to discriminate in: the ordination, appointment or training of priests, ministers of religion or members of any religious order; the appointment of any other person in any capacity by a body established to propagate religion; or, any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to

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[25] *Racial Discrimination Act 1975* (Cth) s 9(1); According to the Anti-Discrimination Board of NSW ethno-religion 'could cover a situation where one ethnic group has a particular religion that is exclusive to that group, such as Sikhs'; 'Race Discrimination', *Anti-Discrimination Board of NSW* (Web Page, 13 August 2018) <https://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_antidiscriminationlaw/adb1_types/adb1_race.aspx>.

[26] *Fair Work Act 2009* (Cth) s 351(1).

[27] Ibid s 351(2)(a).

[28] *Discrimination Act 1991* (ACT) s 7(1)(u); *Anti-Discrimination Act 2015* (NT) s 19(1)(m); *Anti-Discrimination Act 1991* (Qld) s 7(i); *Anti-Discrimination Act 1998* (Tas) s 16(o) and (p); *Equal Opportunity Act 2010* (Vic) s 6(n); Equal Opportunity Act 1984 (WA) s 53.

[29] *Anti-Discrimination Act 1977* (NSW) s 4 and s 7.

[30] *Equal Opportunity Act 1984* (SA), s 85T(1)(f).

[31] Exposure Draft - Religious Discrimination Bill 2019 (Cth), the Exposure Draft - Religious Discrimination (Consequential Amendments) Bill 2019 and the Exposure Draft - Human Rights Legislation Amendment (Freedom of Religion) Bill 2019.

the religious susceptibilities of the adherents of that religion.[32] Similar exceptions for religious bodies are present in anti-discrimination laws in other Australian State jurisdictions.[33]These are outlined in Appendix 1.

Under Commonwealth law, religious bodies are permitted to discriminate under two Acts: the *Age Discrimination Act 2004* and the *Sex Discrimination Act 1984*. Section 35 of the *Age Discrimination Act* permits discrimination in respect of an act or practice of a body established for religious purposes that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious sensitivities of adherents of that religion.[34]

The *Sex Discrimination Act 1984* prohibits discrimination on the grounds of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities in broad areas of employment, education and the provision of accommodation and goods and services.[35] Religious bodies are exempt from all anti-discrimination provisions of the Act (ss 14-27) under Section 37 in relation to the ordination, appointment or training of priests, ministers of religion or members of any religious order; the selection or appointment of persons to perform duties or functions in connection with religious observance or practice and any other act or practice of a body conforming to the doctrines, tenets or beliefs of the religion or necessary to avoid injury to the religious susceptibilities of adherents of that religion.[36] Any other act or practice of a body does not include one connected with the provision of Commonwealth-funded aged care, except in relation to employment of persons to provide the aged care.[37]

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[32] *Anti-Discrimination Act 1977* (NSW) s 56.

[33] *Sex Discrimination Act 1984* (Cth) s 37; *Discrimination Act 1991* (ACT) s 32; *Anti-Discrimination Act 1977* (NSW) s 56; *Anti-Discrimination Act 1991* (Qld) s 109; *Equal Opportunity Act 1984* (SA) s 72; *Anti-Discrimination Act 1998* (TAS) s 52; *Equal Opportunity Act 2010* (Vic) s 82; *Equal Opportunity Act 1984* (WA) s 72.

[34] *Age Discrimination Act 2004* (Cth) s 35.

[35] *Sex Discrimination Act 1985* (Cth) s 14-27.

[36] *Sex Discrimination Act 1985* (Cth) s 37(1)(d).

[37] Ibid s 37(2).

While exceptions have been seen to relate predominantly to religious clergy and therefore having little effect on the general population,[38] the subjective nature and vagueness of the requirement of avoidance of injury to the religious susceptibilities means that firstly, the provisions can be used to make excessive and unwarranted injury claims and secondly, can lead to uncertainty about the meaning of the phrase resulting in litigation which could otherwise be avoided if the requirement was more clearly defined.

In addition to the above Federal and State protections and restrictions, a Commonwealth Parliamentary Joint Committee on Human Rights was established under the *Human Rights (Parliamentary Scrutiny) Act 2011*.[39] The role of the committee is to examine Bills, legislative instruments and Acts for compatibility with human rights and report findings to both houses of Parliament and to inquire into any matter related to human rights referred to it by the Attorney-General.[40] Legal advisor to the committee, Professor Andrew Byrnes and committee member, Senator Penny Wright have acknowledged that despite its consistent and principled analysis of Bills, the committee has fallen short of expectations.[41] In the majority of cases the committee's findings of incompatibility have been ignored by Parliament with only a handful of Bills having been amended or rejected on its advice and this has occurred only where the committee's report was endorsed by external individuals and pressure groups.[42]

3.3 Executive protection and restriction

The High Court of Australia has repeatedly confirmed the right of the Australian parliament to use the external affairs power to implement international treaties into domestic law.[43] Such was the case with the enactment of the *Australian Human Rights Commission Act 1986* (Cth) which established the Australia Human Rights Commission (AHRC, formerly the Australian Human Rights and Equal Opportunity Commission,

[38] Evans (n 1) 138.
[39] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) s 4.
[40] Ibid s 7.
[41] William Phillips, 'Great expectations, hard times: Reflections on the Parliamentary Joint Committee on Human Rights (2015) 37(4) *Bulletin, Law Society of South Australia* 28-29, 28.
[42] Ibid 29.
[43] Donald R Rothwell, 'The High Court and the External Affairs Power: A consideration of its outer and inner limits' (1993) 15 *Adelaide Law Review* 209-240.

HREOC) and procedures for implementing Australia's obligations under the ICCPR.[44] The role of the commission is to inquire and attempt to conciliate complaints of unlawful discrimination and acts or practices that may be inconsistent with or contrary to any human right.[45]

In 1998 the AHRC undertook an inquiry into a complaint of employment discrimination arising out of claims to certain forms of religious freedom by the Catholic Education Office. The complainant, Jacqui Griffin, was refused classification as a teacher in Catholic Schools on the basis that she did not uphold the values and teachings of the church because she was a co-convenor of the Gay and Lesbian Teachers and Students Association.[46] The Commissioner inquired into the doctrines of the Catholic Church and Ms Griffin's conduct and found that no aspects of her role or conduct in the advocacy group conflicted with the values and teachings of the Church as stated in its Catechism, which while condemning homosexual activity, also stated that homosexual men and women 'must be accepted with respect, compassion and sensitivity'.[47] The Commissioner found no evidence that Ms Griffin had advocated homosexual practice and asserted that the Catechism states, 'It is deplorable that homosexual persons have been and are the object of violent malice in speech or in action. Such treatment deserves condemnation from the Church's pastors wherever it occurs'.[48] The respondent's claim to the religious body exemption in the Act[49] on the basis that her employment would cause injury to the religious susceptibilities of adherents of Catholic Christianity also failed. Although the Commissioner did not give much consideration to whether the religious susceptibilities of parents at the school would be injured, he said any ideas about Ms Griffin's sexual activity in the minds of parents or students would be merely speculation and likely founded on misconception and therefore may result in an injury to their prejudices rather than their religious susceptibilities.[50]

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[44] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26 ('*ICCPR*').
[45] *Australian Human Rights Commission Act 1986* (Cth) s 11.
[46] *Griffin v Catholic Education Office* [1998] AusHRC 6 (1 April 1998) ('*Griffin v CEO'*).
[47] Ibid 18.
[48] Ibid.
[49] *Sex Discrimination Act 1984* (Cth) s 37.
[50] *Griffin v CEO* (n 46) 22.

The AHRC's 'Conciliation Register List'[51] indicates its primary function, in relation to inquiring about human rights breaches, is to deal with discrimination complaints that come under one of the legislative instruments relating to racial, sex, age or disability discrimination. The commission conciliates disputes in relation to other forms of discrimination, such as refusal or termination of employment on the ground of criminal record, that do not come under Commonwealth legislation and this appears to fall within the ambit of the commission's general human rights inquiry and conciliation powers. Although as already stated, discrimination on the ground of religion is not unlawful under Federal law, the commission does conciliate in relation to religious discrimination, which in some cases could be seen to involve the protection of freedom of religion. One such case recorded on the AHRC Conciliation Register List dated 2015 involves a complainant who claimed to have an offer of student-teacher placement withdrawn by a faith-based secondary school when they became aware that he held different religious beliefs.[52] It can be extrapolated that the complainant's religious rights protected through resolution of the complaint were two-fold: (i) the right to be free from discrimination on the ground of his religious beliefs and (ii) the right to hold and maintain his religious beliefs. As the function of the commission in protecting the human right of religious freedom generally relates to issues of non-discrimination on the ground of religion, the second component of the protected rights would appear to be incidental. The commission's interest in pursuing religious rights for citizens that do not involve discrimination appears to be negligible and there are no matters listed in the register aside from those involving discrimination. Further, support for the human right to freedom of thought, conscience and religion that results in discrimination would likely not be within the interests of the commission. In such a case the commission's role would appear to be to support the party suffering discrimination rather than the party attempting to exercise their right to freedom of thought, conscience and religion. In this way the commission could be seen to have one-sided vision of human rights that ignores some aspects of human rights in favour of others. Whether or not this is justified

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[51] The Conciliation Register provides summaries of a selection of complaints that have been resolved through the Australian Human Rights Commission's conciliation process. 'Conciliation Register', *Australian Human Rights Commission* (Web Page, 14 December 2012) <https://www.humanrights.gov.au/complaints/conciliation-register>.

[52] 'Conciliation Register', *Australian Human Rights Commission* (Web Page, 14 December 2012) <https://www.humanrights.gov.au/complaints/conciliation-register/list?field_discrimination_type_value=discrimination_type_other&field_grounds_value=All&field_areas_value=All&field_date_value=All&keys=&page=1>.

is a matter for debate. Nevertheless, the commission's strong emphasis on its role in the protection against discrimination as the primary human right to be enforced in society should be thoughtfully considered. To remedy this, at the time of writing, the Australian Government has proposed legislation to appoint a 'Freedom of Religion Commissioner' at the AHRC.[53]

3.4 Common law protection and restriction

Grace Bible Church v Reedman is authority that freedom of religion is not recognised as a right protected by the common law. According to White J 'the common law has never contained a fundamental guarantee of the inalienable right of religious freedom and expression'.[54] However the court recognises that religious belief and expression is an important freedom generally accepted in society.[55] The role of courts in this area has been to adjudicate on legislative encroachments upon the right to religious freedom under s 116 of the Constitution along with breaches of Commonwealth and State legislation that protect religious freedom such as those outlined above in 3.2. Another aspect of the judiciary's role is to determine the appropriate limits on religious freedom when it contravenes ordinary laws, for example those related to health or crime.[56]

There have been a few significant High Court cases dealing with religious freedom under s 116 of the Constitution, some of which have shown the court's willingness to both protect and limit the freedom for the purposes of compliance with ordinary laws. In *Krygger v Williams* the High Court upheld a law requiring attendance at compulsory peacetime military training by the applicant who conscientiously objected to military training on the basis of his religious objection to bear arms. The Court found the law requiring attendance at military training did not infringe s 116 because the training had nothing to do with religion and did not prohibit his free exercise.[57] The court held that it was possible for Krygger to be posted to non-combatant duties in accordance with the *Defence Act 1903-1910* which provided for religious objection in this manner.

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[53] Exposure Draft - Religious Discrimination Bill 2019 (Cth) Part 6.
[54] *Grace Bible Church Inc v Reedman* (1984) 36 SASR 376, 388.
[55] *Evans v New South Wales* 168 FCR 576, [79] (French, Branson and Stone JJ).
[56] Evans (n 1) 95.
[57] *Krygger v Williams* (1915) 15 CLR 366, 369.

In *R v Winneke; Ex parte Gallagher* the court dealt with the question of whether or not a witness is required to explain why they elected to affirm in court rather than take a religious oath. Explaining its view of free exercise, with Murphy J in dissent the court held that:

> no one can be required by any law of the Commonwealth to state or explain his reasons for declining to take an oath; his religious beliefs or lack of belief cannot be examined and he cannot be called upon to state, explain or justify them.[58]

One of the most significant roles of state courts and tribunals is at the intersection between religious freedom and anti-discrimination. A number of cases in which religious organisations have attempted to rely on the exceptions to anti-discrimination laws have failed due to problems bringing the circumstances within the exceptions. In employment discrimination case, *Walsh v St Vincent de Paul Society Queensland (No 2)*[59] the tribunal found St Vincent de Paul Society was not a religious body for the purposes of the exemption under the Act.[60] The court held it was a society of lay faithful, closely associated with the Catholic Church.[61] Further, the respondent failed to prove that being a Roman Catholic was a genuine occupational requirement for an employment position in accordance with the Act.[62]

Conversely, In *OV & OW v Members of the Board of the Wesley Mission Council* the NSW Court of Appeal dealt with a complaint by a homosexual couple who applied to Wesley Delmar Child and Family Care to become foster carers and were refused due to their homosexual relationship.[63] The mission relied on the exemption for religious bodies under s 56(d) of the *Anti-Discrimination Act 1977* (NSW). The complaint was referred back to the Tribunal by the New South Wales Supreme Court of Appeal and eventually dismissed on the basis that the belief that a monogamous heterosexual partnership is the norm and ideal family is a doctrine of 'Wesleyanism' and the refusal was in conformity with the doctrine.[64]

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[58] (1982) 152 CLR 211, 229.
[59] [2008] QADT 32.
[60] *Anti-Discrimination Act 1991* (Qld) s 109.
[61] *Walsh v St Vincent de Paul Society Queensland (No 2)* [2008] QADT 32, [76].
[62] *Anti-Discrimination Act 1991* (Qld) s 25(1).
[63] *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293.
[64] Ibid.

OV & OW v Members of the Board of the Wesley Mission Council[65] above and *Griffin v CEO,*[66] outlined in Chapter 3.3, indicate that the court will give some support to religious organisations to apply religious doctrines in carrying out their work and service in the community. The focus in the cases appears to be an entitlement to discriminate on the basis of religious ideologies codified in written sources rather than pointed discrimination against any particular population, although it is recognised that this could be the incidental result. In this way, judicial decisions appear to support religious freedom in a limited manner which does not extend to outright discrimination on the ground of sex or sexual orientation but on the understanding that religions have a right to advance their ideologies in respect of moral codes of conduct pertaining to ways of living rather than ways of being.

In *Cobaw Community Health Services v Christian Youth Camps Ltd (CYC)*[67] the Victorian Civil and Administrative Tribunal (VCAT) dealt with the refusal of a booking for a homosexual youth suicide prevention group for a camp program run by the Christian Brethren Trust. The camp facility was deemed by the court not to be a body established for religious purposes and its activities did not involve the teaching or maintenance of the doctrines of the religion.[68] As the facility's purpose was not religious and related to the conduct of camping for both secular and religious groups, the court allowed the claim and awarded compensation to the group. On appeal by CYC the Supreme Court of Victoria Court of Appeal found there was discrimination on the ground of sexual orientation and neither of the exceptions directed at preserving religious freedom applied in the circumstances of the case.[69]

In a recent case, *Arora v Melton Christian College (Human Rights),*[70] a student's family brought a claim against the college which prohibited the Sikh boy from wearing a patkah head covering. Again, the Tribunal found that the school contravened s 38(1) of the *Victorian Equal Opportunity Act* [71] and discriminated against the boy. The religious

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[65] Ibid.
[66] *Griffin v CEO* (n 46).
[67] [2020] VCAT 1613.
[68] Ibid [254].
[69] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615, [11].
[70] *Arora v Melton Christian College (Human Rights)* [2017] VCAT 1507 ('*Arora v Melton*').
[71] *Equal Opportunity Act 2010* (Vic) s 38(1).

exception under s 39[72] could not apply because the school was not shown to be an educational institution wholly or mainly for students of a particular religious belief, as it had an open enrolment policy accepting children from other faiths.[73]

The cases indicate robust judicial support for anti-discrimination and demonstrate a careful and considered approach to whether or not there is a genuine need to protect religious freedom on a case-by-case basis. Although courts appear willing to analyse religious doctrine in order to protect free exercise, the difficulty for the religious bodies is often providing evidence that their discriminatory actions form part of their religious doctrine. All cases, with the exception of *OV & OW v Wesley,* involved situations that could not reasonably be brought within the exceptions for religious bodies under the various Acts in relation to the provision of goods and services, education or employment. Both *OV & OW v Wesley* and *Griffin v CEO* demonstrate the court's interpretation of the claim of religious bodies to the need to protect religious doctrines and the concept of injury to adherents under the legislated exceptions relating to the appointment of general staff and ordinary acts or practices.[74]

3.5 International law protection and restriction

Australia is obligated to comply with international norms which are customary in nature but not binding unless adopted by the Australian Parliament into domestic law. International instruments relating to religious freedom were briefly outlined in Chapter 2. There are three significant international instruments that provide for freedom of religion. The first is the Universal Declaration of Human Rights (UDHR) which is a declaration of human rights by resolution of the General Assembly of the United Nations in 1948. Article 18 states:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.[75]

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[72] Ibid s 39.
[73] *Arora v Melton* (n 69) [6].
[74] See, eg, *Sex Discrimination Act 1984* (Cth) s 37(c)-(d).
[75] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg. UN Doc A/810 (10 December 1948) art 18.

According to Article 2 everyone is entitled to all rights set forth in the declaration 'without distinction of any kind such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth or other status.'[76]

Regarding limits to the above rights Article 29(2) states:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[77]

The second important instrument is a treaty, the International Covenant on Civil and Political Rights (ICCPR), signed by the Commonwealth of Australia in 1972 with some reservations in respect of Articles 10, 14 and 20. Article 18 provides for both protection and restriction of religious freedom stating that:

1. 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.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children is in conformity with their own convictions.[78]

Article 2(1) requires state parties to the Covenant to respect and ensure the rights under the Covenant without distinction on grounds identical to Article 2 of the UDHR as set out above.[79]

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[76] Ibid art 2.
[77] Ibid art 29(2).
[78] *ICCPR* (n 44) art 18.
[79] Ibid art 2(1).

As referred to in 2.2.1, UN HRC General Comment 22 elaborates on the meaning of the Article, particularly its scope which is to be interpreted broadly. [80] It also maintains that limitations imposed on the freedom to manifest religion or belief for the purposes of protecting morals must be based on principles not deriving exclusively from a single tradition. [81]

Finally, the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief ('The Religion Declaration') was adopted by the General Assembly of the United Nations. Article 1 states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever 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.

2. No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.[82]

Article 8 states that:

> Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights[83]

The preamble of the Declaration holds that it is in consideration that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed.[84]

Australia's human rights obligations under international law have been raised in judicial decisions relating to discrimination demonstrating their application in Australian

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[80] Office of the High Commissioner of Human Rights, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993), [1].
[81] Ibid [26].
[82] *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN GA, 36th sess. UN Doc A/RES/36/55 (25 November 1981), art 1.
[83] Ibid art 8.
[84] Ibid Preamble.

law.[85]The increasing presence of human rights legislation in Australia has given effect to the UDHR, the ICCPR and other international laws ensuring compliance with international commitments. Such measures have been reported to the United Nations during the Universal Periodic Review Process.[86]

3.6 Conclusion

This chapter has presented an overview of legal instruments and measures that protect and limit freedom of religion in Australia for the purposes of explaining the doctrinal context of this research. It has been shown that such measures fall within the full range of Australian legal apparatus including the Australian Constitution, legislation in all jurisdictions, international law, case law and executive regulatory functions.

This doctrinal analysis forms a foundation for proceeding, in the next chapter, to identify a number of interpretive constructions underpinning laws and policies that permit discrimination on the basis of religious belief. The following chapter identifies and explains seven interpretive constructions that are argued to be significant influences in the maintenance of the concept that religion is a worthy basis for exclusion from ordinary civil laws that provide protection from discrimination in workplaces and other settings.

[85] See, eg, in relation to sex discrimination: *Howe v QANTAS Airways Ltd* [2014] FMCA 242) [72]; in relation to sexual orientation discrimination: *CYC v Cobaw* (n 64) [53-5]; in relation to age discrimination: *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 [22], [65], [69]-[70], [120]-[133].

[86] The most recent report was submitted to the UN by the Australian Government in 2015 as part of Australia's second review.

Chapter 4 Interpretive Constructions of Religion and Freedom of Religion

This research addresses the tension between freedom of religion and anti-discrimination laws with a particular focus on exceptions to those laws for religious bodies. The research question may be approached using a number of methodologies and from various perspectives and is commonly answered by balancing the right to religious freedom against the right to freedom from discrimination. The current approach in this thesis is to seek to identify interpretations and constructions of religion and religious freedom underlying legal protection and restriction of the freedom in anti-discrimination laws, including the influence of these interpretations on the way in which the laws are framed. By identifying and questioning interpretive norms about religion and free exercise of religion that underpin exceptions to anti-discrimination laws, it is shown that they can be challenged, at least in part, from their foundations.

Exceptions to anti-discrimination laws give organisations formed for a religious purpose, including religious schools, permission to discriminate against employees and students on the grounds of age, disability, sex, sexual orientation, relationship and pregnancy status. Appendix 1 provides an overview of religious exceptions to equality laws across all jurisdictions in Australia. The laws grant these permissions only to religious organisations, notwithstanding the fact that under international law freedom of religion is a right vested in ‘everyone’ which infers it relates to people. Although international human rights instruments recognise the communal nature of religion, they do not extend the right of freedom of religion to organisations. This question regarding who or what ought to be the subject of the freedom will be discussed further in Chapter 6.

4.1 Interpretive constructions of religion and religious freedom

The purpose of this chapter is to identify interpretive norms relating to religion and religious freedom that have led to those laws that give permission to religious organisations to discriminate and leave individuals with diminished rights to do the same.

This chapter will deal with different interpretations and constructions and provide examples of each as identified in various texts including legislation, parliamentary speeches, government reports, judicial decisions, academic discourse and international law. The following interpretations identified and discussed are not an exhaustive list, but each has been selected as most relevant to the tension between freedom of religion and anti-discrimination laws and the argument put forth herein. Some commentary has been included in this chapter. However detailed analysis and critique of the most important aspects of the interpretations and constructions will be undertaken in Chapters 6 and 7. The aim is to challenge such interpretations that form the basis for religious exceptions to anti-discrimination laws and to subsequently suggest that a revised model, based on different principles, ought to be considered.

Many examples in this chapter are drawn from submissions to the government inquiry into the human right of freedom of religion known as the Religious Freedom Review.[1] The inquiry involved the appointment, by the Prime Minister of Australia, of an expert panel chaired by the Honorary Philip Ruddock, to examine whether Australian law adequately protects freedom of religion. The final report of the review was released in December 2018 and is also known as The Ruddock Report.[2] The review received over 15,500 submissions including from private citizens, academics, religious leaders and organisations on both sides of debates about the tension between religious rights and other rights. Of particular concern for many religious people were the then proposed changes to marriage laws in Australia. Many expressed concern about their ability to express their views on marriage without reprisal and some referred to legal action taken against some private citizens and religious leaders for religious expression. An example

[1] *Religious Freedom Review: Report of the Expert Panel* (Report to the Prime Minister of the Commonwealth of Australia, 2018) ('*Religious Freedom Review*').
[2] Ibid.

of this was a complaint about Hobart's Catholic Archbishop, Julian Porteus who was behind the distribution of a book called 'Don't Mess With Marriage' disseminated to parents in Catholic schools. His actions led to a complaint to the Tasmanian Anti-Discrimination Commissioner by Martine Delaney, a transgender Greens Party candidate. The Commissioner announced that the complaint had merit. However, following conciliation, the complaint was withdrawn by Delaney.

Although submissions to the Religious Freedom Review were heavily focused on contemporaneous changes to legal marriage at the time, many contained interpretations about religion and religious freedom, particularly the need for religious organisations and schools to continue to enjoy exceptions to anti-discrimination laws and to operate in accordance with their doctrines devoid of normal responsibilities under those laws. What follows are seven interpretative constructions of religion and freedom of religion identified in submissions and other sources including legislation, parliamentary speeches, government reports, judicial decisions, academic discourse and international law. These are:

- Religious organisational rights to freedom of religion
- A uniform conception of religious adherents
- Tolerance of discrimination against women
- Religion as beneficial to individuals and society
- A narrow meaning and scope of religion
- A thought, conscience and religion hierarchy
- A human rights hierarchy

4.1.1 Religious organisational rights to freedom of religion

The first interpretive construction identified combines interpretations about the communal expression of religion in the form of organisations, the special nature of religious organisations and the notion that the human right of freedom of religion can be vested in them.

a. Legislation

The mere presence of religious exceptions to anti-discrimination laws signifies support for these interpretations. The reasonable assumption is that exceptions for religious

bodies are based on the notion that there is something so special about religious organisations that they ought to be exempt from some civil laws that apply to all other organisations and persons. While there is provision in anti-discrimination laws for certain clubs or associations to discriminate,[3] for instance a gym may be open exclusively to female members or a legal service may cater for indigenous people, such exceptions are in recognition that there is a legitimate need inherent to the recipients of those services and that the services specifically target that need. The discrimination provides a benefit to them and enables them to access services when they may feel hindered from doing so without the exception. In this sense the goal of the positive discrimination is inclusion rather than exclusion.

A further legislative provision that supports the notion that religious organisations are to be given special recognition is the definition of a 'minster of religion' in the *Marriage Act*[4] which is a person recognised by a religious body as having authority to solemnise a marriage. According to section 29 of the Act only a person of a recognised denomination can register as a minister of religion. The Governor-General has the authority to declare a religious body a recognised denomination.[5] A marriage celebrant not connected to a religious organisation is unable to register as a 'religious marriage celebrant' on the basis of their religious beliefs after the transitional period of 90 days from the date of the commencement of the 2017 amendments to the Act.[6]

b. Parliamentary debate

As would be expected, support for these interpretations can be found in Parliamentary speeches. In the adjournment of the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* Senator Concetta Fierravanti-Wells stated that 'religious communities should feel respected and protected'.[7]

[3] See, eg, *Sex Discrimination Act 1984* (Cth) s 25(3) which allows clubs for one sex only.
[4] *Marriage Act 1961* (Cth) s 5.
[5] Ibid s 26.
[6] *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) s 39DD.
[7] Commonwealth, Parliamentary Debates, Senate, 14 February 2019, 10405-10407 (Concetta Fierravanti-Wells), 10406.

In Parliamentary debate about the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Identity) Bill 2013*, Senator Simon Birmingham made the following comment:

> The general exemption provisions for religious organisations have been a core part of our anti-discrimination laws for a very long period of time. They are symbolic in recognising that there are areas where correct laws and correct approaches to anti-discrimination do potentially clash with the rights of religious institutions to uphold their teachings and their views. To accommodate those rights, there has been a general exemption provided to religious organisations.[8]

In a compelling statement in debate about the same Bill, Senator George Brandis claimed that:

> You cannot have freedom of religion if you also have legislation … which imposes by statutory obligation, an obligation upon a church or religious institution to conduct its affairs at variance with the tenets of its teachings … the state should not have the power to say to a particular church or religious institution which conducts an institution like a hospital, a school or an aged-care home: 'You must conduct that institution in accordance not with the tenets of your faith but in accordance with the dictates of the state.'[9]

Although there is a general recognition of the human right to freedom thought, conscience and religion any notion that thought, conscience or religious belief may be a phenomenon particular to humans appears to be lost. The Explanatory Memorandum for the Bill under a heading 'Exemptions for religious organisations' states that '[t]his exemption recognises rights may be limited by other rights, with the right to equality and non-discrimination limited by the right to freedom of thought, conscience and religion or belief'.[10] According to the legislation, it appears the only right to thought, conscience and belief that limits the right to equality and non-discrimination is a right vested in religious organisations.

Support in Parliamentary debate is to some extent likely to be a response to attitudes and opinions expressed during public consultation regarding religious freedom even though submissions to inquiries represent a very small sector of the community. While public consultation is beneficial in determining community attitudes amongst specific

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[8] Commonwealth, Parliamentary Debates, Senate, 24 June 2013, 3819-3820 (Simon Birmingham), 10406.
[9] Commonwealth, Parliamentary Debates, Senate, 18 June 2013, 3272-3274 (George Brandis), 3273.
[10] Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2013 (Cth) Explanatory Memorandum.

groups, the limited sample size ought to be taken into account and the consultations placed into perspective when attempting to generalise attitudes and subsequently determine the regulatory needs of a society. The survey method of investigation in scientific studies suffers from 'sample bias' resulting from those with extreme views on the particular matter in question being the participators in the study.[11] It is argued that public consultation suffers from the same bias effects. This ought to be considered when using public consultation to justify the subsequent passing of legislation for the community as a whole.

c. Religious Freedom Review

Some submissions to the 2018 Religious Freedom Review consisting of similar content were grouped into a single statement. Submission Group 8 referred to the rights of both individuals and organisations to protection stating:

> It is essential to me/us that these elements of religious freedom are protected by law in Australia:
> 1. The rights of parents in relation to the rearing and education of their children;
> 2. The rights of individuals to express their views on same-sex marriage and other issues;
> 3. The right of individuals to not be coerced into making or endorsing a statement with which they disagree;
> 4. The rights of charities in relation to their policies and practices;
> 5. The rights of religious organisations in relation to their services and facilities, policies and practices;
> 6. The rights of religious organisations and individuals having access to government funding; and
> 7. The rights of celebrants in relation to the conduct of ceremonies.[12]

Other submissions contained similar interpretations about rights to religious freedom being held by organisations, such as charitable agencies and schools. Rikki Lambert recommended 'repealing all federal, state and territory laws that make it unlawful for persons or organisations to discriminate on sexuality grounds when they are doing so based on their conscience or religious conviction'.[13]

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[11] Frederick J Gravetter and Lori-Ann B Forzano, *Research Methods for the Behavioural Sciences* (Cengage Learning, 6th ed, 2018) [13.3].
[12] 'Submission Group 8' to Department of the Prime Minster and Cabinet, Australian Government, *Religious Freedom Review* (Web Page) https://www.pmc.gov.au/domestic-policy/religious-freedom-review/submission-group-8.
[13] Rikki Lambert, Submission No 46 to Department of the Prime Minister and Cabinet, Australian Government, *Religious Freedom Review* (21 December 2017) 8.

Alex Deagon stated that 'religious organisations should be provided with suitable legislative protection so they can freely exercise their religion in a private and public context',[14] and

> For the same-sex couple it is their love and fidelity to their partner, and for the religious body it is the love and fidelity to the object of their religion, but in both cases the parties are claiming a right beyond private behaviour which extends to all aspects of their public lives.[15]

This represents one of the more extreme anthropomorphic treatments of the religious organisation in which it is seen to be in possession of human characteristics such as an ability to love. The legitimacy of the notion that organisations, as entities, possess feelings and conscience is contentious.

Conversely, submissions to the review included challenges to interpretations of religious freedom that include organisational rights, for example the National Secular Lobby stated that 'we must not disadvantage minorities, many of whom are not protected from religious influence by anti-discrimination laws, due to *exemptions* that favour church institutions.'[16]

d. Australian Human Rights Commission Inquiry

The emphasis on organisational approaches to freedom of religion was demonstrated by the 2011 Australian Human Rights Commission Report, 'Freedom of Religion and Belief in the 21st Century' which focused on 'religion and spirituality in their organised forms and as communities in Australian society'.[17] The report included consultations in which religions with more than 10,000 adherents were invited to participate along with other non-religious groups such as atheist and humanist groups.[18] A small number of submissions were received from individuals.[19] The report dealt with individual versus

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[14] Alex Deagon, Submission No 124 to Department of the Prime Minister and Cabinet, Australian Government, *Religious Freedom Review* (4 January 2018) 1.
[15] Ibid.
[16] National Secular Lobby, Submission No 1259 to Department of the Prime Minster and Cabinet, Australian Government, *Religious Freedom Review* (17 January 2018) [2.4.3].
[17] Gary Bouma, Desmond Cahill, Hass Dellal, and Athalia Zwartz, Australian Human Rights Commission, *Freedom of Religion and Belief in 21st Century Australia* (Report, 2011) 8.
[18] Ibid 9.
[19] Ibid 13.

communal rights and stated that 'most discussion came from religious representatives who advocated for greater acknowledgement of the rights of community'.[20] The Salvation Army argued that 'legislation needs to encompass organisational rights … as distinct from how its individual personnel are styled'.[21] The Ad Hoc Interfaith Committee proposed that 'Respect for human rights requires the protection of the communities and associations by which a culture of human dignity flourishes'.[22] On the other hand the Secular Party claimed that '… humans have rights … religions do not'.[23]

Chapter 1 introduced the popular but contentious notion that the human right of freedom of religion is vested in organisations. This constructed proposition carries a degree of convenience in its use in justifying exceptions to civil laws for religious organisations. It remains a robust theme, particularly in parliamentary commentary and submissions to inquiries into freedom of religion and in many cases presents as an underlying assumption rather than an expressly stated assertion.

As stated in Chapter 1, the validity of this widespread assumption has been questioned, particularly in recent times. The reason for this is two-fold: firstly, as more people have become disentangled from the larger organised religions they have seen fit to challenge religious organisational rights that extend beyond the rights of other entities, and secondly, courts have recently been faced with claims by organisations for religious freedom rights. The result has been a closer examination of organisational rights to religious freedom and a recognition of the significance of the issue in determining the basis for exceptions to general laws for religious bodies. The question posed is that if the human right to freedom of religion cannot be vested in an organisation, how is there a legitimate basis for an organisation to claim the right in order to alleviate itself of ordinary civil responsibilities?

e. Cases

Two noteworthy recent legal cases, one in Australia and the other in the United States, dealt with this issue and resulted in opposing outcomes. In a Victorian case, *CYC v*

[20] Ibid 30.
[21] Ibid 31.
[22] Ibid.
[23] Ibid 30.

Cobaw[24]*,* a Christian Youth Camp lost an appeal against the Victorian Civil and Administrative Tribunal (VCAT) finding that it had discriminated against an LGBT group by denying it accommodation and services. The court held that the camp could not rely on the section 77 exception in the *Equal Opportunity Act*[25] as the provision can only apply to natural persons. The court stated that an application of the exception to the camp organisation would be 'to adopt a legal fiction which attributes the beliefs of a person or persons to the corporation'.[26] In contrast, in the US *Hobby Lobby case*[27] when faced with the question of whether Hobby Lobby Stores, was entitled to religious freedom rights under the First Amendment to the US Constitution[28] and the Freedom of *Religion Restoration Act* of 1993[29], the court found that a corporation does indeed hold rights applicable to 'persons'.[30] This meant that the health insurance mandate requiring employers with over 50 employees to provide health insurance to employees including 'preventative care' contraception[31] contravened the company's right to freedom of religion because it claimed the mandate was contrary to the beliefs of the owner of the company, the Green family.

The interpretive construction that religious organisations are entitled to special legal treatment or, as is often the case, no legal interference, is demonstrated by what is known as the ministerial exception, developed under common law, which deems the appointment of religious ministers and leaders to be solely a matter for churches without interference. This was highlighted in the US case *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*[32] in which a teaching minister's employment was found to be outside the jurisdiction of the court. The Supreme Court unanimously held that ministerial employment decisions were solely a matter for the church, and action to reinstate the minister or award compensation would

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[24] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615 ('*CYC v Cobaw*').
[25] Now section 84 of the *Equal Opportunity Act 1995* (Vic).
[26] *CYC v Cobaw* (n 24) [413].
[27] *Burwell v Hobby Lobby Stores Inc*, 134 S Ct 2751 ('*Hobby Lobby*').
[28] *United States Constitution* amend I.
[29] Pub L No 103-141, 107 Stat 1488.
[30] *Hobby Lobby* (n 27).
[31] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the *Patient Protection and Affordable Care Act*, 77 Fed Reg 8725 (15 February 2012).
[32] *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*, 565 US 171 (Mich, 2012) ('*Hosanna-Tabor*').

deprive the church of control over selection of those who propagate its beliefs and would interfere with its governance.[33] Similarly, in the UK case *R (Wachmann) v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth*[34] the court declined to determine whether or not a Jewish Rabbi was morally and religiously fit to carry out ministerial duties. Brown J stated that the court is 'hardly in a position to regulate what is essentially a religious function'.[35] A number of cases around the same time denied ministers of religion any contractual relief against religious bodies on the basis that they were not employed under enforceable contracts with the organisations but with the God they serve.[36] More recently this has been overturned by both the UK courts.[37]

f. Academic literature

As shown in Chapter 1 the academic discourse traverses a range of differing interpretations about the rights of religious organisations to freedom of religion and their special treatment in anti-discrimination laws. Evans and Hood state that 'Religious groups determine their own teaching, morality and orthodoxy and any intrusion of the courts into this represents a serious threat to religious freedom'.[38] More recently, in the aftermath of *CYC v Cobaw*[39] and the US *Hobby Lobby case,*[40] Evans with Rajanayagam, restricted this to religious organisations, arguing that corporations ought not to hold religious rights.[41]

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[33] Ibid.

[34] *R (Wachmann) v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth* [1992] 1 WLR 1036 ('*Wachmann*').

[35] Ibid 1042.

[36] Aidan O'Neill, *Religious Organisations and Secular Courts: The Ministerial Exception: Part 2* (5 April 2011) United Kingdom Supreme Court Blog <http://ukscblog.com/religious-organisations-and-secular-courts-the-ministerial-exception/>.

[37] See *Percy v Church of Scotland Board of National Mission* [2006] 2 WLR 353 in which an associate Minister was found to be engaged under a contract of employment and entitled to bring a complaint of sex discrimination before a tribunal; See also *New Testament Church of God v Stewart* [2008] ICR 282 and *The President of the Methodist Conference v Preston (formerly Moore)* [2011] EWCA Civ 1581 both involving unfair dismissal claims.

[38] Carolyn Evans and Anna Hood, 'A Religious Autonomy and Labour Law: A Comparison of the Jurisprudence of the United States and the European Court of Human Rights' (2012) 1(1) *Oxford Journal of Law and Religion* 81, 103-4.

[39] *CYV v Cobaw* (n 24).

[40] *Hobby Lobby* (n 27).

[41] Shawn Rajanayagam and Carolyn Evans, 'Corporations and Freedom of Religion: Australia and the United States Compared' (2015) 37 *Sydney Law Review*, 329–356.

Some commentators use a secular-based argument to justify religious rights for organised religions. This is based on the notion that in separating itself from the state, the Church is consequently autonomous and sovereign, and that the religious domain is immune from state interference.[42] In Garnett's approach to religious organisational rights, the freedom of the church is seen as essential to the separation of church and state and religious freedom under limited government.[43] He claims that not only are religious institutions actors possessing religious freedom rights that are not reducible to the rights of individuals who participate in those institutions, but they provide a structural role in protecting freedom of speech.[44] He further states that we should acknowledge and 'attend carefully to the health' of religious freedom's institutional infrastructure.[45] This notion that organisational infrastructure possesses a health status is a further example of an anthropomorphic treatment of religious institutions. This 'health' appears to be quite distinct from the commonly used term 'financial health' in relation to corporations and profitability. While the separation of church and state is a vital aspect of the modern liberal democracy, this could not be seen to lead to the conclusion that the Church is exempt from the law of the state. Hence there are limits to this secular argument. The separation of Church and State was an important milestone in securing freedom of religion and is not intended to bestow upon the Church its own sovereignty against the state. If this were so, it could be argued that other institutions may also have separate sovereignty against the state.

Parkinson infers that organisations possess the fundamental human rights guaranteed in strong and clear terms in Article 18 of the ICCPR.[46] He evidently interprets the word 'everyone' in the instrument to include organisations. However this is far from settled and the extent of religious rights vested in religious organisations and the manner in which they may be reflected in laws is subject to debate.[47] Further, Parkinson labels the

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[42] Julian Rivers, 'The Secularisation of the British Constitution' (2012) 14 *Ecclesiastical Law Journal* 371.
[43] Richard W Garnett, 'The Freedom of the Church' (2013) 21(33) *Journal of Contemporary Legal Issues* 33.
[44] Ibid 40.
[45] Ibid 41.
[46] Patrick Parkinson, 'Christian concerns about an Australian Charter of Rights' in Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012) 117, 120.
[47] See, eg, Margaret Thornton, 'Christianity "Privileged" in Laws Protecting Fairness' (2011) 5 *Viewpoint: Perspectives on Public Policy* 41.

belief that the only rights to be given any real significance are individual rights and not group rights as 'fundamentalist'[48] and the view that government can regulate the ordination of clergy, 'extreme'.[49] His commentary provides no explanation as to why there is a different regulatory treatment of clergy appointments to employment by other conscience-based organisations such as, for example, the Royal Society for the Protection and Care of Animals (RSPCA).

Norton argues for religious rights for organisations on the basis that religious organisations are usually necessary for people to pursue a religious way of life because they provide the community with norms and practices for people to pursue that option.[50] This emphasis on communal aspects of religion is further expanded by Khaitan and Norton who contend that the characteristic that determines what counts as a religion is intersubjectivity, which is a feature of social forms, and although religion can involve some private aspects, it cannot exist outside some shared conscience within a social group.[51]

The justification for freedom of religion for organisations in the form of exceptions to general laws appears to be founded on a notion that the communal and associational nature of religion is to be interpreted to mean that freedom of religion must be vested in religious organisations. Aroney argues that communal religious rights ought to be treated with the same respect as the rights of individuals.[52] How this is to translate to legal rights of religious organisations in anti-discrimination laws is unclear as exceptions do not apply to individuals with the exclusion of the Victorian *Equal Opportunity Act.*[53]

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[48] Parkinson, (n 48) 122.
[49] Ibid.
[50] Jane Calderwood Norton, *Freedom of Religious Organisations* (Oxford University Press, 1st ed, 2016) 193.
[51] Tarunabh Khaitan and Jane Calderwood Norton 'The Right to Freedom of Religion and the Right against Religious Discrimination: Theoretical Distinctions' (October 28, 2018) *International Journal of Constitutional law forthcoming; Oxford Legal Studies Research Paper No 14/2019*; *University of Melbourne Legal Studies Research Paper,* 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274123##>.
[52] Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *Queensland Law Journal* 153, 185.
[53] *Equal Opportunity Act 2010* (Vic) s 84.

Although strong support for religious organisational rights is evident in the academic discourse, the concept does have its critics. In arguing against the permissibility of religious organisations to discriminate in employment, Thornton contends that international human rights instruments make it clear that human rights, by definition, are vested in human beings and not in corporations, and questions why corporations operated by religious bodies are privileged above other corporate employers.[54] Sager states that the privileging of religious institutions and their 'all-encompassing webs of belief and status are much too often what intensely bind members of tight social groups' and that this threatens 'Equal Liberty'.[55]

Schragger and Schwartzman offer a convincing challenge to an institutional conception of the religious clauses in the United States First Amendment.[56] They note that although freedom of the Church is not always framed in terms of a claim to sovereignty, the proposition is at the heart of the most aggressive forms of institutionalism.[57] According to Schragger and Schwartzman institutions do not in themselves give rise to any distinctive set of rights, autonomy or sovereignty and any church autonomy is derived from individual rights of conscience.[58]

The above demonstrates the range of interpretations identified in academic discourse pertaining to the notion that freedom of religion is an organisational right.

4.1.2 Uniformity of religious adherents

The second interpretive construction identified by this research is the notion that religious adherents are a uniform group with identical or even similar understandings and manifestations of their religion, and a homogenous adherence to its doctrine and tenets.

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[54] Thornton (n 49) 45.

[55] Lawrence G Sager, 'The *Moral Economy of Religious Freedom'* in Peter Cane, Carolyn Evans and Zoë Robinson (eds) *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, 2008) 16-25, 25.

[56] United States Constitution, amend I.

[57] Richard Schragger and Micah Schwartzman, 'Against Religious Institutionalism' (2013) 99(5) *Virginia Law Review* 917-85, 922.

[58] Ibid 920.

Numerous anti-discrimination laws include exceptions that permit discrimination by religious bodies to avoid insult to the religious 'susceptibilities' or 'sensitivities' of religious adherents. This is shown in Appendix 3. Inherent in this drafting is the notion that the religious susceptibilities of adherents to a particular religion are the same, or at least, substantially similar.

a. Religious Freedom Review

While many submissions to the Religious Freedom Review do consist of similar attitudes to the need for religious rights, the sample of 15,500 particpants represents only a very small proportion of the 14 million people in Australia who identify with a recognised religion.[59] Even if those submissions contained identical opinions they would still make up only 0.11% of the religious population in Australia. It would be expected that those religious groups and individuals who felt their freedoms were under threat, particularly by impending changes to marriage laws and suggestions that religious bodies may lose exceptions to anti-discrimination laws, would be most vocal and contribute to the review.

Nevertheless, a review of submissions uncovered little expression by individuals of a perceived uniformity of religious attitudes. Instead, submissions focused on the right of organisations and individuals to express their beliefs or doctrines respectively. One exception to this was the submission of Jeremie Alexis who stated that

> A Christian believes that the Bible is the inspired Word of God ... When navigating life, a Christian will first and foremost obey the Word of God concerning lifestyle choices and decisions about conduct, purpose, focus and how he treats his fellow man.[60]

Some submissions challenged the notion that all religious adherents hold the same beliefs. For example, Parents and Friends of Lesbians and Gays stated that 'many priests, pastors and ministers views differ to the hierarchy in their churches about the treatment and rights of LGBTIQ couples when it comes to marriage equality'.[61] This

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[59] Australian Bureau of Statistics, *Census of population and housing: Reflecting Australia – Stories from the Census 2016* (Catalogue No 2071.0, 28 June 2017) http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Religion%20Data%20Summary~70.

[60] Jeremie Alexis, Submission No 1560 to Department of the Prime Minister and Cabinet, Australian Government, *Religious Freedom Review* (21 January 2018) 2.

[61] Parents and Friends of Lesbians and Gays, Submission No 13873 to Department of the Prime Minister and Cabinet, Australian Government, *Religious Freedom Review* (12 January 2018) 1.

alleged departure from church doctrine by some of the most devout religious adherents implies either there are varying interpretations of the 'Word of God' or perhaps some are willing to infract it.

b. Cases

The interpretation of uniformity of belief and attitudes was highlighted in the case of Jacqui Griffin who was refused registration as a teacher in Catholic schools. The CEO of the Catholic Education Office presented to the Commissioner that:

> Catholic parents would be outraged and offended by the prospect of the CEO permitting a high profile lesbian activist who engages in what the Catholic Church teaches to be immoral homosexual activity to stand in loco parentis to their children.[62]

This notion is likely to be an assumption, given the results of the Australian Marriage Law Survey where electorates consisting of high Christian populations presented some of the highest proportions of people in support of same-sex marriage.[63]Further, no evidence of parental outrage or offence was submitted to the Commissioner.

c. Academic literature

The academic literature includes numerous challenges to a uniform notion of religious attitudes amongst adherents. While Harrison and Parkinson note that freedom of religion and association ought to recognise that voluntary religious groups are entitled to be governed by their shared values and beliefs,[64] others identify the fact that many values espoused in religious doctrine are not shared. For instance, Evans notes that 'many religious people are committed to principles of non-discrimination even in circumstances where this might bring them into conflict with the teachings of the religion to which they belong'.[65]

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[62] *Griffin v Catholic Education Office* [1998] AusHRC 6 (1 April 1998) 13 (*'Griffin v CEO'*).
[63] Warringah (75% 'Yes' vote and 56.2% Christian compared with 52.2% in Australia) and Mackellar (68% 'Yes' vote and 62.2% Christian); Australian Bureau of Statistics, *Census of Population and Housing: Quickstats Australia 2016* (Catalogue No 2061.0, 27 June 2017) <http://www.abs.gov.au/websitedbs/D3310114.nsf/Home/2016%20QuickStats>.
[64] Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society' (2014) *Monash University Law Review* 413.
[65] Carolyn Evans, 'Principles and Compromises: Religious Freedom in a Time of Transition' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Bloomsbury Publishing PLC, 2014) 223-39, 237.

Gray points out that it can be 'difficult to determine what the doctrines of some religions are' and that Christian religions and people interpret religious texts differently.[66]

Norton's ideas about freedom of religious organisations are premised upon a concept of religious autonomy and organisational self-governance which involves determining internal norms so as to facilitate a religious way of life for adherents.[67] Norton's position is premised on a tight internal structure within religions which may be accurate doctrinally. However, it is argued in this thesis that, in practice, this structure does not extend to adherents as may be assumed.

In summary, the notion that religious adherents of a particular denomination hold the same or even similar views on principal aspects of religious doctrine is shown to be dubious. Despite this, legislated religious exceptions which include the requirement for insult to religious susceptibilities can only operate on an underlying assumption that religious susceptibilities are both uniform and predictable amongst religious adherents of a religious denomination. Hence, this interpretive construction is questionable and therefore open to scrutiny as a test for the permissibility of discrimination in legislation.

4.1.3 Tolerance of discrimination against women

The third interpretive construction identified is the notion that discrimination against women can be tolerated for the purposes of some religious activities.

a. Legislation

The common law concept of ministerial exception is included in sex discrimination laws in all jurisdictions and this is shown in Appendix 1. It grants religious bodies an entitlement to discriminate on the ground of sex. The most noteworthy consequence of this has been the continued exclusion of women from religious leadership positions in some of the most influential churches in Australia and around the world. The ground of

[66] Anthony Gray, 'The Reconciliation of Freedom of Religion with Anti-Discrimination Rights' (2016) 42(1) *Monash University Law Review* 72–108, 92.
[67] Norton (n 52).

sex is one of the original, most significant and unequivocal grounds of anti-discrimination law[68] and is not included in any religious exception other than the legislative enactment of the ministerial exception. This specific inclusion of sex as one of the grounds strongly suggests that the legislation has been carefully drafted to accommodate the maintenance of this historical discrimination against women in religious ministry. Although it is argued in this thesis that this is an extreme and unacceptable form of discrimination, there is much support, or at least tolerance, to be found for it within all types of texts studied for this research. This is not to suggest that the intention of most commentators is to actively discriminate against women but is likely to be an oversight resulting from a general and often subconscious tolerance of discrimination against women in society. The silence ought to signify an area of concern, as this outcome is the most obvious consequence of the exception and yet this fact does not appear to raise concerns from even some of the most ardent advocates of limiting freedom of religion for the purposes of equality.

b. Religious Freedom Review

The Religious Freedom Review is dense with examples of implied acceptance of discrimination against women in religious organisations with its numerous affirmations of church autonomy in the selection of religious clergy. The report states that:

> The Panel heard from thousands of Australians and met with over 180 experts and organisations … Few took issue with the right of religious institutions to operate freely within certain parameters – for example, to discriminate in appointing clergy.69

Indeed, this viewpoint was noted to be common to nearly 'all the more detailed representations to the panel'.[70]

c. Cases

Australian courts have not yet been called to adjudicate matters relating to the ministerial exception specifically. However it was affirmed by the court in the United States in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal*

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[68] The *Sex Discrimination Act 1984* (Cth) was the second Act of Parliament prohibiting discrimination following the *Racial Discrimination Act 1977* (Cth).
[69] *Religious Freedom Review* (n 1) 9-10.
[70] Ibid 116.

Employment Opportunity Commission.[71] Although the case was not a matter relating to sex discrimination, Roberts CJ held that 'by imposing an unwanted minister the State infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments'.[72] Whilst the Free Exercise Clause may be unequivocal, it is interesting to note that racial discrimination has been officially eliminated from religious clergy appointments by both normative progress of attitudes within religious denominations and legislative enactment. According to Minow 'the level of scrutiny the Supreme Court demands for governmentally enforced sex distinctions is ambiguous and not as vigorous as the review of racial discrimination'.[73]

d. Academic literature

The autonomy of religious bodies to discriminate on the ground of sex in selecting clergy is given substantial support in the academic literature notwithstanding the fact that its only goal is to exclude women. Evans argues that the state must respect autonomy of religious group with respect to decisions such as freedom to choose clergy, teachers and to establish schools and distribute texts or publications.[74] Tebbe states that there is agreement on certain legal doctrines that mediate between religious freedom, one of them being that religious congregations 'may choose their religious leaders without interference from employment discrimination law, at least when exclusion is required by the group's theology or mission'.[75] Tebbe's analysis of discrimination in the selection of religious clergy refers to a range of grounds of potential discrimination resulting from the ministerial exception but overlooks the significance of sex as the most evident ground.

Murphy commends the exclusion of race, age, disability and physical features from religious exceptions in anti-discrimination laws and argues that due to the predominance of Christian voices, sexual orientation or open-air Hindu cremations are not included.

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[71] *Hosanna-Tabor* (n 32).
[72] Ibid [173].
[73] Martha Minow, 'Should Religious Groups Be Exempt From Civil Rights Laws' (2007) 48 *Boston College Law Review* 781-849, 818.
[74] Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (The Federation Press, Sydney 2012) 36.
[75] Nelson Tebbe, *Religious Freedom in an Egalitarian Age* (Harvard University Press, 2017) 12.

> It is … worth noting the disproportionate weight of Christian voices in terms of what kinds of grounds can be used to discriminate … The exclusion of race, physical features, disability and age from the permissible grounds for discrimination under ss 82 and 84 of the EOA 2010, while a positive step, also indicates a focus on attributes like sexual orientation, something of concern to many Christians. There is no similar discussion about, for example, allowing Hindus to cremate people in the open air.[76]

Although not mentioned in Murphy's list of grounds, sex is also not excluded from religious exceptions to anti-discrimination laws. This fact, along with a lack of attention to it by some scholars may be due to the predominance of religion itself and the inferior status of women in most major religious denominations.

Although against religious institutional rights, Schragger and Schwartzman support the ministerial exception arguing that it protects freedom of conscience and the social conditions for its formation from interference by the state.[77] They provide no explanation of the legislative protection of sex discrimination and how it is derived from conscience or why religious conscience is a priority over other types of conscience.

In contrast and from a lonesome outpost, Thornton finds no hesitation in expressing the underlying nature of sex discrimination permissibility in religious exceptions to anti-discrimination laws:

> The retention of an exception based on the grounds of sex, marital status and sexuality reveals a latent sexism and homophobia which skews the stated commitment to equal opportunity for all in a way that suggests intolerance and prejudice.[78]

She further acknowledges that 'moral values based on ancient religious texts, including the Bible, are often patriarchal, misogynistic and homophobic, which necessarily conflict with the egalitarian secularism of anti-discrimination legislation'.[79] Whilst the bible may indeed be homophobic, evidence suggests homosexual men have not been excluded from ordination as religious ministers, as have women.[80]

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[76] Bobbi Murphy, 'Balancing religious freedom and anti-discrimination: Christian Youth Camps Ltd v Cobaw Community Health Services Ltd' (2016) 40, *Melbourne University Law Review*, 594–625, 623.
[77] Schragger and Schwartzman (n 59) 979.
[78] Thornton (n 49) 45.
[79] Ibid.
[80] Lisa McClain, 'A thousand years ago, the Catholic Church paid little attention to homosexuality', *The Conversation* (online, 10 April 2019) < https://theconversation.com/a-thousand-years-ago-the-catholic-church-paid-little-attention-to-homosexuality-112830>.

4.1.4 Religion as beneficial to individuals and society

The notion that religion is beneficial to people and society is a common one. While most people are willing to acknowledge the horrible histories of religious authoritarianism, war, persecution and exclusion, these appear to fade to the background for many religious believers. In no way is this condemned in this thesis, as there is a plethora of evidence of the benefits of religious belief including the valuable charitable works of some organised religions. It is merely a point to note that in the discussion surrounding the tension between freedom of religion and equality, bias exists towards certain religious experiences and a blanket statement about the beneficial nature of all forms of religion would seem unwise.

a. Submissions to Inquiries

Demonstrating this skewed vision of religion, the 2011 Australian Human Rights Commission study reported that submissions received 'argued that … religious communities protect and nurture and develop values that are essential to productive social life and social cohesion'.[81] This presents one area of contention in the debate about freedom of religion and anti-discrimination as many benefits of social cohesion arising out of religion may in fact only be experienced by those inside the religious group to the exclusion of others which does not make for a cohesive society as a whole.

Not all submissions hail the benefits of religion and its free exercise. Group 7's submission to the Religious Freedom Review stated that 'Religious freedom has become a way to euphemise and legitimise discrimination against LGBTIQ people' and 'Religious freedom is also abused to justify discrimination against religious minorities, women and people of colour'.[82]

b. Parliamentary debate

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[81] Bouma et al (n 17) 31.

[82] 'Submission Group 7' to Department of the Prime Minster and Cabinet, Australian Government, *Religious Freedom Review* (Web Page) < https://www.pmc.gov.au/domestic-policy/religious-freedom-review/submission-group-7>.

The broad statement of Senator George Brandis in his Parliamentary second reading speech on the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 that the state should not have the power to regulate the conduct of organisations run by religious congregations that provide education, health or aged care[83] appears to reflect a particular belief that religious bodies conducting non-religious activities are to be completely outside the ambit of any state law. The suggestion could only be entertained under an interpretation that religion and the conduct of religions without scrutiny or regulation is beneficial to people and society.

c. Cases

In a UK case, *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan,* Hoffman LJ implied that religion is good, stating that 'religion is something to be encouraged, but is not the business of government'.[84]

d. Academic literature

Ahdar affirms the interpretation the religion is beneficial stating that, '[d]efenders of liberty of religion may have to grasp the nettle and make the case that religious freedom is good because religion is good'.[85]

The interpretation that religion is beneficial to society is challenged by numerous commentators. While Leiter questions the justification for tolerance of religion by attacking its rational foundations, calling it 'a potentially harmful brew of categorical commands and insulation from evidence,'[86]others list the many iniquities committed in the name of religion throughout history.[87]

Schragger and Schwartzman contend that the argument for special rights to autonomy is not premised on the benefits of religion per se, but on the perceived benefits to be

[83] Commonwealth, Parliamentary Debates, Senate, 18 June 2013, 3272-3274 (George Brandis), 3273.
[84] [193] 1 WLR 909, 932.
[85] Rex Ahdar, 'Is Freedom of Conscience Superior to Freedom of Religion' (2018) 7 *Oxford Journal of Law and Religion* 124-42, 142.
[86] Brian Leiter, *Why Tolerate Religion?* (Princeton University Press, 2013) 62.
[87] See, eg, Richard Dawkins, *The God Delusion* (Bantam Books, New York 2006) and Christopher Hitchens, *Why God Is Not Great: How Religion Poisons Everything* (Hachette Book Group, New York, 2007).

gained from religious institutional autonomy. However, they claim that this is insufficient as religious sects are bad because they are likely to 'generate political and social discord … seek alignment with the state … tend towards corruption, interfere with individuals' unmediated relationship with God or injure their members or outsiders'.[88]

The justification for raising the interpretive construct, that religion is beneficial to society, in this thesis is not that freedom of religion should be limited because religion causes harm but that there ought to be some consideration in law-making to account for the fact that religion is not beneficial in all cases. On this basis, and in consideration of the secular nature of Australia, the government ought to be expected to assume a lesser and more neutral role in religious protection.

4.1.5 A narrow meaning and scope of religion

A narrow interpretation of the meaning and scope of religion has led to a deficiency in the recognition, in Australian law, of the true meaning of thought, conscience and religion as declared in Article 18 of the ICCPR and UDHR respectively.[89]

a. Legislation

Conscience-based exceptions to anti-discrimination laws are only available to bodies established for a religious purpose and not to individuals or other organisations founded upon religious beliefs or other conscience motives. It is not suggested that Australia's commitment to freedom of thought, conscience and religion is entirely a result of the ICCPR or the UDHR. However, Australia is a member of the United Nations and is a party to the ICCPR and is thus obligated to recognise the more broad interpretation of the right. Whilst it is accurate to suggest that the right to freedom of religion is a separate right to freedom of thought and conscience, the UN HRC's General Comment

[88] Schragger and Schwartzman (n 59) 950.

[89] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(1) ('*ICCPR*'); *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg. UN Doc A/810 (10 December 1948), art 18.

No. 22 affirms that they are to be protected equally.[90] Further, it is reasonable to suggest that some beliefs of conscience could be given the same status as religion or even be classed as 'religion'.

b. Cases

This was indeed the case in *R v Easton*,[91] a recent NSW case in which a Magistrate accepted Mr Easton's claim that 'freedom is my religion'[92] and that this was as 'tangible as any other faith'[93] Mr Easton brought a claim for a waiver of a pecuniary penalty for his failure to vote in an election, relying on the exception to compulsory voting on the basis of religious duty to abstain.[94] The decision presents some obvious problems for governments with compulsory voting laws in that the claim might be made by a great many more people. However, it is consistent with international human rights instruments as it recognises the broad terms of the right to thought, conscience and religion in the ICCPR and UDHR.

As outlined in Chapter 3, Australian courts have proposed a range of definitions of religion, from a requirement for belief in the supernatural with codes of conduct and an identifiable group in the *Scientology case*[95] to the Macquarie dictionary definition referred to in *Wang v Minister for Immigration* describing religion as 'the quest for the values of the ideal life'.[96] How religion is defined and interpreted determines what kinds of activities can be protected under freedom of religion. Despite some wider judicial formulations, Australia has adopted a very narrow definition of religion for the purposes of exceptions to anti-discrimination laws, giving only conduct carried out by religious bodies protection. This approach is wanting of a justification that satisfies the notion that laws apply equally to all.[97]

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[90] Office of the High Commissioner of Human Rights, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) [1] (*General Comment 22*').
[91] *R v Easton* [2017] NSWLC 19.
[92] Ibid [10].
[93] Ibid.
[94] *Commonwealth Electoral Act 1918* (Cth) s 245(14).
[95] *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, [136].
[96] *Wang v Minister for Immigration and Multicultural Affairs* [2000] FCA 1599 (10 November 2000) [5]-[6].
[97] This will be explained further in Chapters 6 and 7.

4.1.6 A thought, conscience and religion hierarchy

Related to the meaning and scope of religion is the interpretation that some beliefs, usually those within the definition of religion, are more deserving of protection than others. This notion is clearly a foundation upon which religious exceptions in anti-discrimination laws and amendments to the *Marriage Act*[98] have been formulated. It places religious beliefs, particularly those affiliated with major denominations, above other minority group and individual religious beliefs as well as non-religious beliefs of conscience.

a. International Law

In contrast to Australian law and the majority of opinion and discourse, international law does not support the permissibility of discrimination specifically for religious organisations and does not expressly give favour to religious beliefs over other thoughts and beliefs of conscience.

As Murphy states, 'the focus on religious exemptions does not reflect international law which treats religious freedom, freedom of conscience and freedom of thought in the same way'.[99]

As noted, the UN HRC General Comment 22 states that 'the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief'[100] and '[l]imitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18'.[101]

b. Religious Freedom Review

Although the final report of the Religious Freedom Review aligns with international law in stating that '[f]reedom of thought, conscience and religion is a right enjoyed by all, not just those of faith. It protects those who live a life of faith and those who live by

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[98] *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).
[99] Murphy (n 78) 623.
[100] *General Comment 22* (n 92) [1].
[101] Ibid [26].

other beliefs or, indeed, no beliefs',[102] the subsequent recommendations continue to reflect a privileging of religious bodies and those affiliated with them.[103]

The submission to the Review of Professor Alex Deagon reflects this interpretation:

> The desire to promote a truly democratic and inclusive society means that religious organisations should be provided with suitable legislative protection so they can freely exercise their religion in a private and public context. The removal of exemptions for religious bodies is contrary to a fairer and more inclusive society…'[104]

The excerpt is not unlike others referred to above in 4.1.1 in that it supports the vesting of freedom of religion in organisations. It goes further to imply that it is fair to an inclusive society to ensure manifestations of specific religious beliefs, that is, those associated with religious organisations, are given special protections. The notion that the exclusion of people on the grounds of sex, gender, sexual orientation or other characteristics through religious exceptions to anti-discrimination laws is truly democratic and inclusive is one contradiction that is common amongst those who support religious exceptions to anti-discrimination laws. The principle appears to propose that to disallow religious people to exclude others is not inclusive of their exclusion. One way or another, legislators ought to decide whether they will legislate for exclusion, inclusion or neither. A mixture of legislated exclusion for some groups, and inclusion for others is difficult to justify with arguments pertaining to democracy or inclusivity.

Submissions to the Religious Freedom Review included numerous challenges to the special treatment given to religion and religious beliefs. The submission of Eran Segev calls for the right of 'freedom *from* religion to be considered as equal or superior to freedom of religion' and that religions have 'scant regard for the fact that their morality may not be universal'.[105] The Science Party submission argued that 'the non-religious lack the rights to execute their beliefs and desires in the way that followers of

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[102] *Religious Freedom Review* (n 1) 8.
[103] The relevant recommendations will be addressed in more detail in Chapter 7.
[104] Deagon (n 14) 1.
[105] Eran Segev, Submission No 14 to Department of the Prime Minster and Cabinet, Australian Government, *Religious Freedom Review*, (16 December 2017).

mainstream religions do'.[106] They further equated their own beliefs with those of mainstream religions:

> When discussing religious freedoms, we should consider what we believe to be a religion. A definition of religion that requires a belief in supernatural beings or supernatural happenings does not encompass all things that people consider religion. Further, people who are not religious observe small rituals like visiting family during traditionally religious holidays, and they preserve a level of personal morality in the absence of a religious belief. These ways of life put the non-religious shoulder-to-shoulder with followers of mainstream religions.[107]

c. Cases

Courts have been selective in recognising certain religious beliefs as deserving of greater protection, or at least, less interference from the law. For example, in the UK case, *Wachmann* the court held that Jewish law was a sensitive area into which it ought to refrain from entering.[108] The case involved a determination in relation to the continued ordination of a Jewish Rabbi accused of engaging in an adulterous relationship. Courts in Australia have not seen religious belief as significant in determining employment of lay persons[109] or the provision of goods and services,[110]preferring to enter into significant deliberation of religious doctrinal justifications for discrimination.[111] However, in cases where courts have found in favour of complainants, the discrimination has been found to be outside the religious doctrine.

d. Academic literature

The favouring of religious beliefs over other beliefs and non-beliefs is advocated by Webber who claims:

> In our pursuit of an inclusive, egalitarian, individual-rights-respecting polity, we are often tempted to interpret freedom of religion as though it were designed to place religious belief on a par with other beliefs – as though it were designed to secure an absolute equality in

[106] The Science Party, Submission No 13064 to Department of the Prime Minster and Cabinet, Australian Government, *Religious Freedom Review* (14 February 2018) 1.
[107] Ibid.
[108] *Wachmann* (n 34).
[109] *Griffin v CEO* (n 64).
[110] *CYC v Cobaw* (n 24).
[111] *Griffin v CEO* (n 64); *CYC v Cobaw* (n 24).

> religious matters (equality, that is, between religion and non-religion, as well as among different religious beliefs)[112]

Webber argues that this is 'a mistake' claiming that freedom of religion is 'founded upon the affirmative valuing of religion' and that 'religious belief has special value and deserves special protection'.[113]

Webber repeatedly points out that 'we' value and have 'a special respect for individuals' religious obligations' more than other beliefs and actions and that religious reasons have a 'superordinate importance'.[114] He provides examples of the wearing of a Jewish yarmulke to school being permitted but not a baseball cap, or the reason for an employee's request not to work on a Saturday for religious reasons that would take precedence over a person simply wanting to visit their grandmother.[115] Webber's reason for this special treatment is that 'religion is unique, is especially significant in a way that is relevant to moral judgements, and we are committed to phenomena that share that significance equally'.[116] While a baseball cap is unlikely to be a choice arising from conscience, the argument does not explain why the moral judgement involved in wearing a religious garment outweighs that of a visit to grandmother on her birthday. Further, there are more relevant examples such as the differential treatment of religious beliefs and other beliefs of conscience such a commitment to animal rights. The notion that religion has a unique moral basis and therefore ought to be given special treatment is difficult to contemplate, particularly in modern society where ideas relating to how to conduct oneself morally are so varied and many are just as valid as organised religion. It could be argued that the special treatment of religious belief appears to be little more than an historical tradition rather than a reasoned course of action. Following this analysis, it is clear that the construction of religion as deserving of special rights is not easy to explain and can be seen to have a purely interpretive basis rather than an empirical one.

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[112] Jeremy Webber, 'Understanding the Religion in Freedom of Religion' in Peter Cane, Carolyn Evans and Zoe Robinson (eds) 2008, *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, Cambridge, United Kingdom, 2008) 26-43, 26.
[113] Ibid 26.
[114] Ibid 34.
[115] Ibid 32-4.
[116] Ibid 36.

Affirming this interpretive nature of concern for religion and religious belief, Ahdar asks whether religious freedom could be understood as a form of freedom of conscience rather than separate to it.[117] However, he finds that liberty of conscience is a narrower right in many respects that has not been well received in the European Court of Human Rights, and it would be unwise for religion to be recast as such.

Challenges to a hierarchy of activities relating to religion over thought and conscience are numerous in the academic literature.[118] For example Minow states that 'the special treatment of religious groups is striking, especially given the denial of comparable exemptions to secular not-for-profit organisations.'[119] Sandberg points out the differential treatment of the beliefs of individuals and those believed to be held by religious bodies in anti-discrimination laws[120] is less a matter of whether the beliefs are religious or not, and more a matter of the type of entity holding them. The legislative preference is clearly for organisations.

In summary, the interpretive nature of a hierarchy in which religious beliefs are superior and more deserving of protection than other beliefs of conscience is clear. Anti-discrimination legislation gives effect to this construction. However, there are numerous challenges to it that have been heard, but not accounted for in legislative provisions that claim to protect freedom of thought, conscience and religion.

4.1.7 A human rights hierarchy

The final interpretation identified by this research is the notion that the right to freedom from discrimination is of a higher status than the right to freedom of thought, conscience and religion, along with an identically opposite interpretation, that freedom of religion takes precedence over non-discrimination. Stakeholders and commentators on each side of the debate argue that one of these opposing interpretations is the basis

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[117] Rex Ahdar, 'Is Freedom of Conscience Superior to Freedom of Religion?' (2018) 7 *Oxford Journal of Law and Religion* 124-42.
[118] Minow (n 75) 785; Murphy (n 78) 623; Sager (n 57); Schragger and Schwartzman (n 59) 967-8; Leiter (n 88) 23; Michael J Perry, 'Freedom of Conscience as Religious and Moral Freedom'(2014) 0 *Journal of Law and Religion* 1-18; Sadurski, Wojciech, 'Neutrality of Law towards Religion' (1990) 12 *Sydney Law Review* 420; Ronald Dworkin, *Religion Without God* (Harvard University Press, 2013) 116, 9.
[119] Minow (n 75) 785.
[120] Russell Sandberg, 'The Right To Discriminate' (2011) 13 *Ecclesiastical Law Journal* 157-81, 173.

for the treatment of religious belief in anti-discrimination laws. The truth is that anti-discrimination laws are constructed both ways. For individuals, the right to be free from discrimination takes precedence over rights to freedom of thought, conscience and religion. In respect of religious organisations, freedom of religion is given priority.

a. Religious Freedom Review

Some submissions to the Religious Freedom Review contained the view that freedom of religion has come to mean, or should not mean, religious privilege.[121] Others lamented that freedom from discrimination was considered more important than freedom of speech, conscience and religion.[122] Group 1 expressed concern that 'Christian hospitals, aged care, education institutions and care organisations may be inhibited by anti-discrimination laws'.[123]

b. Other commentary

In an opinion piece for the Washington Post, Kristen Waggoner, a United States attorney who represented Jack Phillips in the *Masterpiece Cakeshop* case stated that creative followers of the Abrahamic faiths including Christianity, Judaism and Islam, be they filmmakers, photographers or musicians, are forced to decide to either turn away from their faith or forfeit their livelihood. She claims 'the government ignores this harm to these people of faith, focusing exclusively on the interests of same-sex couples.'[124]

c. Academic literature

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[121] Submission Group 7 to Department of the Prime Minster and Cabinet, Australian Government, *Religious Freedom Review* (Web Page) <https://www.pmc.gov.au/domestic-policy/religious-freedom-review/submission-group-7>; Parents and Friends of Lesbians and Gays, Submission No 13873 to Department of the Prime Minister and Cabinet, Australian Government, *Religious Freedom Review* (12 January 2018), 1.

[122] Submission Group 1, Group 12, Group 15, Group 16 Department of the Prime Minster and Cabinet, Australian Government, *Religious Freedom Review* (Web Page) < https://www.pmc.gov.au/domestic-policy/religious-freedom-review/review-submissions>.

[123] Submission Group 1 to Department of the Prime Minster and Cabinet, Australian Government, *Religious Freedom Review* (Web Page) https://www.pmc.gov.au/domestic-policy/religious-freedom-review/submission-group-1.

[124] Kristen Waggoner, 'The baker isn't the only winner in the wedding cake ruling', *Washington Post* (online), 6 June 2018 <https://www.washingtonpost.com/opinions/the-baker-isnt-the-only-winner-in-the-wedding-cake-ruling/2018/06/06/baffc8f6-68dd-11e8-bea7-c8eb28bc52b1_story.html?utm_term=.a9a8598b5f1c>.

Parkinson refers to a hierarchy of human rights claiming that '…secular liberal interpretations of human rights charters will tend to relegate religious freedom to the lowest place in an implicit hierarchy of rights established not by international law but by the intellectual fashions of the day'.[125] Fredman's hierarchy of rights is quite different. She argues that 'while religious adherents are not compelled to change their beliefs, manifestation of belief should not be permitted to trump the overriding right of each person to equal respect and concern'.[126]

d. Parliamentary debate

In her Senate speech to the adjournment of the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018*, Senator Amanda Stoker stated that

> this matter should be addressed as part of the government's holistic response to the Ruddock review so that the rights of LGBTI people are protected in a way that fairly balances that right with the competing rights of others and fosters a society in which the human rights of all people are encouraged to co-exist.[127]

How to frame anti-discrimination laws so that the right to be free from discrimination will co-exist with the right to freedom of religion will present a challenge, and the issue of how the law should respond to the Religious Freedom Review was referred to the Australian Law Reform Commission (ALRC). Shortly after the review the Attorney-General issued the agency with terms of reference to conduct an inquiry into the *Framework for Religious Exemptions in Anti-discrimination legislation*.[128] The ALRC is due to report its findings in December 2020.

e. International law

Which of the right to freedom of religion and the right to freedom from discrimination is to be the most dominant has been the source of much debate. The answer according to

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[125] Parkinson (n 48) 121.

[126] Sandra Fredman, *Comparative Human Rights Law* (Oxford University Press, 2018) 437.

[127] Commonwealth, Parliamentary Debates, Senate, 14 February 2019, 10401-10402 (Amanda Stoker), 10402.

[128] The Hon Christian Porter, Attorney-General of Australia, 'Review into the Framework of Religious Exemptions in Anti-discrimination Legislation' (Media Release, 10 April 2019) < https://www.attorneygeneral.gov.au/Media/Pages/Review-into-the-Framework-of-Religious-Exemptions-in-Anti-discrimination-Legislation-10-april-19.aspx>.

human rights norms and international laws is that these are equivalent rights and there is no hierarchy of human rights. The Vienna Declaration and Programme of Action states that

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.[129]

Although not reflected in Australia's anti-discrimination laws, the theoretical proposition is affirmed in the Religious Freedom Review:

> 'Importantly, there is no hierarchy of rights; one right does not take precedence over another … Australia does not get to choose, for example, between protecting religious freedom and providing for equality before the law. It must do both under its international obligations'.[130]

Despite much consultation with the community and political debate, how to grapple with the balance of competing human rights in a practical sense has not been settled. This thesis aims to break down some of the interpretive constructions of freedom of religion in order to bring a more reasoned analysis to the debate; one that does not favour one side and one that does not prefer one human right over another. The hermeneutic nature of the positions as demonstrated in the above interpretations means that such remonstrating is unlikely to result in a satisfactory resolution. It is proposed that this problem can be resolved without the need to preference one right over another. It is argued in this thesis that there are other ways to dissolve much of the tension between religious freedom in anti-discrimination law and still recognise the equality of the two human rights.

4.2 Behind the interpretive constructions

There are likely to be numerous reasons for the development of the interpretive constructions outlined in chapter 4.1. Firstly, there is acceptance of the supremacy of

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[129] *Vienna Declaration and Programme of Action,* adopted by the World Conference on Human Rights in Vienna, UN Doc A/CONF.157/23 (25 June 1993) [5].
[130] *Religious Freedom Review* (n 1) [1.37].

large-scale powerful Churches which is derived from history and tradition. Coupled with this is a challenge for the state in releasing itself from religious authority, or at least pressure to accommodate religion, particularly when it has positive relationships with religious denominations as providers of education and social services that would otherwise need to be provided by the state. Minow notes that the government acknowledges the contribution religious organisations make to individuals and society and acts to avoid confrontation with influential religious groups.[131] Davies rightly states that religious practices become cultural.[132] Hence, Australia has a strong Christian cultural foundation with widespread celebration of Christian Holy days amongst non-religious people, including as official public holidays. Thornton and Luker argue that 'despite a formal commitment to secularism, the heritage of English Protestantism underpins all aspects of socio-political and legal organisation in Australia and there is an ambivalent response to atheism or agnosticism as an alternative'.[133]According to Fetzer and Soper a country's prior church-state legacy, institutional structures and political access channels are important in shaping the religious tolerant western nation.[134]

Secondly, there is a perception that organised religion is authoritative in setting rules for moral and ethical living, which maintains an impression amongst those outside the religion that all adherents of a religion have a homogenous set of beliefs about how to live a moral and ethical life and that their beliefs and conduct align with codes of conduct espoused by the religion they follow.

Thirdly, the inferior status of women in society can explain the widespread tolerance of discrimination against women resulting from the ministerial exception. Although there have been significant gains for women over the past 100 years, the silence surrounding sex discrimination by religious organisations compared with the outcry in relation to sexual orientation is notable.

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[131] Minow (n 75) 782.

[132] Margaret Davies, 'Pluralism in Law and Religion' in Peter Cane, Carolyn Evans and Zoë Robinson (eds) *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, 2008) 72-99, 85.

[133] Margaret Thornton and Trish Luker, 'The Spectral Ground: Religious Belief Discrimination' (2009) 9 *Macquarie Law Journal* 71, 78.

[134] Joel Fetzer and Christopher Soper, *Muslims and the State in Britain, France and Germany* (Cambridge University Press, 2005).

A detailed analysis of the basis for these interpretive constructions is beyond the scope of this thesis. Nevertheless, the reasons identified ought to raise questions about the validity of the interpretive constructions about religion that underpin exceptions to anti-discrimination laws for religious organisations.

4.3 Conclusion

This chapter has raised seven interpretive constructions of religion and freedom of religion that are argued in this thesis to be foundational in the treatment of religion in anti-discrimination laws. This thesis does not make either the first, or the only, suggestion that such constructs are relevant to the tension between freedom of religion and anti-discrimination. However, this thesis does highlight the *interpretive* nature of these foundational ideas and the covert way in which they underscore the exempting of religious organisations from many anti-discrimination laws. It is hoped that rather than remaining blind to the influence of underlying assumptions to avoid inconvenience, discomfort or conflict, attention could be paid to the significance of these interpretations. Doing so may lead to laws that offer more justifiable protection and restriction on freedom of religion with less contradiction and bias in favour of the most vocal and powerful minorities.

The interpretations have been identified in this chapter for the purposes of examining assumptions underpinning religious exceptions to anti-discrimination laws. In the following chapter, two problematic aspects of religious exceptions to anti-discrimination will be identified and examined. The purpose of this is to provide a comprehensive analysis of some of the most salient issues that together operate to obstruct a better understanding of how religious freedom could more adequately be protected in Australia by law. It is shown in this thesis that this is possible while also protecting individuals from the most pernicious forms of religious-based discrimination.

Chapter 5 Two Anti-Discrimination Law Concepts

So far it has been noted that exceptions to anti-discrimination laws for religious bodies have been recognised as one way in which the law protects freedom of religion in Australia. It has also been shown that while freedom of religion belongs to 'everyone' according to the ICCPR[1] and the UDHR[2] when examining exceptions in anti-discrimination laws the freedom to discriminate on the basis of religious beliefs only belongs to religious bodies with the exception of the Victorian *Equal Opportunity Act* which provides an exception for individuals.[3] As outlined in Chapter 3, the exceptions apply to some grounds of discrimination only. In all jurisdictions these are age, sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities in areas of employment, education and the provision of accommodation and goods and services.[4] The various grounds referred to in the religious exceptions in each Federal and State Act are outlined in Appendix 1.

This thesis asks whether there ought to be exceptions to anti-discrimination laws on the basis of religious beliefs and if so, in what circumstances. In this chapter the terms of the anti-discrimination laws and exceptions for religious bodies are examined in more detail so as to better understand their meaning and to highlight two notable features that if reconsidered may offer a more practical approach to the permissibility and restriction of discrimination on the basis of religious belief. These legislative features are firstly, the grouping together of mutable and immutable grounds of discrimination making no

[1] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(1).
[2] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg. UN Doc A/810 (10 December 1948), art 18.
[3] *Equal Opportunity Act* 2010 (Vic), s 77.
[4] *Sex Discrimination Act 1985* (Cth) s 14-27.

distinction between them and secondly, the permissibility of discrimination for the avoidance of injury to the religious susceptibilities or sensitivities of adherents.

5.1 Grouping of grounds of discrimination

The first notable feature of anti-discrimination law is the grouping together of grounds of discrimination that are fundamentally different. Lists of grounds of discrimination make no distinction between characteristics that are innate or unchangeable and those that are optional lifestyles or activities derived from values, beliefs, opinions or preferences. Lord Justice Sedley of the United Kingdom and Wales Court of Appeal noted this distinction in relation to the Equality Bill which was before parliament at the time stating that:

> it is to be noted that the same definition is used for all the listed forms of indirect discrimination, relating to age, disability, gender reassignment, marriage and civil partnership, race, religion or belief, sex and sexual orientation. One cannot help observing that all of these apart from religion or belief are objective characteristics of individuals; religion and belief alone are matters of choice.[5]

The distinction between these grounds has been made by numerous scholars and they are commonly referred to as mutable and immutable characteristics. This thesis adds another group described by Marcosson as constructive immutable characteristics.[6]

5.1.1 Immutable grounds

Age, race, sex and intersex are clearly biological and therefore immutable. An individual has no power to change them, other than by medical surgeries that can only be partially effective.

Sexual orientation

Although there is some argument that sexual orientation and transgender are choices (mostly by fundamentalist religious individuals and small factions) there is sufficient scientific evidence that homosexuality, bisexuality and transgender orientations are biologically determined. D' Emilio states that 'the religious right has become obsessed

[5] *Eweida v British Airways* [2010] EWCA Civ 80, [40] (Sedley LJ).
[6] Samuel A. Marcosson, 'Constructive Immutability' (2001) 3(2) *Journal of Constitutional Law* 646-721.

with countering the biological basis of homosexuality',[7] while Bailey et al note the widespread and long-standing preoccupation with the acceptability of homosexuality exemplified by political controversies throughout the world.[8] Bailey et al provide a comprehensive summary of current scientific findings regarding sexual orientation and conclude that research findings support a nature rather than nurture explanation for sexual orientation.[9] Some recent studies support a genetic contribution to sexual orientation.[10] Other studies have shown that homosexual conversion therapies have been effective in changing sexual orientation when subjects have been motivated to change.[11] However, conversion therapies have been deemed unethical by many psychologists and medical bodies.[12] The treatment has been banned in many jurisdictions internationally. The basis for the denunciation of conversion therapy is that sexual orientation is immutable and therapies claiming to change sexual orientation are exploitative and cause harm and psychological distress.[13] Despite some claims of success, the fact that one would need to be subjected to extensive and invasive therapy to change suggests a high degree of immutability that individuals ought not to be expected to be subject to simply to prove sexuality is mutable for the purposes of discrimination against them. The court in the US same-sex marriage case, *Obergefell v. Hodges*[14] arrived at a similar conclusion after reviewing the American Psychological Association (APA) brief on homosexuality.

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[7] John D' Emilio, 'Being Gay' in *The World Turned: Essays on Gay History, Politics and Culture* (Duke University Press, 2002) 154, 154.

[8] J Michael Bailey et al, 'Sexual Orientation, Controversy and Science' (2016) 17(2) *Psychological Science in the Public Interest* 45-101, 45.

[9] Ibid 87.

[10] Sanders et al, 'Genome-wide scan demonstrates significant linkage for male sexual orientation' (2015) 45(7) *Psychological Medicine* 1379-88; Tina Hesman Saey et al, 'Same-sex Sexuality Linked to DNA' (2018) 194(9) *Science News Washington* 10.

[11] See, eg, Stanton L Jones et al, 'A Longitudinal Study of Attempted Religiously Mediated Sexual Orientation Change' (2011) 37(5) *Journal of Sex and Marital Therapy* 404-427.

[12] Ten medical and psychological bodies in the UK issued a consensus statement against conversion therapy; 'Conversion Therapy Consensus Statement' (Statement, UK Council for Psychotherapy, June 2014) <https://www.psychotherapy.org.uk/wp-content/uploads/2016/08/ukcp-conversion-therapy.pdf> ('UK Conversion Therapy Consensus Statement'); The Australian Medical Association has condemned conversion therapy; Chris Johnson, 'No Place for Conversion Therapy' (Statement, Australian Medical Association, 10 September 2018) <https://ama.com.au/ausmed/no-place-conversion-therapy>; According to a Wikipedia summary conversion therapy is banned in 18 states of the United States; 'Conversion Therapy' *Wikipedia* (Web Page, 29 November 2019) <https://en.wikipedia.org/wiki/Conversion_therapy#cite_note-172>; Despite much discussion and support for an Australia wide ban, no legislation has been passed to that effect;

[13] 'UK Conversion Therapy Consensus Statement' (n 12).

[14] *Obergefell v Hodges* 576 US, 622 (2015); 135 S Ct 2584, 2594 (2015).

The words of Kennedy J reflect the empirically based notion of immutability of sexual orientation saying 'in more recent years … psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable'.[15] Further Kennedy J notes the constructive immutability of same-sex relationships by saying of the petitioners that 'their immutable nature dictates that same-sex marriage is their only real path to' the 'profound commitment' of marriage'.[16]

Immutability discourse

Before continuing on the basis of the immutability of some traits something must be said of the plethora of discourse on immutability in the area of discrimination, much of which dates back to the 1990s. The discussion adds significant confusion to what could be a fairly straight-forward trajectory for the purposes of determining when discrimination is permissible and when it is not. While the definition of an immutable trait in the US case *Frontiero v Richardson*[17] as one that is determined solely by the accident of birth may be too narrow, as it excludes traits that are not biological but caused by events following birth such as disabilities and impairments, immutability does not mean biological. It means unchangeable and can include traits that are not necessarily congenital but that cannot be changed or ought not to be expected to be changed.

Halley stated that although scientific studies have made biological causes of homosexuality more plausible, postmodern political and intellectual movements have produced 'pro-gay constituencies eager to deny the claim that homosexuality is biologically caused'.[18] and that the biological assertion is an answer to the wrong question'.[19] Halley argues that immutability based on biological causation is not necessary for the assertion of equality on the basis of sexual orientation.[20]

Other more recent discourse supports the importance of immutability. Hoffman argues that for the purposes of rationality and consistency, immutability when recognised as

[15] Ibid 14.
[16] Ibid 13.
[17] 411 US 677, 686 (1973).
[18] Janet E Halley, 'Sexual Orientation and the Politics of Biology: A Critique of the Argument From Immutability' (1994) 46 *Stanford Law Review* 503-68, 505-6.
[19] Ibid.
[20] Ibid 506.

the inability to change, could facilitate a more complete and consistent anti-discrimination mandate in employment law.[21] (However Hoffman describes political affiliation as immutable when it can be, and is often, changed). While completeness may be ambitious as the distinction between immutability and mutability is not so precise, the goals of rationality and consistency are justifiable. Nevertheless, it remains unclear as to what can be described as a trait as opposed to a belief or opinion and whether changeability is seen as a point-in-time concept or if a feature of an individual can only be described as immutable if it is definitively unchangeable over the life span. At some point during the making of discretionary decisions to employ, or provide particular goods and services to, individuals there must be some distinction between traits and beliefs or opinions and what individuals have the power to choose and what they cannot choose. Hence, *capacity to choose* may be a more fitting dimension than actual changeability.

Although the expansive discourse on immutability is helpful in deepening understandings of the range of potential social reasons people are as they are and believe what they believe, it is more aptly the domain of biology and psychology than law. An engagement with the complexity of the discussion to its full extent without narrowing the discussion to the most salient aspects of the human condition would make it virtually impossible for legislators to draft laws for equality and for courts to determine fair outcomes in discrimination cases, as most mutable characteristics could be viewed as immutable to some extent. For instance, a vegan might claim their veganism is a fundamental aspect of their identity, that they are unable to change. They could also posit an argument that they have no choice in the matter as they cannot contemplate any other way of being. This alone suggests the requirement for a more narrow interpretation of immutability for the purposes of making laws in relation to characteristics as grounds for discrimination. This would, at the very least, prevent the legislation eventually expanding to a lengthy document of mutable opinions, preferences and beliefs that could, with a degree of conceptual prowess, be reconfigured as immutable.

[21] Sharona Hoffman, 'The Importance of Immutability in Employment Discrimination Law' (2011) 52 *William and Mary Law Review* 1483-1546, 1546.

The point becomes moot, as in this thesis it is argued that immutability does not mean a lack of desire or contemplation of change. It means even if an individual wanted to and attempted to change the trait, they could not, or they ought not to be expected to, change the trait. This would be a reasonable basis upon which to distinguish between what genuinely can and cannot be changed over the lifespan for the purposes of including grounds for anti-discrimination laws.

Sexual orientation as immutable

As stated above and supported by research, sexual orientation is believed to have biological causes; if not genetic, then derived from other biological conditions since conception or birth. Regardless of causation, it would make little sense for a civil law to recognise sexual orientations in any other manner than that suggested by empirical evidence. Further, doctrines of major churches in Australia including the Catholic, Anglican, Baptist and Uniting denominations along with the Islamic faith are not inconsistent with the biological assertion, most denouncing homosexual conduct rather than the state of being homosexual.[22]

The validity of an expectation that one might be biologically homosexual, bisexual or transgender but act otherwise is of course widely contested and the various denominations differ in terms of acceptance of sexual conduct other than within heterosexual marriage. The point is made here to recognise that the distinction between innate characteristics and conduct has been made by religious denominations in relation to sexual orientation and therefore could reasonably be made in anti-discrimination laws without offence to religious denominations throughout Australia.

Both *Griffin v CEO*[23] and *CYC v Cobaw*[24] supported this approach, noting that the claims for permission to discriminate on the grounds of sexual orientation on the basis of religious belief could not be substantiated as they did not accord with the religious doctrines in question. It is noteworthy that courts will look to specific religious doctrine in order to require substantiation of discrimination based on religion, indicating that a

[22] See, eg, the Australian National Imam's Council, *Islam's Clear Position on Homosexuality* (Statement, 10 March 2018) <https://www.anic.org.au/wp-content/uploads/2018/03/Islams-Clear-Position-on-Homosexuality.pdf > states that 'homosexuality is a forbidden action'.
[23] *Griffin v Catholic Education Office* [1998] AusHRC 6 (1 April 1998).
[24] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615, [11].

mere assertion that a belief is a religious one will not be sufficient in attempting to rely on religious exceptions to enable permissibility of discrimination.

The ground of sex, although immutable is unfortunately unable to be granted the same treatment because religious doctrine of Christianity, Judaism and Islam are clear about the lower status of women and the basis for discrimination against them.[25]

5.1.2 Mutable grounds

Some grounds for discrimination featured in anti-discrimination laws are mutable or at least more mutable than age, sex, disability and sexual orientation as they are not biological or can change over the lifespan. Many are derived from beliefs, opinions or preferences. Religious and political beliefs, relationship and marital status and pregnancy could be said to be mutable, some more so than others. One may choose their beliefs, and strictly speaking they may opt for relationships, marriage, and pregnancy. These are mutable and distinguishable from the immutable characteristics listed above because one can opt in or out of them. There is a degree of choice involved, with the exception of pregnancy as a result of sexual assault. This is not to deny there are limited choices associated with some aspects of these mutable traits, particularly for women, and this will be dealt with below.

Values, choices and preferences

As stated in Chapter 1, the list of grounds of discrimination in anti-discrimination laws is becoming ever more expansive as more grounds are added. A number of these grounds are mutable and can be described as preferences based on values. For instance, political belief is a preference and may also be derived from values. Likewise, religious belief is a choice. On the other hand, *belonging* to a particular religion may not be a choice as many individuals are born and initiated into religions and although in

[25] For example, 1 Timothy 2: 11-14: During instruction a woman should be quiet and respectful. I give no permission for a woman to teach or to have authority over a man. A woman ought to be quiet. Because Adam was formed first and Eve afterwards. And it was not Adam who was led astray but the woman who was led astray and fell into sin (*The Holy Bible* (English Standard Version, Crossway Bibles, Good News Publishers, 2016), *BibleGateway* (Web page) <https://www.biblegateway.com/passage/?search=1+Timothy+2%3A11-14&version=ESV>; Koran 4.34: As for those women from whose determined disobedience and breach of their marital obligations you have reason to fear, admonish them (to do what is right); then, (if that proves to be of no avail), remain apart from them in beds; then (if that too proves to be of no avail), beat them lightly (without beating them in their faces) (The Holy Qur'an (Web Page) 4.34 <http://mquran.org/content/view/527/4/>.

Australia religion is an option, some people feel obligated to follow a religion or experience family or community pressures to practise religion. Some identify with a particular religion without practising it. Although such complexity can be recognised in society as challenging, this is not necessarily a justification for the recognition of religion as immutable under the law in a democratic free nation such as Australia where protections are available for people wishing to change religion or leave a particular religious denomination. There is no state pressure to identify with a religion and one's affiliation with religion as an adult is considered a choice in Australia. If one has been forced into religion, they are entitled to take measures to change their situation and criminal laws can be relied upon to protect individuals from forced or coerced religion amounting to threats or violence. On the other hand, a blanket denial that religion can be to some extent immutable, for instance, for minors and young people would be unwise and a determination about the mutability of religion ought to be context-specific. For example, the notion that cultural or religious courts or disciplinary measures are an appropriate forum for the adjudication of disputes and dispensing of punishments for members of those groups denies the fact that many individuals are either members by force or by indoctrination. Such forums are particularly adverse for women and children who suffer from doctrinally-based religious oppression.

It is clear that in numerous circumstances individuals have limited options as a result of their immutable characteristics. This presents a challenge for an argument that the ability to opt in or out can be a definitive distinguisher between what is mutable and what is immutable. Therefore, discrimination on mutable grounds can often be substantiated as discrimination on immutable grounds.

5.1.3 Constructive immutable grounds

So, some grounds of discrimination, although being in a strict sense mutable, could be said to be constructive immutable grounds. This was suggested by Marcosson as a way to overcome the objections of social construction theory by reflecting the notion that an attribute can be immutable even where it is the product of a social construction.[26] For instance, discrimination against a woman on the ground of pregnancy may be described as constructive sex discrimination. This is reflected in section 5 of the Sex

[26] Marcosson (n 6).

Discrimination Act which recognises discrimination on the ground of a characteristic that appertains to, or is imputed to, persons by reason of their sex, as sex discrimination,[27] Likewise, discrimination against a homosexual person on the ground of relationship type may be described as constructive sexual orientation discrimination. Appendix 2 provides suggested lists of immutable, mutable and constructive immutable characteristics. These are not exhaustive or fixed, particularly the mutable group.

5.1.4 The mutability and immutability debate and freedom of religion

A distinction between innate and other characteristics and the significance of this distinction in the pursuit of equality has been recognised. In 2017, during her Frank Walker Memorial Lecture, Senator Penny Wong stated that 'discrimination against people on the basis of an innate characteristic, like sexual orientation, is anti-liberal and anti-democratic'.[28] Interestingly, the Explanatory Memorandum for the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013 noted that the inclusion of the ground of intersex status 'recognises that whether a person is intersex is a biological characteristic and not an identity'.[29] In their submission to the Religious Freedom Review the National Secular Lobby argued that 'Unlike the inherent characteristics of race, gender, and sexual identity, religion is a matter of choice!'[30]

The equal standing of immutable and mutable grounds for discrimination and the inclusion of values-based grounds in anti-discrimination laws is fervently debated amongst anti-discrimination and human rights scholars and commentators. A popular opinion is that while grounds may be mutable there are various justifications for their inclusion as grounds for discrimination. For instance, some argue that there are mutable traits considered too central to an individual's identity to be asked to change and

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[27] *Sex Discrimination Act 1984* (Cth) s 5.

[28] Penny Wong, 'The Separation of Church and State – The Liberal Argument for Equal Rights for Gay and Lesbian Australians' (Speech, NSW Society of Labor Lawyers, Frank Walker Memorial Lecture), 17 May 2017) <https://www.pennywong.com.au/speeches/the-separation-of-church-and-state-the-liberal-argument-for-equal-rights-for-gay-and-lesbian-australians-nsw-society-of-labor-lawyers-frank-walker-memorial-lecture-2017>.

[29] Explanatory Memorandum, Sex Discrimination (Sexual Orientation, Gender Identity and Intersex Status Bill 2013 (Cth) 2.

[30] National Secular Lobby, Submission No 1259 to Department of the Prime Minster and Cabinet, Australian Government, *Religious Freedom Review* (17 January 2018) [2.7.2].

therefore they should not be penalised for them.[31] The concept of constructive immutability supports this contention. Graham states that courts are moving towards an alternative understanding of immutability including a model of constitutive personhood which recognises that protection can be afforded to people whose identities are not so obviously immutable.[32] Such broadened approaches to immutability have been referred to in terms such as *the new immutability*[33] or *soft immutability.*[34]While the new immutability provides benefits by expanding the concept beyond strictly biological or congenital attributes, it may lead to a situation where there is no limit to the number of mutable attributes that can be included.

As is evident in Appendix 2, the list of mutable grounds can become very lengthy and is arguably limitless. Further, the mutable list changes over time according to current trends. The inclusion of one mutable ground in anti-discrimination laws raises questions about why all would not be included. It further raises questions about who decides which ones should be included as grounds of discrimination and on what basis the characteristics are selected while others excluded. The vast number of preferences and difficulty selecting and limiting them is one argument against the inclusion of mutable grounds in anti-discrimination laws. If political belief is a justified ground there is no reason preferred diet or choice of pet could not also be prohibited grounds. At what point does the list end? The second argument is that both individuals and organisations, particularly values-based entities, have a sound and reasonable justification for the permissibility of discretion in employment and in some circumstances, service provision, on the grounds of values, opinions and preferences.

Overcoming expanding mutability grounds in anti-discrimination laws

Recent attention has been paid to the structure of anti-discrimination laws and the changing and expanding lists of prohibited grounds for discrimination. It is clear that grounds for discrimination are not static. Thornton notes that patterns of equality change over time and even immutable characteristics have swung in and out of favour.[35] She

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[31] Jessica A Clarke, 'Against Immutability' (2015) 125(2) *The Yale Law Journal* 2-102, 5.
[32] Tiffany C Graham, 'The Shifting Doctrinal Face of Immutability' (2011) 19 *Virginia Journal of Social Policy and the Law* 169, 173.
[33] Clarke (n 31) 2.
[34] Joseph Landau, '"Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual-Orientation-Based Asylum Law' 32 *Fordham Urban Law Journal* 237.
[35] Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 44.

claims that discrimination on the ground of religion was a much greater concern during the nineteenth century than today and that race and sex have become prominent issues since the Second World War.[36] Anti-discrimination laws have responded to these changes, increasingly recognising more and more grounds for potential discrimination. In this context, Gaze and Smith support more effective enforcement of existing laws as an alternative to adding further attributes which might be useful in changing discriminatory social arrangements.[37] They further argue that it is important to assess whether or not laws acknowledge and respond to causal factors in discrimination.[38] According to Gaze and Smith, such causal factors are driven by underlying values and behaviours and regulation can be tailored to prompt commitment to substantive equality and can facilitate compliance.[39] It is argued in this thesis that a more structured approach based on principles of immutability and mutability may serve to differentiate between discrimination that requires regulation on the basis that it leads to substantive inequality, and that which is permissible, because it does not.

In the context of freedom of religion, the distinction between mutable and immutable grounds for discrimination becomes salient because most religions involve moral or values-based principles upon which manifestation and conduct is predicated. While mutability principles may apply to the prohibition on commercial businesses and organisations discriminating against people on the grounds of values, choices and preferences that have no relevance to the organisation or the function of employees, they may not apply so aptly to values-based organisations. Be that as it may, it is not uncommon for even commercial organisations to operate under a mission and values statement which incorporates a greater vision than simply making a profit.

The Religious Freedom Review panel received numerous suggestions for how the right of religious bodies to maintain their identities and values might be implemented. Many submissions asserted that faith-based schools should be entitled to select staff who will 'adhere to their religious beliefs and practices, provided they do so in good faith and in

[36] Ibid.
[37] Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2016) 225.
[38] Ibid 334.
[39] Ibid.

order to maintain the religious ethos of the school'.[40] It was further recommended that such schools be required to publish their employment policies and ensure they are known at the time of hiring and ought to be permitted to only discriminate in accordance with those policies.[41]

This approach is consistent with the view of the European Court of Human Rights in *Obst v Germany*[42] and *Schuth v Germany*.[43] Both cases involved the termination of employees by religious denominations for extra-marital conduct. The court came to different conclusions in each because, although the churches were entitled to terminate the contracts based on the fact that the conduct was a serious breach of the teachings of the churches, the employee conduct requirements would have been clear for Mr Obst but not for Mr Schuth. Therefore, the court found a violation of Article 8 of the European Convention on Human Rights[44] only in respect of Mr Schuth.

Parkinson argues that the ability of religious bodies to choose to maintain community values is not the right to discriminate but the right of positive selection.[45]In determining the extent of permissibility of religious entities to discriminate or positively select it is helpful to make the distinction between mutable and immutable grounds of discrimination for two reasons. Firstly, it recognises that religious bodies operate on the basis of their identities, morals and values and secondly and most importantly, it requires religious bodies to explain how discrimination on the grounds of immutable characteristics is based on their identities, morals or values as set out in their doctrinal texts or theological precepts.

Submissions to the 2011 Australian Human Rights Commission research report and the 2018 Religious Freedom Review consistently claimed a right to uphold religious identities and values and stakeholders saw these rights being diminished by marriage

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[40] *Religious Freedom Review: Report of the Expert Panel* (Report to the Prime Minister of the Commonwealth of Australia, 2018) 58.
[41] Ibid.
[42] *Obst v Germany* (European Court of Human Rights, Application No. 425/03, 23 September 2010).
[43] *Schuth v Germany* (2011) 52 EHRR 32 (ECtHR).
[44] Article 8 of the European Convention on Human Rights provides for the right to respect for one's private and family life: *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS No 005 (entered into force 3 September 1953).
[45] Patrick Parkinson, 'Christian Concerns about an Australian Charter of Rights in Paul Babie and Neville Rochow (eds), *Freedom of Religion Under Bill of Rights* (University of Adelaide Press, 2012) 117-51, 128.

equality legislation and the threat of the removal of religious exceptions to anti-discrimination laws. To the 2011 Australian Human Rights Commission research report Jenny Eckford wrote:

> Churches, Christian schools, church-run welfare agencies and other associations should be exempt from anti-discrimination legislation, so they can practise their own values – without being forced to hire people who reject those values, such as practising homosexuals, promiscuous heterosexuals or believers in witchcraft.[46]

Claims by religious adherents and bodies to a right to discriminate against people in order to uphold their religious identities, morals and values ought to involve a requirement to justify the discrimination by reference to those identities, morals and values. This would mean requiring them to make a case for how discrimination on the grounds of sex and sexual orientation is based on their identities, morals or values. In most cases this would prove difficult.

5.1.5 Mission and values in commercial and non-commercial enterprise

There appears no sound argument for religious bodies to exclusively be deemed to be operating under deeply-held value-based missions and activities. There is a plethora of other organisations, although not established for a religious purpose, that engage in activities that pursue no other goal than to benefit individuals in society or the community generally. Such activities could be said to stem from deeply-held values including religious or non-religious beliefs relating to morals, empathy, compassion and service to others. These organisations include the 57,984 charities in Australia,[47] such as the RSPCA, numerous aged care and disability organisations, health support and research organisations and legal centres.

Commercial organisations, although aimed towards profit-making usually operate under certain values and goals that go beyond financial growth, and these are usually expressly stated in a mission and values statement. Westpac Banking Corporation's vision and strategy aims 'To be one of the world's great service companies, helping our

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[46] Jenny Eckford, Submission no. 154 to Australian Human Rights Commission, *Freedom of Religion and Belief in 21st Century Australia* (2011) 33.

[47] 57,038 charities are registered with the Australian Charities and Not-for-profits Commission. See 'About the ACNC' *Australian Charities and Not-for-profits Commission* (Web Page) <https://www.acnc.gov.au/>.

customers, communities and people to grow and prosper'.[48] One of Westpac's values is 'Integrity' … 'demonstrating the highest standards of honesty and ethical behaviour'.[49] Rugby Australia's vision is to 'inspire all Australians to enjoy our great global game.' In achieving this the company sets out to 'make Rugby a game for all – our community'.[50] 'Diversity' is one guiding principle around which the organisation carries out this community vision.[51]

5.1.6 Conclusion

In summary, there are certain human traits that are immutable and justifiable as prohibited grounds of discrimination in employment and the provision of goods and services. Constructive immutable characteristics ought to be given the same treatment as immutable characteristics. Chosen identities, morals and values are mutable characteristics and their inclusion as grounds in anti-discrimination laws is questionable. This is evidenced by concerns about the rapidly expanding and more complicated lists of prohibited grounds for discrimination without some underlying principle behind the chosen attributes. While the *new immutability* has addressed limits associated with strict immutability, it has opened prohibited discrimination to a sphere that is arguably too wide. The notion of constructive immutability satisfactorily bridges the divide between mutability and immutability, and it is argued that these concepts have a role to play in determining the fundamental principles behind grounds for prohibiting discrimination. This thesis argues for the recognition of immutable, mutable and constructive immutable traits or characteristic in anti-discrimination laws and that the distinction is particularly relevant to the permissibility of discrimination on the basis of religious belief. The claim by religious adherents and bodies to the freedom to discriminate against members of certain groups because they wish to uphold their identities, values and morals requires them to justify how the discrimination of immutable and constructive immutable grounds is consistent with, and relevant to the maintenance of, those identities, values and morals. Discrimination on the grounds of mutable characteristics is more likely to be justifiable on the basis of identities, values and

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[48] 'Our Strategy and Vision', *Westpac Banking Corporation* (Web Page) < https://www.westpac.com.au/about-westpac/westpac-group/company-overview/our-strategy-vision/>.
[49] Ibid.
[50] 'Strategic Vision', *Rugby Australia* (Web Page) <https://australia.rugby/about/about-us/strategic-vision>.
[51] 'Diversity', *Rugby Australia* (Web Page) <https://australia.rugby/diversity >.

morals than immutable characteristics and where this is applicable there has been a suggestion that expectations and polices outlining those identities, values and morals be communicated to the public and those potentially impacted.

This section has identified and discussed the grouping together of grounds of discrimination in anti-discrimination laws, whether they be mutable or immutable. It has been argued that this is unnecessary as it does not account for the need for organisations of all types to function in accordance with their mission and values. Further, it does not adequately differentiate between serious forms of discrimination that result in inequality and exclusion of people belonging to certain groups, and reasonable selectivity for the purposes of the proper functioning of organisations. The distinction between mutable and immutable grounds, including the recognition of constructive immutable grounds as immutable will dispense with the need for the inclusion of many 'ifs and buts' in anti-discrimination legislation. For instance, the need for exceptions relating to political parties will be unnecessary with a global recognition that discrimination on mutable grounds is permissible on the condition that it is based on the mission, goals and values of an organisation and is in reasonable pursuit of those ends.

The next section raises another pitfall in anti-discrimination legislation that is unnecessary, creates confusion and can be shown to have a questionable foundation.

5.2 Uniformity of religious susceptibilities of adherents

A uniform notion of religious belief and manifestation amongst adherents was introduced in Chapter 4 as an interpretive construction and one that is reflected in exceptions to anti-discrimination laws. Under sections 37(1)(d), and 38(1)-(3) of the *Sex Discrimination Act 1984* (Cth) discrimination on various grounds is permitted to avoid 'injury to the religious susceptibilities of adherents'. Other legislative exceptions to anti-discrimination provisions use the term 'religious sensitivities,' for example, the *Equal Opportunity Act 2010* (VIC) s 82(2)(b). Appendix 3 shows the terminology in the various Australian jurisdictions.

5.2.1 Beliefs and attitudes of religious adherents

The notion of religious adherent uniformity was identified in some submissions to the Religious Freedom Review and academic discourse. However the textual analysis in Chapter 4 uncovered many challenges to the idea that adherents of religious denominations are consistent or uniform and in fact many people claiming to be members of some faiths do not believe vital aspects of the religious doctrine of that faith and actually believe concepts diametrically opposed to their faith. A 2017 Pew Poll found that six in ten Christians in the United States hold at least one New Age belief, with 26% believing in astrology, 29% believing in reincarnation and 37% believing spiritual energy can be located in inanimate objects.[52] 36% of Catholics reported believing in reincarnation. Of Atheists, 10% believed in psychics, 7% believed in reincarnation and 13% believed inanimate objects could hold spiritual energy.

A recent Gallup poll found that fewer than half of the Catholics surveyed had confidence in organised religion and one third thought priests were not honest or ethical.[53]

The 2011 AHRC Freedom of Religion report recognised the internal diversity of the religious stating that

> …it is counterproductive to assume that communities, individuals, governments and religions are monolithic … the reality is that cultural and religious complexity abounds at each of these levels. For example, there are Catholics who are gay, there are Mahayana and Tantrayana Buddhists, and there are evangelical Christians who work respectfully with Muslims. There are huge differences among the members of any community, to say nothing of the diversity in the ways in which the norms of a community are interpreted and followed.[54]

This recognition of such intra-diversity of religious sensibilities makes it difficult to envisage what kind of discrimination would avoid insult to the religious sensibilities of adherents.

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[52] Claire Gecewicz, 'New Age Beliefs Common Among Both Religious and Nonreligious Americans', *Fact Tank* (Online) 1 October 2018 < https://www.pewresearch.org/fact-tank/2018/10/01/new-age-beliefs-common-among-both-religious-and-nonreligious-americans/>.

[53] Megan Brenan, 'US Catholics' Faith in Clergy Shaken' (11 January 2019) Gallup News < https://news.gallup.com/poll/245858/catholics-faith-clergy-shaken.aspx>.

[54] Bouma, Gary, Desmond Cahill, Hass Dellal, and Athalia Zwartz, Australian Human Rights Commission, *Freedom of Religion and Belief in 21st Century Australia* (Report, 2011) 31-32.

In *OV & OW v Members of the Board of Wesley Mission,* Allsop, P found that the religious susceptibilities test in the s56 religious exception of the *Anti-Discrimination Act 1977* (NSW) would require a likely injury to 'a significant portion of the group'.[55] It is becoming more difficult to determine the beliefs of a significant proportion of religious groups and further it is remiss to assume beliefs accord with religious doctrine. An extensive Pew Research Center survey in the US on religious attitudes was conducted in 2014. The Religious Landscape Study found that 70% of Catholics believed homosexuality should be accepted and 23% believed it should be discouraged.[56] Of those who believed homosexuality should be accepted, 75% were in favour of same-sex marriage while 12% of those who believed homosexuality should be discouraged were in favour of same-sex marriage.[57]

Similar extensive studies do not appear to have been carried out in Australia. However smaller polls around the time of the marriage law reforms indicated a parallel trend in Australia with the US, whereby religious adherents are rejecting religious doctrine. According to a Galaxy Poll[58], 54% of Australians who identified as Christians supported same-sex marriage and 61% of Christians did not want the conservative Christian opinion to represent the opinion of all Christians in Australia.[59] These results along with other surveys reported in newspapers[60], and the eventual outcome of the Australian Marriage Law Postal Survey[61] as outlined in Chapter 1, are sufficient to

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[55] *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 [2].

[56] Pew Research Center, 'Views about homosexuality among Catholics' *Religious Landscape Study* (2014) < https://www.pewforum.org/religious-landscape-study/religious-tradition/catholic/views-about-homosexuality/>.

[57] Pew Research Center, 'Views about same-sex marriage among Catholics by views about homosexuality' *Religious Landscape Study* (2014) < https://www.pewforum.org/religious-landscape-study/religious-tradition/catholic/views-about-homosexuality/>.

[58] Milly Stilinovic, 'Support for Marriage Equality in Australia is High, So Why Is The Government Stalling?' *Forbes* (online, 26 July 2017) <https://www.forbes.com/sites/millystilinovic/2017/07/26/support-for-marriage-equality-in-australia-is-high-so-why-is-the-government-stalling/#1245a32e5d1b>.

[59] James MacSmith, 'Australian Christians Support Same-sex Marriage According to New Poll', *News.com.au* (online, 24 July 2017) <https://www.news.com.au/lifestyle/relationships/marriage/australian-christians-support-same-sex-marriage-according-to-new-poll/news-story/8dc3f1808beada4a62a6e571748a6364>.

[60] For a summary of surveys of attitudes towards same-sex marriage see Janet Phillips, 'Attitudes to same-sex marriage' *Parliament of Australia* (Blog Post, 17 November 2010) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2010/November/Attitudes_to_same-sex_marriage>.

[61] Australian Bureau of Statistics, *Australian Marriage Law Postal Survey, Results for NSW* (Catalogue No 1800.00, 15 November 2017) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1800.0~2017~Main%20Features~New%20South%20Wales~9>.

highlight the difficulty with the religious susceptibility limb of the test in anti-discrimination laws.

5.2.2 Multiple pluralisms

The evidence throws doubt on the possibility that the requirement for the permissibility of discrimination under the law to avoid insult to religious susceptibilities of adherents can be realistically applied in any case.

The diversity of religious attitudes was referred to by Khaitan and Norton who noted a web of multiple but interrelated beliefs and practises amongst adherents who often pick and choose from a range of options.[62] In *The Many Altars of Modernity,* Berger refers to multiple types of pluralism. There is religious pluralism within the minds of individuals and in society. There is the pluralism between the religious and the secular and there is a pluralism of varying delineations in the coexistence of religion and secularity.[63] Surveys conducted by Woodhead show an emerging combination of secular and religious beliefs that cannot fit neatly within either religious or secular schemas.[64]

The evidence that religious adherents are now so diverse creates challenges for the requirement under the law that discrimination is permissible where the alternative would insult the religious susceptibilities of adherents. It is difficult to determine if insult to susceptibilities may or will eventuate when it is increasingly difficult to identify what those susceptibilities are and whether enough 'adherents' of a religion are affected by them.

This leads to the question of how much religious doctrine is simply drafted canon emanating from the religious authority at its leadership and governance level and how much is actually taken up by adherents or affiliates. In such a climate where adherents

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[62] Tarunabh Khaitan and Jane Calderwood Norton 'The Right to Freedom of Religion and the Right against Religious Discrimination: Theoretical Distinctions' (October 28, 2018) *International Journal of Constitutional law forthcoming; Oxford Legal Studies Research Paper No 14/2019*; *University of Melbourne Legal Studies Research Paper,* 3, 6.

[63] Peter L Berger, *The Many Altars of Modernity: Towards a Paradigm for Religion in a Pluralist Age* (De Gruyter Inc, Berlin, 2014) 78.

[64] Linda Woodhead, 'Intensified Religious Pluralism and De-differentiation: The British Example' (2016) 53 *Society* 41-46, 41.

are not adhering the question must be asked: how many actual *adherents*, in the true sense of the word, do some of the major religions have?

5.3 Conclusion

This chapter has highlighted two aspects of religious exceptions in anti-discrimination laws that, given emerging social changes, are becoming difficult to justify in modern society. Both the grouping of mutable and immutable grounds of discrimination and a uniform notion of religious adherents for the purposes of the permissibility of discrimination for religious bodies, relate to diversity and pluralism of belief, values, opinions and preferences.

So far, this thesis has outlined legal protections and restrictions of religious freedom to discriminate in Australia. Secondly, it has identified and explained a range of interpretive constructions about religion and freedom of religion that arguably underpin religious exceptions anti-discrimination laws. Thirdly, this thesis has identified two important aspects of the exceptions that appear to require reassessment for their practicability and application to the conduct of religious organisations in employment, education and the provision of goods and services.

The next chapter will bring together these concepts to answer the research question.

Chapter 6 Reining in the Canon

This thesis has argued that interpretive constructions of religion, religious belief and religious freedom underpin religious exceptions to anti-discrimination laws and that current trends, international laws and critical analysis suggest a need to reassess these interpretations and assumptions.

In review, the interpretive constructions raised in Chapter 4 were:

- Religious organisational rights to freedom of religion,
- Uniformity of religious adherents,
- Tolerance of discrimination against women,
- Religion as beneficial to individuals and society,
- A narrow meaning and scope of religion,
- A thought, conscience and religion hierarchy, and
- A human rights hierarchy

The list is not exhaustive, but each interpretation is argued to be relevant in explaining the basis for religious exceptions to anti-discrimination laws.

In Chapter 5 two constructs in religious exceptions to anti-discrimination laws were highlighted and analysed. These were:

- the grouping together of mutable and immutable grounds of discrimination, and
- the 'injury to religious susceptibilities test' which implies an assumption of uniformity amongst religious adherents.

This role of this chapter is to discuss the consequences of the interpretations and anti-discrimination law constructs outlined in chapters 4 and 5 and to suggest how the current challenges may be overcome by recognising that:

a) religious exceptions to anti-discrimination laws are reliant on interpretive constructions about religion, religious beliefs, religious believers and religious freedom that can be scrutinised,
b) more accurate and suitable conclusions can be reached about religion, religious beliefs, religious believers and religious freedom, and
c) anti-discrimination laws can be revised to reflect such conclusions.

The research question is:
Should the law permit religious organisations and individuals to discriminate on the basis of freedom of religion, and if so, under what circumstances?

Before answering the question more accurate evidence-based conclusions about religion and religious freedom need to be made. To do this, three questions are to be answered. Firstly, what is the meaning of the right to freedom of religion and who ought to have it? Secondly, what, if any, are appropriate grounds of discrimination on the basis of freedom of religion? Thirdly, what, if any, exceptions on the basis of religion or religious belief ought to be included in anti-discrimination laws?

6.1 What is the right to freedom of religion and who ought to have it?

Chapter 2 outlined the human right to freedom of religion in an historical context, explaining that to a large extent, human rights have been recognised as necessary to protect the people from authoritarian power of the state. Positive human rights are but one aspect of a social and political state system marked by democratic leadership, the separation of powers and the rule of law. These systems recognise that citizens have rights against the state and that these rights are equal amongst citizens. The latter aspect recognises that individuals not only require protection from the state but also from other individuals. According to Locke these rights are inherent in humans and referred to as natural rights.[1]

[1] John Locke, *Two Treatises of Government* (Cambridge University Press, first Published 1690 in Peter Laslett (ed), *Locke: Two Treaties of Government* (Cambridge University Press, 1988) 107.

6.1.1 Human rights: Natural or legal rights?

More recently philosophers have questioned the notion of natural rights on the basis that people have no legitimate rights other than those granted to them by the state. This is more an issue of perspective. Locke was no doubt well aware that the state may or may not grant rights within its political structures and that citizens are at the mercy of political systems. His concept of rights appears to be based on the notion that if there was not something inherent in humans and their vulnerability in social contexts that was deserving of protection, there would be no perceived need to protect individuals from collective systems of power over them. Therefore, there is something inherent in humanity that requires the state to recognise the need to make laws to protect individuals. Further, there is something inherent in humankind that makes it necessary to protect individuals from each other. In this sense, rights granted by the state reflect and affirm natural rights rather than negate them.

So, laws recognise basic rights to be free from violence, to acquire property and to make a reasonable life for oneself, among other liberties. The enacted right to freedom of religion in international and domestic treaties, Constitutions and legislative instruments has developed as part of this system which includes freedom of association and freedom of speech.

This analysis of the foundations of human rights is important in determining not only the nature of religious freedom but also in clarifying the fundamental aspects of humanity in respect of religious beliefs that are deserving of protection. It is argued that this is a far better and more objective starting point than inviting religious denominations to inform the state of the protections from ordinary laws they desire and then finding ways to exempt them from those laws.

What type of freedom of religion requires legal protection?

Chapter 4 identified two interpretive constructions present in various texts relating to understanding aspects of freedom of religion that require protection. These related to a) a narrow meaning and scope of religion and b) a thought, conscience and religion hierarchy. It is argued in this thesis that the law in Australia protects only some types of religious manifestation, and protection is limited by a narrow definition of religion and

a perception that religious belief is more worthy of protection than other beliefs of conscience. Perry raises the point that the human right of freedom of thought, conscience and religion referred to in Article 18(1) of the ICCPR[2] is often misleadingly described as *religious* freedom.[3] He notes that the freedom is explained in the UN HRC's General Comment 22 as 'far-reaching and profound' and that this extends beyond religion to mean 'the right to live one's life in accord with one's religious and/or moral convictions and commitments.'[4]

While it is recognised that thought, conscience and religion may be distinct and separate phenomena to be protected, General Comment 22 states that they are to be given equal protection; that Article 18 protects theistic, non-theistic and atheistic beliefs; and the terms "belief" and "religion" are to be broadly construed.[5] Hence the distinction is of little importance in determining what needs to be protected by states.

Who ought to have freedom of religion?

In addition to a very limited approach to the *type* of freedom of thought, conscience and religion protected by Australian law there are restrictions on *who* is entitled to certain types of freedom of religion. This was evident in the interpretive construct identified in Chapter 4 which is the notion that only religious organisations hold rights to some forms of freedom of religion. However according to the ICCPR[6] freedom of religion is for everyone, a provision that is consistent with democratic norms and the rule of law.

6.1.2 Organisations and freedom of thought, conscience and religion

As outlined in Chapter 4 there is some tension regarding whether or not religious bodies are entitled to freedom of religion as entities, distinguishable from the freedom attached to their members. While the concept of the vesting of human rights in organisations has

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[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(1) ('*ICCPR*').
[3] Michael J Perry, Freedom of Conscience and Religious and Moral Freedom (2014) 0 *Journal of Law and Religion* 1-18, 5.
[4] Ibid.
[5] Office of the High Commissioner of Human Rights, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*, 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993), [1].
[6] *ICCPR* (n 2) art 18(1).

been questioned,[7] there is a high degree of general support for the notion as outlined in Chapter 4. This support is reflected in the legislative exceptions to anti-discrimination laws for religious bodies which have been seen by many as one significant means by which states can protect freedom of religion. The issue of organisational rights to freedom of religion has not been given substantial, or even a moderate level of coverage. This suggests there has been little reflection on the inferences that can be drawn from permitting religious organisations to discriminate on the basis of rights that are considered *human* rights.

Under international laws there is nothing to suggest freedom of religion is a right afforded to entities other than humans. Schragger and Schwartzman argue that 'a move from individual rights to associational self-governance does not create a corporate entity with rights that are not derived from the rights and interests of those who compose it'.[8] Whilst Aroney argues otherwise,[9] it would appear a significant leap to construe the associational and communal aspects of religion referred to in international instruments[10] to be an assertion that the right to freedom of religion is to be vested in all or any organisations that may be formed by religious denominations. There is good reason to refrain from making this leap.

The risks of organisational discrimination

There are potential harmful consequences arising from granting organisational entities of any kind of human right, particularly those that facilitate discrimination. Religion, philosophy or political ideology used as a justification for exclusion and discrimination at an organisational level is something that states ought to consider with caution, particularly in a climate in which extreme religious and political ideology is becoming a

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[7] Margaret Thornton, 'Christianity "Privileged" in Laws Protecting Fairness' (2011) 5 *Viewpoint: Perspectives on Public Policy* 41; *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615 [413] (Neave JA).

[8] Richard Schragger and Micah Schwartzman, 'Against Religious Institutionalism' (2013) 99(5) *Virginia Law Review* 917-85, 957.

[9] Nicholas Aroney, 'Freedom of Religion as an Associational Right' (2014) 33(1) *Queensland Law Journal* 153.

[10] Article 18 of the UDHR states that the right to freedom of thought, conscience and religion is a freedom 'either alone or in community with others … to manifest his religion or belief in teaching, practice, worship or observance,' *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg. UN Doc A/810 (10 December 1948), art 18.; Article 18 of the ICCPR states that the right includes freedom 'either individually or in community with others, *ICCPR* (n 2) art 18(1).

global issue of concern. Laws will need to withstand more extreme religious ideologies in what are becoming radically pluralist societies. Granting permission to discriminate to some groups is likely to lead to similar demands from other more radical groups. The state would want to avoid a situation in which it is compelled to pick and choose between religious factions and denominations as some will assert rights to discriminate in ways that could lead to serious persecution of groups such as women and LGBTQI. A second reason why religious freedom in the form of exceptions to ordinary laws is not beneficial to society is that group discrimination is much more powerful than individual discrimination. In the past discrimination on a large scale has become persecution. Mass persecution on a large scale often leads to mass murder and genocide, both of which are not only a feature of the historical landscape but are currently taking place in many nations throughout the world. The fact that religion is a feature of much of this persecution makes the argument even more compelling.

A second reason the permissibility of organisational discrimination is undesirable is that numerous psychological studies have demonstrated that people adjust their thoughts, feelings and behaviours to be consistent with group standards. Asch showed that the majority of research participants conformed to a judgment that was clearly wrong and the more people in the group who asserted the incorrect judgment, the more likely the subject was to agree.[11] Milgram showed that acts of violence against people are committed in social situations in which people obey the instructions of others.[12] Indeed, people will inflict harm on others when asked to do so or when others are either doing the same or supporting the behaviour.[13] This research suggests that the presence of other people in a group affects behaviour and that people are more emboldened by group dynamics and social pressures, real or imagined, to behave in ways from which they would ordinarily refrain. Discrimination on a group level provides safety in numbers for those who wish to manifest toxic ideologies and persecute minority or other groups. When organisations are permitted to discriminate against vulnerable people at a group level, all of these psychological forces are most likely at play.

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[11] Solomon E Asch, 'Opinions and Social Pressure' (1955) 193(5) *Scientific American* 31.
[12] Stanley Milgram, 'Behavioural Study of Obedience' (1963) 67 *Journal of Abnormal and Social Psychology* 371-78.
[13] Ibid.

When considering the act of discriminating it is not organisations that discriminate. It is humans who manifest their preferences, beliefs and attitudes by making choices. As is argued above, those choices may be impacted by group dynamics, social pressures or the commands of others. Therefore, although organisations may be representative of their members, they are not a true reflection or representation of the preferences, beliefs and attitudes of the individuals behind them. This issue was in part dealt with in the analysis of the concept of a uniform perception of religious adherents in Chapters 4 and 5. In the current context, where individuals in the group have a variety of attitudes, beliefs and behaviours, it means the organisation as an entity is even more questionable as a direct representative of its members. Additionally, in the same way the corporate veil is seen to wrongfully protect individual operators from personal responsibility, religious organisations ought not to be permitted to utilise the same kind of organisational veil. These factors suggest a need for caution in accepting an argument for organisational rights to religious freedom and to the permissibility of discrimination for entities, against people from particular social groups.

6.1.3 Individuals and freedom of thought, conscience and religion

Discrimination may be thought of as selectivity; picking and choosing and excluding what is not wanted. The tension between anti-discrimination laws and freedom of religion is raised when this selectivity becomes unjustifiable and unfair. Anti-discrimination laws exist to prevent the exclusion of individuals and people who are members of certain groups. Such groups may be defined by age, sex, disability, sexual orientation, political or religious ideology or many other criteria. These are often a result of historical prejudice and disadvantage. When individuals discriminate, they make choices based on their preferences, beliefs and attitudes. The ability to have and manifest preferences, beliefs and attitudes along with the free will to do so is an important aspect of humanity.

If any entity ought to be permitted to discriminate in certain activities in the public sphere such as in the provision of goods and services, it would most appropriately be individuals (humans) as freedom of religion is a *human* right. Recent cases in the US and the UK demonstrate the serious and lengthy legal action (although eventually unsuccessful) taken against individuals seeking to exercise their freedom of religion by

denying products and services to people where the provision of those goods and services supports activities to which they are conscientiously opposed. Such preferences have been taken to be discrimination for the purposes of anti-discrimination laws.

Cake baker cases

As introduced in chapter 1, in a US case, *Masterpiece Cakeshop,* a same-sex couple filed a complaint with the Colorado Civil Rights Commission because baker, Jack Phillips, refused to bake a cake for their wedding on the basis that same-sex marriage was contrary to his religious convictions. The Commission referred the matter to a State Administrative Law Judge who ruled in favour of the couple.[14] The decision was affirmed by the Colorado Court of Appeals but later overturned by the Supreme Court of the United States. The court found the decision was inconsistent with others where refusal to bake cakes with offensive slogans against homosexuals was permitted and that the commission had shown hostility towards Phillips' religious beliefs.[15] Kennedy J said the Commission did not consider the case with the religious neutrality that the Constitution requires.[16] Mr Phillips has reopened his bakery and displays a notice on the business website explaining the religious-based limits on his services.[17]

Northern Ireland's Equality Commission took similar action against Asher's Bakery whose owner refused to place the slogan 'support gay marriage' on a cake.[18] The earlier Commission and Court of Appeal decisions were overturned by the Supreme Court on the basis that there was no discrimination on the grounds of sexual orientation.[19] The court said the right to freedom of thought, conscience and religion under Article 9(1) of the European Convention on Human Rights was engaged and limited a person's obligation to manifest a belief which he does not hold.[20] The freedom was also manifest in Article 10(1)[21] which provides for freedom of expression.

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[14] *Masterpiece Cakeshop v Colorado Civil Rights Commission* 584 US (2018); 138 S Ct 1719 (2018), syllabus, 1. ('*Masterpiece Cakeshop*').
[15] Ibid.
[16] Ibid. (Kennedy J).
[17] '[Jack] cannot create custom cakes that express messages or celebrate events that conflict with his religious beliefs' *Masterpiece Cakeshop* (Web Page) < https://masterpiececakes.com/>.
[18] *Lee v Asher's Bakery Pty Ltd* [2018] UKSC 49. ('*Lee v Asher's Bakery'*).
[19] Ibid [35].
[20] Ibid [49]-[50].
[21] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*ECHR'*) art 10(1).

While *Masterpiece* and *Asher's* were ultimately decided in favour of the bakers, the reasons provided relate to inconsistency with other decisions in the former, and relief from the requirement to express a belief that one does not hold, in the form of a slogan, in the latter. Kennedy J in *Masterpiece Cakeshop* acknowledged that while the case was brought to the Supreme Court after same-sex marriage became legal in the US,[22] it was not so when Mr Phillips refused to bake the cake.[23] It remains to be seen whether a similar outcome would be forthcoming for an outright refusal to bake the cake for a same-sex marriage ceremony after the legalisation of same-sex marriage in the US and without a finding of bias in the Commission's decision.

Other beliefs of conscience

Although much attention has been focused on beliefs of a religious nature, it is clearly possible to hold beliefs of conscience that are not aligned with a particular recognised religion. One example would be the belief that the consumption of meat or animal produce is harmful to animals, which is a major justification for vegetarianism and veganism. A vegetarian or vegan chef may wish to refrain from cooking certain foods and providing goods or services containing meat or animal products, even when those foods or supplies may be on the menu for a particular ethnic event. A vegetarian graphic designer may not wish to design a menu for a kosher or halal restaurant. They may refuse to design a menu for any restaurant serving meat. However, when it is a kosher or halal restaurant discrimination on the grounds of race, religion or ethnicity may be raised. A make-up artist may only use certain brands of make-up that are free from animal testing while a customer demands their services and use of other brands necessary for a cultural event. In such situations there is a clash between different religious or other beliefs of conscience or a clash between beliefs and rights to be free from discrimination on the grounds of ethnicity or religion. Resolving these tensions by refusing one party the right to act in accordance with their deeply-held beliefs not only requires them to forgo their beliefs in favour of those of another, but actually forces them to manifest that which is against their beliefs. It is argued that when that compulsion is legally enforced the individual forgoes their identity and values in favour

[22] See *Obergefell v Hodges* 576 US (2015) ('*Obergefell v Hodges'*).
[23] *Masterpiece Cakeshop* (n 14) 1 (Kennedy J).

of those of another. They lose that which makes them human – freedom of choice, freedom of expression and freedom of thought, conscience and religion.
According to Durham and Evans the core domain of freedom of religion, known as the *forum internum*, is the realm of inner belief that is central to human dignity.[24] When an individual has two choices: one to forego their identity and values and comply with the law, or the other to stop their activities altogether, the law becomes oppressive against citizens and their right to live in accordance their deeply-held commitments. It is argued that this interferes with an individual's right to act upon their free will and therefore undermines their humanity.

According to the European Court of Human Rights the possibility of removing oneself from the work situation to alleviate the problem is relevant. In *Eweida and others v United Kingdom* the European Court of Human Rights discussed the need to take into account whether the possibility of changing job would negate the interference on a claimant's freedom of religion in determining whether the restriction on the freedom was proportionate.[25] In the case of a sole trader there is generally an absence of a reasonable possibility of changing jobs.

Civic workforce obligations

The above hypothetical situations can be distinguished from the US case involving Kentucky County clerk, Kim Davis,[26] who, following the Supreme Court's decision in *Obergefell*[27] legalising same-sex marriage throughout the US, refused to allow the staff at her office to issue marriage licences to any couples, same-sex couples or otherwise. Davis' reason was that her name would appear on the licences and she was opposed to same-sex marriage on the basis of her religious beliefs. The Plaintiffs sought an injunction preventing her from withholding the licences. Davis' claim was that the Commonwealth of Kentucky deprived her of her religious rights. The court said the State of Kentucky had 'absolute jurisdiction over the regulation of the institution of

[24] W Cole Durham Jr and Carolyn Evans, 'Freedom of religion and religion-state relations' in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge, published online, 11 December 2012).
<https://www.routledgehandbooks.com/doi/10.4324/9780203072578.ch19>.
[25] *Eweida and others v United Kingdom* [2013] 57 Eur Court HR 8, 83 ('*Eweida and others*').
[26] *Miller v Davis* 123 F Supp 3d 924 (2015) ('*Miller v Davis*').
[27] *Obergefell v Hodges* (n 22).

marriage',[28] and that it was not unreasonable for the Plaintiffs to expect their elected official to perform her statutory duties. Bunning J said

> Davis swore such an oath when she took office on January 1, 2015. However, her actions have not been consistent with her words. Davis has refused to comply with binding legal jurisprudence, and in doing so, she has likely violated the constitutional rights of her constituents.[29]

In this case Davis was employed by the state and was delegated the role of carrying out certain directives to perform a civic function that, following *Obergefell,* was the legal right of all citizens. She did not carry out her duties as directed and therefore had no claim on the basis of her religious beliefs.

Civil workforce vs sole traders and the right to thought, conscience and religion

There are three other marked differences between Davis' claim and that of the cake bakers. Firstly, *Masterpiece Cakeshop* and *Asher's Bakery* operated their own small businesses and were not duty-bound under an oath or a direction from the state authority and were not paid by taxpayers. There is no constitutional right to have a cake made for any particular event or to certain specifications. Secondly the making of cakes is differentiated from issuing licences on behalf of the state as it involves personal labour, artistry and skill. It would be expected that artisans have a strong connection with the fruits of their labour and that each product made is an individual creative work. Indeed, the Supreme Court in *Masterpiece Bakery* acknowledged that Jack Phillips was required to use his artistic skill to make an expressive statement which he found could not be expressed in any way consistent with his religious beliefs.[30] Thirdly, Davis was an employee and the employer directed her to perform her duties in accordance with its functions and policies. It is argued that whilst a tolerant employer may choose to exempt her from duties in respect of some tasks, it is not obligated to do so on the basis of her preferences, religious beliefs or other beliefs of conscience. One may choose their beliefs and to manifest them at their discretion. However, when employed to carry out a role in return for salary, the employer defines the role to be undertaken and the duties to be performed. While there may be a legitimate refusal to perform tasks contrary to one's

[28] *Miller v Davis* (n 26) 933.
[29] Ibid 943 (Bunning J).
[30] *Masterpiece Cakeshop* (n 14) [x].

beliefs, in Davis' case the duty to issue marriage licences was legal and necessary in order to give effect to the new same-sex marriage laws.

While the performance of duties for an employer is defined by the employer and the employee chooses whether or not they wish to carry out those duties at the time of employment, this thesis argues that so too does the sole trader or small business partner when choosing to accept or decline a particular job. Just as it would not be reasonable for an employer to assume a set of duties will be performed by an employee on the basis of pre-determined parameters of a mere position title, a customer cannot reasonably define the scope of the duties an individual service provider will perform based on their business name or profession. It would be extreme for an employer to say, 'I will employ you as a secretary. Therefore, you will do all tasks that secretaries do for whatever purpose I command and once you commence employment you must continue doing so. If you resign because you do not like my assigned duties, you must never work as a secretary again.' To force a cake baker to bake any cake a customer commands is to say, 'You are a cake baker. Therefore, you will bake every kind of cake requested for any purpose. If you choose not to do so, you must stop making cakes for money.' Unlike the employee, the sole-trader or small business partner cannot resign and move to another workplace if discontent with the job or duties requested of them. Under this rule their choices are to submit to the command, compromise their beliefs and do work they are unhappy doing or close their business, never to work as a cake baker again.

The sole-trader or small business partner has not, simply by virtue of opening up for business, made an oath or commitment in the public sphere or economy to work on any task at the whim of the customer, regardless of their deeply-held beliefs of conscience or religion, just as the employee has not. It is reasonable to suggest that most people would benefit from working in jobs carrying out duties that are consistent with their beliefs and attitudes. On the other hand, carrying out duties against one's deeply-held beliefs either by force, coercion or oppression is likely to lead to a negative psychological response. Festinger's renowned psychological theory of cognitive dissonance[31] has been demonstrated repeatedly.[32] When one is forced, or even chooses

[31] Leon Festinger, *A Theory of Cognitive Dissonance* (Stanford University Press, 1957).
[32] Andrew J Elliot and Patricia G Devine, 'On the Motivational Nature of Cognitive Dissonance: Dissonance as Psychological Discomfort' (1994) 67(3) *Journal of Personality and Social Psychology*

to act against one's beliefs and attitudes, known as their schema,[33] this results in a cognitive dissonance that must be resolved in one of two ways. The individual either changes their belief or changes their perception of the conduct and fits it within their schema.[34] Under the circumstances the latter would only be possible by denying that the activities are against one's beliefs which would be a fiction. According to psychological research, such a course of action in compromising one's deeply-held beliefs can lead to negative emotions such as shame and guilt which are related to depression.[35] Wicclair adds that 'acting contrary to one's identity-conferring commitments can have considerable psychological and personal costs such as … a sense of self-betrayal, personal disintegration and a loss of self-respect'.[36]

While it may be seen as favourable for people with illiberal attitudes to change them, the scenario raises concerns about indoctrination and social control through forced compliance. It is helpful to remember that it operates bidirectionally so that those with liberal and progressive attitudes will be prevented from manifesting them if the law prevents individuals from acting in accordance with those values when it may result in offence to a person or group. One-directional bias prohibitions on manifesting deeply-held beliefs are likely to backfire. Attempts to pick and choose the 'correct' attitudes for manifestation by individuals ultimately failed in the overturning of the biased approach to the *Masterpiece Cakeshop* decision by the Colorado Civil Rights Commission.[37]

In the first case that dealt with the right to freedom of thought, conscience and religion in Article 9(1) of the European Convention on Human Rights, *Kokkinakis v Greece*[38]

382-394; James M Olson and Jeff Stone, 'The Influence of Behaviour on Attitudes' in Dolores Albarracin, Blair T Johnson and Mark P Zanna (eds), *The Handbook of Attitudes* (Routledge Hanbooks, online, 2005) <https://www.routledgehandbooks.com/doi/10.4324/9781410612823.ch6>.

[33] The concept of a mental schema was often discussed by Immanuel Kant and later developed by Jean Piaget.

[34] Festinger (n 31); Leon Festinger and James M Carlsmith, 'Cognitive Consequences of Forced Compliance' (1959) 58 *Journal of Abnormal and Social Psychology* 203-210.

[35] Gershon M Breslavs, 'Moral emotions, conscience and cognitive dissonance' (2013) 6(4) *Psychology in Russia: State of the Art* 65-72, 66.

[36] Mark Wicclair, 'Conscientious Objection in Healthcare and Moral Integrity' (2017) 26 *Cambridge Quarterly of Healthcare Ethics* 7-17, 11.

[37] *Masterpiece Cakeshop* (n 14).

[38] (1993) 17 EHRR 397 [31].

the European Court of Human Rights expressed the nature of the right to freedom of thought, conscience and religion as being:

> in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics, and the unconcerned. The pluralism indissociable from democratic society, which has been dearly won over the centuries, depends on it.

It is difficult to see how force or coercion upon an individual to use their skill and effort to perform duties against their will is compatible with human rights. The suggestion requires consideration of some other human rights apart from freedom of thought, conscience and religion. Article 8(3)(a) of the ICCPR states that 'no one shall be required to perform forced or compulsory labour'.[39] Article 23(1) of the UDHR states that 'Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'.[40] The option of closing a business and losing one's career and living is a very serious punitive measure for wanting to live in accordance with one's values and beliefs. Such a 'choice' as an alternative to performing forced or compulsory labour could be seen as contradictory to international work-related human rights. Should market forces result in a loss of clientele for conducting a business contrary to community attitudes, so be it. However, to outlaw the conduct is a harsh imposition by the state on an individual's freedom of thought, conscience and religion and their rights to work. Rather than a matter of being sympathetic to a discriminator's cause, the issue is one of respecting the human right to certain freedoms and not of agreement with what one does with those freedoms.

These issues ought to be considered in the tension between freedom of religion for individuals and anti-discrimination laws in the provision of goods and services. Such contemplation recognises the importance of the connection between beliefs, preferences, attitudes and work. Although the right to satisfying and meaningful work is not expressed in human rights instruments it is generally accepted as a reasonable expectation in western democratic countries such as Australia. Where a sole trader can show that discrimination on mutable grounds is consistent with their deeply-held religious beliefs or other beliefs of conscience, the human rights set out above mean

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[39] *ICCPR* (n 2) art 8(3)(a).

[40] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg. UN Doc A/810 (10 December 1948), art 23.

there ought to be a freedom to refuse to use their body, mind and skill to carry out tasks against those beliefs.

A thought, conscience and religion hierarchy

The analysis of interpretive constructions in Chapter 4 revealed an assumption that some beliefs of conscience or religion are more important or worthy of greater protection than others. This interpretation is relevant to new provisions of Australian Marriage legislation. A refusal to solemnise a same-sex marriage on the basis of a religious belief is unlawful for any person who did not register as a religious marriage celebrant before the transitional cut-off date[41] From that date only persons recognised by a religious denomination can register as a minister of religion.[42] The law recognises the permissibility of refusal to solemnise same sex marriage on the basis of certain religious beliefs only, and not on other beliefs of conscience. This reflects interpretive construction referred to in 4.1.6, 'a thought, conscience and religious hierarchy,' where religious beliefs are considered more worthy of protection than other beliefs of conscience.

A human rights hierarchy

Those who wish to use religious beliefs as a justification for discrimination appear to place their right to freedom of religion higher than another's right to be free from discrimination and vice versa. Where rights clash in this way it is helpful to attempt to weigh the harmful outcomes for each party. While this is not simple, and individuals have their own perspective about their experience of harm there are two points to be considered. Firstly, harm experienced out of the loss of a human right is more debilitating for an individual than an organisation. Secondly, organisations are not subject to the human rights protections relating to employment and labour in international instruments. This indicates there is a greater need to protect individuals from persecution for discriminating on the basis of religious beliefs or other beliefs of conscience, than organisations.

[41] *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth) s 39DD. The cut-off date was 90 days from the commencement of the Act.
[42] Ibid s 29.

Given that the human right of freedom of thought, conscience and religion should afford some protection to individuals who wish to manifest their deeply-held beliefs of conscience and religion by discriminating on grounds which could offend others, this then leads to the second question of what are the appropriate grounds for discrimination on the basis of freedom of religion?

6.2 What, if any, are appropriate grounds of discrimination on the basis of freedom of religion?

This question can be discussed by reference to the grouping together of immutable and mutable grounds in anti-discrimination laws which was discussed in Chapter 5 along with the interpretive construction in Chapter 4 that there is an underlying acceptance of discrimination against women influencing exceptions to anti-discrimination laws.

In chapter 5 this thesis proposed the necessity for a distinction between immutable and mutable grounds of discrimination in relation to the manifestation of religious beliefs and other beliefs of conscience. The justification for this is that mutable grounds involve values and beliefs as do thought, conscience and religion. In order to maintain identities, beliefs and values individuals and organisations choose employees, colleagues and to conduct activities in accordance with those identities, beliefs and values.

6.2.1 Discrimination on immutable grounds

It is difficult to find credibility in any form of discrimination on the grounds of race, age, sex, sexual orientation, transgender, intersex or disability. The claim that discrimination on the grounds of age, sexual orientation and disability is justifiable in order to maintain religious identities, values and beliefs is a fiction. Such discrimination is not included in religious doctrine of the major recognised religions; nor has it been supported by the courts in respect of religious organisations. One strictly immutable ground omitted from the latter group is sex. Whilst a thorough theological analysis of the written doctrines of all religions is beyond the scope of this research, sex discrimination is included in religious doctrine in the world's major religions including Christianity, Islam and Judaism, Buddhism and Hinduism. In some religions this is

most commonly manifested in the prohibition on women being admitted to clergy and other leadership roles. There are clear and separate roles for women and men with women being subordinate. For instance, in the Catholic Church women may be ordained as 'nuns,' the lowest in the hierarchy of clergy and only men as 'brothers', 'priests', 'bishops', 'cardinals' and 'popes', in hierarchical order, with the latter being the highest ranking. Christian religious doctrine contains scriptures referring to the lower status of women which is the basis for the prohibition on their ordainment as leaders, for example:

> **34** the women should keep silent in the churches. For they are not permitted to speak, but should be in submission, as the Law also says. **35** If there is anything they desire to learn, let them ask their husbands at home. For it is shameful for a woman to speak in church.[43]

> 11 Let a woman learn quietly with all submissiveness. 12 I do not permit a woman to teach or to exercise authority over a man; rather, she is to remain quiet. 13 For Adam was formed first, then Eve; 14 And Adam was not deceived, but the woman was deceived and became a transgressor.[44]

Leader of the Catholic Church, Pope Francis, has reportedly reasserted the prohibition on the ordination of women as Priests.[45] This is believed to be due to the doctrine of *apostolic succession*, which holds that because Jesus only appointed male apostles it is 'Divine Will' that the priesthood is restricted to only men.[46] In 1976 the Church affirmed its commitment to this principle in a declaration on the question of admission of women into the ministerial priesthood.[47] Although the declaration recognises changes in the social standing of women and their increased participation, it states that male and female roles in the Church are distinct, do not confer inferiority or superiority on either sex, but nevertheless are not equal.[48] In this way the declaration makes a feeble

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[43] '1 Corinthians 14:34-38' *The Holy Bible* (English Standard Version, Crossway Bibles, Good News Publishers, 2016), *BibleGateway* (Web page) <https://www.biblegateway.com/passage/?search=1+Corinthians+14%3A34-37&version=ESV>.
[44] '1 Timothy 2:11-14' *The Holy Bible* (English Standard Version, Crossway Bibles, Good News Publishers, 2016), *BibleGateway* (Web Page) <https://www.biblegateway.com/passage/?search=1+Timothy+2%3A11-14&version=ESV>.
[45] The Conversation, *Pope Francis won't support women in the priesthood, but here's what he could do* (6 March 2018) <https://theconversation.com/pope-francis-wont-support-women-in-the-priesthood-but-heres-what-he-could-do-91555>.
[46] Ibid.
[47] Sacred Congregation for the Doctrine of the Faith, Catholic Church, *Declaration Inter Insigniores on the question of the admission of women to the ministerial priesthood* (given in Rome at the Sacred Congregation of the Doctrine of the Faith, 15 October 1976). <http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19761015_inter-insigniores_en.html>.
[48] Ibid.

patronising attempt to deny the superiority of the positions of priest, bishop, cardinal and pope, all of which refuse women access to decision-making at even the local level in the Catholic Church. The historical accuracy of a male-only clergy appointed by Jesus and during the early days of the church is the subject of contested debate.[49]
The Anglican Church is less centralised and ministerial ordination is the domain of the individual diocese in Australia. Women's ordination is currently a contentious issue, with some diocese appointing female ministers and others condemning the practise.[50]
Although there is nothing in the Islamic Qur'an mandating a prohibition on women as leaders, there is a Fatwa rule that women are not permitted to lead men in prayer.[51]
Therefore women cannot be given the role of Imam, the religious leader of a Sunni congregation, unless the congregation consists of only women.

While orthodox Judaism prohibits the ordination of women Rabbis, Reformed Judaism began ordaining women in 1972.[52] The Traditional Orthodox Rabbis of America released a statement in 2017 condemning the ordination of women by a women's college for Torah studies in Jerusalem calling it 'deeply disappointing'.[53] They asserted that the ordination of women implies that a lack of ordination for women diminishes and insults the contribution of many great women to Judaism.[54] Encouragingly, this puzzling argument has not been applied to all aspects of society in which women have sought to obtain equal status and work. The risk that a woman may lose praise and merit for her role as a cleaner by being appointed a manager, is unlikely to be something for her to consider when contemplating her future goals.

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[49] Beverly Mayne Kienzle and Pamela J Walker (eds), *Women Preachers and Prophets through Two Millennia of Christianity* (University of California Press, 1998).
[50] Madeline Lewis, 'Not all Australian Anglican dioceses accept women as priests but Newcastle's oldest parish just ordained its first' *ABC News* (online, 13 May 2019) < https://www.abc.net.au/news/2019-05-12/not-all-women-can-be-priests-in-the-anglican-church-of-australia/11090892>.
[51] Shaykh Abul El Fadl, *Fatwa: On Women Leading Prayer* (5 April 2010) The Search for Beauty on beauty and reason in Islam https://www.searchforbeauty.org/2010/04/05/fatwa-on-women-leading-prayer/>; Dar Al-Ifta Al Missriyyah, *A woman leading men in congregational prayers* (undated) <http://www.dar-alifta.org/Foreign/ViewFatwa.aspx?ID=10803>.
[52] Avi Hein, 'Women in Judaism: A history of women's ordination as Rabbis' *Jewish Virtual Library* (Web Page) <https://www.jewishvirtuallibrary.org/a-history-of-women-s-ordination-as-rabbis>
[53] 'Statement on Ordination of Women as Rabbis', *TORA: Traditional Orthodox Rabbis of America* (Statement 12 January 2017) < https://torarabbis.org/2017/01/12/statement-on-ordination-of-women-as-rabbis/>.
[54] Ibid.

The ministerial exception

In the analysis outlined in Chapter 4, there is much support to be found for the freedom of religions to choose their own clergy and this is seen by many as a fundamental right of religious bodies. The ministerial exception can be found in sex discrimination legislation in all jurisdictions.[55] For instance, s 37 of the *Sex Discrimination Act 1984* (Cth) provides exceptions to Division 1 and 2 which prohibit sex discrimination in employment, education, in the provision of goods and services for:

(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[56]

It is noteworthy that the ministerial exception is only present in the *Sex Discrimination Act 1984* (Cth) in the Commonwealth suite of discrimination legislation, giving weight to the argument that its only function is to permit the exclusion of women from religious ministries. This research found that discrimination against women is willingly accepted by the vast majority of stakeholders and commentators as a consequence of belief in the ministerial exception in anti-discrimination laws.[57]

The result of the ministerial exception is that it casts doubt over the justification for a prohibition on the freedom of all other organisations to discriminate in the appointment of leaders. It further highlights the interpretive constructions identified in this thesis, particularly that religion and religious belief is worthy of a higher status than all other beliefs, values and missions, even those based on moral conscience.

Religious scriptures and doctrines relating to the status of women as outlined above are incompatible with the modern liberal state and ought to be questioned. While it is recognised that scriptures were written during an era in which women held a much lower status than today, they are rarely scrutinised either in political or academic circles.

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[55] *Sex Discrimination Act 1984* (Cth) s 37; *Discrimination Act 1991* (ACT) s 32; *Anti-Discrimination Act 1977* (NSW) s 56; *Anti-Discrimination Act 1992* (NT) s 51; *Anti-Discrimination Act 1991* (Qld) s 109; *Equal Opportunity Act 1984* (SA) s 50; *Anti-Discrimination Act 1998* (Tas); 52; *Equal Opportunity Act 2010* (Vic); Equal Opportunity Act 1984 (WA) s 72.
[56] *Sex Discrimination Act 1984* (Cth) s 37(a)-(b).
[57] As discussed in 4.1.3.

This thesis maintains that religious organisations manifesting practices that adhere to discriminatory biblical scriptures written hundreds of years ago are difficult to justify. The ministerial exception clearly has one goal and that is to exclude women from leadership roles in religious denominations. Not every biblical doctrine is adhered to with such gusto as the one that underpins the ministerial exception and no other immutable ground of discrimination is given such flexible treatment as that of sex. Religions ought to be asked to explain the value and mission behind such principles, and on the proviso that they can in fact provide an explanation, it ought to be tested against the public interest and the permissibility of other organisations to select their own leaders devoid of any legal responsibilities to equality principles. Where there is no explanation apart from the continuance of paternalistic practises demonstrated 2000 years ago, the justification becomes untenable.

6.2.2 Discrimination on mutable grounds

A list of potential grounds of discrimination that involve mutable grounds for discrimination is set out in Appendix 2 and the list can be greatly expanded to include many more attitudes and beliefs. This thesis supports the notion that discrimination on mutable grounds ought to be permissible, particularly where certain attitudes, beliefs and conduct are important to the values and mission of an organisation. The same ought to apply where an individual is exercising their right to commit themselves to their work in accordance with their values and beliefs of conscience. An alternative arrangement appears unmanageable, in light of the plethora of possible mutable grounds.

Although it may appear this is supportive of illiberal attitudes and conduct, the matter extends bilaterally. There are circumstances where discrimination on the grounds of immutable traits is permitted, for instance where race or gender is important to carrying out a service such as a women's shelter support worker. This may also be applied in relation to mutable characteristics when necessary for the proper functioning of an organisation. For instance, a women's advocacy group may wish to specifically employ feminists due to their attitudes about and support of women. A family planning clinic would likely need to select employees possessing the attitudes and beliefs that ensure they are willing to carry out contraception and pregnancy termination services. A vegetarian animal rights advocate may wish to be entitled to refuse to bake a cake in the

form of a cow for a halal abattoir party without losing their livelihood. These examples demonstrate the importance of allowing some degree of selectivity and choice on mutable grounds. In this way individuals would be permitted to act in accordance with their deeply-held beliefs of conscience without interference from the state. This would also serve to prevent an eventual absurd situation whereby all possible mutable characteristics are included in anti-discrimination laws and people are no longer permitted to exercise choice in any human activity including selecting a romantic partner on the basis of their traits including their attitudes, interests, values and beliefs. A *strict* reading of international human rights and anti-discrimination laws already supports such absurdity without expressly identifying any mutable traits.[58] While a distinction between private and public life ought to be acknowledged, when individuals engage in public life in ways that involve issues of personal conscience, that distinction becomes blurred.

The 'identity and values' argument for permissibility of discrimination and its relationship with immutable and mutable attributes

Religious submissions to the Religious Freedom Review[59] suggest that adherents wish to maintain their identities and live by their values. It is therefore important to make the point that in order to be entitled to favourable treatment, those identities and values must be able to be validly defined and described as identities and values rather than mere preferences. While a person may claim an identity or abide by certain values, it is where the manifestation of those identities and values conflict with ordinary laws that the claim becomes more difficult to substantiate.

Innate attributes are different from morals and values, which are chosen. It is difficult to imagine a moral code or value that could legitimately claim the unsuitability of women for religious clergy positions. If it can be argued that there is such a value, the nature of that value and how is it beneficial to a religious community or the broader community

[58] For example, section 9 of the *Racial Discrimination Act 1975* (Cth) which makes it unlawful to do any act involving a preference based on race, colour, descent or national or ethnic origin in social life could be given a strict reading meaning that a preference for friendships or relationships with persons of a particular ethnicity may be a contravention of the section; Article 26 of the ICCPR states that 'the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status; *ICCPR* (n 2) art 26.

[59] *Religious Freedom Review: Report of the Expert Panel* (Report to the Prime Minister of the Commonwealth of Australia, 2018) ('*Religious Freedom Review*').

ought to be clarified. Such values need to be explained and justified if they are to come within an argument for the permissibility of discrimination on the basis of the maintenance of identities and values. Most religions claim to uphold moral and ethical attitudes and standards for living. Any moral or value-based standard attached to the exclusion of women from church leadership ought to be explained. If it cannot be explained or the explanation is markedly inconsistent with widely-accepted public opinion, it is difficult to see how the state can justify supporting it by legislating for such exclusion as an exception to laws that apply to all other organisations. Similarly, the notion that homosexual people should be denied employment or enrolment in a school cannot be based on a legitimate value or mission. Even where such a notion is viewed as morally valid internally by a religious group and deemed to be in place for some purpose explainable within the religion, it is not a value that can be supported by the state. Therefore, the state need not legislate for it in exceptions to generally applicable laws or by funding organisations that uphold such values. There is no obligation for the state to do so. The state need not support *any* values necessarily, but it ought to refrain from actively supporting values of inequality, with respect to the most fundamental grounds of sex, age, race, disability and sexual orientation. Doing so while at the same time disallowing the same conduct for non-religious organisations contravenes the rule of law. In contrast, attitudes and beliefs are mutable attributes and can be distinguished from immutable characteristics because they are codes of belief or codes of conduct for how to live one's life. They are manifested in chosen attitudes, lifestyles and behaviours.

Organisations and discrimination on mutable grounds

It has been asserted in this thesis that selecting on mutable grounds amounts to preference rather than harmful discrimination. All organisations whether religious, cultural, not-for-profit, community-minded or commercial are entitled to function in accordance with their preferences which are derived from their values, goals and mission and this ought to include the permissibility to employ people who will abide by those values and carry out the mission or the organisation. A claim to a right to freedom of thought, conscience or religion is not required in order to establish permissibility for such operations. It is a recognised right of organisations to conduct lawful business activities, and any prohibitions on the entitlement of organisations to select the most suitable employees who will carry out the values and mission of the organisation would

be an imposition by the state on the conduct of business. Employers discriminating against employees in this manner would need to show, in a defence of a claim for wrongful discrimination, that a failed applicant did not have the requisite attitudes, values, beliefs or conduct necessary to carry out the position adequately. Therefore, the organisation ought to be required to publish its values and mission and set out clearly the attitudes and conduct expected of potential employees. This type of prior notification on the part of religious organisations was included in Recommendations 5 and 7 of the Religious Freedom Review.[60] However, it relates to discrimination on the immutable grounds of age, race, sex and sexual orientation, which according to this thesis is objectionable. As stated above, discrimination only on mutable grounds can be explainable in the context of the organisation's values and mission. Such prior notification was also seen as important in the two ECtHR cases, *Schuth v Germany*[61] and *Obst v Germany*[62] outlined in Chapter 4.

Individuals and discrimination on mutable grounds

Similarly, individuals who carry out business activities or employment ought to be able to exercise their discretion when undertaking work. The rationale for this is that beliefs of conscience and religion are fundamental to the functioning of individuals in their day-to-day lives. Laws that prohibit people living in accordance with their fundamental beliefs and values could not be sustained without being seen as a grave imposition by the state on individual freedoms inherent in constitutional liberal states and those prescribed under international human rights instruments. Even where individuals are engaged in the public sphere, they ought not to be taken to be doing so with the full relinquishment of their beliefs of conscience and values. This would be contrary to human rights as set out in international instruments. It also suggests that the state may entitle citizens to part-take in the economy only if they submit to ideologies set out by the state. It could be argued that political ideologies only vaguely differ from religious ones and that the state may replace religion becoming a 'new god'.

[60] Ibid 2.
[61] *Schuth v Germany* (2011) 52 EHRR 32 (ECtHR) 34.
[62] *Obst v Germany* (European Court of Human Rights, Application No. 425/03, 23 September 2010).

6.3 Doctrinally based discrimination

The decisions in *CYC v Cobaw*[63] and *Griffin v CEO*[64] raise an important issue to consider in the permissibility of discrimination on the basis of freedom of religion. In both cases the court could not find a doctrinal basis for the discrimination in the religious texts or policies. This raises the question of what the outcome of those cases would be should discrimination on immutable grounds be incorporated into religious doctrine. Would religious doctrinally based discrimination on the grounds of sex, race, disability, age, sexual orientation, transgender or intersex status be acceptable to the courts? As outlined above, the ministerial exception exists to protect one such form of discrimination. What needs to be pointed out in this regard is that the situation may become much more problematic than merely a prohibition on women religious leaders, as oppressive as that may appear. A reliance on doctrinally based discrimination is an unsafe proposition, for how does the state respond when a religion is established that generates doctrine excluding and thereby persecuting particular groups in the community? For instance, suppose a religion or a more extreme form of an existing religion develops and accumulates significant numbers of adherents, and this religion sets out its policies to discriminate against people on grounds of disability, race, sex or sexual orientation. If the state or judiciary has conceded a form of freedom of religion that entitles religious organisations to discriminate against people on the proviso that the discrimination is founded upon written doctrine, the state or court then finds itself in an uncomfortable predicament as it has over-committed its gesture of freedom of religion, albeit in an act of goodwill, that has later turned sour. Further, religious doctrinally based discrimination is particularly insidious as it implies the discrimination is divinely ordained persecution or exclusion. As Holloway states, 'it is one thing to hate people because you don't like their opinions. It is another thing to say God hates them too and wants them exterminated.'[65]

Whilst admittedly it is difficult to predict future potential circumstances, this thesis suggests it is important in the development of legislation to be aware of foreseeable risks in granting exceptions to general laws, particularly when those entitled to the

[63] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615 [289-90].
[64] *Griffin v Catholic Education Office* [1998] AusHRC 6 (1 April 1998) 7.
[65] Richard Holloway, *A Little History of Religion* (Yale University Press, New Haven, 2016), 38.

exceptions are not clearly defined or their nature and intentions fully understood. Any exception on the basis of freedom of religion needs to be considered carefully, lest it become a loose cannon. It is noted that laws are generally made within current and recognisable contexts and circumstances and in this case legislators have acted in contemplation of religions currently existing in society. However, these may change over time. An opening for further and more specific discrimination for religious organisations does not appear to be a sensible approach in the current climate and is even more concerning in view of a foreseeable future where more extreme demands from religious groups can be expected. It is suggested that limits need to be applied pre-emptively rather than as a cure in retrospect.

6.4 Redundancy of religious exceptions

The arguments made herein lead to the conclusion that religious exceptions to anti-discrimination laws are largely redundant. There are three reasons for this claim. Firstly, current exceptions to anti-discrimination laws for religious bodies include a requirement that the discrimination be based on the doctrines, tenets and beliefs of the religion. This requirement is further included in Recommendations 5 and 7 of the Religious Freedom Review which states that permissible discrimination is to be 'founded on the precepts of the religion'.[66] However, discrimination on immutable grounds as set out in the legislative exceptions (see Appendix 1) is yet to be found to be consistent with religious doctrine, tenets and beliefs. An exception is the decision in *OV & OW v Members of the Board of the Wesley Mission Council*[67] referred to in Chapter 3.4 where it was argued as differing from outright sexual orientation discrimination. It was not sexual orientation discrimination that the court found to be part of the doctrine of Wesley Mission but a belief about the ideal family for raising children which was claimed to be a monogamous heterosexual marriage. This doctrine would exclude all other family types that are not monogamous heterosexual marriages such as de facto couples and single parents. Hence, the case is not strictly one involving outright sexual orientation discrimination.

[66] *Religious Freedom Review* (n 59) 2.
[67] *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293.

The court adopted the view that where the claimed value or attitude is not expressly stated in religious doctrine and cannot be identified as a value or policy of a religion, it will not be taken to be a doctrine of that religion. So far this appears to rule out discrimination on the immutable grounds of age, disability or impairment, sexual orientation, intersex or transgender, leaving only the ground of sex as the final immutable frontier on which religious bodies could be permitted to discriminate on the basis of the precepts of religion. Although it is argued that sex discrimination against women is fundamentally out of step with modern society by approximately 100 years and if the exclusion of other groups such as racial or disability groups from ministerial and religious observance activities is seen as abhorrent, there appears no reason why the exclusion of women could be justified and supported by legislation. A change in this area will require more people willing to speak for women's equality as they do for racial, disability and LGBTQI equality.

While a reliance by religions on doctrinal prejudice currently appears to be one way to facilitate discrimination, it is not recommended that this be a test for the permissibility of discrimination as this may to lead to unacceptable and additional forms of exclusion and persecution that the state would wish to avoid.

Secondly, religious exceptions to anti-discrimination laws on mutable grounds are redundant because all organisations, religious or non-religious ought to be entitled to discriminate on mutable grounds where it is for the purposes of carrying out the mission, goals and values of the organisation and with full disclosure as proposed in 6.2.2.

Thirdly, discrimination in employment and student admissions in religious bodies and educational institutions needs to pass the 'injury to religious susceptibility of adherents' test which is argued in this thesis to be either impossible or unnecessary.

Exceptions for genuine need

There may be some justifiable reasons for the exclusion of people on immutable grounds. Such practices often relate to segregation of the sexes in religious ritual, prayer and spaces. This is a feature of some religions and cultures including indigenous activities. It is notable that this exception is present in anti-discrimination laws in the

Northern Territory,[68] Queensland[69] and Tasmania.[70] Other religions such as Islam prohibit men and women praying together and do not allow women into certain areas in the mosque. Some mosques prohibit women altogether. This was the case at the Sabarimala Temple in Kerala until the Indian Supreme Court struck down the rule that disallowed girls and women between the ages of 10 and 50 from entering the temple.[71] The rule was derived from notions of untouchability and pollution associated with menstruation.[72] The court found that exclusion on that basis was anathema to constitutional values and perpetuated patriarchy.[73] It was further stated that this was not an essential religious practice.[74] The exception relating to segregation, exclusion and religious spaces in the three Australian jurisdictions is somewhat similar to the ministerial exception and may require reconsideration but is more complex as there may be some valid reason for the discrimination such as privacy or dignity. If so, it is most like exceptions relating to accommodation such as single-sex dormitories for students and hospital wards (see Appendix 2). Single-sex public bathrooms and changerooms are another type of discriminatory segregation that has some valid basis. However, where equal options are available for men and women there is little to debate over. One area that may improve is the provision of unisex facilities in addition to those for male and female. However, these ought not to replace existing facilities.

In relation to sex discrimination, the decision turns on the intention and purpose. In some situations the distinction between male and female is irrelevant to the circumstances, such as for ministerial appointment. In other contexts, in consideration of the realities of biology and human sexuality and behaviour, segregation can be seen as justifiable. If the religious site exception is no different to the separation of other public facilities for a specific purpose, it can be reassigned as a general exception and combined with the accommodation exception provided there are equal facilities for racial, sex and age groups. Hence, it need not be specifically a religious exception.

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[68] *Anti-Discrimination Act 1992* (NT) s 43.
[69] *Anti-Discrimination Act 1991* (Qld) s 48.
[70] *Anti-Discrimination Act 1998* (Tas) s 42.
[71] *Indian Young Lawyers Association & Ors v State of Kerala & Ors* (In the Supreme Court of India Civil Original Jurisdiction Writ Petition (Civil) No 373 of 2006 <https://indiankanoon.org/doc/163639357/>.
[72] Ibid [32].
[73] Ibid [4].
[74] Ibid [75].

Temporary Exemptions

Various Acts allow for temporary exceptions to be granted to individuals or organisations by state authorities requiring them to justify why they ought to be entitled to discriminate in contravention of anti-discrimination laws.[75] Many such exemptions have been to give effect to positive discrimination in the pursuit of inclusion rather than to exclude vulnerable groups.[76] Whilst this is one remedy for organisations wishing to maintain their identities, goals and missions, temporary exemptions remain reliant on notions of exception and special privilege rather than aiming for a framework for how religious freedom might sit within anti-discrimination legislation with a degree of consistency. It is argued that the latter would be a preferred approach which could afford organisations more clarity at the outset and would eliminate, or at least reduce, the need for lengthy application processes. This is not to suggest that such a framework could cover all situations and that temporary exemptions ought to be ruled out, but simply that they be seen as a last resort.

6.5 Conclusion

This thesis finds that the current religious exceptions to anti-discrimination laws serve no real function and only reflect badly on religious organisations and the government for its attempt to legislate for religious privilege. Claims for the permissibility of discrimination on the ground of sexual orientation have not been accepted by the judiciary when the discrimination is not founded on the precepts of the religion. Further, the exceptions are unnecessary to the operation of religious organisations and are not needed in order for them to operate in accordance with their mission and values or to maintain the religious identities of adherents.

The only function of the ministerial exception is to exclude women from religious leadership roles. It is difficult to justify its removal on the same grounds as other

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[75] *Sex Discrimination Act 1984* (Cth) s 44; *Age Discrimination Act 2004* (Cth) s 44; *Disability Discrimination Act 1992* (Cth) s 55; *Anti-Discrimination Act 1977* (NSW) s 126; *Equal Opportunity Act 1995* (Vic) s 89.

[76] For instance, a government department was granted permission to run a recruitment drive aimed at indigenous applicants to improve the rate of indigenous employment in the Victorian public service. 'Exemptions', *Victorian Human Rights and Equal Opportunity Commission* (Web Page) <https://www.humanrightscommission.vic.gov.au/discrimination/exceptions-exemptions-and-special-measures/exemptions>.

exceptions relating to employment of general staff and the provision of goods and services as there are doctrinal precepts relating to the exclusion of women. However, the ministerial exception ought to be removed on the basis that it privileges one kind of organisation over all others and is therefore incompatible with the rule of law which holds that laws apply to all equally.

Should mutable grounds remain in anti-discrimination laws prohibiting non-religious organisations from selecting employees who will carry out their duties in accordance with the values and mission of the organisation, there appears no basis for excluding religious organisations. However, this thesis does not support the inclusion of mutable grounds for discrimination in anti-discrimination laws. The preference is to limit laws to immutable and constructive immutable grounds. This allows for the proper functioning of society and for the maintenance of human choice and preferences in accordance with deeply-held values and beliefs.

An analysis of submissions to the Religious Freedom Review[77] revealed fear and concern amongst religious adherents that they are being, or will be, prevented from maintaining their identities and values by the enforcement of anti-discrimination laws, marriage reforms and the removal of religious exceptions to anti-discrimination laws. That fear is found to be unsubstantiated in respect of religious organisations but substantiated for individuals. While religious bodies are privileged by being granted protection beyond that which is necessary, individuals are at risk of a more stringent and unnecessary burden on their ability to manifest deeply-held beliefs of conscience including religious beliefs.

This chapter has brought together the interpretive constructions underpinning religion and freedom of religion along with aspects of anti-discrimination laws identified in Chapters 4 and 5. The intention is to analyse these underlying interpretations of religion and religious freedom that have been given little consideration. This thesis has so far highlighted the impact of those interpretive constructions and shown that they are in many ways unfounded. They also act as an obstruction to a less complicated approach to the tension between freedom of religion and anti-discrimination laws. These

[77] *Religious Freedom Review* (n 59).

interpretations have provided a foundation to justify an inflated level of protection for religious bodies to discriminate against members of particular groups on immutable and constructive immutable grounds. This excessive focus on organisations has drowned out the rights of the individual and come at the expense of recognising the purpose of freedom of religion which is to protect it as an individual *human* right. According to the UDHR and the ICCPR *everyone* has the right to freedom of thought, conscience and religion.[78] In Australia the freedom is heavily swayed towards religious organisations rather than everyone. Malcolm Evans delivered a reminder that the focus of traditional human rights thinking was to ensure the interests of the individual are not engulfed by the state.[79] He argued that the interests of the state are now the prevailing priority over those of individuals and that 'this is not what human rights protections are meant to be about'.[80]

There are four overall conclusions. Firstly, religious organisations as entities should not, and need not, rely on the human right of freedom of thought, conscience and religion. Secondly, religious organisations are entitled to operate in accordance with their mission and values, as are all other organisations and need not rely on freedom of religion in order to do so. Expected conduct for employees and limits to service provision need to be disclosed publicly. Thirdly, religious exceptions to the prohibition on discrimination on the immutable grounds of sexual orientation, age and disability in anti-discrimination laws are redundant and can be removed without religious organisations losing their identities, mission or values. Fourthly, exceptions to anti-discrimination laws ought to be provided for individuals for the purposes of their work and social activities where mutable grounds remain are maintained in the laws. Only the Victorian legislation contains one.[81] However the exception is too extensive as it excepts the individual from all prohibited discrimination on the grounds of sex and sexual orientation in Part 4 which covers a wide range of areas that do not pertain to activities on an individual basis such as accommodation, finance and sports teams. At the same time the exception is too narrow in that it only covers religious beliefs. An

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[78] *UDHR* (n 10) art 18; *ICCPR* (n 2) art 18(1).

[79] Malcolm Evans, 'Freedom of Religion Under the European Convention on Human Rights: approaches, trends and tensions' in Peter Cane, Carolyn Evans, Zoe Robinson (eds), *Law and Religion in Theoretical and Historical Context* (Cambridge University Press, Cambridge UK, 2008) 291, 315.

[80] Ibid 315.

[81] *Equal Opportunity Act 2010* (Vic) s 84.

exception that recognises the human right to freedom of thought, conscience and religion would include beliefs of conscience.

Religious identities and values can be maintained by the exclusion of mutable grounds from anti-discrimination laws which would entitle all organisations to maintain their identities, missions and values by being selective in accordance with those identities, missions and values.

The law should permit discrimination on the basis of freedom of thought, conscience and religion for individuals in their work and personal social activities when those beliefs are deeply-held beliefs of conscience or religion.

The model proposed herein recognises the human right to freedom of thought, conscience and religion while limiting it to its status as an individual *human* right. Organisations should not be entitled to human rights and nor is it necessary to grant them such rights. Accordingly, organisations, both religious and non-religious operate as non-human entities without human rights but with an entitlement to carry out legal business activities in accordance with a clearly defined and expressed mission and set of values. Selection in the course of business on the grounds of mutable characteristics ought to be required to be explained in the context of the organisation's mission and goals and the nature of the work.

The current chapter has outlined the proposed position on organisational and individual rights to freedom of thought, conscience and religion in the context of work and the provision of goods and services. The next chapter will summarise the outcomes of this discussion and propose a revision of current legislative restriction and permissibility of discrimination on the basis of religious belief. Additionally, it will demonstrate the application of the proposed model by reference to four cases involving both individual and organisational rights. The first is an Australian situation given much media attention and recently settled out of court, that of Israel Folau and Rugby Australia. The second is another Australian matter, that of Roz Ward, involving freedom of speech which was also resolved without litigation. The third is a Canadian case, *Trinity Western University*

v Law Society of Upper Canada[82] and the fourth, a European Court of Human Rights case, *Eweida and others v UK*.[83]

[82] [2018] 2 SCR 453.
[83] *Eweida and others* (n 25).

Chapter 7 A revised framework for freedom of religion in anti-discrimination laws

This thesis has identified and analysed the impact of a range of interpretive constructions of religion and freedom of religion along with aspects of anti-discrimination laws that operate to obstruct a resolution to the tension between freedom of religion and equality. This chapter will set out the conclusions and suggest a revision of exceptions to anti-discrimination laws that reflect the human right to freedom of thought, conscience and religion as described in international instruments and principles underlying liberal democracies such as individual autonomy, freedom from state intrusion and the rule of law.

7.1 Exceptions for religious organisations

In Chapter 6 it was suggested that legislated exceptions to anti-discrimination laws on immutable grounds for bodies established for a religious purpose are redundant. The reason for the redundancy is two-fold. Firstly, the exempted immutable grounds for discrimination of age, sexuality or sexual orientation, gender identity and intersex status are generally found to be unrelated to religious doctrine or policy. Therefore, discrimination on those grounds would be unlikely to meet the requirements in the legislation that the discrimination be in accordance with religious doctrine, tenets or beliefs.[1]

Demonstrating the above claim, in both *CYC v Cobaw*[2] and *Griffin v CEO*[3], discrimination on the ground of sexual orientation could not be upheld and in fact the

[1] Legislation in all jurisdictions contains this or a similar requirement. See Appendix 3.
[2] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615 ('*CYC v Cobaw*').
[3] *Griffin v Catholic Education Office* [1998] AusHRC 6 (1 April 1998) ('*Griffin v CEO*').

court and HREOC respectively found that the doctrines, tenets, beliefs and teachings of the religion in question were inconsistent with discrimination on that ground.[4]

Secondly, religious bodies along with all other organisations ought to be entitled to discriminate on the mutable grounds of religious or political conviction, opinion, belief or activity or any other mutable ground and a religious exception is not necessary for this entitlement. This should be qualified by three requirements: a) that such selectivity supports the maintenance of identity, mission, goals and values of the organisation, b) the manifestation of the political conviction, opinion, belief or activity will interfere with the organisation's operations, mission, values or goals, and c) that the relevant mission, goals and values of the organisation are made clear in writing along with expectations of employees and any limits to goods and service provision based on such mission, goals and values. The European Court of Human Rights has supported similar disclosure requirements for both religious and non-religious organisations.[5]

Relationship, marital, family or carer status, or responsibility are grounds included in religious exceptions across all jurisdictions in varying contexts, except Tasmania, as shown in Appendix 1.[6] These grounds are more complex and cannot strictly be sorted into mutable or immutable grounds. Further, the grouping is somewhat disordered. Relationship and marital status are different to family or carer status or responsibility, pregnancy and breastfeeding. Relationship and marital status are more mutable and family, carer status or responsibility are more immutable, although neither could be said to be strictly so. However, discrimination on any of these grounds would heavily discriminate against women. Hence, they are constructive immutable grounds and need to be protected. For example, while divorce is seen by some religions as sinful and against religious tenets, it is one way in which women protect themselves from family violence. Women, as the predominant carers with family responsibilities in society, are heavily burdened by discrimination on these grounds. Additionally, LGBTQI people

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[4] *Griffin v CEO* (n 3) 7; *CYC v Cobaw* (n 2) [289-90].

[5] *Schuth v Germany* (2011) 52 EHRR 32 (ECtHR) ('*Schuth v Germany*'); *Obst v Germany* (European Court of Human Rights, Application No. 425/03, 23 September 2010) ('*Obst v Germany'*); *Eweida and others v UK* [2013] 57 Eur Court HR 8 ('*Eweida v Others*').

[6] *Sex Discrimination Act 1984* (Cth) s 37; *Anti-Discrimination Act 1977* (NSW) s 56; *Anti-Discrimination Act 1992* (NT) s 51; *Anti-Discrimination Act 1991* (Qld) s 109; *Equal Opportunity Act 1984* (SA) s 85ZM (ministerial ordination only); *Equal Opportunity Act 2010* (Vic) s 82; *Equal Opportunity Act 1984* (WA) ss 72-73.

would be disadvantaged were discrimination on the grounds of relationship type permitted.

It is acknowledged that religious organisations will tend to contest this proposition on the basis that relationships and marriage are essential elements of their faiths and certain codes of conduct are justified. The very minimum that can be done by legislators is, firstly, to separate out marriage and relationship status from family or carer status and responsibility leaving the latter as prohibited as a ground of discrimination for all religious and non-religious bodies, and secondly, if not eliminating the marital and relationship status exception for religious bodies, to at least discourage it as a ground for discrimination. Australia has enacted laws for equality such as same-sex marriage and therefore ought not to contradict those by actively supporting activities that result in inequality.

7.1.1 The ministerial exception

This research found the 'absence of doctrine' argument is unavailable for the ministerial exception in relation to sex-related discrimination. However, the exception is difficult to justify against the public interest. Women have had substantially equal participation in society and have not been disqualified from occupations for over 50 years with some notable exceptions relating to perceived occupational danger. Sex discrimination is prohibited across all jurisdictions in all public contexts in Australia[7] with only genuinely required exceptions. So far, no reasonable explanation has been forthcoming from the government or in the literature as to why religious denominations are entitled to exclude women from leaderships roles, while in all other areas of public life the practice is thought to be repugnant. Further, it is prohibited in all non-religious organisations, even those whose mission is based on beliefs of conscience. Ministry roles are remunerated employment positions. While Evans has argued that the ministerial exception impacts a relatively small number of people,[8] there are active

[7] *Sex Discrimination Act 1984* (Cth) s 5; *Anti-Discrimination Act 1977* (NSW) s 24; *Anti-Discrimination Act 199*2 (NT) s 19(1)(b); *Anti-Discrimination Act 1991* (Qld) s 7(a); *Equal Opportunity Act 1984* (SA) s 85ZM (ministerial ordination only); *Equal Opportunity Act 2010* (Vic) s 82; *Equal Opportunity Act 1984* (WA) ss 72-73.

[8] Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (The Federation Press, 2012) 138.

groups advocating for the ordination of women[9]and there is a growing acceptance of women as religious clergy.[10] A low level of popularity of a particular pursuit or career amongst women, or people in general, is not generally used as an argument against equal opportunity. The fact that few women may wish to be airline pilots should not exclude them from the profession and nor should it be a justification for discrimination against women.

7.2 Exceptions for individuals

Chapter 6 included an argument for exceptions for individuals to anti-discrimination laws. Discrimination or selectivity based on values, beliefs and preferences ought to be permitted in the areas of personal relationships and social activities on all grounds and in the provision of goods and services on mutable grounds where mutable grounds are maintained in anti-discrimination legislation. The latter ought to relate to situations where the work involves the expression of, or support for, a subjective and mutable ideology, belief or opinion and the undertaking of the work would compromise the religious or conscientious beliefs of the worker. The exception in s 84 of the *Equal Opportunity Act 2010* (Vic) is a good start. However rather than simply excepting individuals from all provisions of an entire Part on the grounds of religious belief it could be stated in the following terms:

An individual person does not contravene this Act when discriminating against a person

a. on any ground in relation to personal and private social activities, and
b. on the grounds of religious, political or conscientious conviction, belief or activity in work or the provision of goods and services where the provision of those goods and services will compromise the person's deeply-held religious beliefs or other beliefs of conscience.

Where mutable grounds are included in anti-discrimination laws this may be one way to facilitate both parties, in a clash of religious or other beliefs of conscience, to maintain

[9] See, eg, Women's Ordination Conference < https://www.womensordination.org/>; Women's Ordination Worldwide < http://womensordinationcampaign.org/>.

[10] Barney Zwartz, 'Anglican women clergy now part of new normal', *The Age* (online), 10 December 2012 < https://www.theage.com.au/national/victoria/anglican-women-clergy-now-part-of-new-normal-20121209-2b3gl.html>; Annette Binger, 'The Ministry of Women', *Eureka Street* (online), 31 May 2006 < https://www.eurekastreet.com.au/article/the-ministry-of-women>.

their own identities and live by their values. It supports pluralism of ideas and is based on the notion that morally policing individuals in their day-to-day lives and choices is an overreach of state authority and is unnecessary.

7.3 Mutability and Immutability

As outlined in Chapter 5, the justification for making a distinction between mutable and immutable grounds is hotly debated.[11] Much of the tension surrounds the notion that immutability infers that an attribute cannot be changed and that a requirement for such a standard should not form a test for protection from discrimination.[12] Yet this is just one aspect of immutability. It is argued that the concept is not absolute and does not require strict immutability.[13] As Marcosson states, immutability includes attributes that are produced by social construction, and includes those that are constructively immutable[14] as described in Chapter 5 based on the notion that although in a strict sense one can choose the attribute, one ought not to be expected to change it to be afforded protection in some contexts.[15]A broad interpretation of immutability says little about the nature of attributes.[16] This includes attributes that are genetically, congenitally and socially determined. The immutability and mutability distinction means there are some attributes that can in fact be expected to change. It is argued in this thesis that those attributes are concerned with choices relating to conduct, activities and lifestyles. This impacts discrimination regulation as it allows organisations to be selective on mutable grounds in order to maintain their mission, goals and values. For instance, a vegan organisation may choose to employ those who live a vegan lifestyle over those who do not without being subject to discrimination complaints. The benefit of the distinction between immutability and mutability is that it highlights the difference between such a situation and others where an individual's attributes are irrelevant to the context and either unchangeable or the change would involve significant difficulty, harm or cost. As

[11] Janet E Halley, 'Sexual Orientation and the Politics of Biology: A Critique of the Argument From Immutability' (1994) 46 *Stanford Law Review* 503-68; Sharona Hoffman, 'The Importance of Immutability in Employment Discrimination Law' (2011) 52 *William and Mary Law Review* 1483-1546; Samuel A. Marcosson, 'Constructive Immutability' 3(2) *Journal of Constitutional Law* 646-721; Jessica A. Clarke, 'Against Immutability' (2015) 125(2) *The Yale Law Journal* 2-102.
[12] Marcosson (n 11) 647.
[13] Ibid 649-50.
[14] Ibid 650.
[15] Ibid. 652.
[16] Ibid. 654.

Marcosson states ‘properly understood and argued, immutability can be of particularly great force in winning the fight for equality’.[17]

An existential relativist may claim that religious or other beliefs of conscience may include beliefs about women, sexual orientation, age, race or disability, political opinion and numerous other judgements about certain groups and that there is little distinction between beliefs about immutable characteristics and beliefs about mutable characteristics. The response to this is that although there may be uncertainty about the mutability of characteristics, if a line were not drawn for the purposes of determining what is acceptable discrimination, it would mean one of two things: either all selectivity is to be prohibited discrimination or no selectivity is to be prohibited discrimination. The goal of this thesis is not to doubt the validity of relativism but to attempt to reconcile it with a standard of human rights which has been widely accepted globally as being a source of protection from harm for humans. Discriminating on any attribute could be seen as unfair. For example, selecting an employee based on their tertiary educational qualifications is discriminatory because a great number of people do not have the opportunity for a quality education or for tertiary study. Financial or other social barriers impact their participation and therefore many people do not have an equal standing to achieve positive educational outcomes. Instead of radical equality, a line is drawn at some point where discrimination within the line is accepted and beyond it is not. This has been the principle behind the many anti-discrimination laws in Australia and globally. Where that line ought to be drawn is a matter of contention, is subjective and continues to change. It is the same kind of line drawn when determining what is and is not acceptable behaviour in society for the purposes of criminal law or other civil regulation because both are based on moral or ethical considerations. These lines are a matter of personal opinion, but in societies they take on a collective force, whether or not each individual agrees with where they are drawn.

Many will argue that in Australia the many lines drawn between right and wrong, which are based on morality, stem from our Judeo-Christian history and are therefore not only personally subjective but Judeo-Christocentric, ethnocentric and racist. Many lines drawn are anthropocentric. The point is that lines are drawn between right and wrong

[17] Ibid 649.

based on ideologies pertaining to morality. This thesis suggests a line be drawn for the purposes of making discrimination unlawful and that line be based on characteristics that people cannot change or ought not to be expected to change, along with associated situational characteristics or activities that they ought not to be expected to change for employment or in the provision of goods and services. This is not to suggest there is no truth to the proposition that ultimately no characteristic is truly mutable, but to account for a more practical and functional understanding of discrimination and how it operates under current social and economic conditions. Alternative systems are likely to prove unmanageable, will be constantly reactively changing so that lines continue to move and both individuals and organisations will struggle for clarity on whether they are acting within or outside the law. Litigation is likely to expand rather than contract. As all characteristics could be interpreted as immutable, even a propensity for crime, a complete prohibition on any forms of discrimination in pursuit of a society of radical equality is possible. Whether it would produce a functional society or an anarchical one is a salient point.

Clarke argues that the 'new immutability' which has broken down the distinction between mutable and immutable grounds for discrimination and extended prohibited grounds to include those that are seen to be changeable remains 'deeply flawed as a way of rethinking equality law.'[18] She contends that it does not address the goal of anti-discrimination law, which is to avoid systemic forms of bias.[19] Clarke suggests a new legal framework that disrupts stereotypes and superficial judgements that contribute to inequality and that this will require more empathy and understanding.[20] The details of the framework and how it would operate are unknown and legislating for empathy and understanding would present challenges. Gaze and Smith concur, suggesting that rather than increasing the number of grounds for discrimination, law-makers could ask whether laws acknowledge and respond to the reasons the problem arose in the first place.[21] This appears to be a recognition that the current program of continuously expanding the lists of grounds does not address issues of inequality effectively.

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[18] Clarke (n 11) 101.
[19] Ibid 2.
[20] Ibid 102.
[21] Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, Cambridge, UK, 2017) 225, 334.

However, it is difficult to envisage how the law will respond to the reasons for inequality, just as it is difficult for criminal law to address reasons for crime. Nevertheless, such arguments are useful in their explanation of the nature of discrimination and the need to address unfair power imbalances in society. It may be that they are the impetus for a different kind of social science discussion rather than how the law ought to regulate the manifestation of prejudicial attitudes through discriminatory conduct. While the notion is certainly a fundamental background discussion to anti-discrimination law, how the legislation would incorporate it and cover all potential power imbalances is a challenging question.

The current model is intended to serve practical purposes and it would not be expected to replace judicial review of specific contextual situations. However, the judiciary must either rely on legislative interpretation or precedent. Without some underlying principle, the lists of grounds are potentially infinite and currently include attributes that do not represent significant areas of group disadvantage in society such as lawful sexual activity, accommodation and occupation. This is not to ignore the possibility that any of these attributes may result in discrimination in certain contexts. It is argued that a prohibition on discrimination on the grounds of immutable or constructive immutable grounds is likely to capture areas of unfair discrimination due to power imbalances on a more context-specific level and is a more practical option than increasing the number of attributes. An important feature of the model is that permitted discrimination on mutable grounds is to be conditional upon a) it being necessary for the mission, goals and values of organisations and disclosed to the public or b) in respect of individuals, aligned with deeply-held religious or other beliefs of conscience. This places a limit on the permissibility of discrimination on mutable grounds, ruling out reckless or vexatious conduct.

It is argued that a more clearly defined principle underpinning the selection of the grounds for inclusion is preferred over continuing ad hoc inclusions of grounds. The inclusion of constructive immutable grounds can overcome the difficulties in areas of ambiguity. Rather than encumber legal interpreters with extensive lists of grounds, it makes little difference to prohibit discrimination on immutable and constructive immutable grounds and make discrimination possible on mutable grounds

(characteristics that are preferences, opinions, choices and lifestyles) conditional upon certain tests being met, as outlined above, which could apply to individuals and organisations in terms relevant to each context.

7.4 Applying the framework

The application of the current framework in the context of a variety of cases relating directly to discrimination on a range of grounds, on the basis of religious belief has been discussed throughout this thesis.

The following sections provide four cases that demonstrate the consistency of the current framework with judicial decisions and its practical application to freedom of thought, conscience and religion in respect of individuals and organisations. Two of the examples do not relate to discrimination on the basis of religious belief but demonstrate the consistent way in which the framework may operate across all organisations so that religious bodies are not singled out for special privilege. The first case provides an example of how non-religious organisations may discriminate on the grounds of mutable characteristics for the purposes of organisational mission, goals and values. The second demonstrates the limits to this where the discrimination is not founded upon the precepts of the organisation's mission and goals. The third case involves an interesting combination of the maintenance of organisational non-religious mission and values against an organisational claim to freedom of religion. The fourth case demonstrates the limits to individual rights to manifest religious beliefs in the scope of one's employment.

7.4.1 'Isileli "Israel" Folau v Rugby Australia Limited & Anor (Israel Folau matter)

Israel Folau is an Australian football player. Folau had a long-standing career playing both Rugby Union and Australian Rules Football.[22] In 2019 Folau was under contract to play Rugby Union for the New South Wales Waratahs in Super Rugby.[23] Folau first gained media attention in 2018 for anti-homosexual comments he made on social

[22] 'Israel Folau' *Wikipedia* (Web Page, 4 December 2019) <https://en.wikipedia.org/wiki/Israel_Folau>.
[23] Ibid.

media[24] and was warned and threatened with sanctions by Rugby Australia.[25] In 2019 his contract with Rugby Australia was terminated as a result of social media comments denouncing homosexuality and implying that God also denounces homosexual people. NSW Rugby and Rugby Australia released a statement regarding the sacking.[26] The issue sparked significant public outcry, including a vast number of media commentators who argued that the decision contravened Folau's freedom of speech and religion.[27] While many did not support his comments, they vouched for the right of individuals to express their beliefs publicly. Both politicians and corporate leaders contributed to the debate.[28] Many claimed that the termination of Mr Folau's employment contract was discrimination on the grounds of religious beliefs.[29] Public support for Folau's cause and a legal challenge was reflected in donations given to an internet funding campaign with 'Go Fund Me', which was later terminated by the website as contrary to its mission, values and policies and the money returned to all donors.[30] The Australian Christian Lobby then formed a new crowd funding campaign and claims to have raised over $2,000,000 from 20,000 people for Israel Folau's cause.[31]

The position put forward in this thesis is that all organisations may be selective and may discriminate against people on mutable grounds such as religious belief, as in the current case, when three requirements are met: a) that such selectivity supports the maintenance of identity, mission, goals and values of the organisation, b) the

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[24] the42.ie, 'Israel Folau in trouble again as he says 'God's plan' for gay people is to go to 'hell'', *the42.ie* (online), 4 April 2018 < https://www.the42.ie/israel-folau-homophobic-slur-3939395-Apr2018/>.
[25] Australian Associated Press, 'Israel Folau escapes Rugby Australia sanction after revealing he offered to quit', The Guardian (online), 17 April 2018 <https://www.theguardian.com/sport/2018/apr/17/israel-folau-would-sooner-lose-friends-family-and-rugby-than-his-religion>.
[26] NSW Rugby Media, *Rugby Australia and NSW Rugby Statement Regarding Israel Folau Legal Action* (6 June 2019) NSW Rugby Union < http://www.nswwaratahs.com.au/news/news-article/articleid/18377/rugby-australia-and-nsw-rugby-union-statement-regarding-israel-folau>.
[27] Crispin Hull, 'Israel Folau and the importance of protecting free speech' *The Canberra Times* (online) 20 April 2019 <https://www.canberratimes.com.au/story/6079801/the-importance-of-protecting-free-speech/>.
[28] Ibid.
[29] Carla Mascarenhas, 'Israel Folau, religious freedom and the implications for us all' *Port Macquarie News* (online) 12 June 2019 <https://www.portnews.com.au/story/6212003/israel-folau-religious-freedom-and-the-implications-for-us-all/>.
[30] Paige Cockburn, 'Israel Folau's campaign shut down by GoFundMe, donors to be refunded' *ABC News* (online) 24 June 2019 <https://www.abc.net.au/news/2019-06-24/israel-folau-gofundme-campaign-deleted/11240354>.
[31] Martin Iles, 'Overwhelming Support Means Folau Fundraiser Can Be Paused' (Media release, 27 June 2019) <https://www.acl.org.au/mr_nat_folau6>.

manifestation by the individual of their political conviction, opinion, belief or activity will interfere with the organisation's operations, mission, values or goals, and c) that the relevant mission, goals and values of the organisation are made clear in writing along with expectations of employees and any limits to goods and service provision based on such goals and values. It is proposed that while Mr Folau was entitled to hold and express his opinions and beliefs on social media, he is not entitled to be employed with any particular organisation, regardless of his conduct in manifestation of those beliefs. The decision to continue his employment or terminate it was a matter for the company. An inquiry into the mission and values of Rugby Australia reveals that the organisation is committed to inclusivity. The organisation's website states that 'Rugby Australia is committed to making rugby a game for all Australians and ensuring that it reflects the communities in which we live.'[32] It would be expected that both fans and players of the game may be homosexual or have friends or family members who are homosexual. Fans are customers who pay money to attend games. Sport is a community activity bringing people of all races, sexes, ages, genders and social standings together. It is therefore understandable that the organisation would want to preserve its community spirit, mission and values and select employees who will support these goals, including those at the forefront of representation of the game and the organisation. The maintenance of income from fans is also a consideration for the organisation. Whilst Rugby Australia would likely not attempt to prevent employees from holding certain beliefs, conduct in the manifestation of beliefs that is contrary to the organisation's mission, values and future sustainability would be counterproductive to it. The conduct of Israel Folau is reasonably seen to be within this range of conduct and the company is within its rights to decide to terminate his employment provided that the mission and values including expectations of employees were made known to him at the time of entering into the contract. This latter requirement is not known on the current information available.

On 31 July 2019 Mr Folau lodged a claim for injunctive and declaratory relief, compensation, interest and an apology under the *Fair Work Act 2009* (Cth) in the Federal Court of Australia for unlawful termination on the ground of religion.[33]

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[32] 'Diversity', *Rugby Australia* (Web Page) <https://australia.rugby/diversity>.

[33] 'Isileli "Israel" Folau v Rugby Australia Limited & Anor', *The Federal Court of Australia* (Online File, Matter no. MLG2486/2019, 10 October 2019)

This proposal is not an argument in favour of Rugby Australia's decision to terminate Mr Folau's contract, but an argument that Rugby Australia ought to have the *right* to terminate employees based on maintenance of its identity, mission and values when they form part of the contract with employees. As argued in Chapter 6 of this thesis, there need not be a religious justification for the company to do so and it need not be a body established for a religious purpose. The matter is one of contractual obligation. Whether freedom of religion can trump contractual obligations remains to be seen. This approach does not interfere with the ability of individuals to hold religious and other beliefs of conscience but falls short of enabling them to manifest those beliefs in ways that interfere with and undermine the mission, goals, values and reputation of their employers. The case further raises rights to freedom of speech and expression and the following example demonstrates that a similar approach can be taken in respect of these aspects of Folau's comments. Just prior to submission of this thesis the parties in the Folau matter reached a settlement, the details of which are confidential but have been the subject of speculation.[34]

7.4.2 The Roz Ward case

La Trobe University lecturer, Roz Ward, was suspended from duties in response to her Instagram post stating the following: 'Now we just need to get rid of the racist Australian flag on top of state parliament and get a red one up there and my work is done.' For the purposes of the application of the current model, this situation is readily distinguishable from the Israel Folau matter. It is unlikely that Ms Ward's political opinion regarding the Australian flag and her desire for the flag on state parliament building to be replaced with a communist one will interfere with the mission, goals and values of La Trobe University. Therefore, while the university has a right to employ those who will uphold its mission, goals and values and dispense with those who will not, it would need to show that the comment interfered with these aspects of the organisation. It appears doubtful that Ward's conduct could meet this test. In fact, diversity of political opinion is a normal and expected feature of tertiary educational

<http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/about/media/pic/folau>; Section 772 of the *Fair Work Act 2009* (Cth) prohibits termination on the ground of religion.

[34] Mike Hytner, 'Israel Folau and Rugby Australia settle unfair dismissal claim over social media post', *The Guardian* (online, 4 December 2019) < https://www.theguardian.com/sport/2019/dec/04/israel-folau-and-rugby-australia-settle-unfair-dismissal-claim-over-social-media-post>.

institutions. Balancing these other human rights to freedom of speech and expression with anti-discrimination law is achievable within the scope of the current model and the expectations for disclosure referred to by the European Court of Human Rights in *Schuth v Germany*[35] and *Obst v Germany*[36] can be applicable to freedom of speech and expression, just as they were for freedom of religion in those cases.

7.4.3 Trinity Western University v Law Society of Upper Canada

Trinity Western University, an evangelical Christian institution, operated under a code of conduct which prohibited students engaging in 'sexual intimacy that violates the sacredness of marriage between a man and a woman', even when students were away from the campus and in their private homes.[37] Students were required to adhere to the code under a 'Community Covenant Agreement'.[38] The university planned to offer a law degree and subsequently applied to the regulator of the legal profession in Ontario, The Law Society of Upper Canada (LSUC), for accreditation of the course for graduate entry into the profession. The society rejected the application on the basis of the university's mandatory Covenant. The court found that the LSUC, which was required under its statute to protect the public interest in its accreditation process, 'was entitled to conclude that equal access to the legal profession, diversity within the bar and preventing harm to LGBTQ law students were all within the scope of its duty to the public interest'.[39]

This thesis argues that bodies established for a religious purpose ought not to be entitled to the human right of freedom of religion. While they are entitled to set codes of conduct that select employees or students on mutable grounds, the sexual intimacy prohibition would appear to discriminate against people on an immutable ground of sexual orientation and is therefore questionable. A detailed analysis of the laws of Ontario are beyond the scope of this analysis. The way in which the Covenant is expressed makes it somewhat difficult to envisage how it would be implemented. However, being a matter of conduct it could come within the freedom suggested in this

[35] *Schuth v Germany* (n 5).
[36] *Obst v Germany* (n 5).
[37] *Trinity Western University v Law Society of Upper Canada* [20018] SCR 453, Headnote.
[38] Ibid.
[39] Ibid [20] (Abella, Moldaver, Karakatsanis, Wagner and Gascon JJ).

thesis, of all organisations to determine their own mission and values and to select those who will adhere to those values and carry out the mission. It certainly complies with a requirement to make the conduct expectations known to students as it is an 'agreement' to be entered into prior to enrolment in the institution.

On the proviso that the Covenant is legally permissible under anti-discrimination laws of Canada, the current model in this thesis supports the court's decision that the LSUC was also within its rights to set its own parameters in support of its own mission, values and goals. Further, it would appear a serious error to allow the educational institution to impact students with a set of values and yet to prohibit another organisation from doing the same.

7.4.4 Eweida and others v United Kingdom

A European Court of Human Rights Case, *Eweida*, was brought by four claimants, two of whom claimed relief for termination of employment. The first claimant was a marriage registrar who refused to conduct same-sex civil partnerships for a state authority. The second was a counsellor, employed by a private relationship counselling company, who refused to provide family counselling services to a same-sex couple. The basis of both claims was the claimants' beliefs that to conduct the activities was contrary to their religious convictions. The court held that the Contracting States to the European Convention on Human Rights had a wide margin of appreciation as to the way in which same-sex equality was achieved.[40] In the marriage registrar case, although the claimant did not enter into her employment contract in full relinquishment of her religious beliefs and the marriage laws changed during her employment, it was the policy of the local government agency to protect the rights of others under the Convention and her employment was justifiably terminated.[41] Similarly, the counsellor claim was rejected on similar grounds although it was noted that he entered into his employment with full awareness that the psychological services provided to the community were inclusive of all relationships including same-sex ones.[42] The outcome highlights the distinction made in this thesis between individual rights to freedom of

[40] *Eweida and others* (n 5) 109.
[41] Ibid 106.
[42] Ibid 109.

thought, conscience and religion and how organisations should be entitled to manage those rights when they have obligations to the public under anti-discrimination laws. It further reflects the suggestion in this thesis that organisations may maintain identities, missions, goals and values, may expect employees to conduct themselves accordingly, and that no religious purpose is required for organisations to do so. It demonstrates that religious exceptions are not required for organisations to maintain their identities, mission, goals and values. Both claimants were employed by organisations that in Australia would be required to provide the services to all citizens in a non-discriminatory manner. It is a matter for the organisation to decide whether they will terminate the employment of staff who refuse service to certain groups or appoint other personnel to provide the service. The latter course of action may be an effective solution to the problem. However, this would depend on how disruptive such staff allocations were to the operation and financial position of the organisation. This analysis demonstrates consistency between the current model and the judicial outcome. Where an organisation operates under an express mission including goals and values it is entitled to select employees who will cooperate with those ends in respect of their preferences, choices and lifestyles that impact the organisation and its operation. Under the proposed framework this is not seen as unjustifiable discrimination or a contravention of the human right to freedom of religion.

7.5 Consistency of the proposed framework with judicial decisions

The two European Court results above are consistent with the current model, although a different method was used to arrive at the same conclusion. The explanation provided by the court appears somewhat weak, with only brief reference to organisational policies and values and the requirement for employees to follow them. Nevertheless, this does appear to be a significant justification for the decisions.

Although limited in number, the above judicial decisions support the current framework for resolving the tension between freedom of religion and anti-discrimination in employment and the provision of goods and services at the organisational level. Similarly the framework supports the Australian decisions in *Griffin v CEO*[43] and *CYC*

[43] *Griffin v CEO* (n 3).

v Cobaw.[44] Notably, in the latter case the court held that the individual employee who refused the booking from the LGBTQ group for the camp was entitled to the s 84 protection for individuals in the *Equal Opportunity Act 2010* (VIC) which aligns with the enhanced rights of individuals proposed in this thesis. However, it is also argued that this legislative protection is too broad and regardless of protection for individuals, the organisation ought to be prohibited from discriminating on constructive immutable grounds and should be vicariously liable for the conduct of the employee.

The framework put forth in this thesis aligns with judicial decisions arrived at after much deliberation over the range of issues. This analysis has shown it adapts well to the resolution of a range of competing interests and rights. The model captures the balance between freedom of religion and other rights without a need to perform a balancing function. The underlying principles of the framework can be justified on the basis of the nature of the right to freedom of religion, equality principles and international human rights law. One of the most salient of these fundamental underlying principles is that although it is proposed that organisations do not have the human right to freedom of religion, they do not need the right in order to enforce their mission, goals and values. This is consistent with the approach of the courts to non-religious organisations. Therefore, no special treatment is needed for bodies established for a religious purpose as the same outcome is arrived at regardless of the organisation's purpose.

In terms of the permissibility of individuals to discriminate, the model supports decisions made in the cake baker cases. However, as stated above those decisions involved the recognition of bias and inconsistency with prior cases and freedom of expression in the form of a slogan. A straight refusal to bake a cake for a same-sex wedding on the basis of religious belief may yield a different result. If so, the operation of the model remains consistent as same-sex marriage is within the ground of relationship type and therefore best described as constructive immutable for reasons outlined above in 7.1.

[44] *CYC v Cobaw* (n 2).

The United States' *Hobby Lobby case*[45] offers a different perspective to the European Canadian and Australian cases. Hobby Lobby Stores Inc was permitted to withhold medical insurance for fertility and pregnancy related services that were contrary to the company owners' religious convictions. Unlike in the Victorian case, *CYC v Cobaw*[46], the company was seen to be entitled to the human right of freedom of religion notwithstanding the fact that it was not a religious body. The current model does not support the decision due to the discrimination constructively discriminating against women which is sex discrimination. It is unlikely Australian courts would make the same finding due to anti-discrimination laws, particularly those that prohibit indirect discrimination such as s5(2) of the *Sex Discrimination Act 1984* (Cth). The dominance of the fundamentalist Christian ideology in the United States is likely to be behind the decision which has been viewed as somewhat aberrant.[47]

7.6 The Ruddock Report and Religious Freedom Reforms

Whilst the 2018 Religious Freedom Review[48] enabled stakeholders to voice their beliefs and concerns about the government expanding or limiting freedom of religion, it failed to address underlying principles and concepts behind those beliefs and concerns. This thesis aimed to capture those principles and concepts and address them as interpretive constructions that are open to analysis and scrutiny. Fears and concerns were found to be unsubstantiated or unjustifiable in respect of organisational rights to uphold identities and values. Other rights, such as the permissibility of individuals to manifest their religious or other beliefs of conscience were indeed found to be under threat. The outcome is that organisations have been granted more than adequate protection in respect of religious entitlements, while there could be some enhanced freedoms for individuals.

Organisations over Individuals

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[45] *Burwell v Hobby Lobby Stores Inc*, 134 S Ct 2751.
[46] *CYC v Cobaw* (n 2).
[47] Shawn Rajanayagam and Carolyn Evans, 'Corporations and Freedom of Religion: Australia and the United States Compared' (2015) 37 *Sydney Law Review* 329–356, 355-356; Steven Walt and Micah Schwartzman, 'Morality, Ontology and Corporate Rights' (Public Law and Legal Theory Research Paper Series 2016-21), University of Virginia Law School, February 2016, 18-19.
[48] *Religious Freedom Review: Report of the Expert Panel* (Report to the Prime Minister of the Commonwealth of Australia, 2018).

The government continues to interpret freedom of thought, conscience and religion as predominantly an organisational right rather than a *human* right. According to Evans it is organisations, rather than individuals, who are playing the central role in conversations about freedom of religion.[49] Without any legislative protection for individuals to the right of freedom of religion in respect of making choices about their work and activities on the basis of beliefs, they are in a precarious position. A strict reading of anti-discrimination legislation removes all rights of individuals to make choices based on their personal preferences and religious or other beliefs of conscience in any area of life on any grounds referred to in the acts, whether they be mutable or immutable. This has been somewhat rectified in the Victorian equality legislation.[50] However, the terms are problematic and ought to be reviewed to ensure they are both broad and restrictive enough as outlined above in 7.2.

Ruddock Report Recommendations

Recommendation 1 proposes that jurisdictions review exceptions to anti-discrimination laws on immutable grounds of race, disability, pregnancy or intersex status for religious organisations.[51] Sex and sexual orientation are omitted. It seems the interpretive construction raised in Chapter 4.1.3, the tolerance of discrimination against women, remains a persistent component of religious rights in Australia along with the subordination of LGBQ rights to those of racial and disability groups. A group hierarchy is evident here with LGBQ and women being at the bottom representing an embarrassing affront to a great many Australians.

Recommendation 5 proposes permissibility of discrimination on the grounds of sexual orientation, gender identity and relationship status by religious schools in the employment of staff and contractors.[52] This includes students in Recommendation 7.[53] The discrimination must be founded in the precepts of the religion which is similar to the current model's requirement to support the maintenance of identity, mission, goals and values of the organisation. However, based on judicial decisions to date in

[49] Evans (n 8) 3.
[50] *Equal Opportunity Act 2010* (Vic) s 84.
[51] *Religious Freedom Review* (n 48) 1.
[52] Ibid 2.
[53] Ibid.

Australia, this test is unlikely to be satisfied in relation to gender identity or sexual orientation. Hence the argument herein that exceptions on these grounds are redundant. The recommendation is not unlike the existing exceptions and leaving them in the law is confusing for the community and will result in unnecessary litigation by giving religious organisations and school communities the impression that they will be permitted to discriminate on these grounds when it is likely to be obstructed by judicial review. It further places a heavy burden on those who seek justice through lengthy human rights complaint processes and court claims. In contrast to sexual orientation, relationship status could potentially be founded on religious precepts and its proposed treatment was discussed in 7.1.

Recommendations 15 and 16 address a lacuna in the Commonwealth, New South Wales and South Australian equality legislation, all of which omit religious belief or activity as a ground of discrimination.[54] It recommends that the two states include the ground with 'appropriate' exceptions for religious bodies, schools and charities. How such provisions would succeed and to what extent they would compete with contractual employment arrangements is unknown. The decision in *Eweida and others*[55] appears to suggest that terms of employment take precedence over acts based on religious beliefs, at least in the UK and Europe. However, in that case the employees refused to carry out work duties. Where religious manifestation is private, a different outcome may eventuate. For instance, in the Israel Folau case it is argued that the actions were performed in the context of his private life. On the other hand, his status as a public figure and public representative of the organisation and the fact that the nature of his work provides him with a platform for promoting his views, may cast doubt on this claim. The issue of freedom of speech is also relevant to his case.

The report made 16 recommendations, many of which are not relevant to this thesis, or make no significant changes to existing anti-discrimination laws.

In response to increasing pressure to clarify the law following the Israel Folau matter, the Australian government responded to the review by releasing a package of proposed

[54] Ibid 5.
[55] *Eweida and others* (n 5).

freedom of religion legislative reforms.[56] The reforms address recommendations in the review relating to rights to freedom of religion generally, and a few of the issues referred to in this thesis. The main priority of the Bills is to protect against discrimination on the grounds of religious belief or activity 'in key areas of public life,'[57] while the topic of this thesis is the regulation of discrimination on other grounds, *on the basis* of religious beliefs held by the discriminator. The reforms do not address discrimination on other grounds by those holding religious beliefs. While the reforms may improve the position of claimants such as Israel Folau, this is uncertain as his termination may not be seen to be discrimination on the grounds of his religious belief or activity. The issue may be his *conduct* and whether it is found to be misconduct and a breach of his employment contract. Further, it is questionable whether Folau's social media posts would be seen to constitute a solely religious activity. Freedom of speech and expression would also be raised in the case. As the dispute is now settled the law remains undetermined.

7.7 Conclusion

This chapter has outlined the conclusions of this research and offered a different perspective on how anti-discrimination can accommodate freedom of religion by a) distinguishing between mutable and immutable attributes and permitting discrimination relating to mutable attributes conditional upon a requirement for organisational mission-based need and public disclosure; b) removing exceptions for religious bodies and c) incorporating an exception for individuals if mutable grounds are to be maintained. These three steps would enable a more streamlined and practical approach that would enable individuals, religious bodies and all other organisations to maintain identities and values while preserving the prohibition of serious forms of discrimination on immutable and constructive immutable grounds.

[56] Exposure Draft - Religious Discrimination Bill 2019 (Cth), Exposure Draft - Religious Discrimination (Consequential Amendments) Bill 2019 and Exposure Draft - Human Rights Legislation Amendment (Freedom of Religion) Bill 2019.
[57] 'Religious Freedom Reforms' *Attorney General's Department* (Web Page) <https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx>.

Chapter 8 Conclusion

The development of exceptions to anti-discrimination laws demonstrated in their statutory drafting appears somewhat piecemeal and reactive to religious voices rather than carefully considered as a holistic set of rules that both support and limit freedom of thought, conscience and religion in accordance with international human rights laws and principles of the secular democratic liberal state.

The answer to the research question is that discrimination should not be permissible for religious bodies or individuals on immutable grounds or constructive immutable grounds. However, discrimination on other grounds involving preferences pertaining to activities and lifestyles ought to be generally permitted for organisations and individuals, where it is necessary for the maintenance of mission, goals and values (for organisations) or deeply-held beliefs (in the case of individuals) and notice is provided to prospective employees, students and customers of businesses. Removal of the few mutable grounds from anti-discrimination legislation will result in a situation where there is no need for most exceptions for bodies established for a religious purpose. Arguably, the only exceptions that may attract quasi-legitimate justification are on the grounds of marital and relationships status and the ministerial exception on the ground of sex. However marital and relationship status are highly associated with sex and sexual orientation discrimination which are both immutable. Further, discrimination against women and LGBTQI people in employment is not considered to be in the public interest. Further, the result of the Marriage Law Postal Survey suggests unequal treatment is inconsistent with public opinion. Should legislators decide not to remove these exceptions, the least that can be done is for the government to refrain from offering support, either legal or financial, to organisations discriminating on these grounds. A neutral stance to religion by government is preferable and is consistent with secular expectations.

The proposed elimination of exceptions for religious organisations in this thesis is consistent with the outcomes in Australian cases, *Griffin v CEO*[1] and *CYC v Cobaw*[2] but inconsistent with the rather contrary outcome of the US *Hobby Lobby* case[3]. It is argued that it will provide no lesser position for bodies formed for a religious purpose in Australia, with the exception of the permissibility of sex discrimination. This is due to the fact that courts have not upheld discrimination against individuals or groups that is not supported by religious doctrine or policy. Be that as it may, this thesis stresses the danger of making religious doctrine the determining factor for discrimination and proposes that it is an error, bound to cause future frustrations. For this reason, an elimination of religious exceptions on immutable grounds of sexual orientation, sex, disability or impairment, age, race and other constructive immutable grounds is recommended in order to prevent foreseeable tensions in an increasingly pluralist society. This should include constructive immutable grounds, many of which make up the majority of additional grounds added to anti-discrimination laws.

The suggestions in this thesis for anti-discrimination law exceptions for individuals are consistent with judicial decisions in the cake baker cases and by the ECHR in *Eweida and others v UK*. However, they are not consistent with Australia's amendments to marriage laws in respect of civil marriage celebrants as these laws do not recognise the broad scope of the freedom of thought, conscience and religion in the ICCPR, including the equal standing of religious beliefs and other beliefs of conscience.

On the presumption that mutable grounds of discrimination will remain in, and continue to be added to, anti-discrimination laws, this thesis argues for a greater range of freedoms for sole traders and small partnerships, for three reasons: a) the proportionality between the individual cost of compliance with its benefits to the community; b) it reflects human rights relating to freedom from compulsory labour and freedom of employment and c) it supports the bidirectional manifestation of beliefs, avoiding accusations of bias.

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[1] *Griffin v Catholic Education Office* [1998] AusHRC 6 (1 April 1998).
[2] *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615.
[3] *Burwell v Hobby Lobby Stores Inc*, 134 S Ct 2751.

Complaints regarding discrimination committed by individuals on the basis of their religious or other beliefs of conscience do not appear to be a matter for urgent attention in Australia and there appears no need for legislative restrictions on individuals and the manifestation of their preferences. The available options are to either set rules for, and monitor every aspect of citizens' lives, or instead, adopt the view that it is beneficial for individuals to make their own choices and that all good things will be arrived at by the power of free will rather than by force. Recalling the positions of Hobbes and Locke in reference to the role of the state in the governance of citizens, the Hobbesian approach is that individuals cannot be trusted to self-govern and must relinquish their natural rights in return for protection[4] while Locke claimed that when people are given the right information they could make good decisions and govern themselves.[5] Rather than force people to comply against their will, the focus might best be directed at information and education in order to facilitate the gaining of insight into the lives of vulnerable groups. This was a strong feature of Australian Marriage Law Postal Survey campaigns, which resulted in a positive outcome for the LGBTQI community.

The right of individuals to live in accordance with their religious beliefs and other beliefs of conscience is paramount to the human condition. The interference with this right in relation to work must compete with other human rights in the ICCPR as outlined in Chapter 6. In relation to organisations, on the other hand, the responsibility for anti-discrimination is more incumbent, both because an imposition on organisations does not compete against other rights pertaining to human freedoms, and because there are dangers in allowing discrimination at a group level.

A very recent policy paper by the Centre for Independent Studies reported on a YouGov Galaxy Poll of how Australians perceive religion and freedom of religion. The results reveal that Australians view religious freedom as an individual right to belief but are sceptical about religious organisations.[6] Although 78% of respondents thought it was

[4] Thomas Hobbes, *Leviantan* (OUP 2009) in Peter Laslett (ed), *Locke: Two Treaties of Government* (Cambridge University Press, 1988)
[5] John Locke, *Two Treatises of Government* (Cambridge University Press, first Published 1690 in Peter Laslett (ed), *Locke: Two Treaties of Government* (Cambridge University Press, 1988) 222
[6] Monica Wilke and Robert Forsyth, 'Respect and division: How Australians view religion' (Policy Paper 27, Centre for Independent Studies, December 2019) 1.

important to respect religion in a multicultural society[7], 64% of respondents believed that no religious organisation should be permitted to refuse to employ someone on religious grounds.[8] This outcome highlights the importance of identifying the nature of religion and religious freedom including what and who ought to be protected. It suggests that the distinction between individual rights and those of organisations is important to Australians and that there is a general uneasiness about organisational rights to discriminate. This thesis has addressed this important matter in the minds of many Australians. It has sought to contribute to the discussion and to suggest a regulatory response.

The proposed model is not intended to deal with every possible set of circumstances without ambiguity or challenge. It may, however, reduce litigation by shrinking the area of uncertainty to a more manageable scale. This can be the result of a more structured approach consisting of sound underlying principles rather than a reactionary, piecemeal construction of legislation that becomes unrestrained in its potential impact. The continual adding of new grounds for discrimination has been criticised[9] and it is difficult to envisage at what point the lists of grounds will be completed. They may continue to expand, making the laws cumbersome and difficult to implement, if this is not already the case. Further, such extensive lists of grounds are likely to confuse those governed by the laws, and the notion that employers and individuals will read through lengthy state and commonwealth legislation in order to understand their obligations appears unrealistic. This thesis proposes that developing some underlying principles for understanding where the line is drawn for the permissibility and prohibition of discrimination would assist those governed by laws along with those policing them. After all, there must already be some theoretical justification for the prohibition of some grounds and not others. This thesis suggests that the justification is predominantly associated with immutability and mutability, despite the ambiguities inherent in the distinction. This has been demonstrated in the explanations provided in judicial

[7] Ibid 3.
[8] Ibid 5.
[9] See, eg, Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, Cambridge, UK, 2017) 225, 334.

decisions which expand immutability to include attributes that ought not to be required to be changed.[10]

This model is not intended to be fixed over time. It does not prevent governments being responsive to community needs. Should certain forms of discrimination become increasingly prevalent or target specific groups, the government may step in to address the issue at the time. It is the role of legislators to represent members of the community and to respond to emerging trends.

Despite the criticisms of religion including of the many violent acts done in its name, religion has offered numerous benefits to individuals and societies. Religious programs have contributed to the conversion of criminals in prisons and religious doctrine is the basis for western liberal democracy which is founded upon the fundamental ethical principle known as 'The Golden Rule,' to do to others as you would have them do to you.[11] While individuals ought to have considerable freedom to live in accordance with their deeply-held beliefs of conscience including religious beliefs, Blackford notes that religious communities exercise private power over those who do not accept religious tenets and others who are uninformed about alternatives.[12] An obligation on religious bodies to abide by anti-discrimination law ought not to be seen as an infringement on freedom.[13]

Carter argues that religious freedom to act outside state laws is justifiable as historically, religious groups have offered resistance to majoritarian tyranny and authoritarian state rule.[14] However Blackford argues that other groups in the community exercise the same function such as courts, trade unions, advocacy groups, universities

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[10] See, eg, *Obergefell v Hodges* 576 US 622 (2015); 135 S Ct 2584, 2594 (2015) and *Latta v Otter* 771 F.3d 456, 464 (9th Cir 2014); *Watkins v US Army* 875 F.2d 699, 726 (9th Cir 1989).

[11] 'Matthew 7:12',*The Holy Bible* (English Standard Version, Crossway Bibles, Good News Publishers, 2016) *BibleGateway* (Web Page) <https://www.biblegateway.com/passage/?search=matthew+7%3A12&version=ESV>.

[12] Russell Blackford, *Freedom of Religion and the Secular State* (John Wiley & Sons, United Kingdom, 2012) 138.

[13] Ibid 139.

[14] Stephen L Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (Anchor, New York, 1994) 125.

and commercial enterprises and that this does not entitle them to exemptions from general laws.[15]

The primary subject of this thesis is the special entitlements permitting discrimination by religious bodies. However religious organisational privilege is not limited to discrimination. Another area highlighted recently has been the cover-up of child sex abuse and protection of perpetrators by religious denominations, particularly the Catholic Church. While other professionals and groups in society operate under mandatory reporting requirements, religious bodies appear to have been an exempted group for whom general laws do not apply or are not adequately enforced. Hence, the issue of religious privilege is moving to the forefront of human rights issues in Australia and globally.

Finally, law is but one way to manage the morality of a population. Not every perceived wrong is required to be prohibited by law. Morality is highly subjective. Law-makers ought to refrain from excessive moral interference upon the freedoms of citizens. At the same time, they ought to refrain from granting privileges to religious organisations and their members that are denied to others. All people hold values, morals and beliefs about standards of conduct. To deny individuals their private rights and freedoms while favouring certain codes of conduct associated with historically powerful organised religious denominations is inconsistent with international human rights instruments, the fundamental principles of modern liberal democracies and the rule of law.

[15] Blackford (n 12) 137.

Appendix 1 **Table 1 Religious exemptions by jurisdiction and area of activity** (Reproduced from The Religious Freedom Review[1] and updated by author* October, 2019)

Exemptions by area of activity	Religion	Political opinion, belief or conviction	Age	Race	Disability or impairment	Sex	Sexuality or Sexual orientation	Gender Identity and history	Intersex status	Relationship, marital, family or carer status or responsibility
Work General exemptions, incl genuine occupational requirements	Commonwealth NT QLD TAS	Commonwealth NT QLD	Commonwealth NT SA	~~Commonwealth*~~ ACT NSW NT	~~Commonwealth*~~ NT	Commonwealth ACT NT QLD SA TAS VIC WA	Commonwealth NT QLD SA	QLD SA TAS	SA	Commonwealth NT QLD
Work Appointment and training of priests, ministers, etc. and in the participation of religious observance	ACT NT QLD TAS VIC WA	ACT NT QLD VIC WA	ACT NSW NT QLD VIC WA	ACT NSW NT QLD VIC WA	ACT NSW NT QLD VIC WA	Commonwealth ACT NSW NT QLD SA TAS VIC WA	Commonwealth ACT NSW NT QLD SA VIC WA	Commonwealth ACT NSW QLD SA VIC WA	Commonwealth ACT	Commonwealth ACT NSW NT QLD VIC WA SA
Work Employment etc. at educational institutions	ACT NT QLD TAS VIC WA	ACT QLD WA	ACT WA	ACT WA	ACT NSW WA	Commonwealth ACT NSW QLD SA VIC WA	Commonwealth ACT NSW NT QLD SA VIC WA	Commonwealth ACT NSW QLD SA VIC WA	ACT SA	Commonwealth ACT NSW QLD SA VIC WA
Education Exemptions regarding admission as students etc.	ACT NT QLD SA TAS VIC WA	ACT WA	ACT NSW VIC	ACT VIC	ACT NSW QLD VIC	Commonwealth ACT NSW NT QLD VIC WA	Commonwealth ACT NSW WA	Commonwealth ACT NSW WA	ACT	Commonwealth ACT NSW WA
Accommodation Exemptions related to aged care, health, students, or single-sex dormitories	ACT NT QLD VIC WA	ACT NT QLD WA	ACT NT QLD VIC WA	ACT NT QLD VIC WA	ACT NT QLD VIC	Commonwealth ACT NT QLD SA VIC WA	Commonwealth ACT NT QLD SA TAS VIC WA	Commonwealth ACT QLD	ACT	Commonwealth ACT NT QLD
Access to premises Use of religious sites	NT QLD		NT QLD	NT QLD TAS		NT QLD				

[1] *Religious Freedom Review: Report of the Expert Panel* (Report to the Prime Minister of the Commonwealth of Australia, 2018) 133.

Appendix 2. Examples of immutable, mutable and constructive immutable attributes

Immutable	Mutable	Constructive Immutable
Sex	Religious belief	Relationship type (ie.
Age	Political belief	heterosexual, homosexual)
Race	Relationship status (ie. de	Pregnancy
Ethnicity	facto, married, single)	Carer status
Language	Feminist	Ethno-religion
Disability or impairment	Misogynist	Parental status
Sexual orientation	Misandrist	Breast feeding
Intersex	Vegetarian	Family responsibilities
Transgender	Vegan	
Socio-economic status	Meat-eating	
Intelligence	Creationist	
Physical features	Libertarian	
	Humanist	
	Post-humanist	
	Marxist	
	Socialist	
	Capitalist	
	Communist	
	Healthy lifestyles proponent	
	Anti-vaccination proponent	
	Anthropogenic climate change supporter	
	Anthropogenic climate change denier	
	Open borders supporter	
	Closed borders supporter	

Appendix 3 Doctrinally-based requirements for acts of discrimination in anti-discrimination and equality legislation in Australia

Jurisdiction	Act	Section	Condition
Commonwealth	*Sex Discrimination Act 1984*	37	The act or practice conforms to the doctrines, tenets and beliefs of the religion. Necessary to avoid injury to religious susceptibilities of adherents
		38	Educational institutions: Conducted in accordance with doctrines, tenets and beliefs of the religion In order to avoid injury to religious susceptibilities of adherents
	Age Discrimination Act 2004	35	Conforms to the doctrines, tenets or beliefs and is necessary to avoid injury to religious sensitivities of adherents
NSW	*Anti-Discrimination Act 1977*	56	Conforms to the doctrines, tenets or beliefs or is necessary to avoid injury to religious susceptibilities of adherents
ACT	*Discrimination Act 1991*	32	Conforms to the doctrines tenets or beliefs and is necessary to avoid injury to religious susceptibilities of adherents
		46	Educational institutions: The discrimination is intended to enable the institution to be conducted in accordance with doctrines, tenets, beliefs or teachings
NT	*Anti-Discrimination Act 1992*	37A	Educational institutions operating in accordance with religious doctrine and to avoid injury to religious sensitivities of people of the religion
		51	Acts done as part of the religious observance or practice
QLD	*Anti-Discrimination Act 1991*	109	In accordance with the doctrine of the religion and necessary to avoid offending religious sensitivities of people of the religion
		90	Accommodation: In accordance with the doctrine of the religion and necessary to avoid offending religious sensitivities of people of the religion
SA	*Equal Opportunity Act 1984*	50	In administration of a religious body or a practice, in accordance with the precepts of the religion and necessary to avoid injury to religious susceptibilities of adherents
TAS	*Anti-Discrimination Act 1998*	52	Acts carried out in accordance with the doctrine of a particular religion and necessary to avoid injury to religious sensitivities of any person of that religion
VIC	*Equal Opportunity Act 2010*	82	Conforms with the doctrines, beliefs or principles of the religion; is reasonably necessary to avoid injury to the religious sensitivities of adherents
		83	Religious schools: Anything done in the course of establishing, directing, controlling or administering the educational institution that conforms with the doctrines, beliefs or principles of the religion and is reasonably necessary to avoid injury to the religious sensitivities of adherents
WA	*Equal Opportunity Act 1984*	72	Conforms with the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents

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