The Legality of Denial of Service to Same-Sex Partners and Organisations: Developments in the United Kingdom, United States and Australia

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In recent decisions, the highest courts of the United Kingdom and the United States have considered refusals of service in the context of same-sex marriage. In the former case, this was a refusal to bake a cake containing a support same-sex marriage message. In the latter, it was a refusal to bake a cake for a same-sex wedding. This article explains these decisions, as well as an Australian Court of Appeal decision which considered similar, though not identical issues. After outlining existing anti-discrimination and free speech protection in Australia, the article considers how such conflicts would likely be resolved according to Australian law. In so doing, it includes some general reflections on the recent decisions, in the context of larger trends in how the law views homosexuality, as well as the relationship between law and religion.

Introduction

In recent years, the debate over the rights of homosexual individuals has shifted. Past laws criminalising homosexual activity are long gone.[1] Laws providing for equal access to superannuation and in succession legislation are well established. [2] Anti-discrimination legislation generally forbids discrimination on the basis of sexual orientation in the workplace, in relation to accommodation, and the provision of goods and services. A plebiscite in 2017 heralded the acceptance by a majority of Australians of the concept of same-sex marriage, leading to amendment of the *Marriage Act 1961* (Cth).[3] Many of these reforms have been mirrored around the world, particularly in Western nations.[4]

A new frontier of disagreement has, however, become apparent. This frontier involves the refusal of some business owners to provide services to same-sex couples or organisations representing or supporting same-sex individuals. Often, these refusals are based on genuinely and strongly held religious objections. These disputes have recently attracted the attention of the highest courts in the United Kingdom and the United States. This article will explain the recent decisions in those jurisdictions, summarise a somewhat equivalent precedent in Australia, and then consider the likely legal outcome if a business owner were today to refuse to provide a service to a same-sex couple. Given that the two overseas decisions involved a refusal to provide a service to a same-sex wedding, I will use that factual scenario for discussion purposes, to see how Australian law would likely resolve that conflict. This will involve consideration of anti-discrimination legislation, including exemptions involving religious freedoms, as well as constitutional arguments about freedom of speech. It will be borne in mind in this discussion that, although international legal comparative analysis is interesting and may be useful, appropriate differences in the legal framework in which these decisions are made overseas must always be borne in mind.

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[1] *Human Rights (Sexual Conduct) Act 1994* (Cth).

[2] *Same Sex Relationships (Equal Treatment in Commonwealth Laws) Act 2008* (Cth); *Family Law Amendment (Defacto Financial Matters and Other Measures Act 2008* (Cth);

[3] Section 5 definition of marriage no longer contains reference to gender.

[4] On the legalisation of same-sex marriage, see *Marriage (Same Sex Couples) Act 2013* (UK) s1; *Civil Marriage Act 2005* (Canada). In the United States, this occurred through the decision of the Supreme Court in *Obergefell v Hodges* 576 US 644 (2015), by virtue of the *Fourteenth Amendment* to the United States *Constitution*.

United Kingdom Decision in *Lee v Ashers Baking Co Ltd*

Gareth Lee was an existing customer of a bakery owned by the respondent.[5] He is homosexual. During a time when there was intense community debate about whether or not same-sex marriage should be legalised, he approached the bakery. He was aware that they offered a bespoke cake service, where customers could ask for a particular cake design. He asked them to make a cake with the words 'Support Gay Marriage'. He intended to take the cake to a community event. Mr Lee was not aware that the bakery's owners had strong religious views, and objected to gay marriage on religious grounds. They declined to make the cake ordered by Mr Lee. Mr Lee brought legal action, arguing that he had been discriminated against on the basis of sexual orientation and because of his political beliefs. All members of the United Kingdom Supreme Court rejected his argument.

The judgment of most interest here[6] was that of Baroness Hale, with whom Lord Kerr, Lord Hodge, Lady Black and Lord Mance agreed. Baroness Hale rejected an argument that Mr Lee had been discriminated against on the basis of his sexuality. The evidence was that the bakery would have refused to make the cake with the requested message, regardless of the sexual orientation of the person who requested it. This meant that they had not discriminated on the basis of sexual orientation. The court made the point that the reason for the refusal, the message, was not a proxy for sexual orientation since, as the result of various referenda and plebiscites had made clear, many heterosexual people were also in favour of same sex marriage.

The Court stated that the argument that Mr Lee had been discriminated against because of his political opinion was stronger. Support for gay marriage was clearly a political opinion. However, the Court determined that Mr Lee could not legally compel the bakery's owners to express a message with which they disagreed. This would amount to compelled speech. Baroness Hale stated that the anti-discrimination law

> Should not be read or given effect to in such a way as to compel providers of goods, facilities and services to express a message with which they disagree, unless justification is shown for doing so.[7]

This notion of 'compelled speech' was relatively new to the law of the United Kingdom. The court referred to the recent decision of the United States Supreme Court in *Masterpiece Cakeshop v Colorado Civil Rights Commission* in adopting the notion of 'compelled speech'.[8] That doctrine is well established in the American *First Amendment* law. It is now appropriate to discuss the decision in *Masterpiece Cakeshop*, upon which the United Kingdom Supreme Court relied in rendering its decision in *Ashers Baking*, and explore in some more depth the concept of 'compelled speech', and whether in fact it was implicated in the factual scenarios involved in *Ashers Baking* and *Masterpiece Cakeshop*.

United States Supreme Court Decision in *Masterpiece Cakeshop*

A same-sex couple approached the owner of a bakery, Mr Phillips, and asked him to make a cake for their upcoming wedding. Mr Phillips refused to make the cake, stating that his religious views precluded him from providing a service to a gay wedding. He indicated he would make another type of cake for the couple, but not a wedding cake. His religious views also influenced other choices he made in his business, refusing to make cakes containing alcohol, or in relation to Halloween, for example. The same sex couple brought the situation to the attention of the Colorado Civil Rights Commission.

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[5] [2020] AC 413.
[6] The other judgment was based on technical grounds of no current relevance.
[7] 439.
[8] (2018) 138 S. Ct 1719.

During public hearings of the complaint, two commissioners expressed views that might be taken to be hostile towards religion, stating that the owner of a business could not expect to bring their religious views into the commercial sphere, that religion should not be used to hurt others, and that religion had been used in the past to justify atrocities such as the Holocaust and slavery. The Commission upheld the couple's complaint. Mr Phillips appealed the Commission's decision on the basis of two aspects of the *First Amendment*, arguing that the state anti-discrimination statute infringed his freedom of religion and freedom of speech.

One barrier to the freedom of religion claim was that the United States Supreme Court had in an earlier decision determined that laws of general application that incidentally impacted religious freedoms and did not specifically target them were valid.[9] Mr Phillips sought to attack this existing precedent, but a majority of the Supreme Court upheld it.[10] This meant that Mr Phillips' argument that the state anti-discrimination law unconstitutionally interfered with the free exercise of his religion was unsuccessful – the anti-discrimination law was clearly of general application, it (arguably) incidentally impacted religious freedom, but did not specifically target it. Thus, the freedom of religion argument on that basis did not succeed. However, a majority of the Court also accepted that the state needed to be neutral towards religion. The statements made by the Commissioners during the public hearing indicated animus and hostility towards religion.[11] This was inconsistent with the *First Amendment* and the requirement for neutrality. That finding is not of particular importance to current discussion.

Of more interest was the Court's consideration of the freedom of speech argument, including Mr Phillips' claim that the application of the anti-discrimination law here meant that he was being compelled to articulate a message with which he disagreed, which was contrary to his *First Amendment* freedoms.

A majority of the Court did not accept this argument. The main reasons were delivered by Kennedy J, a judgment in which Roberts CJ, Breyer, Alito, Kagan and Gorsuch JJ joined. Kennedy J stated:

> The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech.[12]

Thus, the majority did not think that freedom of speech was implicated on the facts, because it found that the making of a cake was not expressive activity. Admittedly, there are differences between the factual scenario in *Masterpiece Cakeshop*, where the customers requested no specific message on the cake, and *Ashers Baking*, where the customer did. However, Mr Phillips had argued in *Masterpiece Cakeshop* that by the very fact of making the cake, he was being asked to communicate support for a same-sex wedding and/or a message that such unions should be supported. The majority did not agree.

On the other hand, Thomas J (with whom Gorsuch J agreed) found in favour of Mr Phillips on the free speech argument:

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[9] *Employment Division Department of Human Services of Oregon v Smith* 494 US 872 (1990).
[10] 1727 (Kennedy, a judgment in which Roberts CJ, Breyer, Alito, Kagan and Gorsuch JJ joined); Kimberley Crowley 'The Many Layers of *Masterpiece Cakeshop*' (2020) 100 *Boston University Law Review* 301, 316-319.
[11] 1731.
[12] 1723.

> Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are 'weddings' and suggest that they should be celebrated, the precise message he believes his faith forbids.[13]

First Amendment jurisprudence requires that, in cases of compelled speech, the government must demonstrate a compelling justification for its regulation. Thomas J found that there was no compelling justification for the Colorado law. As a result, he found for Mr Phillips on *First Amendment* free speech grounds.

Thus, although the United Kingdom Supreme Court in *Ashers Bakery* relied on the judgment of the United States Supreme Court in *Masterpiece Cakeshop* for its decision that 'compelled speech' was involved, in fact this was only the position of two of the justices in *Masterpiece*. The majority denied that the cake in *Masterpiece* involved expressive conduct, and actually decided on grounds that have no relevance to the situation in *Ashers Bakery*. That this is the position is borne out by the fact that subsequent case law has split as to whether the provision of a service to a wedding involves compelled speech of a kind that implicates the *First Amendment*.[14]

Australia: Christian Youth Camps Ltd v Cobaw Community Health Services Ltd

The closest equivalent Australian decision involved not cakes but camping grounds. In *Christian Youth Camps*,[15] the relevant grounds were owned and operated by the appellants, established by the Christian Brethren Trust, and connected with the Christian Brethren Church. The respondents were a support group for same-sex attracted youth. The website of the appellant advertised to the public that it was available for hire to a broad range of groups, including those with a connection to religion, and those with no connection to religion.

A representative of the respondent contacted the appellants, seeking to book one of their resorts for a weekend. A representative of the appellant asked about the nature of the respondent, and what type of activities it proposed to conduct on-site. After the respondent told the appellant about its nature, and of its view that same-sex attraction was within the natural range of human sexualities, the appellant indicated that they did not know what the Board's response would be to the request. Later, he indicated the Board would have difficulties renting the premises to the respondents, and they should look for alternative accommodation, because the appellants were a 'Christian organisation that supports young people'.

The relevant legislation, the *Equal Opportunity Act 2010* (Vic) generally prohibited discrimination in the provision of goods, services and accommodation in relation to protected 'attributes'. These attributes include sexual orientation and lawful sexual activity. Religious freedoms were partly accommodated in the exemptions in the legislation. At the relevant time, s75 applied to 'religious bodies'. It exempted things done by a religious body that (a) conformed with the doctrines of the religion, or (b) was 'necessary to avoid injury to the religious sensitivities of adherents (to) the religion. Section 77 contained an exemption where the discrimination was 'necessary for the (person discriminating) to comply with the person's genuine religious beliefs or

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[13] 1744.

[14] So, for example, in *Telescope Media Group v Lucero* 936 F. 3d 740 (Eighth Circuit, 2019) the Court found that a photographer could not be forced to provide service to a gay wedding, on the basis of free speech in the First Amendment. A similar result occurred in *Brush and Nib Studios v City of Phoenix* 448 P. 3d 890 (2019). On the other hand, other cases have found that a denial of service in such circumstances is not defensible on *First Amendment* grounds: *State v Arlene's Flowers* 389 P. 3d 543 (Washington, 2017), 441 P. 3d 1203 (Washington, 2019); *Elane Photography v Willock* 309 P. 3d 53 (New Mexico, 2013).

[15] (2014) 308 ALR 615; see Anthony Gray 'The Reconciliation of Freedom of Religion With Anti-Discrimination Rights' (2016) 42 *Monash University Law Review* 72.

principles. Cobaw argued that the appellants had breached the *Equal Opportunity Act 2010* (Vic). The appellants denied that it was engaged in unlawful discrimination, and sought to rely on the religious exemptions. Thus, an important difference between this case, on the one hand, and *Ashers Bakery* and *Masterpiece Cakeshop*, on the other, is that the Victorian case was determined purely on religious freedom grounds, while the others were determined in accordance with freedom of speech principles.

It should be borne in mind in this context that Victoria does not have a constitutionally enshrined religious freedom, in a way equivalent to the *First Amendment* of the *United States Constitution*. Article 9 of the European Convention on Human Rights protects freedom of religion to some extent.[16]

The Victorian Court of Appeal found against the appellant on both counts. The appellants argued they did not unlawfully discriminate on the basis of sexual orientation. They claimed their position was based on opposition to pre-marital sex, and to the message that it understood the proposed workshop would convey – that homosexuality was part of the natural range of human activity. They denied their position was based on discrimination against sexual orientation per se. However, the Court of Appeal found it was artificial to separate sexual orientation and sexual attraction; one was inextricably bound with the other. In effect, Cobaw was discriminated against on the basis of the sexual orientation of its members. Thus, a prima facie breach of the *Equal Opportunity Act 2010* (Vic) had occurred.

Further, the Court found that neither of the exemptions applied. The section 75 defence was not applicable, because Christian Youth Camps was not a 'body established for religious purposes. Its activities were broad, some involving outdoor type activities and others with religious connections. Its websites did not prominently indicate that it was a religious body, and there was no suggestion its facilities were reserved for religious-based events.

Even if Christian Youth Camps were a religious body, a majority of the court found that the organisation's refusal to provide the service did not conform with the doctrines of the relevant religion. Nothing in the religious texts required refusal to provide accommodation to a same-sex support group, or same-sex individuals. The court disagreed that same-sex sexual activity was against God's will, indicating many Biblical passages (such as those in Leviticus) ought not to be read literally.[17] It was necessary that the particular activity under consideration have 'an intrinsically religious character'. Refusing accommodation to a gay youth support group did not meet this standard. This was interpreted narrowly to mean that the adherent had 'no alternative' other than to comply with it. There was no evidence that religious adherence required preventing others from expressing their sexuality.[18]

Nor did the court believe that the discrimination here was *necessary* to avoid the religious sensitivities of adherents to that faith, in terms of the alternative limb of s75. There was no evidence the CYC had previously only rented its premises to married couples, or ever asked any previous renter whether any of the group seeking accommodation was homosexual. A majority of the Court found that the requirement of necessity should be applied objectively, not subjectively.[19] It was not sufficient that a particular adherent believed that she or he was required to act as they did due to their religious faith; it would be necessary for the defence to apply that the belief have an objective basis. It would need to be shown that, in order to comply with the relevant anti-discrimination law, the subject of the complaint would be required to act in a

[16] The *Charter of Rights and Responsibilities 2006* (Vic) was not in operation at the time of the factual scenario considered in *Christian Youth Camps Ltd*.
[17] 672-673 (Maxwell P).
[18] 674 (Maxwell P).
[19] Maxwell P (676); Neave JA (709); contra Redlich JA (733).

manner amounting to an affront to the reasonable expectations of adherents of that faith.[20]

Neave JA, in the majority, concluded that where religious freedom was sought to be exercised in the commercial realm, less protection would typically be accorded to it.[21] It would be more difficult in such a context for the adherent to demonstrate that discrimination in that context was necessary in order to comply with the person's genuine religious beliefs. They would be free to maintain that belief, or practice it in their own life, by living in accordance with it. Neave JA noted this distinction was similar to that pertaining in European law, where Article 9 of the European Convention protected religious belief absolutely, as well as strongly protected acts closely connected with (or, in other words, 'at the core of') religion such as worship and prayer. However, the Court had permitted more extensive interference with manifestation of religious belief that was less closely connected with religious observance.[22] She concluded it was not 'necessary' for the Christian Youth Camp to refuse to provide the accommodation to the complainant in order to comply with genuine religious beliefs. For example, the Court did not interpret Article 9 so as to permit the owners of a pharmacy to refuse to supply birth control pills to a customer due to their religious views.[23] Similarly, the United Kingdom Supreme Court had found unlawful direct discrimination where the owners of a hotel refused to provide a double bedded room to a homosexual couple.[24]

That having been acknowledged, it is worthwhile to note the dissenting views of Redlich JA, particularly regarding the manifestation of religious belief in a commercial environment. He said nothing in the legislation indicated that it was intended that manifestation of religious belief be confined narrowly to worship. It could to some extent be applied in the commercial sphere. He said it was an insufficient answer to someone's claim to manifest religious belief in a commercial environment to say that they could manifest that belief in other ways.[25] He said it was artificial and unrealistic to draw a clear distinction between a person's religious belief and the manifestation of that belief, as the majority had done. He indicated that, for persons of faith, their religious identity was often intrinsic. Practically, they could not separate their beliefs from their actions, as the majority suggested. Redlich JA believed *Christian Youth Camps* Ltd was entitled to rely on the religious exemption:

> What enlivened the applicants' obligation to refuse Cobaw the use of the facility was the disclosure of a particular proposed use of the facility for the purpose of discussing and encouraging views repugnant to the religious beliefs of the Christian Brethren. The purpose included raising community awareness as to those views. It was the facilitation of purposes antithetical to their beliefs which compelled them to refuse the facility for that purpose. To the applicants, acceptance of the booking would have made them morally complicit in the message that was to be conveyed at the forum and within the community … to knowingly provide a forum for the purpose of discussing, developing and disseminating a particular message can be seen as condoning, if not encouraging, that message.[26]

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[20] 678-679 (Maxwell P).
[21] 'Where the act claimed to be discriminatory arises out of a commercial activity, it is less likely to be regarded as an interference with the right to hold or manifest a religious belief than where the act prevents a person from manifesting their beliefs in the context of worship or other religious ceremony. This is because a person engaged in commercial activities can continue to manifest their beliefs in the religious sphere': [430](Neave JA).
[22] 710-711.
[23] *Pichon and Sajous v France* [2001] ECHR 898.
[24] [2013] UKSC 73.
[25] 741.
[26] 745.

Redlich JA concluded it was in fact 'necessary' to conform with their views that the *Christian Youth Camps* refused the request.[27]

The High Court of Australia refused leave to appeal against this decision.[28]

The article will now turn to consider how Australian anti-discrimination legislation might apply to the factual scenarios in *Ashers Baking* and *Masterpiece Cakeshop*. It is appropriate to consider them separately, because to some extent they raise separate issues. It will then consider possible freedom of speech arguments.

Outline of Relevant Provisions of Anti-Discrimination Legislation

There is a high degree of overlap in the relevant aspects of the nine relevant pieces of discrimination legislation in Australia, and some difference. Specifically, all of them prohibit, as a general rule, discrimination on the basis of sexuality or sexual orientation.[29] Some of them also prohibit discrimination on the basis of political belief or activity.[30] This general prohibition on discrimination applies in the area of goods and services, and includes refusing to provide a service to a person for the prohibited reason, or where the prohibited reason is a substantial part of the reason.[31] There is some variety in how religious exemptions from the general provisions of the legislation are framed. The position in seven of the jurisdictions is that the religious exemption only applies to bodies established for religious purposes.[32] Thus, the exemption would clearly not apply in the commercial environment of a bakery. The position in the other two jurisdictions, Victoria and Tasmania, differs.

As the *Christian Youth Camps* case made clear, in respect of Victoria, and in respect of Tasmania as well, an individual can claim a religious exemption. This applies, in the case of Victoria, where the discrimination is 'reasonably necessary for the … person to comply with the doctrines, beliefs or principles of their religion'.[33] In the case of Tasmania, the provision states it is lawful to discriminate on the ground of religious belief or activity in relation to acts (a) carried out in accordance with the doctrine of a particular religion; and (b) are necessary to avoid offending the religious sensitivities of any person of that religion.[34]

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[27] 746.
[28] Transcript of Proceedings, *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] HCA Trans 289 (Crennan, Kiefel and Bell JJ).
[29] *Sex Discrimination Act 1984* (Cth) s 5A; *Anti-Discrimination Act 1977* (NSW) s49ZG; *Equal Opportunity Act 2010* (Vic) s 6(g); *Anti-Discrimination Act 1991* (Qld) s 7(n); *Equal Opportunity Act 1984* (SA) s 29; *Equal Opportunity Act 1984* (WA) s 35O; *Anti-Discrimination Act 1998* (Tas) s 16(c); *Discrimination Act 1991* (ACT) s 7(w); *Anti-Discrimination Act 1992* (NT) s 19(c). This is replicated in those jurisdictions with specific human rights legislation: *Human Rights Act 2004* (ACT) s 8; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8; *Human Rights Act 2019* (Qld) s 15.
[30] *Equal Opportunity Act 2010* (Vic) s6(k); *Anti-Discrimination Act 1991* (Qld) s 7(j); *Equal Opportunity Act 1984* (WA) s 53; *Anti-Discrimination Act 1998* (Tas) s 16(m) and (n); *Discrimination Act 1991* (ACT) s 7(j); *Anti-Discrimination Act 1991* (NT) s 19(n). See also *Human Rights Act 2004* (ACT) s 8; *Charter of Human Rights and Responsibilities Act 2006 (Vic)* s 8; *Human Rights Act 2019* (Qld) s 15.
[31] *Sex Discrimination Act 1984* (Cth) s 22; *Anti-Discrimination Act 1977* (NSW) s 49Z; *Equal Opportunity Act 2010* (Vic) s 44; *Anti-Discrimination Act 1991* (Qld) s 46; *Equal Opportunity Act 1984* (SA) s 39; *Equal Opportunity Act 1984* (WA) s 35Y; *Anti-Discrimination Act 1998* (Tas) s 22; *Discrimination Act 1991* (ACT) s 20; *Anti-Discrimination Act 1992* (NT) s 41.
[32] *Sex Discrimination Act 1984* (Cth) s 37; *Anti-Discrimination Act 1977* (NSW) s 56; *Anti-Discrimination Act 1991* (Qld) s 109; *Equal Opportunity Act 1984* (SA) s 50; *Equal Opportunity Act 1984* (WA) s 72; *Discrimination Act 1991* (ACT) s 32; *Anti-Discrimination Act 1992* (NT) s 51.
[33] *Equal Opportunity Act 2010* (Vic) s 84.
[34] *Discrimination Act 1998* (Tas) s 52.

Application of the Law to Factual Scenarios in Ashers and Masterpiece

I will now consider application of these principles to the factual scenarios in Ashers and Masterpiece, involving refusal to provide a cake with a 'support gay marriage' message on it, and a general refusal to provide a service to a gay wedding on religious grounds.

(a) Discrimination on the Basis of Sexuality or Sexual Orientation

In relation to refusing to supply a cake with the relevant message, as discussed above, the United Kingdom Supreme Court found that the customer had not been discriminated against on the basis of his sexuality. The bakery would also have refused to provide the cake to a heterosexual person who requested a similar cake. This is similar to the comparator used in Australian discrimination law, comparing how the provider treats a person with the protected attribute, as opposed to a person without the protected attribute. The baker could argue that, regardless of the sexuality of the customer, the bakery would refuse to supply such a cake. In other words, that the customer was not being discriminated against because of his sexuality.

The United Kingdom Supreme Court also considered whether indirect discrimination was occurring. It considered whether support for same-sex marriage was a kind of proxy for homosexuality. However, given that a large number of heterosexual people clearly support same-sex marriage, it found it could not be so considered. This finding would also make it difficult for the customer to argue that the refusal to supply the cake with a message was indirect discrimination, because it impacted more significantly on a same-sex individual than someone not of that sexuality. It is possible to argue that it was more likely that a same-sex person would request a cake with such a message than would a heterosexual person, thus there is indirect discrimination in the refusal to provide anyone with such a cake. However, that argument was not successful in *Ashers*.

The discrimination seems more apparent in the refusal to supply a service to a gay wedding, as was the position in *Masterpiece Cakeshop*. Clearly, the baker would provide a wedding cake to a heterosexual couple, but not a homosexual couple. This is direct discrimination on the basis of a prohibited attribute, and would not be permitted. In this way, the case would be more similar to the factual scenario considered by the United Kingdom Supreme Court in *Preddy v Hall; Hall v Same*.[35] There the court considered hotel owners who refused to provide a double-bed room to a same-sex couple. All members of the Supreme Court found that the hotel owners were guilty of unlawful discrimination against the couple. They had used a person's sexuality as the criterion for determining whether or not services would be provided, and this was unlawful.[36] Similarly here, a baker who refuses to provide a cake for same-sex wedding, in circumstances where they would agree to provide a cake for a heterosexual wedding, is clearly applying a criterion of sexuality in determining whether or not services are provided. This is unlawful.

(b) Discrimination on the Basis of Political Belief

This would be most applicable to the situation in Ashers, where a person is asked to make a cake with a particular message. An expression of support for same-sex marriage is clearly the expression of a political belief. The United Kingdom Supreme Court accepted for the purposes of argument that there may have been discrimination on the basis of political belief when Ashers refused to provide the cake with the requested message. Thus, at least if the refusal occurred in Victoria, Queensland, Western Australia, Tasmania, Australian Capital Territory or the Northern Territory, it seems that the refused customer would be able to demonstrate they had been discriminated

[35] [2013] 1 WLR 3741.
[36] 3750 (Baroness Hale).

against on the basis of their political beliefs. This is not a ground of prohibited discrimination in the New South Wales legislation, or federally.

It is more difficult to make this argument in relation to refusal to supply a service for a gay wedding, unless it can be argued that the marriage itself amounts to reflection of a political belief, such that it can be said that a refusal to supply to it in effect amounts to discrimination on the basis of political belief. In relation to such a scenario, it would be simpler to argue discrimination on the basis of sexual orientation, since it is only same-sex individuals who are refused the service.

(c) Specific Religious Exemptions

We must deal with the two jurisdictions in which specific religious exemptions could potentially apply to a refusal by a commercial service provider to provide a service for a same-sex wedding, Victoria and Tasmania.

In Victoria, this occurs where it is reasonably necessary to comply with the doctrines, beliefs or principles of their religion. As framed today, the section clearly imposes an objective test. It is not sufficient that the person believes it is necessary to act as they did in order to comply with their religion; the section includes an objective component with the use of the word 'reasonably'.

The reasoning employed by the majority of the Victorian Court of Appeal in *Christian Youth Camps* is persuasive here. The Court found that nothing in the Christian Brethren's beliefs required them to enforce norms of behaviour on others. The beliefs reflected how an individual adherent should act, not how they should get others to act. Similarly, though some faiths may believe that gay marriage is contrary to the word of God, the argument might be this belief would preclude the adherent from being party to such a marriage. However, it would not (should not) preclude them from providing a service to such a marriage. There was nothing in religious texts that said that adherents should not provide accommodation to groups that might believe things that were anathema to the religion, according to the court in *Christian Youth Camps*. Similarly, there is nothing in religious texts to the effect that a commercial enterprise owned by someone of faith should not provide a service to an occasion of which the adherent does not personally approve. If it was not necessary to refuse to provide accommodation for same-sex attracted youth and their support group, it is hard to see how refusal to provide a cake to a gay wedding, or to make a cake with a pro-same-sex wedding message, would be necessary. On the test given in *Christian Youth Camps*, that it would have to be an 'affront' to religious adherents to comply with the anti-discrimination requirement, making a cake, with or without message, does not qualify.

As discussed above, Redlich JA, dissenting in *Christian Youth Camps*, held that this defence was applicable to the facts in the case. He determined that by forcing the organisation to provide a service to a group whose mission and values were not approved by the organisation, the organisation was in effect being made complicit in the message of the organisation. For this reason, Redlich JA determined that it was necessary to comply with their religious beliefs that the organisation through its officers refused the request. As noted above, the High Court refused leave to appeal this decision. I will consider the question of whether the forced provision of a service makes the provider 'complicit' in a message being provided, or to be provided, by the requester, in the following section. For current purposes, it can be said that there is no specific provision in the anti-discrimination provisions making it generally unlawful to refuse to provide a service because the requester has one of the protected attributes that provides an exemption in cases where the provider believes that to comply with the request would make them 'complicit' in the activities of the requester.

The Tasmanian exemption is more difficult to fit within, requiring that the person wishing to rely on it demonstrate that their actions were carried out in accordance with religious doctrine *and* were necessary to avoid offending the religious sensitivities of adherents to that religion. This phrasing, which appeared in a previous iteration of the Victorian provision, was considered in *Christian Youth Camps*, and applied narrowly. The court found that the relevant matter have an intrinsically religious character, in order to be seen as 'necessary'. It is hard to think of a wedding cake in these terms. At its very highest, the service itself might have an intrinsically religious character, at least to adherents. However, even then, one would have to acknowledging that many (perhaps most) weddings are civilian and secular, rather than religious, in character. The wedding cake, typically unveiled at a reception where the formalities of the wedding are over, surely has no 'intrinsically religious character'.

In relation to those jurisdictions with a human rights charter, specific protection for religious freedom is also narrowly constructed, applicable to freedom of thought, the right to adopt a religion, and to demonstrate it through worship, observance, practice and teaching.[37] Clearly, this would not extend to refusing someone a service in a commercial context.

In summary, none of the religious exemptions in any of the anti-discrimination would apply to the refusal to make a cake for a same-sex wedding, or refusal to provide a cake with an expression of support for same-sex marriage. In the case of seven of the nine jurisdictions in Australia, the religious exemption does not apply in the commercial sphere at all. In the case of the other two, the exemption is cast and has been interpreted narrowly, to apply to activities with high religious significance and within the core values and beliefs of particular adherents of faith. Making a wedding cake hardly qualifies. In so concluding, I mean no disrespect to those who continue to disagree with the concept of same-sex marriage. Although same sex marriage was legalised in Australia in 2017 following a strong public vote in favour of it, there remains a significant number of Australians who disagree with same-sex marriage. They are entitled to their views, and they should be respected.

(d) Freedom of Speech

There is one remaining argument that the commercial premises might make. This is the argument that was successful for the Ashers Baking Co, and which attracted the support of two justices in Masterpiece Cakeshop. This argument is that, by requiring a baker to bake a cake for a same-sex wedding, or requiring them to add the phrase 'support gay marriage' to a cake, that the anti-discrimination laws are in effect compelling the baker to speak. The argument is that this is contrary to their freedom of speech. Freedom of speech is enshrined and protected in Article 10 of the *European Convention on Human Rights* and in the *First Amendment* to the United States *Constitution*. It is accepted for current purposes that the right to freedom of speech includes the right to refrain from speaking. Baroness Hale in *Ashers* said that the anti-discrimination legislation should not be interpreted 'so as to compel providers of goods, facilities and services to express a message with which they disagree, unless justification is shown for doing so'.[38] She concluded that 'no justification has been shown for the compelled speech which would be entailed for imposing civil liability for refusing to fulfil the order'.[39] Could an Australian baker argue that, by requiring them to supply a cake for a same-sex wedding or to supply a cake with a 'support same-sex marriage' message, that the law would in effect be compelling them to utter a message with which they disagreed? Redlich JA (dissenting) in *Christian Youth Camps* seemed to accept such an argument, concluding that 'to the applicants, acceptance of the

[37] *Human Rights Act 2004* (ACT) s 14; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14; *Human Rights Act 2019 (Qld)* s 20.
[38] [2020] AC 413, 439.
[39] [2020] AC 413, 441.

booking would have made them morally complicit in the message that was to be conveyed at the forum and within the community'.[40] Are these views correct?

Prior to answering that question, a quick summary of the extent of free speech protection in Australia is in order. Australia generally followed the common law tradition in terms of rights protection. This meant that rights existed, to the extent they were not abrogated by statute.[41] Statutes would be interpreted so as not to interfere with fundamental human rights, or to interfere with them to the most limited extent, in cases of ambiguity.[42] However, in 1992 the High Court of Australia found that Australia's *Constitution* contained an implied freedom of political communication, arising from Australia's status as a representative democracy.[43] It found that inherent in our system of representative government, individuals needed access to a range of views about political matters – to share and hear opinions, with minimal governmental interference. In the past 30 years, some of the contours of the freedom have been established. Relevantly for current purposes, the freedom is a negative freedom, in that laws that inhibit the freedom may be struck down on the basis of the implied freedom,[44] or their operation circumscribed so that they do not impact the freedom.[45]

So far, there has not been a case involving the implied freedom that has involved compelled speech of the kind arguably at issue in the present situation. Thus, this is a novel argument. However, a baker for current purposes might argue that, if the anti-discrimination legislation were applied to in effect force them to articulate a message with which they disagreed, the law would breach their implied freedom about political matters. It is accepted for current argument that the question of same-sex marriage remains 'political', as that term has been broadly defined in the case law.

A majority of the High Court applies a three-stage test in relation to cases involving the implied freedom of political communication.[46] Firstly, it considers whether the law burdens a person's freedom of political communication. Secondly, it considers whether the law is passed for a purpose that is compatible with representative and responsible government. Thirdly, it considers proportionality – whether the law is *suitable* to achievement of a legitimate objective, *necessary* in order to attain it, being minimally invasive of human rights, and *adequate in its balance*.[47] I will now apply this three-stage test in relation to a law which might require a baker to supply a wedding cake, with or without message.

In my opinion, the challenge falls at the first hurdle. Such a law does not burden the baker's freedom of political communication. In essence, this is because, a simple

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[40] 745.
[41] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (all members of the Court).
[42] *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ Brennan Gaudron and McHugh JJ); *R v Secretary of State for the Home Department; Ex Parte Simms* [2000] 2 AC 115, 131-132 (Lord Hoffmann).
[43] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Ltd v Wills* (1992) 177 CLR 1.
[44] Eg *Brown v Tasmania* (2017) 261 CLR 328.
[45] Eg *Coleman v Power* (2004) 220 CLR 1, 77 (Gummow and Hayne JJ)(statutory provision read down so as only to apply where impugned behaviour likely to lead to a breach of the peace).
[46] *McCloy v New South Wales* (2015) 257 CLR 178, 195 (French CJ Kiefel Bell and Keane JJ).
[47] *McCloy v New South Wales* (2015) 257 CLR 178, 194-195 (French CJ Kiefel Bell and Keane JJ). The joint reasons clarified there that a law would be suitable if it had a rational connection to the purpose of the provision, necessary where there was no obvious and compelling alternative, reasonably practicable of achieving the purpose that had a less invasive impact on the freedom. The question of adequacy of balance was a value judgment, where the court considered the balance between the importance of the objective of the relevant provision, compared with the extent to which it impacted the implied freedom (195).

wedding cake does not contain any communication at all. This was the position taken by a majority of the Supreme Court of the United States in *Masterpiece Cakeshop*.[48]

Regarding the request to make the cake with message of support for same-sex marriage, the issue is who is communicating the message. With respect, the United Kingdom Supreme Court was wrong in *Ashers*, and Thomas and Gorsuch JJ were wrong in *Masterpiece Cakeshop*, to conclude that this was an instance of compelled speech. The speech is not that of the baker. The speech is that of the customer.

A number of examples might assist to make this point. Consider a customer who asks a baker to bake a specific cake for an upcoming birthday. The customer asks them to write 'Happy Birthday Alex' on the cake. The baker does so. Of course, when Alex sees the cake, she or he realises that the sentiment expressed on the cake is that of their family or friends who ordered the cake. It is not a personal message from the baker.

Similarly, I might purchase a card for a special occasion. When I send my parents a card that contains the pre-printed message 'Happy Anniversary', they know that the message is mine. It comes from me. I have simply used a business as a conduit to express my message.

The examples could be multiplied, but enough have perhaps been given to demonstrate the simple point that when a customer requests that a purchased product contain a particular message, the most reasonable interpretation to place upon the message is that it conveys the sentiment of the customers. It says nothing about the private or personal views of the person who happened to make the product. For similar reasons, the rights to freedom of expression contained in the existing sub-national human rights legislation in Australia[49] would not be implicated at all if the law were applied to effectively require a bakery to provide these requested services.

Thus, with great respect it is not correct to conclude, as the United Kingdom Supreme Court did in *Ashers*, that the bakers were being 'compelled to speak'. They were not. Nor was the baker who was asked to make the cake for the same-sex marriage. They were asked to provide a product. They were not asked to express *personal* support for gay marriage, or to state that they *personally* believed the event was worth celebrating. On a practical level, it is likely the guests would be unaware of whom had made the cake. This makes it untenable to argue the existence of the cake, or any message on it, reflected the personal views of the maker. Further, if these businesses would like to in fact communicate their views about political issues like same-sex marriage, they are of course free to do so on their websites, in their packaging, or in store.[50] What the law precludes them from doing is refusing service. This law leaves their ability to communicate their actual views entirely unconstrained.

I am fortified in reaching this conclusion by a consideration of the United States case law that has elaborated at some length on what is meant by 'compelled speech'. Of course, care must always be taken when referring to the case law from another jurisdiction. The Australian implied freedom is narrower than the *First Amendment* freedom. That said, examples of occasions when the United States Supreme Court have

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[48] (2018) 138 S. Ct. 1719, 1723: 'the free speech aspect of this case is difficult for few persons who have seen a beautiful wedding cake might have thought of the creation as an exercise of protected speech' (Kennedy J, with whom Roberts CJ, Breyer, Alito, Kagan and Gorsuch JJ joined).

[49] *Human Rights Act 2004* (ACT) s 16; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15; *Human Rights Act 2019* (Qld) s 21.

[50] This formed part of the United Kingdom Supreme Court's reasoning in *Preddy v Hall; Hall v Same* [2013] 1 WLR 3741. In denying that the hotel owners' religious freedoms should permit them to refuse service to a gay couple, Baroness Hale noted the owners were free to manifest their religion in other ways (3752).

found that speech is being compelled have included where students were required to sing the national anthem,[51] where parade organisers were required to include a particular float,[52] and where the owner of a vehicle was required to carry number plates with a particular government message.[53] Just as importantly, example where the Supreme Court has found that speech is not being compelled have included where a mall owner was required to permit students to distribute flyers within a shopping mall,[54] where law schools were required to permit military recruiters to attend recruitment events,[55] and where cable television operators were required to carry particular broadcasts.[56] Relevant to determining which side of the lines these cases fall is whether an ordinary observer would interpret the speech to be the person or organisation claiming to be compelled to speak, or would realise they were (merely) conveying the speech of another. Here, the case of the bakery is surely in the latter category.[57]

If I am wrong on this point, and the making of a cake for a same-sex wedding, or the inscription on a cake of a message supporting same-sex marriage is in fact a communication by the baker, it is readily accepted that compelling them to speak against their will would infringe their implied freedom to communicate. As indicated, this has not been specifically determined yet in Australian law, but compelled speech in other jurisdictions has been held to infringe free speech rights.

It would then need to be considered whether the relevant laws, here the anti-discrimination legislation, was passed for a legitimate reason compatible with representative government. Clearly, it is a laudable objective to seek to have individuals treated equally, and to avoid discrimination on irrelevant grounds. These laws have a legitimate objective.

We would then consider proportionality testing. These laws are considered to be suitable towards achieving a legitimate objective. It is *suitable* to a goal of achieving equality that individuals and businesses refrain from discriminating on irrelevant grounds. The ends and means are rationally connected. They are also considered *necessary* – if laws did not prohibit discrimination on irrelevant grounds, some businesses and individuals would continue to act in this manner. There is no other practical way to achieve this purpose other than to prohibit the discrimination.

Finally, arguably they are *adequate in their balance* – the courts typically provide some kind of margin of appreciation for legislatures here. The legislature has sought to weigh up a range of different considerations, including the importance of equality and non-discrimination, while providing some exemptions including in the religious area. However, the legislation generally has recognised a distinction between religious organisations, who are given broader scope to discriminate, and non-religious organisations, which might be owned by those of religious faith. The court might conclude that, in attempting to craft some religious exemptions but in generally requiring a business operating in a commercial environment to avoid discriminating in relation to serving customers, the law has struck a reasonable balance between, on the one hand, the dignitary harm that would be caused to a would-be customer by being

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[51] *West Virginia State Board of Education v Barnette* 319 US 624 (1943).
[52] *Hurley v Irish American Gay* 515 US 557 (1995).
[53] *Wooley v Maynard* 430 US 705 (1977).
[54] *Pruneyard Shopping Centre v Robins* 447 US 74 (1980).
[55] *Rumsfeld v Forum for Academic and Institutional Rights Inc* 547 US 47 (2006).
[56] *Turner Broadcasting System v FEC* 512 US 622 (1994).
[57] See similarly Robert Wintemute 'Message-Printing Businesses, Non-Discrimination and Free Expression: Northern Ireland's "Support Gay Marriage" Cake Case' (2015) 26(3) *King's Law Journal* 348, 353; Mark Strasser 'Masterpiece of Misdirection' (2019) 76 *Washington and Lee Law Review* 963, 1002; Rene Reyes '*Masterpiece Cakeshop* and *Ashers Baking Company*: A Comparative Analysis of Constitutional Confections' (2020) 16 *Stanford Journal of Civil Rights and Civil Liberties* 113, 132.

refused service on this basis and, on the other, the genuinely-held religious freedoms and views of a business person.

Somewhat similar issues would be ventilated if the matter were brought under any of the existing sub-national human rights instruments. All acknowledge that human rights are not absolute, and reasonable limits are acceptable. Relevant factors will include the nature of the right impacted, the importance of the purpose of the limit, the nature and extent of the limit, the relationship between the limit and its purpose, and whether means less restrictive of human rights are available in order to meet the legitimate objective of the legislation.[58]

Final Reflections

1. Coherence in the Law

Interesting insights may be gained when comparing the decision reached in *Ashers Baking* with larger developments in this area of the law. As noted at the beginning, there have been monumental developments in the law applicable to homosexuality.[59] Advances in Australian law were noted at the commencement of the article. These have mirrored advances in the United Kingdom law, including the decriminalisation of homosexual activity,[60] and legislative implementation of gay marriage,[61] together with evident concern with equality and avoidance of discrimination on irrelevant grounds, as reflected in equality legislation.[62] This legislation does not specifically exempt a person with religious views from general non-discrimination requirements in relation to the provision of services. These indications of parliamentary intent are particularly important in a jurisdiction such as the United Kingdom, which recognises a parliamentary sovereignty model of government. This was noted by Baroness Hale in her leading judgment in *Preddy v Hall; Hall v Same*:

> Now that, at long last, same sex couples can enter into a mutual commitment (she was speaking of a civil commitment because at the relevant time the United Kingdom had not legislated to permit same-sex marriage, which it now has) … the suppliers of goods, facilities and services should treat them in the same way.[63]

She concluded that the law 'should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their rights to manifest their religion'.[64]

In this statutory context of greater acceptance of homosexual individuals, acceptance of homosexual relationships and real moves towards equality of individuals, reflected in rule of law ideals, the decision in *Ashers Baking Co* sets a jarring note. There is an unfortunate irony in respect of judgments of Baroness Hale, with respect. On the one hand, her judgment in *Preddy* rightly notes the change in the law towards full acceptance of same-sex individuals and same-sex marriage, and that service providers were now required to treat such individuals in exactly the same way as they would treat others. However, then in *Ashers* Baking Co, her judgment effectively gives the green

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[58] *Human Rights Act 2004* (ACT) s 28; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2); *Human Rights Act 2019* (Qld) s 13.

[59] Baroness Hale noted that homosexuals 'were long denied the possibility of fulfilling themselves through relationships with others. This was an affront to their dignity as human beings which our law has now … recognised': *Preddy v Hall; Hall v Same* [2013] 1 WLR 3741, 3756.

[60] *Buggery Act 1533* (Eng); Lord Wolfenden *Report of the Departmental Committee on Homosexual Offences and Prostitution* (1957)(leading to decriminalisation in 1967)

[61] *Marriage (Same Sex Couples) Act 2013* (UK) s 1.

[62] *Equality Act 2006* (UK); *Equality Act 2010* (UK).

[63] 3752..

[64] 3756.

light to refusals to provide a particular service, because it might indicate support of same-sex marriage.

The judgment in *Ashers* surely undermines, at the very least, parliament's efforts to legalise same-sex marriage and to legitimize same-sex relationships to permit business owners to effectively refuse service to those who wish to express support for such relationships, or to express that such individuals should be entitled to marry. It is not known whether the United Kingdom Supreme Court would also permit a baker to refuse to bake a cake for a same-sex marriage because it was such a marriage, though its references to *Masterpiece Cakeshop* suggest that it may well do so. On the other hand, the judgments in *Preddy v Hall* suggest the Court might view this as discrimination on the basis of sexual orientation. Pun intended, one cannot have one's cake and eat it too. Frankly, we get into a difficult position when those of religious faith seek, in effect, dispensation from generally applicable rules. In so saying, of course those with religious beliefs are entitled to respect for themselves and their views.

However, religious views per se cannot legitimise disregard for the law of the land.[65] If religiously minded individuals wish for the law to change so that they effectively have the right to refuse service in a commercial realm based on their religious views, they are perfectly entitled to do so. However, unless and until this occurs, individuals should not be encouraged to ignore generally applicable legal principles based on their religious views. Frankly, a nation governed by the rule of law cannot tolerate such behaviour. As Laws LJ noted in *McFarlane v Relate Avon Ltd*:

> The Judaeo-Christian tradition, stretching over many centuries, has … exerted a profound influence upon the judgment of lawmakers as to the objective merits of this or that social policy. And the liturgy and practice of the established Church are to some extent prescribed by law. But the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled. It imposes compulsory law, not to advance the general good on objective grounds, but to give effect to … subjective opinion … the promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. It is irrational … (and) divisive, capricious and arbitrary. We do not live in a society where all the people share uniform religious beliefs. The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens, and our constitution would be on the way to a theocracy, which is of necessity autocratic.[66]

This mirrors the position of the Australian High Court[67] and of the Supreme Court of the United States that laws of general application apply to those with religious views that might suggest to the contrary of what the law requires.[68]

2. Relation Between Religion and the Law

The relation between religion and the law has a long and deep history. Obviously, at one time the church had its own courts. Monarchs sometimes denied that the ordinary law applied to them. The supremacy of the parliament over the monarch, the putative head of the state church, was established in 1688. Since that time, the influence of

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[65] *Preddy v Hall; Hall v Same* [2013] 1 WLR 3741, 3752: 'We do not normally allow people to behave in a way which the law prohibits merely because they disagree with the law. But to allow discrimination against persons of homosexual orientation … because of a belief, however sincerely held, and however based on the biblical text, would be to do just that' (Baroness Hale).
[66] [2010] EWCA Civ 880, [23]-[24].
[67] *Church of the New Faith v Commissioner of Payroll Tax* (Vic)(1983) 154 CLR 120, 136: 'religious conviction is not a solvent of legal obligation' (Mason ACJ and Brennan J).
[68] *Employment Division Department of Human Services of Oregon v Smith* 494 US 872 (1990).

religion over the law has waned, though clearly many of the legal doctrines we currently enforce have some kind of religious basis.

There continue to be scholars who lament the increasing incursion of the state into fields previously occupied by religion. Julian Rivers is one of these, lamenting that the 'rational rejection' of religion in the legal space is almost complete:

> The effect is to turn religion into another hobby. One can devote one's spare time, energy and money to it; one can meet with other like-minded people, set up clubs and societies, network, produce literature, employ people, buy property, try to persuade others how wonderful it is, introduce one's children to it, run holiday camps promoting it, and the law will even treat all this activity as publicly beneficial. One can be very religious, if one feels like it. But the law need make no space for the idea that there might actually be a God, who might really be calling people into relationship with himself, who might make real demands on his worshippers. Religion thus acquires all the moral weight of stamp-collecting or train-spotting.[69]

Respectfully, it is not correct to state that the law 'need make no space for the idea that there might actually be a God'. In each of the jurisdictions studied, the importance of religion is recognised in legal instruments. It is recognised in Article 9 of the *European Convention on Human Rights*, the *First Amendment* to the United States *Constitution*, and in the express human rights instruments of two states and a territory in Australia. The law has made space for the idea there might actually be a God.

On the other hand, the law has also made space for other ideas – the idea that individuals should be treated with dignity and respect, and should not be subjected to discrimination on arbitrary grounds. This idea also has deep roots in our legal system, reflecting the rule of law. Legislatures in the United Kingdom and Australia have had to make difficult decisions as to the reconciliation between these various important rights, in recognition of the fact that they sometimes clash. In the United States, courts have had more responsibility in making these decisions. Difficult choices have to be made by decision makers in this space, and lines drawn. Parliaments, human rights instruments drafters and courts have drawn a distinction between religious belief, which is absolute and inviolate, and the manifestation of that belief through conduct, which is limited, partly because it may implicate others. And, as established by the Glorious Revolution, the law of parliament prevails, and should prevail, over religious belief and authority. Professor Rivers may not like where some legislatures and courts have drawn the lines. He and others may complain that it is impossible to separate belief from conduct.[70] However, it is not accurate to assert that religion has become a hobby or the equivalent of stamp collecting. No hobby enjoys express protection in the above-named human rights instruments. If Professor Rivers, or others, believe that the decision makers have not drawn the lines in the correct place, they are of course free to lobby them to alter the rules, by creating more exemptions from generally applicable laws in favour of religious interests. But the primary right of the legislature to make such difficult decisions cannot be gainsaid.

As the law stands, as discussed above it generally requires those who enter into the commercial realm to serve customers on a non-discriminatory, non-judgmental basis. This position has been arrived at through legislative and constitutional reform. It is

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[69] Julian Rivers 'The Secularisation of the British Constitution' (2012) 14 *Ecclesiastical Law Journal* 371, 398.

[70] Benjamin Berger 'The Limits of Belief: Freedom of Religion, Secularism and the Liberal State' (2002) 7(1) *Canadian Journal of Law and Society* 39, 47; Shelley Wessels 'The Collision of Religious Exercise and Government Non-discrimination Policies' (1989) 41 *Stanford Law Review* 1201, 1208; Gabriel Moens 'The Action-Belief Dichotomy and Freedom of Religion' (1989) 12 *Sydney Law Review* 195, 215; Marci Hamilton 'The Belief/Conduct Paradigm in the Supreme Court's Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct' (1993) 54 *Ohio State Law Journal* 713.

thought that these changes generally reflect societal values about such issues. This difficult compromise should be respected by those who wish to offer commercial services to the public. They are not free to choose which laws to obey or not obey according to their conscience. In our system of government, law passed by parliament overrides any strongly and genuinely held personal views, whether animated by religion or otherwise. And this is how it should be.

Conclusion

This article has used the factual scenarios involved in recent decisions of the highest courts in the United Kingdom and the United States, to determine how they would likely be determined in Australian law. It was determined that a refusal to provide a wedding cake for a same-sex wedding in any jurisdiction in Australia would amount to unlawful discrimination on the basis of sexual orientation. It was determined that refusal to provide a message on a cake to which the baker objected would amount to unlawful discrimination on the basis of political belief, in all jurisdictions other than New South Wales, which does not make this a prohibited ground of discrimination. This makes the situation in that state of a refusal to provide such a message on the basis of religious belief somewhat uncertain. That state's parliament may wish to consider amendment to its discrimination legislation to protect political belief.

In most states, religious exemptions in discrimination legislation do not apply to the commercial environment, so they would not be applicable to the present scenarios. Victoria and Tasmania do have such protections, but it would be very difficult for the business to successfully argue that refusing to provide a service to a same-sex marriage was in accordance with religion doctrine and/or necessary to meet the religious sensibilities of adherents, given how those requirements were interpreted by the Victorian Court of Appeal in *Christian Youth Camps*.

The final argument for the service provider would be that to compel them to provide the cake for a same-sex wedding or to write a message supportive of same-sex marriage would be to infringe their freedom of speech. However, it is unlikely that any message on a cake would reasonably be taken to be the speech of the baker, and the mere fact of supplying a cake probably does not contain expressive content. Even if it were accepted that expression was involved, freedom of speech is not an absolute freedom, and limits are acceptable if pursuant to a legitimate objective, and suitable, necessary and adequate in their balance. There is good reason to think that the limited extent to which such anti-discrimination laws would impose on freedom of speech in such a case would meet these requirements.

This article thus respectfully reaches a different conclusion to the United Kingdom Supreme Court in *Ashers*, and of two of the justices in the United States Supreme Court in *Masterpiece Bakery*. All of the jurisdictions studied have come a long way in relation to homosexuality, removing past laws criminalising homosexual acts, progressively removing discrimination, and recognising the validity of same-sex marriage. These developments risk being undermined if commercial businesses are able to refuse service to such marriages, or expressions of support for them. Coherence in the law suggests that the law has taken a wrong turn with parts of these recent decisions, which Australian courts should not follow, and which future United Kingdom and United States decisions should correct. The law has sought to reach an accommodation between two important rights, anti-discrimination norms and religious freedoms. Those in the commercial space must respect this accommodation, even though they might privately disagree with it.

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