

CASE NOTE

**CHRISTIAN YOUTH CAMPS LTD V COBAW
COMMUNITY HEALTH SERVICES LTD***

**BALANCING RELIGIOUS FREEDOM
AND ANTI-DISCRIMINATION:
CHRISTIAN YOUTH CAMPS LTD V COBAW
COMMUNITY HEALTH SERVICES LTD**

BOBBI MURPHY[†]

*Courts in Australia are rarely called on to discuss the tension between free exercise of religion and rights arising under the general law. When free exercise of religion entails discrimination against protected individuals, however, the competing concepts of liberty and equality are fiercely contested. Victorian anti-discrimination legislation was recently tested in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*, where a Christian camp was successfully sued for refusing to accommodate a group of same-sex attracted youths. The Victorian Court of Appeal's interpretation of the Equal Opportunity Act 1995 (Vic) was broad and protective of the Act's purposes, and represents an encouraging step in anti-discrimination jurisprudence. However, the decision also highlights gaps in legislative protection for similarly-situated individuals, and leaves some conceptual issues unresolved and open to future challenge.*

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* *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615.

[†] BA, JD (Melb); Solicitor, King & Wood Mallesons. I am grateful for the comments of Beth Gaze, and the feedback of the two anonymous referees on an earlier draft of this case note. Any errors that remain are my own.

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I INTRODUCTION

Courts in Australia are rarely called on to discuss the tension between free exercise of religion and rights arising under the general law.¹ However, the concept of religious freedom in Australia is fiercely contested 'in the extent to

¹ See Neil Foster, 'Law and Religion in the Victorian Court of Appeal' (2014) 88 *Australian Law Journal* 860, 860.

which it is lawful for religious groups to discriminate' through the operation of carve-outs to anti-discrimination legislation.²

The scope of religious exemptions to Victorian anti-discrimination legislation was recently tested in *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* ('Cobaw').³ Cobaw Community Health Services successfully sued Christian Youth Camps ('CYC') for unlawful discrimination on the basis of sexual orientation, as CYC was unable to bring its conduct within the religious exemptions.

Cobaw was a landmark case. It was the first time that the Victorian Supreme Court considered the religious exemptions in the *Equal Opportunity Act 1995* (Vic) ('EOA 1995'), and the majority's approach represents a significant departure from the narrow, technical approach other courts have often taken to discrimination law.⁴ While on the High Court, Kirby J repeatedly lamented the Court's focus on the 'technical' language of statutes to the detriment of claimants seeking relief.⁵ In the 2006 case of *New South Wales v Amery*, his Honour noted that in the past decade, no party claiming relief under any anti-discrimination legislation had succeeded.⁶ Far from these failures being pre-ordained, Kirby J appeared to view them as the result of a narrowing of the Court's approach to anti-discrimination legislation.⁷

Part II of this case note briefly outlines the liberty–equality debate, and its embodiment in the *EOA 1995* and the *Equal Opportunity Act 2010* (Vic) ('EOA 2010'). In a democratic and plural society where value conflicts are inevitable, Sandra Fredman's multi-dimensional approach to equality provides a useful tool for their resolution. Part III will therefore consider the operation of the exemptions in *Cobaw* by reference to her model. It will focus on key elements of the Court of Appeal's approach, many of which appropriately reinforce the protective function of the *EOA 1995*.

² 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.

³ (2014) 308 ALR 615.

⁴ See Neil Rees, Simon Rice and Dominique Allen (eds), *Australian Anti-Discrimination Law* (Federation Press, 2nd ed, 2014) 35.

⁵ See especially *IW v City of Perth* (1997) 191 CLR 1, 52.

⁶ (2006) 230 CLR 174, 200 [88].

⁷ *Ibid* 200–1 [87]–[89].

Part IV will consider how legislative changes to the *EOA 2010* may affect the position in *Cobaw*, and highlight some relevant considerations for possible future reform. This case note argues that the 2010 reforms do not go far enough to achieve the Act's objective of eliminating discrimination 'to the greatest possible extent',⁸ but a deeper and more significant problem is the complaint-based model on which the Act is premised.

II LIBERTY AND EQUALITY THROUGH THE PRISM OF RELIGIOUS EXEMPTIONS

A *Liberty and Equality*

At the heart of the balancing act between the right to freedom of religion and the right to be free from discrimination is a tension between liberty and equality, two of the values underpinning most democratic and pluralist societies. Both are considered fundamental rights, deserving of legislative protection. In many cases, they are also mutually reinforcing. For example, Ronald Dworkin argues that equality of resources 'can only be achieved if each individual is not only free to make choices but must also take responsibility for those choices based on the cost of their decisions to other people.'⁹

However, as the focus of anti-discrimination law shifts from access and distribution to self-identity, these two values more frequently come into conflict.¹⁰ The legislation itself enshrines this sense of opposition. It requires both sides to argue that their interest in protection or liberty respectively should be given the greater weight. An example outside of the present case is freedom of speech and racial vilification laws. In legislating against acts that are likely to 'offend, insult, humiliate or intimidate',¹¹ but providing for public interest-based exemptions,¹² Australian law seeks to sustain a balance between

⁸ *EOA 2010* s 3(a).

⁹ Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 34, quoting Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000) 122.

¹⁰ See generally Joel Harrison and Patrick Parkinson, 'Freedom beyond the Commons: Managing the Tension between Faith and Equality in a Multicultural Society' (2014) 40 *Monash University Law Review* 413, 414.

¹¹ *Racial Discrimination Act 1975* (Cth) s 18C.

¹² *Ibid* s 18D.

robust public debate, and the need to protect marginalised or disadvantaged groups from hate speech.¹³

Religious exemptions to anti-discrimination legislation also exist at the intersection between these two competing values. On the one hand, they affirm the importance of the right to religious liberty, which is protected by numerous domestic and international legal instruments.¹⁴ We acknowledge that particular groups need to affirm and express their identity collectively, and sometimes this involves the right to exclude. For example, it might seem acceptable for an Indigenous group to protect its cultural identity and beliefs by excluding non-Indigenous people. A similar argument can be made for religious groups.

On the other hand, religious exemptions to anti-discrimination legislation seem to push the values of liberty and equality into conflict. As Altman notes, 'claims of religious liberty are frequently made by persons who wish to engage in activities that appear to amount to discrimination.'¹⁵ It is the unenviable task of governments and the law to maintain a balance by 'restricting ... liberty for the sake of upholding, perhaps even promoting, equality'.¹⁶

This tension between religious ethics and an increasing commitment to enshrining the value of equality in the law has resulted in a series of exceptions for religious bodies. In the case of the *EOA 1995*, as in other legislation, the terms of the religious exemptions represent the balance that has been struck by the legislature between these two important rights.

B *The 'Asymmetry Thesis': Are Religious Exemptions to Anti-Discrimination Law Justifiable?*

Sandra Fredman's concept of multidimensional equality, discussed in Part III, is particularly useful in determining how these conflicts should be resolved. But the very idea of balancing — and thus implicitly limiting — an individu-

¹³ *Eatock v Bolt* (2011) 197 FCR 261, 311 [210] (Bromberg J).

¹⁴ See, eg, *Racial and Religious Tolerance Act 2001* (Vic) s 8; *Anti-Discrimination Act 1991* (Qld) s 124A(1); *Anti-Discrimination Act 1998* (Tas) s 19(d); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2(1), 18. The Commonwealth, New South Wales and South Australia are notable exceptions, as they do not have such explicit legislative protections.

¹⁵ Andrew Altman, *Discrimination* (30 August 2015) Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/archives/fall2015/entries/discrimination/>>.

¹⁶ Thomas Giegerich, 'Freedom of Religion as a Source of Claims to Equality and Problems for Equality' (2000) 34 *Israel Law Review* 211, 212.

al's right to equality against the rights of individuals wishing to discriminate, is controversial.¹⁷

The validity of striking a balance between religious freedom and equality is subjected to a sustained and powerful attack by Cass Sunstein, who objects to what he calls the 'asymmetry thesis': the fact that, in the application of law to religious institutions, they are subject to ordinary criminal and civil law, but frequently exempt from anti-discrimination legislation.¹⁸ This is the case in the *EOA 2010*.

One response to Sunstein is that this comparison is unfair: there are significant interests backing much of the criminal and civil law, including the right to bodily integrity,¹⁹ and property rights. Religious beliefs requiring human sacrifices would not justify an exemption from the law against murder, but the belief that only men can be priests might justify an exemption from sex discrimination law. Private property's importance to economic and social structures may also explain why a religious connection to particular land does not justify trespass.

Sunstein suggests that the 'asymmetry' referred to above is largely explained by our intuition that the state should only interfere with religious practice when it has compelling reasons to do so, and that the interests protected by the ordinary criminal and civil law provide such compelling reasons — and those behind anti-discrimination law do not.²⁰ However, as Sunstein points out, this intuition does not always reflect reality. It is true that the interests protected by the criminal law are often significant. But the civil law in particular is also directed against less serious harms — for example, 'intentional infliction of emotional distress.'²¹ Religious organisations are

¹⁷ Some scholars argue that there should be no specific exemptions for religious groups at all. Rather, there should be a 'general limitations clause' that would require groups to justify any discriminatory actions with reference to a human rights framework. This would narrow the exemptions, but would arguably still cover situations where conformity with religious doctrine is a genuine occupational requirement — such as a priest, rabbi or imam. For further discussion, see Harrison and Parkinson, above n 10, 430.

¹⁸ Cass Sunstein, 'On the Tension between Sex Equality and Religious Freedom' (Working Paper No 167, University of Chicago Law School, June 2007) 1, 2.

¹⁹ See *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 233 (Mason CJ, Dawson, Toohey and Gaurdon JJ) (*'Marion's Case'*).

²⁰ Sunstein, 'Sex Equality and Religious Freedom', above n 18, 7.

²¹ *Ibid.*

subject to these laws, despite the fact that they prohibit only low-level harms. The same cannot always be said for anti-discrimination law.²²

It is also difficult to justify treating the interest of being free from discrimination on the basis of sexuality and its attendant assault on dignity as less worthy of protection than the interests underpinning other civil laws. Asserting that discrimination always causes less harm than other civil wrongs simultaneously overestimates the harms caused by civil wrongs (which represent the vast majority of laws to which religious bodies are subject) and underestimates the harm caused by discriminatory acts.²³ Of course, the nature of harm caused by discrimination, and what is morally wrong about discrimination itself, are not settled notions.²⁴ For the purposes of this case note, I adopt Deborah Hellman's view that the core of the harm or wrong is that discrimination demeans or denigrates those against whom it is directed.²⁵ In Hellman's account, 'demeaning' is defined as differentiating between people in a way that fails to treat them as being of equal moral worth.²⁶ The United States Supreme Court decision striking down laws that prohibited same-sex marriage reflects this view. Kennedy J wrote:

the necessary consequence [of such laws] is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the *Constitution*, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.²⁷

Jurisdictions like Canada and South Africa have adopted a similar perspective, expressed in the concept of dignity. Both countries now view the concept of dignity as fundamental to the foundation of equality rights,²⁸ suggesting that an affront to dignity — such as through conduct that demeans or devalues part of an individual's identity — is increasingly considered to be a serious harm. This reflects the stance taken by some Australian advocacy

²² See generally *ibid* 3–4.

²³ *Ibid* 7–8.

²⁴ See Altman, above n 15.

²⁵ Deborah Hellman, *When Is Discrimination Wrong?* (Harvard University Press, 2008) 172.

²⁶ *Ibid* 38.

²⁷ *Obergefell v Hodges*, 192 L Ed 2d 609, 629 [11] (2015).

²⁸ See Fredman, *Discrimination Law*, above n 9, 19–20.

groups, which focuses on the negative impact of judgemental messages about sexual orientation on young people, especially those who also seek to retain a religious affiliation.²⁹

A second response to Sunstein — which underlies the arguments made by CYC in *Cobaw*, discussed below — is that anti-discrimination legislation strikes at the heart of religious practice in a way that other laws usually do not. That is, religious practices and equality law are inherently likely to come into conflict. The oft-cited religious underpinnings of parts of the ordinary law lend some force to this argument: a long historical association would tend towards coherence rather than contradiction.³⁰ Sunstein's response to this objection is less persuasive: he raises the possibility that the civil law might infringe on a religion that requires animal sacrifice,³¹ and also argues that sex discrimination law would not impinge on the freedom of some religious groups.³² While this is true in theory, the reality is that most major religions do not require animal sacrifice, but many embrace views about sex and sexuality that would, if not for the exemptions, fall foul of anti-discrimination legislation.

Whether or not this last response is convincing, Sunstein's asymmetry thesis highlights the incongruity of assuming that the harms proscribed by anti-discrimination law are always less significant than those proscribed by

²⁹ See, eg, Gay and Lesbian Health Victoria, Submission No 98 to the Scrutiny of Acts and Regulations Committee, *Inquiry into the Exceptions and Exemptions to the Equal Opportunity Act 1995*, quoted in Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Exceptions and Exemptions to the Equal Opportunity Act 1995: Final Report* (2009) 61.

³⁰ Sunstein, 'Sex Equality and Religious Freedom', above n 18, 9. The religious underpinnings of law are not without controversy. Keith Mason has called the so-called religious foundations of Australian law a 'myth': Keith Mason, *Constancy and Change: Moral and Religious Values in the Australian Legal System* (Federation Press, 1990) 3. Conversely, it has been considered that 'the heritage of English Protestantism underpins all aspects of socio-political and legal organization in Australia': Margaret Thornton and Trish Luker, 'The Spectral Ground: Religious Belief Discrimination' (2009) 9 *Macquarie Law Journal* 71, 78. Indeed, Thornton has contended that '[t]he second major strand of equality in the Western world emanates from the Judaeo-Christian belief that all human beings are created equal in the sight of God': Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) 9.

³¹ Sunstein, 'Sex Equality and Religious Freedom', above n 18, 9. For example, water buffalo are sacrificed in the Hindu festival of Gadhimai in Nepal, and Muslims engaged in the Hajj are required to sacrifice a goat or lamb, or to join others in sacrificing a cow or camel, during Eid al-Adha.

³² *Ibid.*

other civil laws. It is an important reminder to legislators and courts that any exemption to the application of anti-discrimination law should have strong justification.

C *Anti-Discrimination Legislation in Australia and Victoria*

Australian anti-discrimination law reflects the asymmetry thesis. It exempts religious organisations and individuals from anti-discrimination law in particular circumstances, and on particular grounds. Religious exemptions exist in most Commonwealth anti-discrimination legislation,³³ and state statutes provide highly similar exemptions for religious bodies (variously defined) to discriminate in order to protect the religious beliefs (alternatively ‘sensibilities’ or ‘sensitivities’) of their adherents.³⁴

The *EOA 1995* contained two exemptions for religious bodies and/or individuals.³⁵ Section 75 exempted ‘anything done by a body established for religious purposes’ from the application of the statute where it ‘conform[ed] with the doctrines of the religion’ or was ‘necessary to avoid injury to the religious sensitivities of people of the religion.’³⁶ Section 77 protected discriminatory acts if they were ‘necessary for the first person [the discriminator] to comply with the person’s genuine religious beliefs or principles.’³⁷

As the Attorney-General noted in her second reading speech of the *EOA 1995*, the exemptions intend to ‘strike a balance between two very important and sometimes conflicting rights — the right of freedom of religion and the right to be free from discrimination.’³⁸ This is consistent with international

³³ See, eg, *Age Discrimination Act 2004* (Cth) s 35; *Sex Discrimination Act 1984* (Cth) s 37. Note that such exemptions are not available in the *Racial Discrimination Act 1975* (Cth) and the *Disability Discrimination Act 1992* (Cth).

³⁴ *Anti-Discrimination Act 1977* (NSW) s 56(d) (which covers ‘bod[ies] established to propagate religion’); *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) s 52; *EOA 2010* s 82; *Equal Opportunity Act 1984* (WA) s 72. The term ‘susceptibilities’ is also commonly used: see, eg, *Anti-Discrimination Act 1977* (NSW) s 56(d); *Equal Opportunity Act 1984* (SA) s 50(1)(c); *Equal Opportunity Act 1984* (WA) s 72(d).

³⁵ This Act has been replaced by the *EOA 2010*, but will be used for the purposes of discussing *Cobaw*.

³⁶ *EOA 1995* s 75(2).

³⁷ *Ibid* s 77.

³⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 1995, 1254 (Jan Wade, Attorney-General).

law, which acknowledges that states may balance equality rights with rights to religious freedom.³⁹

III COBAW AND THE RELIGIOUS EXEMPTIONS

A *The Cobaw Case and Decision*

On behalf of a group of youths and youth workers, Cobaw Community Health Services sued CYC for unlawful discrimination under the *EOA 1995*.⁴⁰ CYC ran Phillip Island Adventure Resort. The youths and youth workers were part of a state-funded youth suicide prevention program for same-sex attracted youth called 'WayOut', run by Cobaw Community Health Services.⁴¹ The coordinator of the program, Ms Sue Hackney, sought to book the camp for a forum for 60 same-sex attracted youths and 12 youth workers from across Victoria.⁴² When Mr Mark Rowe, the manager of the camp, inquired as to the nature of the group's planned activities, Ms Hackney responded that the project 'believed ... same-sex attraction or homosexuality was a normal and natural part of the range of human sexualities', and that the weekend would involve workshops and discussions aimed at raising awareness.⁴³ Mr Rowe effectively refused to accept the booking.

Cobaw Community Health Services sued both Mr Rowe and CYC under ss 42(1)(a), 42(1)(c) and 49(1) of the *EOA 1995*, which together prohibit less favourable treatment on particular grounds, one of which can be the ground of sexual orientation.⁴⁴ CYC and Mr Rowe denied any discrimination, but said if they did discriminate, any such treatment fell within the religious exemp-

³⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 2(1), 18(3). See also Scrutiny of Acts and Regulations Committee, above n 29, 93.

⁴⁰ *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* [2010] VCAT 1613 (8 October 2010) [7] (Judge Hampel).

⁴¹ *Ibid* [5]; *Cobaw* (2014) 308 ALR 615, 622 [21] (Maxwell P).

⁴² *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* [2010] VCAT 1613 (8 October 2010) [6] (Judge Hampel).

⁴³ *Ibid* [100]. See also *Cobaw* (2014) 308 ALR 615, 623 [28] (Maxwell P), 724 [490] (Redlich JA).

⁴⁴ See also *EOA 1995* ss 6(1), 8 regarding the basis on which discrimination is prohibited.

tions to the *EOA 1995*.⁴⁵ At first instance, the Victorian Civil and Administrative Tribunal found that Mr Rowe discriminated against Cobaw Community Health Services, that CYC was vicariously liable, and that neither could avail themselves of the exceptions.⁴⁶ Mr Rowe's appeal was allowed by Maxwell P and Redlich JA (Neave JA dissenting), but CYC's appeal was dismissed by Maxwell P and Neave JA (Redlich JA dissenting).⁴⁷ Maxwell P (Neave JA agreeing) and Redlich JA found that, for the purposes of s 75, CYC was not a 'body established for religious purposes' and therefore could not avail itself of the exemption.⁴⁸ If it were such a body, the refusal was also 'not necessary to avoid injury to the religious sensitivities' of adherents.⁴⁹ Maxwell P and Neave JA (Redlich JA dissenting) held that corporations could not hold beliefs, and therefore could not rely on s 77.⁵⁰ And even if this was not the case, the refusal was also not necessary to comply with genuine religious beliefs or principles.⁵¹

B Key Elements of the Court of Appeal's Decision

1 Multi-Dimensional Equality

As Maxwell P noted in the opening of his Honour's judgment, the case involved a 'collision' of two fundamental rights: liberty and equality.⁵² Fredman's concept of multi-dimensional equality provides a means of reconciling these competing and independently desirable values, and evaluating the balance the Court of Appeal struck between them.

⁴⁵ *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* [2010] VCAT 1613 (8 October 2010) [9] (Judge Hampel); *Cobaw* (2014) 308 ALR 615, 619 [6] (Maxwell P). See also *ibid* ss 75(2), 77.

⁴⁶ *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* [2010] VCAT 1613 (8 October 2010) [361] (Judge Hampel).

⁴⁷ *Cobaw* (2014) 308 ALR 615, 648–9 [148]–[154], 679–80 [303]–[308] (Maxwell P), 690 [358] (Neave JA); 712 [437] (Redlich JA).

⁴⁸ *Ibid* 667–8 [243]–[244] (Maxwell P), 690 [358] (Neave JA), 712 [437] (Redlich JA).

⁴⁹ *Ibid* 679 [302]–[303] (Maxwell P), quoting *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* [2010] VCAT 1613 (8 October 2010) [344] (Judge Hampel).

⁵⁰ *Cobaw* (2014) 308 ALR 615, 680 [308], 682 [316] (Maxwell P), 706 [411] (Neave JA), 721 [473] (Redlich JA).

⁵¹ *Ibid* 684 [327] (Maxwell P). See also *EOA 1995* s 77.

⁵² *Cobaw* (2014) 308 ALR 615, 619 [1]–[3].

Fredman developed her multi-dimensional account in response to the limitations of the 'equal treatment' principle at the core of formal equality.⁵³ Reducing equality to 'treating likes alike' ignores discriminatory social structures, devalues individual identity in favour of assimilation, and may entail harmful policies that ignore antecedent inequality.⁵⁴ Instead, equality should be a substantive concept.

Fredman acknowledges that 'substantive equality resists capture by a single principle' or formula.⁵⁵ Rather than providing a definitive description, she reconceptualises substantive equality as a dynamic concept involving four dimensions. These reflect, respectively, the 'distributional, recognition, structural and exclusive wrongs experienced by out-groups.'⁵⁶ While their interactions may not always be harmonious, all facets must be considered in order to create a 'truly substantive' approach to equality.⁵⁷ Since several of these dimensions were implicated in *Cobaw*, multi-dimensional equality is a particularly useful tool with which to evaluate the Court of Appeal's decision.

2 *Finding on Discrimination: The Concept of Dignity*

The first question for the Court was whether the attribute of homosexuality was the reason or substantial reason for the refusal of accommodation.⁵⁸ Mr Rowe argued that his objections were not a result of an opposition to homosexuality specifically, since he would allow a group of lesbian parents to book the camp for family-based activities.⁵⁹ It was argued that his objection (and that of CYC's) was specifically to the 'syllabus' of promoting homosexuality by telling young people that it was a natural and healthy human sexuality.⁶⁰

The Court emphatically rejected this narrow and technical distinction. Judge Hampel in the Victorian Civil and Administrative Tribunal, whose reasoning on this point Maxwell P adopted unreservedly,⁶¹ said:

⁵³ Sandra Fredman, 'Substantive Equality Revisited' (Legal Research Paper No 70, University of Oxford, October 2014) 6–12.

⁵⁴ *Ibid.*

⁵⁵ *Ibid* 20.

⁵⁶ *Ibid* 2.

⁵⁷ *Ibid* 21.

⁵⁸ *Cobaw* (2014) 308 ALR 615, 626 [42] (Maxwell P).

⁵⁹ *Ibid* 629–30 [55]–[56].

⁶⁰ *Ibid* 619 [5]; see also 629–30 [55]–[56].

⁶¹ *Ibid* 628 [51], 631 [59].

an objection to telling a person (same-sex) sexual orientation is part of the range of normal, natural or healthy human sexualities is, in truth, an objection to (same-sex) sexual orientation. It denies same-sex attracted people the same rights to live as who they are, to express their sexual orientation in the manner they choose, and to gather with others of the same sexual orientation and those personally associated with them, to discuss matters of particular significance to them by reason of their sexual orientation, as heterosexuals enjoy.⁶²

Accepting the comparator adopted by the trial judge — a group of young people with the attribute of heterosexuality, or a particular race or ethnicity, wanting to ‘discuss issues relating to that part of their identity which is ... intimately connected with that attribute’⁶³ — all judges agreed that direct discrimination had been made out.⁶⁴

The Court’s approach to the identity question is encouraging for two reasons. First, it adopted a purposive and sensible construction of the Act’s protections: it seems a matter of common sense that the right to have a particular identity is worth very little if it cannot be affirmed and embraced in a public context. Most importantly, it may signal a departure from the formalism that has left the field of Australian anti-discrimination law ‘littered with the wounded’⁶⁵ — victims whose success at first instance is overturned on appeal. Instead, the approach to dignity taken by the Court is consistent with a recent shift in emphasis in anti-discrimination law, away from ‘access and participation towards a particular notion of dignity or identity.’⁶⁶

The majority’s approach (and that of Redlich JA, to the extent that his Honour also rejected the technical distinction between identity and ‘sylla-

⁶² *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* [2010] VCAT 1613 (8 October 2010) [199].

⁶³ *Ibid* [207].

⁶⁴ *Cobaw* (2014) 308 ALR 615, 632 [66] (Maxwell P), 711 [433] (Neave JA), 725 [493] (Redlich JA).

⁶⁵ *X v Commonwealth* (1999) 200 CLR 177, 213 [120] (Kirby J). Cf *New South Wales v Amery* (2006) 230 CLR 174, 186 [28] (Gummow, Hayne and Crennan JJ). On beneficial construction, see also *IW v City of Perth* (1997) 191 CLR 1, 52 (Kirby J); Rees, Rice and Allen, above n 4, 5 [2.4.4]; Beth Gaze, ‘Context and Interpretation in Anti-Discrimination Law’ (2002) 26 *Melbourne University Law Review* 325; *Bunning v Centacare* (2015) 293 FLR 37, 45–8 [27]–[44] (Judge Vasta). On this point, Redlich JA dismissed the relevance of international law to beneficial construction in *ibid* 714 [443].

⁶⁶ Harrison and Parkison, above n 10, 414.

bus')⁶⁷ also coheres with a multi-dimensional view of equality. The Court's concern with the 'right to enjoyment and acceptance of identity' closely mirrors Fredman's recognition dimension, which focuses on affronts to the recognition and dignity accorded to an individual.⁶⁸ Redlich JA explicitly states that Cobaw Community Health Services' objectives of protecting people's 'self-worth and personal dignity' are of 'intrinsic value'.⁶⁹ This is an appropriate approach where a primary concern is the psychological harm that prejudice can cause. A purely formal or equal opportunity approach would not be able to adequately articulate or capture the harm inflicted on the youths involved in *Cobaw*.

This approach to dignity, which associates itself closely with recognition of identity, status and self-worth, mirrors the approach taken in Canada and South Africa. The Canadian Supreme Court has held that the concept of dignity ensures 'equal recognition' for members of society, who are all 'equally deserving of concern, respect and consideration'.⁷⁰ The South African Constitutional Court has similarly implied that an assault on dignity affects the 'ability to achieve self-identification and self-fulfilment'.⁷¹

Cobaw's focus on dignity also shows the Court moving towards a more substantive conception of equality. As Fredman notes, dignity is at the core of equality in several international jurisdictions,⁷² and gives content to the idea of equality in a way that purely formal notions cannot. The Canadian Supreme Court has called it the 'lodestar' of the rights guaranteed by the *Canadian Charter of Rights and Freedoms*.⁷³ In the *Basic Law of the Federal Republic of Germany* (the *Constitution* of Germany), respect for human rights is expressed as dependent on respect for dignity: art 1 takes as its point of depar-

⁶⁷ *Cobaw* (2014) 308 ALR 615, 714 [440].

⁶⁸ Fredman, *Discrimination Law*, above n 9, 28, 30.

⁶⁹ *Cobaw* (2014) 308 ALR 615, 713 [438].

⁷⁰ *Law v Canada* [1999] 1 SCR 497, 529 [51] (Iacobucci J).

⁷¹ *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1999] 1 SA 6, 37 [36] (Ackerman J) (Constitutional Court).

⁷² Fredman, 'Substantive Equality Revisited', above n 53, 17–20. For an example of the centrality of dignity in foreign jurisdictions see, eg, *Constitution of the Republic of South Africa Act 1996* (South Africa) s 36(1); *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 1(1).

⁷³ *R v Kapp* [2008] 2 SCR 483, 504 [21] (McLachlin CJ and Abella J).

ture that ‘human dignity shall be inviolable,’ and from this derives the existence of ‘inviolable and inalienable’ human rights.⁷⁴

Dignity protects the status of individuals by preventing ‘levelling down.’⁷⁵ Similar to pension funds in the European Union,⁷⁶ CYC might have attempted to escape the charge of discrimination by *broadening* the categories of people against whom it discriminated — to include, for example, unmarried heterosexual couples — so it could not be said that the discrimination was on the basis of sexual orientation.⁷⁷

Nonetheless, it should be borne in mind that the concept of dignity has its limitations as a legal test.⁷⁸ It is an abstract and contested concept⁷⁹ which is ‘confusing and difficult to apply’ in practice,⁸⁰ and is susceptible to use as justification for opposite viewpoints. In some cases, it has also become an additional burden that claimants must satisfy, rather than the ‘philosophical enhancement’ initially envisaged.⁸¹ These shortcomings highlight one of the major strengths of a multidimensional conception of equality like Fredman’s — the other dimensions mitigate the inevitable weakness of relying on only one concept of equality.

3 *Transformative Equality: Corporate and Individual Responsibility*

In keeping with the legislative purpose of allowing accommodation providers to be directly liable for discriminatory acts done by employees, Maxwell P and

⁷⁴ *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] arts 1(1)–(2).

⁷⁵ Fredman, *Discrimination Law*, above n 9, 21.

⁷⁶ Rather than lowering the pension age for men to the same level as women, pension funds raised the age at which women could access their money. This was accepted by the European Court of Justice, despite the fact that it made women worse off, and men were no better off: *ibid.*

⁷⁷ Indeed this was what the proprietors of the accommodation in *Bull v Hall* (2013) WLR 3741 argued they were doing: at 3747 [17] (Baroness Hale DPSC).

⁷⁸ *R v Kapp* [2008] 2 SCR 483, 504–5 [21]–[22] (McLachlin CJ and Abella J).

⁷⁹ For an example of differing views on the meaning of ‘human dignity’, see generally Christopher McCrudden (ed), *Understanding Human Dignity* (Oxford University Press, 2013).

⁸⁰ *R v Kapp* [2008] 2 SCR 483, 504–5 [22] (McLachlin CJ and Abella J).

⁸¹ *Ibid.*

Neave JA found that CYC was directly liable for Mr Rowe's refusal.⁸² Contrary to Cobaw Community Health Services' and the Victorian Attorney-General's submissions, Maxwell P held that the deterrent and denunciatory purposes of the Act were better accomplished through a finding of liability for a corporation than merely singling out an individual employee. His Honour noted that the risk of direct liability for discriminatory conduct creates a 'powerful incentive' for employers in general to ensure they comply with the Act,⁸³ contributing to the transformation of social structures required by substantive equality. This focus on institutional and systemic effects also indicates Maxwell P took seriously the transformative purposes of the legislation: Fredman notes that a finding of liability against a company carries an expressive value, which helps achieve 'respect and accommodat[ion]' of difference.⁸⁴

4 *Redistributive Equality: Definition of a Religious Body*

The Court found that CYC was not a body established for religious purposes, and therefore s 75 of the *EOA 1995* was unavailable.⁸⁵ This decision relied on close attention to the circumstances of CYC's operations, and suggests that courts will not be satisfied that a body has religious purposes merely because it is an emanation of a religious body, or includes religious principles in its constitution. The Court found that CYC existed for the fundamentally commercial purpose of making campsite accommodation available to the public, and the requirement that the camp be conducted in accordance with Christian beliefs and principles did not transform this secular purpose into a religious one.⁸⁶

This approach is particularly important in light of the number of religious organisations providing various social services on a commercial basis.⁸⁷ The

⁸² *Cobaw* (2014) 308 ALR 615, 643 [123] (Maxwell P), 697 [381] (Neave JA); cf at 719–20 [463]–[466] (Redlich JA).

⁸³ *Ibid* 647 [143].

⁸⁴ Fredman, *Discrimination Law*, above n 9, 30.

⁸⁵ *Cobaw* (2014) 308 ALR 615, 668–9 [244]–[252] (Maxwell P), 690 [359] (Neave JA), 712–13 [437] (Redlich JA).

⁸⁶ *Ibid* 668 [247] (Maxwell P).

⁸⁷ For example, the Catholic Church in Victoria is involved in 482 schools, 11 hospitals, 40 nursing homes and 12 children's welfare institutions: Carolyn Evans, 'Legal Aspects of the Protection of Religious Freedom in Australia' (Background Paper, Centre for Comparative Constitutional Studies, June 2009) 40.

Court acknowledged that the provision of services may have a religious motivation, but unless the activity itself is intrinsically religious, 'it is difficult to see how questions of doctrinal conformity or offence to religious sensitivities can meaningfully arise.'⁸⁸ The association between CYC and the Christian Brethren was 'invisible' for members of the public,⁸⁹ and CYC's activities were 'indistinguishable' from other actors in the commercial market.⁹⁰

Cobaw's consideration of the perceived association between an organisation and its religion is also significant to the 'redistribution dimension' of Fredman's account.⁹¹ While discrimination against members of the LGBTQI community is arguably first and foremost a recognition harm in Fredman's formulation, practices like hiring discriminately and withholding goods and services also have tangible effects on economic distribution. A narrow reading of 'body established for religious purposes' as per s 75(2) of the *EOA 1995* ensures that the majority of goods and services provided to the public on a commercial basis do not come with religious conditions attached. Maxwell P stated in unequivocal terms that where an organisation operates in a secular field, in the same way as other commercial operators, its religious affiliation cannot prevent it from being subject to the same laws on discrimination as other such accommodation providers.⁹² Neave JA was similarly concerned to ensure that providers of accommodation and goods and services did not excessively restrict equality of access.⁹³ This awareness of access issues and their economic consequences echoes what Fredman terms the 'detrimental consequences'⁹⁴ that attach to a particular status.

5 *The Meaning of 'Doctrine'*

The decision offered a relatively strict interpretation to 'doctrine' in s 75 of the *EOA 1995*, affirming Judge Hampel's finding that 'doctrine refers to the core architectural statements of faith, or the body of teachings that describes the

⁸⁸ *Cobaw* (2014) 308 ALR 615, 671 [264] (Maxwell P); see also at 711 [433] (Neave JA).

⁸⁹ *Ibid* 671 [266] (Maxwell P).

⁹⁰ *Ibid* 671 [268]; see also at 679 [303].

⁹¹ Fredman, *Discrimination Law*, above n 9, 26.

⁹² *Cobaw* (2014) 308 ALR 615, 671–2 [268].

⁹³ *Ibid* 691–2 [364].

⁹⁴ Fredman, *Discrimination Law*, above n 9, 26.

fundamental shape of that form of religious belief.⁹⁵ CYC contended at first instance, and the Court of Appeal accepted, that the relevant doctrine of the Christian Brethren was ‘plenary inspiration’, or literal interpretation of the scripture.⁹⁶ The Court upheld Judge Hampel’s conclusion that it was not this doctrine, ‘but the manner in which it is interpreted’, which gives rise to beliefs about homosexuality and marriage.⁹⁷ Therefore, the conduct did not fall within the s 75 exemption.

Further, even if teaching on homosexuality is part of the Christian Brethren’s doctrine, their Honours’ view of the evidence was that it was a rule of private morality only.⁹⁸ There is no injunction to refuse accommodation to those who do not comply with the doctrine.⁹⁹ An important element of this finding was CYC’s failure to make consistent enquiries about the marital or other status of guests.¹⁰⁰ By implication, it seems that a doctrine consistently reflected in the rules and procedures of an organisation *would* meet the test adopted by the Court in this case.

It is curious that the Court of Appeal judges rarely referred to similar litigation in *OV v Members of the Board of the Wesley Mission Council* (‘OV’), given it also dealt with doctrine.¹⁰¹ The central issue in that case was whether the Wesley Mission fell within the exemption for actions of religious bodies where these conform to the doctrines of their religion.¹⁰²

At trial, the Equal Opportunity Division of the New South Wales Administrative Decisions Tribunal identified the relevant doctrine relied on by the Wesley Mission as the ‘belief that “monogamous heterosexual partnership within marriage is both the norm and ideal” [of the family].’¹⁰³ Having

⁹⁵ *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* [2010] VCAT 1613 (8 October 2010) [288].

⁹⁶ *Cobaw* (2014) 308 ALR 615, 672 [269]–[272] (Maxwell P).

⁹⁷ *Cobaw Community Health Services v Christian Youth Camps Ltd* [2010] VCAT 1613 (8 October 2010) [306].

⁹⁸ *Cobaw* (2014) 308 ALR 615, 674 [280] (Maxwell P). However, the defendants’ expert opinion affidavit was ruled inadmissible at first instance, so the plaintiff’s evidence on this point was effectively uncontested: *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* [2010] VCAT 1613 (8 October 2010) [280] (Judge Hampel).

⁹⁹ *Cobaw* (2014) 308 ALR 615, 674 [279] (Maxwell P).

¹⁰⁰ *Ibid* 675–6 [288]–[289].

¹⁰¹ (2010) 79 NSWLR 606.

¹⁰² *Ibid* 612 [17] (Basten JA and Handley AJA).

¹⁰³ *Ibid* 618 [42], quoting *OV v QZ [No 2]* [2008] NSWADT 115 (1 April 2008) [122].

previously identified ‘religion’ as ‘the Christian religion’ rather than the Wesleyan denomination,¹⁰⁴ the Equal Opportunity Division was then unable to find that the ‘Christian’ religion as a whole had any view on homosexuality consistent enough to be called doctrine.¹⁰⁵ Its interpretation of doctrine was also narrow: ‘a teaching of the religion ... [that] must have a source in some religious text or oral tradition regarded as authoritative within the religion.’¹⁰⁶

The New South Wales Court of Appeal disagreed. It allowed that religion could refer to a specific denomination, such as Wesleyan Christianity, and accepted that the meaning of doctrine includes ‘a creed or body of teachings ... proclaimed by ecclesiastical authorities as true.’¹⁰⁷ The reference to ‘body of teachings’ suggests this definition would encompass not just formal pronouncements like the Nicene Creed, but also ‘the body of teachings and beliefs which direct the lives and beliefs of the religion’s adherents, and the way they practice their religion.’¹⁰⁸

The Victorian Court of Appeal did not indicate whether it relied on the *OV* definition, or whether it thought its own approach was consistent — although Judge Hampel in *VCAT* indicated that her Honour’s interpretation cohered, since the broad words ‘creed’ and ‘body of teachings’ were qualified by the phrase ‘proclaimed by ecclesiastical bodies as true.’¹⁰⁹ The reason for not engaging further with the decision may simply have been that unlike in *OV*, the question of religious doctrine was not determinative in *Cobaw*. However, this lack of engagement leaves an unfortunate lack of clarity in what will constitute a religious doctrine for the purposes of the *EOA 1995* and its current form in *EOA 2010*.

6 Reasonable Necessity or Objective Test for Impugned Conduct

Both ss 75(2)(b) and 77 of the *EOA 1995* also require the discriminatory conduct to be ‘necessary’. Maxwell P and Neave JA adopted a form of reason-

¹⁰⁴ *OV v QZ [No 2]* [2008] NSWADT 115 (1 April 2008) [113]–[119].

¹⁰⁵ *Ibid* [127]–[128].

¹⁰⁶ *Ibid* [125].

¹⁰⁷ *OV* (2010) 79 NSWLR 606, 618 [44] (Basten JA and Handley AJA).

¹⁰⁸ *Ibid* 621 [55], quoting *Members of the Board of the Wesley Mission Council v OV [No 2]* [2009] NSWADTAP 57 (1 October 2009) [45].

¹⁰⁹ *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* [2010] VCAT 1613 (8 October 2010) [288]–[289].

able necessity test when applying both sections,¹¹⁰ despite the fact that there is no such qualifier in the language of the provisions.

Maxwell P agreed with the trial judge that whether the conduct was necessary to conform with doctrine should be determined by considering whether the doctrine required or dictated the particular behaviour in the circumstances.¹¹¹ This view appears to diverge from that of the European Court of Human Rights in *Eweida v United Kingdom*,¹¹² where the Court commented that 'there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question.'¹¹³ It also diverges from the earlier approach in *Jubber v Revival Centres International*, where a code of conduct preventing church attendance by a man wearing an earring was upheld as conforming with the doctrines of the religion.¹¹⁴ In contrast, Maxwell P and Neave JA both seemed to have taken the view that the action supposedly in conformity with doctrine must be required or compulsory rather than an option available.¹¹⁵

Since the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') was found not to apply to the case in question, this approach could not derive from the s 7(2) balancing requirement.¹¹⁶ Rather, Maxwell P and Neave JA seemed prepared to read in an objective test in order to ensure that the idiosyncratic beliefs of individuals would not 'always trump the right of individuals to be free from discrimination on prohibited grounds.'¹¹⁷ This approach mirrors that in other areas of discrimination law. For example, the tension between the right to free speech and the right to be free from racial vilification has been resolved using a similarly objective test in

¹¹⁰ *Cobaw* (2014) 308 ALR 615, 684 [328] (Maxwell P), 709 [423] (Neave JA).

¹¹¹ *Ibid* 675 [285]–[286] (Maxwell P). Cf *Jubber v Revival Centres International* [1998] VADT 62 (7 April 1998).

¹¹² (European Court of Human Rights, Fourth Section Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013).

¹¹³ *Ibid* [82].

¹¹⁴ [1998] VADT 62 (7 April 1998).

¹¹⁵ *Cobaw* (2014) 308 ALR 615, 675 [287] (Maxwell P), 711 [432]–[433] (Neave JA).

¹¹⁶ The *Charter of Human Rights and Responsibilities Act 2006* (Vic) enacts a balancing test by stipulating that '[a] human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors': at s 7(2).

¹¹⁷ *Cobaw* (2014) 308 ALR 615, 676 [291] (Maxwell P), 708 [422] (Neave JA).

Eatock v Bolt.¹¹⁸ Section 18C of the *Racial Discrimination Act 1975* (Cth) prohibits certain types of offensive speech or behaviour, and s 18D effectively exempts otherwise unlawful speech or behaviour from the Act's application if they are done 'reasonably and in good faith'. Bromberg J observed that 'two competing values ... are protected by [the] sections', and that the impairment of the rights protected by s 18C must be subject to a test of proportionality.¹¹⁹

Redlich JA dissented on this point — his Honour held that s 77 of the *EOA 1995* should encompass both explicitly stated doctrines and principles, and a broader category of actions 'which a person of faith undertakes in order to maintain consistency with the canons of conduct associated with their religious beliefs and principles'.¹²⁰ His Honour noted that doctrines rarely contain guidance for their application, and people of faith must look beyond bare doctrinal command to determine what was 'necessary' to comply.¹²¹ Therefore, s 77 requires a subjective inquiry into whether the individual genuinely believed they were required to act in a particular manner because of a doctrine or principle.¹²²

Redlich JA also rejected the relevance of CYC's commercial nature, or its failure to make inquiries of those booking the camp, or to advertise its Christian expectations publicly in any way.¹²³ His Honour found this apparent absence of concern with the marital, sexual or other status or conduct of guests was not relevant to whether refusing the booking was required by their religion.¹²⁴ This seems incorrect. The invisibility of the camp's Christian foundations to the public, together with an established absence of concern about the behaviour of guests at the camp, demonstrates this was not a core part of CYC's beliefs. Given the importance of the rights to be balanced, it seems fair to limit the ability to invoke religion as a liability shield to instances where it is a central part of an entity's practices.

¹¹⁸ (2011) 197 FCR 261.

¹¹⁹ *Ibid* 339–40 [341]; see generally at 338–41 [337]–[350].

¹²⁰ *Cobaw* (2014) 308 ALR 615, 732 [518].

¹²¹ *Ibid*.

¹²² *Ibid* 733 [524].

¹²³ *Ibid* 742 [554].

¹²⁴ *Ibid* 742 [556].

7 *Reliance on International Jurisprudence*

The majority drew on overseas jurisprudence in several instances, suggesting that Victorian courts are becoming more amenable to influence from the strong equality jurisprudence in foreign jurisdictions.¹²⁵

In affirming that a central feature of identity is its expression in sexual behaviour and its public affirmation, Maxwell P endorsed the trial judge's statement that the 'essence of the prohibitions on discrimination on the basis of [homosexuality] is to recognise the right of people to be who or what they are' and to 'enjoyment and acceptance of [that] identity'.¹²⁶ This is in keeping with a number of other decisions,¹²⁷ particularly the similar case of *Bull v Hall*,¹²⁸ on which Neave JA relied in finding that sexual orientation is an important aspect of identity. Neave JA justified her Honour's objective interpretation of s 77 in part by relying on Baroness Hale's leading judgment in that case, in which her Ladyship commented that the effect of a subjective test would be to allow people to exempt themselves from discrimination legislation, simply because they disagree with the law — and this is usually not allowed.¹²⁹

There is an apparent contrast with the more recent decision of the European Court of Human Rights in *Eweida v United Kingdom*,¹³⁰ which concerned the right of a Christian British Airways employee to wear a religious necklace on the outside of her clothing, in violation of the company's uniform policy.

¹²⁵ Ibid 656–7 [188]–[197] (Maxwell P), 704 [409], 710 [428] (Neave JA).

¹²⁶ Ibid 630 [57], quoting *Cobaw Community Health Services Ltd v Christian Youth Camps Ltd* [2010] VCAT 1613 (8 October 2010) [193] (Judge Hampel). See also *Bull v Hall* [2013] WLR 3741, 3755 [52] (Baroness Hale DPSC). This can be usefully contrasted with the more recent decision of the Federal Circuit Court in *Bunning v Centacare* (2015) 293 FLR 37 where the single judge adopted this very distinction between identity and behaviour in ruling that polyamory was not a sexual orientation within the meaning of the *Sex Discrimination Act 1984* (Cth).

¹²⁷ See *Cobaw* (2014) 308 ALR 615, 630 [57] (Maxwell P), citing *R v Ministry of Defence; Ex parte Smith* [1996] QB 517, 564 (Bingham MR); *R (Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860 (Admin) (26 April 2004) [192] (Richards J); *Egan v Canada* [1995] 2 SCR 513, 528 [5] (La Forest J for Lamer CJ, La Forest, Gonthier and Major JJ); *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570, 588 [67] (Thomas J).

¹²⁸ [2013] WLR 3741.

¹²⁹ *Cobaw* (2014) 308 ALR 615, 709 [422], quoting *ibid* 3751 [34].

¹³⁰ *Eweida v United Kingdom* (European Court of Human Rights, Fourth Section Chamber, Application Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013).

The Court found that the right to manifest a religious belief is ‘fundamental’, and was not outweighed by British Airways’ desire to project a ‘certain corporate image’.¹³¹ For this reason, a ‘fair balance was not struck’.¹³² It is only possible to speculate about why the Court of Appeal did not refer to this case. The explanation may be that a case about discrimination *against* a religious person was not considered as directly relevant as *Bull v Hall*, which closely mirrored the facts of *Cobaw*. A second possibility is that the facts were simply evaluated differently in each case. The majority in *Cobaw* did not refute the fundamental nature of religious freedom, but its importance was outweighed by the harm to the dignity of the young people involved. From the judgment in *Eweida v United Kingdom*, the interest at stake — the ‘[need] to project a certain corporate image’¹³³ — did not seem to be one which anti-discrimination legislation was overly concerned with protecting.

C Shortcomings of the Cobaw Decision

1 Judicial Decisions on Subjective Religious Matters

There is an inherent difficulty in requiring a secular court to determine what constitutes religious doctrine (eg, under s 75 of the *EOA 1995*), and the content of a person’s beliefs (eg, under s 77 of the *EOA 1995*). Redlich JA’s judgment demonstrates his Honour’s acute awareness of this problem, noting the incommensurability of statutory consequences for discrimination versus the perceived consequences — such as ‘eternal damnation’ — for breaching religious precepts.¹³⁴ Neave JA also adverted to this issue, noting that in *Shergill v Khaira*,¹³⁵ the United Kingdom Court of Appeal found that religious *beliefs* are ‘subjective inward matters’, and therefore not justiciable as a legal question since they are incapable of proof.¹³⁶ The same reasoning arguably applies to attempts by the court to discern the *doctrines* of a particular

¹³¹ Ibid [94].

¹³² Ibid.

¹³³ Ibid.

¹³⁴ *Cobaw* (2014) 308 ALR 615, 733 [521].

¹³⁵ [2012] EWCA Civ 983 (17 July 2012) (*Shergill*). This case related to identifying a spiritual successor of the ‘second Holy Saint’. Two groups within the Sikh community disagreed about the answer, which was relevant to the ownership of two temples.

¹³⁶ *Cobaw* (2014) 308 ALR 615, 707 [415] (Neave JA), quoting *ibid* [17] (Mummery LJ).

religion, since these are necessarily subject to different interpretations across time and place.

It is true that courts are ill-equipped to embark on theological inquiries, especially ones leading to a substantive determination on a matter that is probably controversial even among religious scholars.¹³⁷ However courts may be required to pronounce on such issues, and the use of expert witnesses may be an appropriately transparent and fair way of exercising the discretion that Parliament has evidently conferred through the broad language of ss 75(2)(a) and 77 of the *EOA 1995*.¹³⁸ The requirement that the conduct be somehow 'core' raises a secondary issue: it arguably gives religious organisations the perverse incentive to claim that discrimination on the basis of sexuality is a central part of their practices. In response, Sunstein argues that this incentive has always existed, and cannot by itself be determinative of the legitimacy or otherwise of a law.¹³⁹

2 *Inconsistent Interpretative Approaches?*

The Court's discussion of the protections from, and exemptions to, discrimination in the *EOA 1995* occur many pages apart. But viewed side by side, the majority's approach to these issues entails a possible conflict. CYC raised this apparent inconsistency in its unsuccessful application for special leave to appeal to the High Court.¹⁴⁰ It noted that the majority's interpretation of s 77 relied on a distinction between the freedom to believe something, and the manifestation of that belief. Citing Redlich JA's dissent, CYC argued that this entails the same 'problematic and unfair' differentiation between homosexual identity and 'syllabus' that was rejected by the Court of Appeal.¹⁴¹ Since the Court of Appeal majority and Bell J of the High Court did not directly engage with this question, these explanations are purely speculative. However, two considerations could provide at least a partial explanation for this apparent contradiction.

¹³⁷ See, eg, Reid Mortensen, 'Church Legal Autonomy' (1994) 14 *Queensland Lawyer* 217.

¹³⁸ Sunstein, 'Sex Equality and Religious Freedom', above n 18, 11–12.

¹³⁹ *Ibid* 11.

¹⁴⁰ Transcript of Proceedings, *Christian Youth Camps Limited v Cobaw Community Health Services Ltd* [2014] HCATrans 289 (12 December 2014) 140 (M Pearce SC).

¹⁴¹ *Ibid* 348, quoting *Cobaw* (2014) 308 ALR 615, 739 [543] (Redlich JA).

The first, which Maxwell P's judgment implicitly relied upon,¹⁴² is that the different approaches are required by ordinary principles of statutory construction. As remedial legislation, the *EOA 1995* — and therefore its protections — is to be given a liberal interpretation.¹⁴³ A purposive interpretation also demands that effect be given to the Act's express object of eliminating discrimination 'as far as possible'.¹⁴⁴ The prohibitions are framed in broad terms, and are not qualified in any way on their face. Conversely, the exemptions in ss 75–7 are not a general protection for any act by a religious individual, but are carefully circumscribed by words like 'conforms' with 'doctrines' and 'necessary' to comply with 'genuine religious beliefs'.¹⁴⁵ These more restricted terms express the balance that Parliament intended to strike between competing rights of equality and freedom of religion.¹⁴⁶ On this view, the exemptions do not 'define the limits' of the broad anti-discrimination provisions contained in the *EOA 1995*, but only delimit 'exemptions from the scope of those prohibitions'.¹⁴⁷

A second and supporting reason is that the exemptions may be aimed at protecting the right to act in accordance with religious doctrine, but not religious identity as such. At another point in his Honour's judgment, Maxwell P notes that s 75 is intended to ensure that 'religious institutions are free to act in ways which accord with their guiding doctrines', and the notion of 'injury to religious sensitivities' is simply a corollary of this.¹⁴⁸ As discussed above, codification means that it is possible to speak meaningfully of the doctrines of a religion. The same is not the case with sexual orientation, which does not have defined canons of expression. These differences may weigh in favour of a permissive approach to sexual identity, but a more restrained approach to religion.

Ultimately, the potential conflict raised by CYC and Redlich JA remains under-theorised, and may well be the subject of future contention. As noted, CYC's application for special leave was refused, but seemingly for the reason

¹⁴² For a thorough discussion of Maxwell P's approach to statutory interpretation, see *Cobaw* (2014) 308 ALR 615, 651–7 [166]–[197].

¹⁴³ *Ibid* 654 [179].

¹⁴⁴ *Ibid*. See also *EOA 1995* s 3.

¹⁴⁵ *Cobaw* (2014) 308 ALR 615, 654 [180] (Maxwell P).

¹⁴⁶ *Ibid* 657 [196].

¹⁴⁷ *Ibid* 655 [185].

¹⁴⁸ *Ibid* 670–1 [263].

that since the legislation had changed in the interim, a decisive interpretation of the *EOA 1995* from the High Court would not be an appropriate use of court resources.¹⁴⁹ This suggests that Maxwell P and Neave JA's construction of identity and manifestation of religion, and the scope to be given to both, may yet be challenged.

IV RELIGIOUS EXEMPTIONS POST-COBAW

A Effect of Changes to the EOA 1995 on the Cobaw Decision

The *EOA 2010* was passed after two major inquiries: a review of current Victorian equal opportunity legislation for the Victorian Attorney-General ('*Gardner Report*'),¹⁵⁰ and a report by the Scrutiny of Acts and Regulations Committee ('SARC').¹⁵¹ Both made recommendations to improve and modernise the existing legislation.¹⁵² The Labor government purported to tighten the exemptions as a result of these,¹⁵³ although the effect of the reforms seems ambivalent. This Part will discuss changes specific to the religious exemptions — but it should be noted that there are also extensive changes to other areas of the Act.¹⁵⁴

1 *Broadening of the Definition of 'Religious Body'*

The reforms adopted the broader definition of 'religious body' found in the *Charter* in s 81(b)¹⁵⁵ despite SARC's recommendation that the definition of religious body should be retained (and indeed, narrowed) in the *EOA 2010*.¹⁵⁶

¹⁴⁹ Transcript of Proceedings, *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* [2014] HCATrans 289 (12 December 2014) 800 (Crennan J).

¹⁵⁰ Julian Gardner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report* (2008).

¹⁵¹ Scrutiny of Acts and Regulations Committee, above n 29.

¹⁵² *Gardner Report*, above n 150, 12; *ibid*, ix.

¹⁵³ Victoria, *Parliamentary Debates*, Legislative Assembly, 10 March 2010, 787 (Rob Hulls, Attorney-General).

¹⁵⁴ Notably, the removal of the comparator test for direct discrimination in *EOA 2010* s 8(2)(a), replacing 'less favourable' with 'unfavourable' treatment.

¹⁵⁵ The definition now reads as follows: 'an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles': *EOA 2010* s 81(b); *Charter* s 38(5)(b).

¹⁵⁶ Scrutiny of Acts and Regulations Committee, above n 29, 62.

This significantly expands the coverage of s 82, and arguably reduces equality rights. For example, it may apply to organisations that ‘have nothing to do with any recognised or organised religion’ who simply self-declare they conduct their affairs in accordance with religious doctrines, beliefs or principles.¹⁵⁷ CYC may well have met this broader definition: while not established for religious purposes,¹⁵⁸ it could conceivably be an educational organisation conducted in accordance with Christian beliefs about homosexuality. Since the ‘religious body’ issue was not determinative in *Cobaw*,¹⁵⁹ this legislative change may not have affected the outcome. However in cases where the principal issue is whether an organisation is a ‘religious body’, the expanded definition could lead to dramatically different results.

2 Protection of ‘Beliefs and Principles’ in Section 82

Protections for religious bodies are apparently broadened in s 82(2)(a) of the *EOA 2010*,¹⁶⁰ which would arguably change the outcome in *Cobaw*. The *EOA 1995* conferred protection on the ‘doctrines’ of a religion,¹⁶¹ which the majority of the Court of Appeal interpreted as limited to those embodied in the texts of CYC’s religion.¹⁶² On the evidence, these did not contain an injunction against accommodating gay or lesbian people.¹⁶³ However, the expansion of s 82 to protect ‘beliefs’ and ‘principles’ would seemingly allow organisations to point to more subjective evidence; for example, of common practices outside of texts.¹⁶⁴ It should be noted that the Explanatory Memorandum stated that the test was not intended to provide for a lower threshold than s 75(2)(a) of the *EOA 2010*¹⁶⁵ — however, to the extent that it allows

¹⁵⁷ *Ibid* 63.

¹⁵⁸ As per the requirement in *EOA 2010* s 81(b).

¹⁵⁹ (2014) 308 ALR 615, 684 [327] (Maxwell P).

¹⁶⁰ Previously s 75(2) under the *EOA 1995*.

¹⁶¹ *Ibid* s 75(2)(a).

¹⁶² *Cobaw* (2014) 308 ALR 615, 672–3 [269]–[273] (Maxwell P).

¹⁶³ *Ibid* 674 [279].

¹⁶⁴ Note that *EOA 2010* s 82(2) is also possibly narrower than the previous s 75(2), because it enumerates the grounds on which discrimination is permissible rather than providing a blanket exemption. This would not have made a difference in *Cobaw*, since sexual orientation is an enumerated ground. However, it is clear that discrimination on the basis of age, physical features, race or disability (not enumerated in s 82(2)) would not be exempt from the operation of the Act.

¹⁶⁵ Explanatory Memorandum, Equal Opportunity Bill 2010 (Vic) 42.

evidence beyond religious texts to be considered, it does seem to broaden the evidence available to organisations to make out s 82(2)(a).

Further, the defence in s 82(2)(a) is still not explicitly tempered with any requirement to consider whether the discrimination is ‘reasonably necessary’ to comply with religious beliefs. It does not require the consideration of any other rights, and as such may infringe the reasonable limitations test in the *Charter*.¹⁶⁶ However, it seems likely that the majority’s approach of reading the provision objectively will continue, especially since the reform has retained the word ‘conforms’, which reinforces the idea of some form of external, objective compulsion.¹⁶⁷

3 Section 84

In contrast to the preceding discussion, the reforms have narrowed rather than broadened s 84 of the *EOA 2010*. The addition of ‘reasonably necessary’ is the legislative adoption of the *Cobaw* majority’s objective approach: the use of ‘reasonably’ means this new provision would not readily yield Redlich JA’s subjective analysis.¹⁶⁸ In the course of CYC’s application for special leave in the High Court, Bell J noted that this was a ‘significant’ change.¹⁶⁹ This arguably supports Redlich JA’s contention that the previous test was *not* so objective — although it is equally possible to construe it as mere codification of the accepted majority approach. Further, the provision shifts to a more objective assessment of the beliefs and principles to be protected. Rather than ‘genuine beliefs and principles’, s 84 simply states ‘comply with doctrines, beliefs or principles’ of the religion. The omission of ‘genuine’ renders the test an objective, rather than a subjective, one.

B *Effect of the Charter*

The *Charter* was not necessary to the outcome in *Cobaw*, since it was not applicable¹⁷⁰ and the majority was able to reach its verdict relying on statutory

¹⁶⁶ Scrutiny of Acts and Regulations Committee, above n 29, 62.

¹⁶⁷ *Cobaw* (2014) 308 ALR 615, 684 [330] (Maxwell P).

¹⁶⁸ The addition of enumerated grounds in s 84 means discrimination on the basis of disability, race, physical features or age is not permissible.

¹⁶⁹ Transcript of Proceedings, *Christian Youth Camps Limited Ltd v Cobaw Community Health Services Ltd* [2014] HCATrans 289 (12 December 2014) 70 (Bell J).

¹⁷⁰ *Cobaw* (2014) 308 ALR 615, 620 [10] (Maxwell P).

construction alone. However, the SARC¹⁷¹ and John Tobin argue it provides a useful methodology for resolving difficult conflicts between religion and equality otherwise ‘characterised by rhetoric and unsubstantiated assertions.’¹⁷²

Section 32 of the *Charter* could be used to support an objective interpretation of s 82(2)(a) of the *EOA 2010* (as mentioned earlier in this Part), which would otherwise infringe human rights and the ‘reasonable limitations’ approach of s 7(2) of the *Charter*. It also may assist to balance rights in more marginal cases — for example, where there is a stronger argument that the discrimination is necessary to comply with the doctrines of the particular religion. It also adds weight to the importance of protection: the *EOA 2010* includes the objective to ‘promote and protect’ the *Charter* right to equality.¹⁷³

C Adequacy of Past Reforms and Changes in the Future

1 Exemptions are Still Overly Broad

It is beyond the scope of this case note to consider reform proposals in detail, but given the protective purpose of the *EOA 2010*, ss 81 and 82(2)(a) seem too broad. It is no answer that the exemptions should be very broad because they are rarely relied upon. One supposed proof of this fact is that relatively few cases have invoked the exceptions.¹⁷⁴ However, it is misleading to take this as evidence of the fact that religious-based discrimination itself is rare. Many people, on becoming aware of the exemptions, would be quickly discouraged from pursuing any claims.¹⁷⁵ Sue Hackney’s article about Cobaw Community Health Services’ experience makes this clear — the group was acutely aware of the hurdles imposed by the religious exemptions.¹⁷⁶

¹⁷¹ Scrutiny of Acts and Regulations Committee, above n 29, 4.

¹⁷² John Tobin, ‘Should Discrimination in Victoria’s Religious Schools Be Protected? Using the Victorian *Charter of Human Rights and Responsibilities Act* to Achieve the Right Balance’ (2010) 36 *Monash University Law Review* 16, 18.

¹⁷³ *EOA 2010* s 3(b).

¹⁷⁴ See, eg, Justice and International Mission Unit, ‘A Balancing Act: The Right Not to Be Harmed by Religious Discrimination versus the Right to Religious Freedom’ (Discussion Paper, Uniting Church in Australia: Synod of Victoria and Tasmania, August 2009) 20.

¹⁷⁵ See, eg, *ibid.*

¹⁷⁶ Sue Hackney, *Cobaw Strikes a Blow Against Ability of Religious Organisations to Discriminate* (16 May 2014) Human Rights Law Centre <http://hrlc.org.au/cobaw_suehackney/>.

Even more importantly, the law has a 'legitimizing as well as a regulating function.'¹⁷⁷ The broad language of s 81 of the *EOA 2010* could allow organisations with only a tenuous connection to religion to avoid anti-discrimination legislation. As Evans and Ujvari argue, this conveys that the goal of equality is of limited value.¹⁷⁸ As long as such broad exemptions are allowed by legislation, even if not relied on in practice, they will sustain, rather than challenge, the prejudices that people already hold.

It is also worth noting the disproportionate weight of Christian voices in terms of what kinds of grounds can be used to discriminated upon. 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.¹⁷⁹ There is no similar discussion about, for example, allowing Hindus to cremate people in the open air.¹⁸⁰ Similarly, 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.¹⁸¹

2 Enforcement and Limitations

The reforms discussed above demonstrate the complexity of achieving an acceptable balance between religious freedom and equality, and arguably an ambivalent commitment to eliminating discrimination. But even if the

¹⁷⁷ Carolyn Evans and Leilani Ujvari, 'Non-Discrimination Laws and Religious Schools in Australia' (2009) 30 *Adelaide Law Review* 31, 42.

¹⁷⁸ Ibid.

¹⁷⁹ See generally Michael Flood and Clive Hamilton, 'Mapping Homophobia in Australia' (Webpaper, Australia Institute for a Just, Sustainable, Peaceful Future, July 2005) 14 <http://www.glhv.org.au/files/aust_inst_homophobia_paper.pdf>.

¹⁸⁰ Angus McLeay, 'Striking the Right Balance: Freedom of Religion and Equality under the *Equal Opportunity Act*' (Speech delivered at the Human Rights Law Centre, Melbourne, 4 June 2015) <http://humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&id=1229:information-on-racial-and-religious-vilification-jun-2010&Itemid=687&tmpl=component&print=1&page=>.

¹⁸¹ Justice Debbie Mortimer, 'Striking the Right Balance: Freedom of Religion and Equality under the *Equal Opportunity Act*' (Speech delivered at the Human Rights Law Centre, Melbourne, 4 June 2015) <http://humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&id=1229:information-on-racial-and-religious-vilification-jun-2010&Itemid=687&tmpl=component&print=1&page=>.

exemptions were to be tightened, a core problem remains: adjudication is an ‘extremely poor system for achieving social reform.’¹⁸²

The current reactive, complaints-based model imposes significant burdens on those seeking to enforce their rights, and may discourage many from doing so altogether.¹⁸³ It relies on individuals and groups having the motivation and resources to bring claims that are often resource-intensive and complex — as Maxwell P suggested about the nature of discrimination claims in the course of his judgment¹⁸⁴ — not to mention emotionally exhausting. Hackney’s article about the costs to Cobaw Community Health Services and the young people it was representing testifies eloquently to this issue.¹⁸⁵ These concerns were echoed in the *Gardner Report*, which indicated that ‘[reliance] on complaints is not an effective way to eliminate discrimination.’¹⁸⁶

V CONCLUSION

Religious exemptions to anti-discrimination legislation squarely raise a conflict of principles. These conflicts are likely to become more frequent: growing numbers of religious organisations are providing social services, while at the same time anti-discrimination legislation is protecting an expanding array of attributes. While protecting freedom of religion is important, exemptions that are drawn or interpreted too broadly have the potential to ‘undermine the effectiveness and scope of [the anti-discrimination regime]’.¹⁸⁷ Thornton argues that the breadth of the exemptions in Victorian anti-discrimination legislation generally indicates only a ‘lukewarm’ commitment to equality, which is ‘invariably’ trumped by freedom of religion.¹⁸⁸

The decision in *Cobaw* represents a relatively rare success for the victims of a discriminatory act. The experience of most victims of discrimination is that the reactive, complaint-based model prevents them from bringing claims at

¹⁸² Cass R Sunstein, ‘Three Civil Rights Fallacies’ (1991) 79 *California Law Review* 751, 768.

¹⁸³ *Gardner Report*, above n 150, 8.

¹⁸⁴ *Cobaw* (2014) 308 ALR 615, 621 [14].

¹⁸⁵ See Hackney, above n 176.

¹⁸⁶ *Gardner Report*, above n 150, 8.

¹⁸⁷ Evans, above n 87, 40.

¹⁸⁸ Margaret Thornton, ‘Excepting Equality in the Victorian *Equal Opportunity Act*’ (2010) 23 *Australian Journal of Labour Law* 240, 241.

all — this is reason enough to seriously reconsider how the law seeks to promote equality and eliminate discrimination. The Court of Appeal's approach sets an encouraging precedent for future discrimination legislation, eschewing a narrow and technical approach, and exhibiting a willingness to subject claims of religious organisations to some scrutiny before concluding discrimination is necessary. This approach reflects the recognition, transformation and redistribution dimensions of Fredman's concept of equality.

However as noted above, some issues may be less settled than they appear. The High Court has not addressed the question of the scope to be given to protected characteristics and associated behaviours, compared with manifestations of religion. Further, the *EOA 2010* still has significant gaps in the protection it affords to LGBTIQI individuals. Current trends suggest that the *EOA 2010* will continue to be pushed to provide protections to broader groups for an expanding array of harms, and these questions may well arise in future litigation.